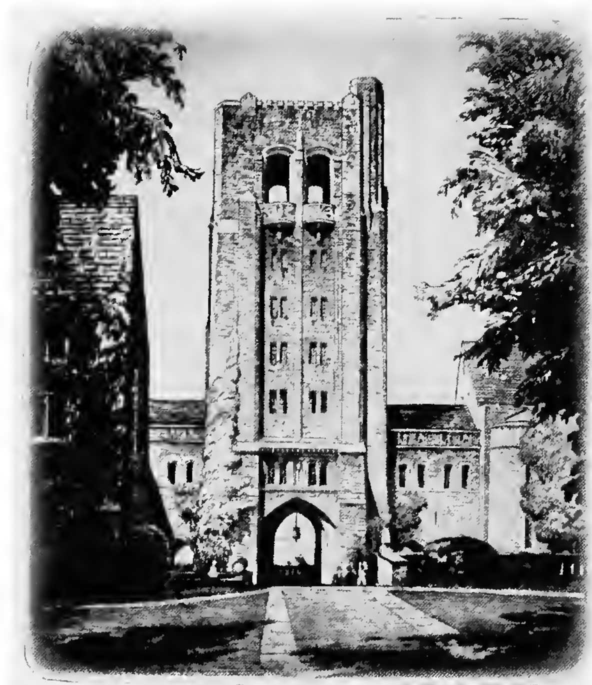

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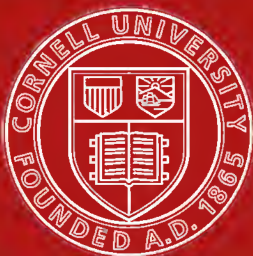

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HOPKINS' SELECTED CASES

ON THE

LAW OF CONTRACTS

ARRANGED WITH REFERENCE TO CLARK'S
HANDBOOK OF CONTRACTS

The following cases are practically identical with those selected by Mr. Clark and published in "Clark's Annotated Cases on Contracts." They are here printed without the annotations to supply the need felt for a smaller set; and without Mr. Clark's name, in order to avoid confusion between the two sets

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ILLUSTRATIVE CASES

ON THE

LAW OF CONTRACTS

LAWSON'S EX'R v. LAWSON.[1]

(16 Grat. 230)

Supreme Court of Appeals of Virginia. April 10, 1861.

This was an action of assumpsit in the circuit court of the county of Alexandria by Thomas A. Brewis, executor of John Lawson, deceased, against Isabella Lawson. The declaration contained only the common counts, and whilst it commenced in the name of Thomas A. Brewis, executor of John Lawson, it charged that the defendant was indebted to the plaintiff, and promised to pay the plaintiff.

The defendant pleaded "non assumpsit;" and on the trial demurred to the evidence. That evidence was that on the 3d day of June, 1851, T. A. Brewis, the plaintiff, came to the room where John Lawson, the plaintiff's testator, was sick in bed, and counted out to him a sum of money, upwards of six hundred dollars, in notes, and asked Lawson if he (Brewis) should carry the money back to the store. That Lawson said, "No; he would be better after a while, and would then arrange it for the bank." Lawson then handed the money to his wife, the defendant, and told her to put it aside until he felt better, and that he would arrange it for the bank. That John Lawson died on the 18th of June, 1851, and that between that date and the time when Brewis qualified as executor of the estate of Lawson, Brewis asked Mrs. Lawson for the money which he handed to John Lawson, and Mrs. Lawson refused to give it to him, saying she intended to keep it.

There was a verdict for $569.85, with interest from the 19th of June, 1851, until paid, subject to the demurrer to evidence; and upon the demurrer the court below gave a judgment for the defendant, whereupon Brewis applied to this court for a supersedeas, which was allowed.

Brent & Kinzer, for appellant. F. J. Smith, for appellee.

LEE, J. The money sought to be recovered in this case was the property of the plaintiff's testator in the form of bank notes, and was handed to defendant (his wife) a short time before his death, for safe-keeping until he should be better, when as he said, he would arrange it for the bank. It remained in her possession during his life, and at his death, which took place a few days after, it was still his property. She made no claim to it as hers, during his life; nor, so far as appears, did she dispose of any part of it to her own use or that of her husband. After his death the plaintiff, though before he had qualified as executor under the will of his testator, called on the defendant for the money, but she refused to surrender it, saying that she intended to keep it.

Now as this money was part of the assets of the estate of the testator, it is clear that the plaintiff is entitled to recover it in some form of action, and in some character either individual or representative.

But it is said that if the plaintiff be entitled to recover, he cannot do so in this action, but should have declared on the special case, or in trover and conversion.

I do not think the plaintiff was bound to declare specially. The action of indebitatus assumpsit for money had and received will lie whenever one has the money of another which he has no right to retain, but which ex æquo et bono, he should pay over to that other. This action has of late years been greatly extended, because founded on principles of justice; and it now embraces all cases in which the plaintiff has equity and conscience on his side, and the defendant is bound by ties of natural justice and equity to refund the money. In such a case, no express promise need be proved, because from such relation between the parties the law will imply a debt and give this action founded on the equity of the plaintiff's case, as it were upon a contract quasi ex contractu as the Roman law expresses it, and upon this debt founds the requisite undertaking to pay. Moses v. Macfarlan, 2 Burrows, 1005, 1008, 1012; per Buller, J., Straton v. Rastall, 2 Term R. 366, 370.

Here this money was part of the assets of the plaintiff's testator, and it was the duty of the defendant ex æquo et bono, to pay it over to the plaintiff.

Nor do I think the plaintiff was bound to declare in trover and conversion. The money handed to the defendant by the testator was in bank notes, and if it be conceded that upon the refusal of the defendant to deliver the same to the plaintiff, trover might be maintained as for a tort, it by no means follows that assumpsit could not be brought. There are many cases in which a party aggrieved, who has a clear remedy by action as for a tort, may waive the tort and sue in assumpsit. Thus an action against a common carrier is for a tort and supposed crime, but assumpsit will lie for the same cause. Per Lord Mansfield, Hambly v. Trott, Cowp. 371, 375. So if a man takes a horse from another, and brings him back again, an action of trespass may be brought, but the owner may bring assumpsit for the use and hire of the horse. Id. If a bankrupt, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignees may recover the goods in trover, or waive the tort and bring assumpsit. Smith v. Hodson, 4 Term R. 211. If a stranger takes my goods and delivers them to another, a contract may be implied, and I may bring an action of trover for them, or of assumpsit to recover their value. Per Lord Abinger, Bassell v. Bell, 10 Mees. & W. 350. In this case it was decided that the assignees of bankrupt, who after the

[1] Irrelevant parts of opinion omitted.

bankruptcy had delivered goods to the defendant to meet an accommodation bill which they were about to give the bankrupt, might waive the tort and sue in assumpsit. So a master whose apprentice has left him and entered into the service of another, who persuades him to remain with him after he had found out who he was and from what shop he had deserted, may waive the tort and bring assumpsit against the defendant for the work and labor of the apprentice. Foster v. Stewart, 3 Maule & S. 191. See, also, Curtis v. Bridges, Comb. 450; Eades v. Vandeput, 5 East, 39; Lightly v. Clowston, 1 Taunt. 112. So if a man take the goods of another and sell them, the owner may waive the trespass and sue him for money had and received. Gilmore v. Wilbur, 12 Pick. 120; Foster v. Stewart, 3 Maule & S. 191. See, also, Jones v. Hoar, 5 Pick. 285. Other illustrations may be derived from the cases, but I will not stop to give them. I think that in no case could the exercise of the right to elect between an action in tort and assumpsit be more appropriate than in this. The bank notes were received and treated by the testator as money, and as such were received and retained by the defendant, and though trover might lie to recover the notes, the law will imply a promise to pay the amount to the plaintiff.

* * * * * *

HERTZOG v. HERTZOG.

(29 Pa. St. 465.)

Supreme Court of Pennsylvania. 1857.

Error to court of common pleas, Fayette county

This suit was brought by John Hertzog to recover from the estate of his father compensation for services rendered the latter in his lifetime, and for money lent. The plaintiff was twenty-one years of age about the year 1825, but continued to reside with his father, who was a farmer, and to labour for him on the farm except one year that he was absent in Virginia, until 1842, when the plaintiff married and took his wife to his father's, where they continued for some time as he had done before. His father then put him on another farm which he owned, and some time afterwards the father and his wife moved into the same house with John, and continued to reside there until his death in 1849.

The testimony of Adam Stamm and Daniel Roderick was relied on to prove a contract or agreement on the part of George Hertzog to pay for the services of plaintiff.

Adam Stamm affirmed: "John laboured for his father. All worked together. The old man got the proceeds. I know the money from the grain went to pay for the farm. The old man said so. John's services worth $12 per month; the wife's worth $1 per week, beside attending to her own family. I heard the old man say he would pay John for the labour he had done."

Daniel Roderick sworn: "John Hertzog requested him to see his father about paying him for his work, which he had done and was doing, and stated that he had frequently spoken to the old man, his father, about it, and he had still put him off. He agreed to see him, and thinks it was in June, 1849. Coming from Duncan's Furnace, he spoke to the old man about paying John for his work. He said he intended to make John safe. John spoke to me in the spring of 1848. The old man died in August, 1849, I think."

The plaintiff also proved the services rendered by himself and by his wife, and by the declarations of the intestate that he had received from the plaintiff $500, money that belonged to the latter's wife, at the time of purchasing a farm in 1847. The court, after the defendant's points were presented, permitted the plaintiff to add to his declaration a count on a quantum meruit.

The defendant pleaded the statute of limitations, and presented the following points:

1. The court are respectfully requested to charge the jury that where a son, after he arrives at the age of twenty-one years, and continues to live with and work for his father, without any special contract, he cannot "recover for wages or service rendered, from the estate of his deceased parent, unless upon clear and unequivocal proof, leaving no doubt that the relation between the parties was not the ordinary one of parent and child, but master and servant."

2. That according to the plaintiff's own showing, the $500 claimed by him belonged to the wife of the plaintiff, and, since the act of 1848, is her separate property, and cannot be recovered in this suit, the same having been instituted in the name of the husband alone.

3. The plaintiff cannot recover in this action on a quantum meruit, there being no such count in plaintiff's narr.

The court below (Gilmore, P. J.) answered these points as follows:

"1. We answer this in the affirmative. It was so ruled in Candor's Appeal, 5 Watts & S. 515. If the plaintiff was working for his father, without a mutual understanding between them that he was to be paid for his labour, he cannot recover wages.

"The jury must be satisfied from the evidence that it was understood between him and his father that he was to be compensated, not by the way of gift or legacy, but by the payment of wages." Here the court referred to the evidence of Adam Stamm and Daniel Roderick, and said, "From this evidence, if you believe it, you may infer such an agreement.

"2. If the jury are satisfied from the evidence that the $500 was in the possession of plaintiff's wife in 1847, and that the defendant [decedent] then received it from her, this would be considered the possession of the same by the husband, and plaintiff could sue without joining his wife.

"3. The court permit the declaration to be amended so as to embrace this point."

The jury found a verdict for the plaintiff of $2,203.97, and the court entered judgment thereon.

The defendant sued out a writ of error, and assigned the answers of the court below for error.

Fuller & Oliphant, for plaintiff in error.

Miller & Patterson, for defendant in error.

LOWRIE, J. "Express contracts are, where the terms of the agreement are openly uttered and avowed at the time of the making; as, to deliver an ox or ten loads of timber, or to pay a stated price for certain goods. Implied are such as reason and justice dictate; and which, therefore, the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work, the law implies that I undertook and contracted to pay him as much as his labour deserves. If I take up wares of a tradesman without any agreement of price, the law concludes that I contracted to pay their real value."

This is the language of Blackstone (2 Comm. 443), and it is open to some criticism. There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions

of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances as really existing, and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this.

But it appears in another place (3 Bl. Comm. 159–166) that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under his definition of an implied contract, another large class of relations, which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in assumpsit.

It is quite apparent, therefore, that radically different relations are classified under the same term, and this must often give rise to indistinctness of thought. And this was not at all necessary; for we have another well-authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely constructive contracts, while the former are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty.

We have, therefore, in law three classes of relations called contracts:

1. Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied.

2. Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.

3. Express contracts, already sufficiently distinguished.

In the present case there is no pretence of a constructive contract, but only of a proper one, either express or implied. And it is scarcely insisted that the law would imply one in such a case as this; yet we may present the principle of the case the more clearly, by showing why it is not one of implied contract.

The law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties.

Thus if a man is found to have done work for another, and there appears no known relation between them that accounts for such service, the law presumes a contract of hiring. But if a man's house takes fire, the law does not presume or imply a contract to pay his neighbours for their services in saving his property. The common principles of human conduct mark self-interest as the motive of action in the one case, and kindness in the other; and therefore, by common custom, compensation is mutually counted on in one case, and in the other not.

On the same principle the law presumes that the exclusive possession of land by a stranger to the title is adverse, unless there be some family or other relation that may account for it. And such a possession by one tenant in common is not presumed adverse to his co-tenants, because it is, prima facie, accounted for by the relation. And so of possession of land by a son of the owner. And in Magaw's Case, Latch, 168, where an heir was in a foreign land at the time of a descent cast upon him, and his younger brother entered, he was presumed to have entered for the benefit of the heir. And one who enters as a tenant of the owner is not presumed to hold adversely even after his term has expired. In all such cases, if there is a relation adequate to account for the possession, the law accounts for it by that relation, unless the contrary be proved. A party who relies upon a contract must prove its existence; and this he does not do by merely proving a set of circumstances that can be accounted for by another relation appearing to exist between the parties.

Mr. Justice Rogers is entitled to the gratitude of the public for having, in several cases, demonstrated the force of this principle in interpreting transactions between parents and children (3 Penn. R. 365; 3 Rawle, 249; 5 Watts & S. 357, 513); and he has been faithfully followed in many other cases (8 Watts, 366; 8 Pa. St. 213; 9 Pa. St. 262; 12 Pa. St. 175; 14 Pa. St. 201; 19 Pa. St. 251, 366; 25 Pa. St. 308; 26 Pa. St. 372, 383).

Every induction, inference, implication, or presumption in reasoning of any kind is a logical conclusion derived from, and demanded by, certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them, a contract is proved; if not, not. If we find, as ascertained circumstances, that a stranger has been in the employment of another, we immediately infer a contract of hiring, because the principles of individuality and self-interest, common to human nature, and therefore the customs of society, require this inference.

But if we find a son in the employment of his father, we do not infer a contract of hiring, because the principle of family affection is sufficient to account for the family

association, and does not demand the inference of a contract. And besides this, the position of a son in a family is always esteemed better than that of a hired servant, and it is very rare for sons remaining in their father's family, even after they arrive at age, to become mere hired servants. If they do not go to work or business on their own account, it is generally because they perceive no sufficient inducement to sever the family bond, and very often because they lack the energy and independence necessary for such a course; and very seldom because their father desires to use them as hired servants. Customarily no charges are made for boarding and clothing and pocket money on one side, or for work on the other; but all is placed to the account of filial and parental duty and relationship.

Judging from the somewhat discordant testimony in the present case, this son remained in the employment of his father until he was about forty years old; for we take no account of his temporary absence. While living with his father, in 1842, he got married, and brought his wife to live with him in the house of his parents. Afterwards his father placed him on another farm of the father, and very soon followed him there, and they all lived together until the father's death in 1849. The farm was the father's, and it was managed by him and in his name, and the son worked on it under him. No accounts were kept between them, and the presumption is that the son and his family obtained their entire living from the father while they were residing with him.

Does the law, under the circumstances, presume that the parties mutually intended to be bound, as by contract, for the service and compensation of the son and his wife? It is not pretended that it does. But it is insisted that there are other circumstances besides these, which, taken together, are evidence of an express contract for compensation in some form, and we are to examine this.

In this court it is insisted that the contract was that the farm should be worked for the joint benefit of the father and son, and that the profits were to be divided; but there is not a shadow of evidence of this. And moreover it is quite apparent that it was wages only that was claimed before the jury for the services of the son and his wife, and all the evidence and the charge point only in that direction. There was no kind of evidence of the annual products.

Have we, then, any evidence of an express contract of the father to pay his son for his work or that of his wife? We concede that, in a case of this kind, an express contract may be proved by indirect or circumstantial evidence. If the parties kept accounts between them, these might show it. Or it might be sufficient to show that money was periodically paid to the son as wages; or, if there be no creditors to object, that a settlement for wages was had, and a balance agreed upon. But there is nothing of the sort here.

The court told the jury that a contract of hiring might be inferred from the evidence of Stamm and Roderick. Yet these witnesses add nothing to the facts already recited, except that the father told them, shortly before his death, that he intended to pay his son for his work. This is no making of a contract or admission of one; but rather the contrary. It admits that the son deserved some reward from his father, but not that he had a contract for any.

And when the son asked Roderick to see the father about paying him for his work, he did not pretend that there was any contract, but only that he had often spoken to his father about getting pay, and had always been put off. All this makes it very apparent that it was a contract that was wanted, and not at all that one already existed; and the court was in error in saying it might be inferred, from such talk, that there was a contract of any kind between the parties.

The difficulty in trying causes of this kind often arises from juries supposing that, because they have the decision of the cause, therefore they may decide according to general principles of honesty and fairness, without reference to the law of the case. But this is a despotic power, and is lodged with no portion of this government.

Their verdict may, in fact, declare what is honest between the parties, and yet it may be a mere usurpation of power, and thus be an effort to correct one evil by a greater one. Citizens have a right to form connexions on their own terms and to be judged accordingly. When parties claim by contract, the contract proved must be the rule by which their rights are to be decided. To judge them by any other rule is to interfere with the liberty of the citizen.

It is claimed that the son lent $500 of his wife's money to his father. The evidence of the fact and of its date is somewhat indistinct. Perhaps it was when the farm was bought. If the money was lent by her or her husband, or both, before the law of 1848 relating to married women, we think he might sue for it without joining his wife.

Judgment reversed, and a new trial awarded.

SCEVA v. TRUE.

(53 N. H. 627.)

Supreme Judicial Court of New Hampshire. Dec., 1873.

For the purpose of raising questions of law, and no other, the parties agreed that the facts are as stated in the following motions to dismiss, and the questions were reserved for the consideration of the whole court:

The defendant, by her guardian ad litem, moves to quash the writ in this suit, and to dismiss said suit: (1) Because, at the time of the attachment of the defendant's real estate in the town of Andover in said suit—as appears by the officer's return upon said writ—and at the time of the service of said writ, and for more than forty years prior thereto, she was, and had been, insane, and without any guardian, and was, and for more than a quarter of a century had been, so hopelessly insane as to have no reason or understanding; that at the time of such attachment and service—and since about November 1, 1871—she was, and has been, kept at a private madhouse in said town, by its overseers of the poor, as one of its insane poor; that the service of said writ was made and completed by leaving a writ of summons therein, at said madhouse; that, for nearly the entire forty years prior to said November 1, 1871, she had lived under the same roof with plaintiff's intestate, who was her brother-in-law, and under his charge, and that all the facts which transpired prior to the death of said intestate (about June 1, 1872) were well known to him, and that the plaintiff had notice or knowledge of all the facts in the premises. (2) That this suit is assumpsit for the support of said Fanny, under the circumstances before set forth, and those which follow. Prior to his death, August 11, 1822, William True, father of said Fanny and her sister Martha, wife of said intestate, owned a farm in Andover and Hill, with a house, barn, and outbuildings thereon, situate in said Andover. On May 25, 1822, in expectation of his death, said William True made the following disposition of his property: He gave, by an instrument in writing under seal, all his personal property, upon certain conditions and subject to certain charges, to his widow, Betsey True, who died upon said premises in May, 1844, without remarrying. He also gave her on the same day, in the same way, "the use and occupation of said real estate, both of lands, buildings, and tenements, so long as she, the said Betsey, remains my widow." He also, by deed, conveyed on the same day one undivided half of all said real estate to each of said daughters. Said intestate carried on said premises in 1822, and married said Martha in December, 1823, and lived on said premises till about one month before his death. All the parties, save Fanny, treated said deeds and instruments as valid, and supposed they were valid; and, aside from the time that the said defendant was away in insane asylums and infirmaries for treatment, all lived together on said premises in one family till they died, or until said Enoch F. Sceva refused to support said Fanny longer; and she was taken away about said November 1st, and when said Enoch F. Sceva left, the month prior to his death. Said Sceva took the entire charge of the premises, used the crops and the proceeds of the lumber, wood, and bark, sold off of the whole farm for the common benefit of the family, and paid the taxes and other bills for the support and maintenance of the family. No administration was ever had upon any part of the estate of said William True, nor was there any use or trust for the benefit of said Fanny. No attempt was ever made to make any contract with said Fanny about her support, or anything else. No application was made for the appointment of a guardian in the interest of said Enoch F. Sceva, because of the opposition of his wife to any step looking to that end. She has been supported during said forty years by said Sceva, his wife, and her mother, out of the avails of said real estate taken as aforesaid, and out of their own funds. Since 1844 her chief support has been from said Sceva. Said intestate was worth nothing when he commenced on said farm, and died worth about $1,600.

Mr. Barnard, for the plaintiff. Mr. Shirley, for the defendant.

LADD, J. It is obvious, we think, that one question which has been argued by counsel at considerable length, namely, whether legal service of a writ can be made upon an insane person or idiot, is not before the court, on this motion to dismiss, in such way that any practical results would be gained by deciding it. The agreement of the parties is not that the suit shall be dismissed in case the court are of opinion that the service was insufficient, but only that the facts may be taken to be as stated for no other purpose but to present the question to the court; and, if the decision should be adverse to the plaintiff, we see no reason why he is not still in a position to take the objection that the matter ought to have been pleaded in abatement in order that an issue may be raised for trial by jury upon the facts which he reserves the right to contest. For this reason we have not considered that question.

The other facts stated in the motion (which is to be regarded rather as an agreed case than a motion to dismiss) stand upon a different footing, inasmuch as they go to the merits of the case, and may be pleaded in bar or given in evidence under the general issue, and, when so pleaded or proved, their legal effect will be a matter upon which the court, at the trial, must pass. Some suggestions upon this part of the case may therefore be of use.

We regard it as well settled by the cases referred to in the briefs of counsel, many of which have been commented on at length by Mr. Shirley for the defendant, that an insane person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of accident or disease, may be held liable, in assumpsit, for necessaries furnished to him in good faith while in that unfortunate and helpless condition. And the reasons upon which this rests are too broad, as well as too sensible and humane, to be overborne by any deductions which a refined logic may make from the circumstance that in such cases there can be no contract or promise in fact,—no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant, as the defendant's counsel seems to suppose, an actual contract,—that is, an actual meeting of the minds of the parties, an actual, mutual understanding, to be inferred from language, acts, and circumstances, by the jury,—but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. The defendant's counsel says it is usurpation for the court to hold, as matter of law, that there is a contract and a promise, when all the evidence in the case shows that there was not a contract, nor the semblance of one. It is doubtless a legal fiction, invented and used for the sake of the remedy. If it was originally usurpation, certainly it has now become very inveterate, and firmly fixed in the body of the law.

Suppose a man steals my horse and afterwards sells it for cash. The law says I may waive the tort, and recover the money received for the animal of him in an action of assumpsit. Why? Because the law, in order to protect my legal right to have the money, and enforce against the thief his legal duty to hand it over to me, implies a promise—that is, feigns a promise when there is none—to support the assumpsit. In order to recover, I have only to show that the defendant, without right, sold my horse for cash, which he still retains. Where are the circumstances, the language or conduct of the parties from which a meeting of their minds is to be inferred, or implied, or imagined, or in any way found by the jury? The defendant never had any other purpose but to get the money for the horse and make off with it. The owner of the horse had no intention to sell it, never assented to the sale, and only seeks to recover the money obtained for it to save himself from total loss. The defendant, in such a case, may have the physical capacity to promise to pay over to the owner the money which he means to steal; but the mental and moral capacity is wanting, and to all practical intents the capacity to promise according to his duty may be said to be entirely wanting, as in the case of an idiot or lunatic. At all events, he does not do it. He struggles to get away with the money, and resists with a determination never to pay if he can help it. Yet the law implies, and against his utmost resistance forces into his mouth a promise to pay. So, where a brutal husband, without cause or provocation, but from wanton cruelty or caprice, drives his wife from his house with no means of subsistence, and warns the tradesmen not to trust her on his account, thus expressly revoking all authority she may be supposed to have, as his agent, by virtue of the marital relation, courts of high authority have held that a promise to pay for necessaries furnished her while in this situation, in good faith, is implied by law against the husband, resting upon and arising out of his legal obligation to furnish her support. See remark of Sargent, J., in Ray v. Alden, 50 N. H. 83, and authorities cited. So, it was held that the law will imply a promise to pay toll for passing upon a turnpike road, notwithstanding the defendant, at the time of passing, denied his liability and refused payment. Proprietors v. Taylor, 6 N. H. 499. In the recent English case of Railway Co. v. Swaffield, L. R. 6 Exch. 132, the defendant sent a horse by the plaintiffs' railway directed to himself at S. station. On the arrival of the horse at S. station, at night, there was no one to meet it, and the plaintiffs, having no accommodation at the station, sent the horse to a livery stable. The defendant's servant soon after arrived and demanded the horse. He was referred to the livery stable keeper, who refused to deliver the horse except on payment of charges which were admitted to be reasonable. On the next day the defendant came and demanded the horse, and the station master offered to pay the charges and let the defendant take away the horse; but the defendant declined, and went away without the horse, which remained at the livery stable. The plaintiffs afterwards offered to deliver the horse to the defendant at S. without payment of any charges, but the defendant refused to receive it unless delivered at his farm, and with payment of a sum of money for his expenses and loss of time. Some months after, the plaintiffs paid the livery stable keeper his charges, and sent the horse to the defendant, who received it; and it was held that the defendant was liable, upon the ground of a contract implied by law, to the plaintiffs for the livery charges thus paid by them.

Illustrations might be multiplied, but enough has been said to show that when a contract or promise implied by law is spoken of, a very different thing is meant from a contract in fact, whether express or tacit. The evidence of an actual contract is generally to be found either in some writing made by the parties, or in verbal communications which passed between them, or in their acts and conduct considered in the light of the circumstances of each particular case. A contract implied by law, on the contrary, rests upon no evidence. It has no actual existence; it is simply a

mythical creation of the law. The law says it shall be taken that there was a promise, when, in point of fact, there was none. Of course this is not good logic, for the obvious and sufficient reason that it is not true. It is a legal fiction, resting wholly for its support on a plain legal obligation, and a plain legal right. If it were true, it would not be a fiction. There is a class of legal rights, with their correlative legal duties, analogous to the obligationes quasi ex contractu of the civil law, which seems to lie in the region between contracts on the one hand and torts on the other, and to call for the application of a remedy not strictly furnished either by actions ex contractu, or actions ex delicto. The common law supplies no action of duty, as it does of assumpsit and trespass; and hence the somewhat awkward contrivance of this fiction to apply the remedy of assumpsit where there is no true contract, and no promise to support it.

All confusion in this matter might be avoided, as it seems to me, by a suitable discrimination in the use of the term "implied contract." In the discussion of any subject there is always danger of spending breath and strength about mere words, as well as of falling into error when the same term is used to designate two different things. If the term "implied contract" be used indifferently to denote (1) the fictitious creation of the law spoken of above; (2) a true or actual but tacit contract,—that is, one where a meeting of the minds or mutual understanding is inferred as matter of fact from circumstances, no words, written or verbal, having been used; and (3) that state of things where one is estopped by his conduct to deny a contract, although, in fact, he has not made or intended to make one,—it is not strange that confusion should result, and disputes arise, where there is no difference of opinion as to the substance of the matter in controversy; whereas, were a different term applied to each,—as, for example, that of legal duty to designate the first; contract, simply, to designate the second; and contract by estoppel, the third,—this difficulty would be avoided. It would of course come to the same thing, in substance, if the first were always called an implied contract, while the other two were otherwise designated in such way as to show distinctly what is meant. This is not always done, and an examination of our own cases would perhaps show that more or less confusion has arisen from such indiscriminate use of the term. A better nomenclature is desirable. But whatever terms are employed, it is indispensable that the distinction, which is one of substance, should be kept clearly in mind, in order that the principles governing in one class of cases may not be erroneously applied to another. See remarks of Smith, J., in Bixby v. Moore, 51 N. H. 402, and authorities cited at page 404.

Much may doubtless be said against supplying a remedy for the enforcement of a plain legal right "by so rude a device as a legal fiction." Maine's Ancient Law, 26. But at this time of day that is a matter for the consideration of the legislature rather than the courts. The remedy of indebitatus assumpsit can hardly be abolished in that large class of cases where it can only be sustained by resorting to a fiction until some other is furnished to take its place.

It by no means follows that this plaintiff is entitled to recover. In the first place, it must appear that the necessaries furnished to the defendant were furnished in good faith, and with no purpose to take advantage of her unfortunate situation. And upon this question the great length of time which was allowed to pass without procuring the appointment of a guardian for her is a fact to which the jury would undoubtedly attach much weight. Its significance and importance must, of course, depend very much on the circumstances under which the delay and omission occurred, all of which will be for the jury to consider upon the question whether everything was done in good faith towards the defendant, and with an expectation on the part of the plaintiff's intestate that he was to be paid. Again, the jury are to consider whether the support for which the plaintiff now seeks to recover was not furnished as a gratuity, with no expectation or intention that it should be paid for, except so far as compensation might be derived from the use of the defendant's share of the farm. And upon this point the relationship existing between the parties, the length of time the defendant was there in the family without any move on the part of Enoch F. Sceva to charge her or her estate, the absence (if such is the fact) of an account kept by him wherein she was charged with her support and credited for the use and occupation of the land,—in short, all the facts and circumstances of her residence with the family that tend to show the intention or expectation of Enoch F. Sceva with respect to being paid for her support,—are for the jury. Munger v. Munger, 33 N. H. 581; Seavey v. Seavey, 37 N. H. 125; Bundy v. Hyde, 50 N. H. 116. If these services were rendered, and this support furnished, with no expectation on the part of Enoch F. Sceva that he was to charge or be paid therefor, this suit cannot be maintained; for then it must be regarded substantially in the light of a gift actually accepted and appropriated by the defendant, without reference to her capacity to make a contract, or even to signify her acceptance by any mental assent.

In this view, the facts stated in the case will be evidence for the jury to consider upon the trial; but they do not present any question of law upon which the rights of the parties can be determined by the court.

Case discharged.

O'BRIEN v. YOUNG.[1]

(95 N. Y. 428.)

Court of Appeals of New York. April 15, 1884.

Appeal from order of the general term of the supreme court, in the First judicial department, made January 8, 1884, which affirmed an order of special term restraining the sheriff of the county of New York from collecting, upon a judgment issued to him herein, interest at a greater rate than six per cent. after January 1, 1880.

Judgment was perfected in this action in favor of plaintiff and against defendants February 10, 1877. Execution thereon was issued to the sheriff November 19, 1883, instructing the sheriff to collect the amount thereof, with interest at the rate of seven per cent. from the date of the entry of judgment.

Lawrence & Waehner, for appellants. Lucien Birdseye, for respondent.

EARL, J. By the decided weight of authority in this state, where one contracts to pay a principal sum at a certain future time with interest, the interest prior to the maturity of the contract is payable by virtue of the contract, and thereafter as damages for the breach of the contract. Macomber v. Dunham, 8 Wend. 550; United States Bank v. Chapin, 9 N. Y. 471; Hamilton v. Van Rensselaer, 43 N. Y. 244; Ritter v. Phillips, 53 N. Y. 586; Railroad Co. v. Moravia, 61 Barb. 180. And such is the rule as laid down by the federal supreme court. Brewster v. Wakefield, 22 How. 118; Burnhisel v. Firman, 22 Wall. 170; Holden v. Trust Co., 100 U. S. 72. The same authorities show that after the maturity of such a contract, the interest is to be computed as damages according to the rate prescribed by the law, and not according to that prescribed in the contract if that be more or less.

But when the contract provides that the interest shall be at a specified rate until the principal shall be paid, then the contract rate governs until payment of the principal, or until the contract is merged in a judgment. And where one contracts to pay moned on demand "with interest," or to pay money generally "with interest," without specifying time of payment, the statutory rate then existing becomes the contract rate and must govern until payment, or at least until demand and actual default, as the parties must have so intended. Paine v. Caswell, 68 Me. 80; Eaton v. Boissonnault, 67 Me. 540.

If, therefore, this judgment, the amount of which is by its terms payable with interest, is to be treated as a contract—as a bond executed by the defendants at its date, then the statutory rate of interest existing at the date of the rendition of the judgment is to be treated as part of the contract and must be paid by the defendants according to the terms of the contract, and thus the plaintiff's contention is well founded.

But is a judgment, properly speaking, for the purposes now in hand, a contract? I think not. The most important elements of a contract are wanting. There is no aggregatio mentium. The defendant has not voluntarily assented. All the authorities assert that the existence of parties legally capable of contracting is essential to every contract, and yet they nearly all agree that judgments entered against lunatics and others incapable in law of contracting are conclusively binding until vacated or reversed. In Wyman v. Mitchell, 1 Cow. 316, Sutherland, J., said that "a judgment is in no sense a contract or agreement between the parties." In McCoun v. Railroad Co., 50 N. Y. 176, Allen, J., said that "a statute liability wants all the elements of a contract, consideration and mutuality as well as the assent of the party. Even a judgment founded upon contract is no contract." In Bidleson v. Whytel, 3 Burrows, 1545–1548, it was held after great deliberation and after consultation with all the judges, Lord Mansfield speaking for the court, "that a judgment is no contract, nor can be considered in the light of a contract, for judicium redditur in invitum." To the same effect are the following authorities: Rae v. Hulbert, 17 Ill. 572; Todd v. Crumb, 5 McLean, 172, Fed. Cas. No. 14,073; Smith v. Harrison, 33 Ala. 706; Masterson v. Gibson, 56 Ala. 56; Keith v. Estill, 9 Port. 669; Larrabee v. Baldwin, 35 Cal. 156; In re Kennedy, 2 S. C. 226; State v. Mayor, etc., of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211.

But in some decided cases, and in textbooks, judges and jurists have frequently, and, as I think, without strict accuracy, spoken of judgments as contracts. They have been classified as contracts with reference to the remedies upon them. In the division of actions into actions ex contractu and ex delicto, actions upon judgments have been assigned to the former class. It has been said that the law of contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life; that contract is co-ordinate and commensurate with duty; that whatever it is the duty of one to do he may be deemed in law to have contracted to do, and that the law presumes that every man undertakes to perform what reason and justice dictate he should perform. 1 Pars. Cont. (6th Ed.) 3; 2 Bl. Comm. 543; 3 Bl. Comm. 160; McCoun v. Railroad Co., supra. Contracts in this wide sense are said to spring from the relations of men to each other and to the society of which they are members. Blackstone says: "It is a part of the original contract entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member." In the wide sense

[1] Opinion of Andrews, J., omitted.

thus spoken of the contracts are mere fictions invented mainly for the purpose of giving and regulating remedies. A man ought to pay for services which he accepts, and hence the law implies a promise that he will pay for them. A man ought to support his helpless children, and hence the law implies a promise that he will do so. So one ought to pay a judgment rendered against him, or a penalty which he has by his misconduct incurred, and hence the law implies a promise that he will pay. There is no more contract to pay the judgment than there is to pay the penalty. He has neither promised to pay the one nor the other. The promise is a mere fiction, and is implied merely for the purpose of the remedy. Judgments and penalties are, in the books, in some respects, placed upon the same footing. At common law both could be sued for in an action ex contractu for debt, the action being based upon the implied promise to pay. But no one will contend that a penalty is a contract, or that one is really under a contract liability to pay it. McCoun v. Railroad Co., supra.

Suppose a statute gives a penalty to an aggrieved party, with interest, what interest could be recovered? The interest allowed by law when the penalty accrued, if the statutory rate has since been altered? Clearly not. He would be entitled to the interest prescribed by law during the time of the defendant's default in payment. There would, in such a case, be no contract to pay interest, and the statutory rate of interest at the time the penalty accrued would become part of no contract. If, therefore, a subsequent law should change the rate of interest, no vested right would be interfered with, and no contract obligation would be impaired.

The same principles apply to all implied contracts. When one makes a valid agreement to pay interest at any stipulated rate for any time, he is bound to pay it, and no legislative enactment can release him from his obligation. But in all cases where the obligation to pay interest is one merely implied by the law or is imposed by law, and there is no contract to pay except the fictitious one which the law implies, then the rate of interest must at all times be the statutory rate. The rate existing at the time the obligation accrued did not become part of any contract, and hence the law which created the obligation could change or alter it for the future without taking away a vested right or impairing a contract.

In the case of all matured contracts which contain no provision for interest after they are past due, as I have before said, interest is allowed, not by virtue of the contract, but as damages for the breach thereof. In such cases what would be the effect of a statute declaring that no interest should be recovered? As to the interest which had accrued as damages before the date of the law, the law could have no effect because that had become a vested right of property which could not be taken away. But the law could have effect as to the subsequent interest, and in stopping that from running would impair no contract. A law could be passed providing that in all cases of unliquidated claims which now draw no interest, interest should thereafter be allowed as damages; and thus there is ample legislative power in such cases to regulate the future rate of interest without invading any constitutional right. When a man's obligation to pay interest is simply that which the law implies, he discharges that obligation by paying what the law exacts.

This judgment, so far as pertains to the question we are now considering, can have no other or greater force than if a valid statute had been enacted requiring the defendant to pay the same with interest. Under such a statute, interest would be computed, not at the rate in force when the statute was enacted, but according to the rate in force during the time of default in payment. A different rule would apply if a judgment or statute should require the payment of a given sum with interest at a specified rate. Then interest at the rate specified would form part of the obligation to be discharged.

Here, then, the defendant did not in fact contract or promise to pay this judgment or the interest thereon. The law made it his duty to pay the interest, and implied a promise that he would pay it. That duty is discharged by paying such interest as the law, during the time of default in paying the principal sum, prescribed as the legal rate.

If this judgment had been rendered at the date the execution was issued, interest would have been computed upon the original demand at seven per cent to January 1, 1880, and then at the rate of six per cent. Shall the plaintiff have a better position because the judgment was rendered prior to 1880?

As no intention can be imputed to the parties in reference to the clause in the judgment requiring payment "with interest" we may inquire what intention the court had. It is plain that it could have had no other intention than that the judgment should draw the statutory interest until payment. It cannot be presumed that the court intended that the interest should be at the rate of seven per cent. if the statutory rate should become less.

That there is no contract obligation to pay the interest upon judgments which is beyond legislative interference is shown by legislation in this country and in England. Laws have been passed providing that all judgments should draw interest, and changing the rate of interest upon judgments, and such laws have been applied to judgments existing at their date, and yet it was never supposed that such laws impaired the obligation of contracts.

It is claimed that the provision in section 1 of the act of 1879, which reduced the rate of interest (chapter 538), saves this judgment from the operation of that act. The provision is that "nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the passage of this act." The answer to this claim is that here there was no contract to pay interest at any given rate. The implied contract, as I have shown, was to pay such interest as the law prescribed, and that contract is not affected or interfered with.

The foregoing was written as my opinion in the case of Prouty v. Railway Co. The only difference between that case and this is that there the judgment was by its terms payable "with interest." Here the judgment contains no direction as to interest. The reasoning of the opinion is applicable to this case and is, therefore, read to justify my vote in this. Since writing the opinion, we have decided in the case of Sanders v. Railway Co., 94 N. Y. 641, the law to be as laid down in the first paragraph of the opinion.

The orders of the general and special terms should be reversed and the motion granted, without costs in either court, the parties having so stipulated.

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THRUSTON v. THORNTON.

(1 Cush. 89.)

Supreme Judicial Court of Massachusetts. Suffolk and Nantucket. March Term, 1848.

This was an action of assumpsit to recover compensation for services, rendered by the plaintiff as a broker, in selling or aiding to sell certain real estate belonging to the defendant. The declaration contained the common money counts, a bill of particulars, and a special count. The cause was tried in the court of common pleas, before Wells, C. J.

The bill of particulars set forth a claim by the plaintiff against the defendant of the sum of one thousand dollars and interest, as a commission of five per cent., "as per contract, for selling his farm called 'Wood Park,' in Virginia, which was sold to Marcus Bull, Esq.," through the plaintiff's agency, for twenty thousand dollars.

In the special count, the plaintiff alleged, in substance, that, in consideration that at the request of the defendant, he would find a purchaser for and sell and dispose of the defendant's farm above mentioned, the defendant promised to pay him five per cent. of the amount for which he should sell the same, as a commission for his services; and that he, confiding in the defendant's promise, did find a purchaser for the estate, for the sum of twenty thousand dollars, to whom the defendant sold and conveyed the same, and received therefor the said sum.

The plaintiff claimed to recover—First, as upon a special contract, on the part of the defendant, to pay him a commission of five per cent. on the sum for which the estate should be sold; or, secondly, if that ground should not be sustained by the evidence, then, a reasonable compensation for his services in effecting the sale.

In order to prove the special agreement relied on by the plaintiff, he introduced the deposition of Cary Selden, who testified: "That some time in the fall of 1840, or early in the following winter, the defendant was in the city of Washington, and placed in the hands of the deponent a written schedule of certain real and other property, valued at twenty-two thousand one hundred and thirty dollars, with a view of having the same sold; that some short time thereafter the defendant came into the office occupied jointly by the deponent and the plaintiff, on which occasion the deponent, at the request of the plaintiff, introduced the latter to the defendant, when the sale of the estate alluded to became the subject of conversation; that in the course of the conversation the plaintiff inquired of the defendant if he would pay a commission for effecting a sale of the property, to which the defendant replied that he would pay a commission to any person who could effect a sale of the property at the price mentioned in the schedule; and that this deponent caused a copy of the schedule to be taken for the use of the plaintiff."

It was also testified, on behalf of the plaintiff, that he did recommend the estate to Marcus Bull, who called upon the defendant, and purchased the estate for the sum of twenty thousand five hundred dollars.

It appeared in evidence that the plaintiff was an attorney at law, and, in connection with his business as an attorney, acted as a real-estate broker. But it did not appear that at the time of the interview, or at any time prior to the sale of the estate, the defendant knew that the plaintiff ever acted as a broker, or that he was informed that the purchaser was sent to him by the plaintiff.

The defendant contended, and introduced evidence tending to show, that no such conversation as was testified to by Selden ever took place, and that he never gave the plaintiff any written description of the estate.

In relation to the special count the judge instructed the jury that if they should be satisfied that the conversation testified to by Selden took place between these parties, then, in order to determine whether the defendant was liable in the present action, it would be necessary for the jury to understand what constituted a legal and binding contract; and that, so far as the matters in difference in this case were concerned, it was only necessary for them to fix distinctly in their minds the following part of the definition of a legal contract:

"A contract implies the assent of two minds. This idea is often expressed by the phrase, 'It takes two to make a bargain.' Or, to state it in other words, it must be understood between the parties that the one party has made an offer, and that the other has accepted it. If one party should make an offer, and the other party should not accept it, there would be no contract. There is sometimes an apparent exception to this rule, but it is only apparent. Thus, if a person should put forth an advertisement, offering a reward to any one who would recover lost property, this offer is to no one in particular and no one accepts it at the time it is made. But the meaning of the offer is that it is made to whomsoever will act upon it; and it is an implied part of the offer that time shall be afforded to any one who chooses to accept it; and if a person, before the offer is withdrawn, does that which by the terms of the offer will entitle him to the reward, his so acting upon the offer constitutes an acceptance of it, and the party making the offer is bound to fulfill his promise. But when the parties are face to face, to constitute a contract, the one must offer and the other accept, unless where it is a part of the agreement that time shall be given to the person to whom the offer is made, to determine whether he will accept or not, in which case, the time given makes a part of the offer."

In view of these instructions, the jury were directed to inquire whether it was proved that at the interview referred to the minds of the parties met, and they made a legal and binding contract; or whether the transaction was, as contended by the defendant, a loose conversation, not understood or intended by them as an agreement; and, as a test, the jury were directed to inquire and determine whether, when the parties separated, it was understood between them that the plaintiff should do or attempt anything for the defendant, in relation to the sale of his estate, in consequence of the conversation which had taken place.

The jury, under these instructions, rendered a verdict for the defendant, and the plaintiff thereupon filed exceptions.

H. H. Fuller & R. F. Fuller, for plaintiff, argued that the instructions were wrong as to the necessity of a formal acceptance of an offer made when the parties were face to face; and that the jury should have been instructed that, if the plaintiff acted in consequence of the defendant's offer, the former was entitled to recover. Williams v. Carwardine, 5 Car. & P. 566, 574, 4 Barn. & Adol. 621; Lancaster v. Walsh, 4 Mees. & W. 16, 22; Murray v. Currie, 7 Car. & P. 584; Horford v. Wilson, 1 Taunt. 12; 20 Am. Jur. 19. The defendant took less than the price stipulated, but that was no reason why the plaintiff should be deprived of his commission.

J. Dana, for defendant, cited Rolle, Abr. "Action of the Case" pl. 1; Com. Dig. "Action of the Case upon Ass.," T, 2.

WILDE, J. On a careful examination of the instructions to the jury, the court have been unable to find any misdirection, or any remarks tending to mislead the jury in their consideration of the evidence. Certainly the remarks of the judge as to the definition of a legal contract, and as to the necessary requisites to constitute such a contract, were, we think, clearly correct. The jury were then directed to consider the evidence, and to decide whether, "at the interview between the parties, their minds met, and they made a legal and binding contract; or whether the transaction, as was insisted by the defendant, was a loose conversation, not understood or intended by them as an agreement." We are of opinion that this direction was entirely correct. It was for the jury to decide what was the meaning and intention of the parties. The conversation was loose and indefinite, and the jury, we think, might well find, as they did, that no contract was in fact made. But, however this may be, it was a question of fact for the jury, and we think they were in no respect misdirected.

Exceptions overruled.

WHITE v. CORLIES.

(46 N. Y. 467.)

Court of Appeals of New York. Nov. 20, 1871.

Appeal from First judicial district.

The action was for an alleged breach of contract.

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

The defendants were merchants at 32 Dey street.

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

On September 28th the plaintiff left his estimate with the defendants, and they were to consider upon it, and inform the plaintiff of their conclusions.

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

On the day following, the defendants' bookkeeper wrote the plaintiff the following note: "New York, September 29th. Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once. The writer will call again, probably between five and six this p. m. W. H. R., for J. W. Corlies & Co., 32 Dey street."

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

Immediately on receipt of the note of September 29th, and before the countermand was forwarded, the plaintiff commenced a performance by the purchase of lumber and beginning work thereon.

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

The court charged the jury as follows: "From the contents of this note which the plaintiff received, was it his duty to go down to Dey street (meaning to give notice of assent) before commencing the work. In my opinion it was not. He had a right to act upon this note and commence the job, and that was a binding contract between the parties."

To this defendants excepted.

L. Henry, for appellants.

The manifestation of assent must be such as tends to give notice to proposing party. Mactier v. Frith, 6 Wend. 103; Vassar v. Camp, 11 N. Y. 441.

Mr. Field, for respondent.

It was not necessary that the fact of concurrence by one party should be made known to the other. Mactier v Frith, 6 Wend. 103, 117. An agent acting with apparent authority binds the principal. Story, Ag. § 443; Clark v. Bank, 3 Duer, 241; President, etc., of Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599; Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125; Dunning v. Roberts, 35 Barb. 463; Cornell v. Masten, Id. 157; Whitbeck v. Schuyler, 44 Barb. 469.

FOLGER, J. We do not think that the jury found, or that the testimony shows that there was any agreement between the parties before the written communication of the defendants of September 30 was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound in contract to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work as we understand the testimony, upon that stuff.

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

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

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

uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

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

All concur, but ALLEN, J., not voting.

Judgment reversed, and new trial ordered.

PARKER v. SOUTH EASTERN RY. CO.
GABELL v. SAME.
(2 C. P. Div. 416.)

Court of Appeal. April 25, 1877.

Actions against the South Eastern Railway Company for the value of bags and their contents lost to the plaintiffs respectively by the negligence of the company's servants.

The plaintiff in each case had deposited a bag in a cloak-room at the defendants' railway station, had paid the clerk 2d., and had received a paper ticket, on one side of which was written a number and a date, and were printed notices as to when the office would be opened and closed, and the words "See back." On the other side were printed several clauses relating to articles left by passengers, the last of which was, "The company will not be responsible for any package exceeding the value of £10." In each case the plaintiff on the same day presented his ticket and demanded his bag, and in each case the bag could not be found and had not been since found. Parker claimed £24. 10s. as the value of his bag, and Gabell claimed £50. 16s. The company in each case pleaded that they had accepted the goods on the condition that they would not be responsible for the value if it exceeded £10; and on the trial they relied on the words printed on the back of the ticket, and also on the fact that a notice to the same effect was printed and hung up in the cloak-room. Each plaintiff gave evidence and denied that he had seen the notice, or read what was printed on the ticket. Each plaintiff admitted that he had often received such tickets, and knew there was printed matter on them, but said that he did not know what it was. Parker said that he imagined the ticket to be a receipt for the money paid by him; and Gabell said he supposed it was evidence of the company having received the bag, and that he knew that the number on it corresponded with a number on his goods.

Parker's case was tried at Westminster on the 27th of February, 1876, before Pollock, B.; and Gabell's case was tried at Westminster on the 15th of November, 1876, before Grove, J. The questions left in each case by the judge to the jury were: (1) Did the plaintiff read or was he aware of the special condition upon which the articles were deposited? (2) Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or make himself aware of the condition?

The jury in each case answered both questions in the negative, and the judge thereupon directed judgment to be entered for the plaintiff for the amount claimed, reserving leave to the defendants to move to enter judgment for them.

In Parker's case the defendants moved to enter judgment, and also obtained from the common pleas division an order nisi for a new trial, on the ground of misdirection. The order was discharged, and the motion was refused by the common pleas division.

See 1 C. P. Div. 618, where the words printed on the ticket are set out at length.

The defendants appealed.

In Gabell's case the defendants applied to the common pleas division for the order nisi for a new trial on the ground of misdirection, but the court refused to grant the order. The defendants then moved for judgment and also obtained from the court of appeal an order nisi for a new trial, on the ground of misdirection.

The cases were heard together.

Feb. 6, 7.

Mr. Benjamin, Q. C., and Mr. Bremner, for the defendants.

The plaintiffs sue on an alleged contract to keep the goods safely, but there is no contract if one party means one thing and the other party means something else; there must be a consensus ad idem.

G. W. Digby, solicitor for Parker. M. J. Pyke, solicitor for Gabell. W. R. Stevens, solicitor for the company.

BRAMWELL, J. A. Not so. One of the parties may so conduct himself as to lead the other to believe that there was a contract.

A man cannot make such a claim saying that he took the ticket, but took care not to read what was printed on it, though he knew that it related to the goods deposited. The plaintiff proposes to the company that they shall do something for him, and they answer, "There are our terms." He had often taken similar tickets, and knew that they had on them printed matter, and he knew that he must give back the ticket in order to get back his goods. If the porter had said, "Read this," the plaintiff could not recover if he asserted merely that he had not read what was printed; and where is the difference? Henderson v. Stevenson, L. R. 2 H. L. Sc. 470, was not a similar case. There the passenger took the ticket in a hurry, and knew nothing about it. Besides, in that case the company were common carriers, bound to take the passenger on terms fixed by law; but the company are under no obligation to keep a cloak-room, and they have an absolute right to prescribe the terms on which they will accept articles left there. They are not even warehousemen, for they will only take small articles for the convenience of passengers. It is absurd to hold that for a charge of 2d. a company ought to become liable to make good a loss of perhaps hundreds of pounds. Harris v. Railway Co., 1 Q. B. Div. 515, was a stronger case. A man is not compelled to read a contract in order to be bound by it. Here the plaintiff took the ticket, and that implies an assent. The ticket contains the terms of

the contract, and the plaintiff cannot, by refusing to read it, force on the company a different contract Lewis v. M'Kee, L. R. 4 Exch. 581. The company has not acted so as to induce the plaintiff to believe that they would be liable. Cornish v. Abington, 4 Hurl. & N. 549; 28 L. J. Exch. 262. And if the porter has done so he has exceeded his authority. The verdict ought to be entered for the defendants, or if not, then a new trial should be directed.

Mr. Prentice, Q. C., and D. Brynmor Jones, for Gabell.

The question is whether a man is bound by the contents of a printed paper merely put into his hands. It could not be pretended that any one would be bound by the terms printed on a turnpike ticket or a theatre ticket. The plaintiff says he thought the ticket was a voucher for the goods, as it was, and, if so, why should he read it? It is not a question of law, but one of common sense, to be left to the jury. The company were clearly bailees for hire, and as such are prima facie liable, and it is for them to shew that they are not.

F. Pollock (Prentice, Q. C., with him), for Parker.

Suppose that the company had put on the ticket that if the goods were not redeemed within twenty-four hours they would be forfeited, or could not be redeemed except on payment of £5, would that have bound the plaintiff? It is no answer that that would be unreasonable, if the ticket is said to constitute a contract; nor is a depositor obliged to know what would be reasonable. To say that he is at peril obliged to read this ticket, is to say that the general law of bailments is so absurd that a bailor must expect special conditions. No one can be expected to know that a receipt or a mere voucher given in order to secure the return of the article to the proper person contains special conditions. The questions were rightly put to the jury, and the verdict ought to stand.

Mr. Bremner, in reply.

If the companies are for 2d. to incur indefinite liabilities, they will shut up the cloak-rooms. It is admitted that the terms specified on the ticket are reasonable, and it is needless to speculate on what would be the consequence if the terms were unreasonable. The depositor had plenty of time to read what was printed, and if he did not he must take the consequences.

Cur. adv. vult.

The judgments of MELLISH and BAGGALLAY, JJ., were read by BRAMWELL, L. J.

MELLISH, L. J. In this case we have to consider whether a person who deposits in the cloak-room of a railway company, articles which are lost through the carelessness of the company's servants, is prevented from recovering, by a condition on the back of the ticket, that the company would not be liable for the loss of goods exceeding the value of £10. It was argued on behalf of the railway company that the company's servants were only authorized to receive goods on behalf of the company upon the terms contained in the ticket; and a passage from Mr. Justice Blackburn's judgment in Harris v. Railway Co., 1 Q. B. Div., at page 533, was relied on in support of their contention: "I doubt much—inasmuch as the railway company did not authorize their servants to receive goods for deposit on any other terms, and as they had done nothing to lead the plaintiff to believe that they had given such authority to their servants so as to preclude them from asserting, as against her, that the authority was so limited—whether the true rule of law is not that the plaintiff must assent to the contract intended by the defendants to be authorized, or treat the case as one in which there was no contract at all, and consequently no liability for safe custody." I am of opinion that this objection cannot prevail. It is clear that the company's servants did not exceed the authority given them by the company. They did the exact thing they were authorized to do. They were authorized to receive articles on deposit as bailees on behalf of the company, charging 2d. for each article, and delivering a ticket properly filled up to the person leaving the article. This is exactly what they did in the present cases, and, whatever may be the legal effect of what was done, the company must, in my opinion, be bound by it. The directors may have thought, and no doubt did think, that the delivering the ticket to the person depositing the article would be sufficient to make him bound by the conditions contained in the ticket, and if they were mistaken in that, the company must bear the consequence.

The question, then, is whether the plaintiff was bound by the conditions contained in the ticket. In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents. The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it. In that case, also, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents. Now if, in the course of making a contract, one party de-

livers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are. I hold, therefore, that the case of Harris v. Railway Co., 1 Q. B. Div. 515, was rightly decided, because in that case the plaintiff admitted, on cross-examination, that he believed there were some conditions on the ticket. On the other hand, the case of Henderson v. Stevenson, L. R. 2 H. L. Sc. 470, is a conclusive authority that if the person receiving the ticket does not know that there is any writing upon the back of the ticket, he is not bound by a condition printed on the back. The facts in the cases before us differ from those in both Henderson v. Stevenson, L. R. 2 H. L. Sc. 470, and Harris v. Railway Co., 1 Q. B. Div. 515, because in both the cases which have been argued before us, though the plaintiffs admitted that they knew there was writing on the back of the ticket, they swore not only that they did not read it, but that they did not know or believe that the writing contained conditions, and we are to consider whether, under those circumstances, we can lay down as a matter of law either that the plaintiff is bound or that he is not bound by the conditions contained in the ticket, or whether his being bound depends on some question of fact to be determined by the jury, and if so, whether, in the present case, the right question was left to the jury.

Now, I am of opinion that we cannot lay down, as a matter of law, either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket, from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions. I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction, where it would be quite reasonable that the party receiving it should assume that the writing contained in it no conditions, and should put it in his pocket unread. For instance, if a person driving through a turn-pike gate received a ticket upon paying the toll, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other turn-pike gate, and might put it in his pocket unread. On the other hand, if a person who ships goods to be carried on a voyage by sea receives a bill of lading signed by the master, he would plainly be bound by it, although afterwards in an action against the shipowner for the loss of the goods, he might swear that he had never read the bill of lading, and that he did not know that it contained the terms of the contract of carriage, and that the shipowner was protected by the exceptions contained in it. Now the reason why the person receiving the bill of lading would be bound seems to me to be that in the great majority of cases persons shipping goods do know that the bill of lading contains the terms of the contract of carriage; and the shipowner, or the master delivering the bill of lading, is entitled to assume that the person shipping goods has that knowledge. It is, however, quite possible to suppose that a person who is neither a man of business nor a lawyer might on some particular occasion ship goods without the least knowledge of what a bill of lading was, but in my opinion such a person must bear the consequences of his own exceptional ignorance, it being plainly impossible that business could be carried on if every person who delivers a bill of lading had to stop to explain what a bill of lading was.

Now the question we have to consider is whether the railway company were entitled to assume that a person depositing luggage and receiving a ticket in such a way that he could see that some writing was printed on it would understand that the writing contained the conditions of contract, and this seems to me to depend upon whether people in general would in fact, and naturally, draw that inference. The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them. I think they are entitled to assume that he can read, and that he understands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak-room. The railway company must, however, take mankind as they find them, and if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. But if what the railway company do is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability. I am of opinion, therefore, that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.

I have lastly to consider whether the direction of the learned judge was correct, namely, "Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself aware of the condition?" I think that this direction was not strictly accurate, and was calculated to mislead the jury. The plaintiff was certainly under no obligation to read the ticket, but was entitled to leave it unread if he pleased, and the question does not appear to me to direct the attention of the jury to the real question, namely, whether the railway company did what was reasonably sufficient to give the plaintiff notice of the condition.

On the whole, I am of opinion that there ought to be a new trial.

BAGGALLAY, L. J. A railway company, in the conduct of their cloak-room business, become bailees for reward of the articles deposited with them for safe custody; and, as such, in the absence of any special contract constituted by the delivery and acceptance of a ticket or otherwise, are responsible to the depositors for the full value of the deposited articles, if unable to restore them when demanded. This clearly would be the nature of the contract if no ticket were delivered, as occasionally happens.

In the present cases the question for consideration is whether the ordinary contract of bailment, which would have resulted from the receipt by the company of the plaintiff's property and the payment by the plaintiffs of the prescribed charges, has been modified by the delivery of the tickets which were admittedly accepted by the plaintiffs, though, as they allege, in ignorance of the purport or effect of the printed statements endorsed upon them. If the practice of issuing cloak-room tickets, containing statements of conditions intended to be binding on depositors, had become general, it might well be that a person depositing his property and accepting a ticket, even though himself ignorant of the practice, must be treated as aware of it, and as bound to ascertain whether any such conditions were stated on the ticket delivered to him; but no such practice has been shewn or even suggested in either of the present cases, nor does it, so far as I am aware, exist. The primary purpose of the ticket is to identify the articles deposited and the party entitled to reclaim them, but, practically, and by reason of the recognised practice of not delivering the ticket until the prescribed charge has been paid, it becomes a voucher for the payment.

So far as these purposes are concerned, the depositor has no occasion to look at the ticket until he desires to reclaim his property, and if the tickets were delivered for these purposes only, the ordinary contract of bailment would be in no respect modified by the delivery of them; and in the absence of any such general practice as that to which I have alluded, it appears to me that the depositor is prima facie entitled to regard the ticket as delivered to him for these purposes only, and that he is in no way put upon inquiry whether the company have any further or ulterior object. But it is, of course, open to the company to shew, not only that they intended that the ticket, which was delivered to the depositor primarily for his own convenience and protection, should also indicate to him certain terms and conditions in favour of the company, by which he was to be bound, but also that he was aware of such intention at the time when he accepted the ticket and that he agreed to give effect to it. The onus of proof is, however, upon the company in respect of these matters. Of the intention of the company to modify the contract of bailment in the cases under consideration by limiting their liability, there can be no question. I also think that, if the plaintiffs were aware, or ought, for reasons which will be indicated presently, to be treated as being aware of the intention of the company at the time when they respectively received their tickets, and did not express their dissent, they must be regarded as having agreed to give effect to them.

The question then remains whether the plaintiffs were respectively aware, or ought to be treated as aware, of the intention of the company thus to modify the effect of the ordinary contract.

Now as regards each of the plaintiffs, if at the time when he accepted the ticket, he, either by actual examination of it, or by reason of previous experience, or from any other cause, was aware of the terms or purport or effect of the endorsed conditions, it can hardly be doubted that he became bound by them. I think also that he would be equally bound if he was aware or had good reason to believe that there were upon the ticket statements intended to affect the relative rights of himself and the company, but intentionally or negligently abstained from ascertaining whether there were any such, or from making himself acquainted with their purport. But I do not think that in the absence of any such knowledge or information, or good reason for belief, he was under any obligation to examine the ticket with the view of ascertaining whether there were any such statements or conditions upon it.

Whether the plaintiff had any such knowledge or information, or good reason for belief, is a question of fact to be determined by the evidence. Had the determination of these questions of fact in the cases under consideration rested with myself, I should upon the evidence, have decided in favour of the plaintiffs in both cases; but having had the opportunity of reading the proposed judgments of both my colleagues, I feel the force of the observations made by them as to the directions given to the juries by the judges who tried the actions. I do not think that the second question was quite right in form, though I think that had it been put in the

form suggested by Lord Justice Mellish, which appears to me to be the more correct form, the same result would have followed. It is possible, however, though I think hardly probable, that the juries were misled by the form of the questions, and, under all the circumstances, the best course to pursue will be, I think, to direct a new trial.

BRAMWELL, L. J. It is clear that if the plaintiffs in these actions had read the conditions on the tickets and not objected, they would have been bound by them. No point was or could be made that the contract was complete before the ticket was given. If, then, reading the conditions, they would have been bound, it follows that, had they been told they were the conditions of the contract and invited to read them, and they had refused, saying they were content to take them whatever they might be, then also they would be bound by them. So, also, would they be if they were so told, and made no answer, and did nothing, for in that case they would have tacitly said the same thing, viz., that they were content to take them, whatever they might be. It follows, further, that if they knew that what was on the tickets was the contract which the defendants were willing to enter into, they, the plaintiffs, would be bound, though not told they were the conditions; for it cannot make a difference that they were not told what by the hypothesis they knew already. We have it, then, that if the plaintiffs knew that what was printed was the contract which the defendants were willing to enter into, the plaintiffs, not objecting, are bound by its terms, though they did not inform themselves what they were. The plaintiffs have sworn that they did not know that the printing was the contract, and we must act as though that was true and we believed it, at least as far as entering the verdict for the defendants is concerned. Does this make any difference? The plaintiffs knew of the printed matter. Both admit they knew it concerned them in some way, though they said they did not know what it was; yet neither pretends that he knew or believed it was not the contract. Neither pretends he thought it had nothing to do with the business in hand; that he thought it was an advertisement or other matter unconnected with his deposit of a parcel at the defendants' cloak-room. They admit that, for anything they knew or believed, it might be, only they did not know or believe it was, the contract. Their evidence is very much that they did not think, or, thinking, did not care about it. Now they claim to charge the company, and to have the benefit of their own indifference. Is this just? Is it reasonable? Is it the way in which any other business is allowed to be conducted? Is it even allowed to a man to "think" "judge," "guess," "chance" a matter, without informing himself when he can, and then when his "thought," "judgment," "guess," or "chance" turns out wrong or unsuccessful, claim to impose a burthen or duty on another which he could not have done had he informed himself as he might? Suppose the clerk or porter at the cloak-room had said to the plaintiffs, "Read that; it concerns you," and they had not read it, would they be at liberty to set up that though told to read they did not because they thought something or other? But what is the difference between that case and the present? Why is there printing on the paper, except that it may be read? The putting of it into their hands was equivalent to saying, "Read that." Could the defendants practically do more than they did? Had they not a right to suppose either that the plaintiffs knew the conditions, or that they were content to take on trust whatever is printed? Let us for the moment forget that the defendants are a caput lupinum—a railway company. Take any other case—any case of money being paid and a paper given by the receiver, or goods bought on credit and a paper given with them. Take also the cases put by Byles, J., in Van Toll v. Railway Co., 12 C. B. (N. S.) at page 87; 31 L. J. (C. P.) 241. Has not the giver of the paper a right to suppose that the receiver is content to deal on the terms in the paper? What more can be done? Must he say, "Read that?" As I have said, he does so in effect when he puts it into the other's hands. The truth is, people are content to take these things on trust. They know that there is a form which is always used. They are satisfied it is not unreasonable, because people do not usually put unreasonable terms into their contracts. If they did, then dealing would soon be stopped. Besides, unreasonable practices would be known. The very fact of not looking at the paper shows that this confidence exists. It is asked: What if there was some unreasonable condition, as, for instance, to forfeit £1000 if the goods were not removed in forty-eight hours? Would the depositor be bound? I might content myself by asking: Would he be, if he were told "our conditions are on this ticket," and he did not read them. In my judgment, he would not be bound in either case. I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read; no condition not relevant to the matter in hand. I am of opinion, therefore, that the plaintiffs, having notice of the printing, were in the same situation as though the porter had said, "Read that; it concerns the matter in hand;" that if the plaintiffs did not read it, they were as much bound as if they had read it and had not objected.

The difficulty I feel as to what I have written is that it is too demonstrative. But, put in practical language, it is this: The defendants put into the hands of the plaintiff a paper with printed matter on it, which in all good sense and reason must be supposed to

relate to the matter in hand. This printed matter the plaintiff sees and must either read it, and object if he does not agree to it, or if he does read it and not object, or does not read it, he must be held to consent to its terms. Therefore, on the facts, the judges should have directed verdicts for the defendants.

The second question left, in my opinion, should not have been left, and was calculated to mislead the jury. It might equally have been put if the plaintiffs had been told that the conditions of the contract were on the ticket, and had been asked to read them. It would then manifestly have been a question of law, and so it is now. Besides, by its terms it was calculated to mislead the jury. The question was whether the plaintiff was under any obligation, in the exercise of reasonable and proper caution, to read the ticket. Obligation to whom? Not to himself, as people sometimes say, for there is no such duty, or, if any, he may excuse himself from performing it. If it means whether a reasonably and properly cautious person might omit to read it, I say, "Yes." At least I hope so. Such a person might well take the matter on trust, but then he ought to be content to take the consequences of so doing. But he has no right, having omitted to inform himself, and having had the means of doing so, to make a claim which he might have fairly made had he had no such means of informing himself. The question probably means "obligation to the defendants." That is, had the plaintiff a right to omit to do so, and then make his claim? I repeat that the same question might be put if he were told that the print contained the conditions of the contract, and then it would obviously be a question of law as it is now. The question is imperfect. The question whether of law or fact is, "Can a man properly omit to inform himself, being able to do so, and then justly claim, when he could not have claimed if he had informed himself?" The latter part of the question is left out. The authorities are in favour of this view. Stewart v. Railway Co., 3 Hurl. & C. 135, 33 L. J. Exch. 199; Van Toll v. Railway Co., 12 C. B. (N. S.) 75, 31 L. J. (C. P.) 241. There is the opinion of Willes, J., in Lewis v. McKee, L. R. 4 Exch. 58, and, lastly, the case of Henderson v. Stevenson, L. R. 2 H. L. Sc. 470. I need not say, if I thought that that case supported the judgment, I should defer to it, but I cannot understand how that can be supposed. The plaintiff there said that he had never looked at the ticket or seen the notice on it, no one having directed his attention to either, and on this the house proceeded. The lord chancellor says: "Your lordships may take it as a matter of fact that the respondent was not aware of that which was printed on the back of the ticket." Here the plaintiffs knew there was printed matter, and must have known it concerned them. The lord chancellor adds: "The passenger receiving the ticket in that form, and without knowing of anything beyond, must be taken to have made a contract according to that which was expressed and shewn to him." I am of opinion therefore, that the judgment should be reversed, and be given for the defendants. If not, though I think the question one of law, still, if it is of fact, it has not been left to the jury, and there should be a new trial. The possible question of fact is that set forth in the judgment of the Lord Justice MELLISH, with a perusal of which he has favoured me. But I repeat I think it is a question of law. I also think the verdict against evidence, and that on that ground there should be a new trial. No one can read the evidence of the plaintiffs in this case without seeing the mischief of encouraging claims so unconscientious as the present.

Orders absolute for new trials.

ELIASON et al. v. HENSHAW.

(4 Wheat. 225.)

Supreme Court of the United States. Feb. Term, 1819.

Error to circuit court for the District of Columbia.

Jones & Key, for plaintiffs in error. Mr. Swann, for defendant in error.

WASHINGTON, J. This is an action, brought by the defendant in error, to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour at a stipulated price. The evidence of this contract given in the court below, is stated in a bill of exceptions, and is to the following effect: A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Captain Conn informs us that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times, in Georgetown, and will be glad to serve you, either in receiving your flour in store, when the markets are dull, and disposing of it when the markets will answer to advantage, or we will purchase at market price when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you $9.50 per barrel, deliverable the first water in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add: "Please write by return of wagon whether you accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harpers' Ferry, to the defendant at his mill, at Mill Creek, distant about 20 miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant on the 14th of the same month, to which an answer, dated the succeeding day, was written by the defendant, addressed to the plaintiffs at Georgetown, and dispatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th inst. was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown, by the first water, at $9.50 per barrel, I accept, and shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary—payment on delivery is all that is required."

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

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

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

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

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

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same $9.50 per barrel. To the letter containing this offer, they required an answer by the return of the wagon, by which the letter was dispatched. This wagon was, at that time, in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate by the usual length of time which was employed by this wagon, in travelling from Harper's Ferry to Mill Creek, and back again with a load of flour, about what time they should receive the desired answer, and, therefore, it was entirely unimportant, whether it was sent by that, or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the an-

swer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent, constituted an essential part of the plaintiff's offer.

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

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

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

FOGG v. PORTSMOUTH ATHENEUM.

(44 N. H. 115.)

Supreme Judicial Court of New Hampshire. Merrimack. Dec., 1862.

Assumpsit, to recover the following account to the writ annexed, namely:

The Proprietors of the Portsmouth Atheneum to Fogg & Hadley, Dr.

1860, Jan 1. To the Independent Democrat from vol. 5, No. 1, to vol. 15, No. 35, inclusive	$21 37
Interest on same	12 00
	$33 37

Also to recover the sum of forty dollars, for the paper called the Independent Democrat, for the space of eleven years before the date of the writ, furnished, sold and delivered to the defendants at their request, by the plaintiffs, at two dollars per year, and for interest on money due and owing from the defendants to the plaintiffs before the date of the writ.

The writ was dated July 26, 1861. Plea, the general issue, with the statute of limitations.

The case was submitted to the decision of the court upon the following agreed statement of facts:

The defendants are a corporation whose object is the support of a library and public reading-room, at which latter a large number of newspapers are taken. Some are subscribed and paid for by the defendants; others are placed there gratuitously by the publishers and others; and some are sent there apparently for advertising purposes merely, and of course gratuitously.

The Independent Democrat newspaper was furnished to the defendants, through the mail by its then publishers, from vol. 3, No. 1 (May 1, 1847). On the 29th day of November, 1848, a bill for the paper, from vol. 3, No. 1 (May 1, 1847), to vol. 5, No. 1 (May 1, 1849), two years, at $1.50 per year, was presented to the defendants by one T. H. Miller, agent for the then publishers, for payment. The defendants objected that they had never subscribed for the paper, and were not bound to pay for it. They at first refused on that ground to pay for it, but finally paid the bill to said Miller, and took upon the back thereof a receipt in the following words and figures: "Nov. 29, 1848. The within bill paid this day, and the paper is henceforth to be discontinued. T. H. Miller, for Hood & Co."

Hood & Co. were the publishers of the paper from May 1, 1847, until February 12, 1849, when that firm was dissolved, and the paper was afterward published by the present plaintiffs. The change of publishers was announced, editorially and otherwise, in the paper of February 15, 1849, and the names of the new publishers were conspicuously inserted in each subsequent number of the paper; but it did not appear that the change was actually known to Mr. Hatch, the secretary and treasurer of the corporation, who settled the above-named bill, and who continued in the office till January, 1850.

The plaintiffs had no knowledge of the agreement of the agent of Hood & Co. to discontinue the paper, as set forth in the receipt of November 29, 1848, until notified thereof by the defendants, after they had furnished the paper to the defendants for a year or more; the books of Hood & Co., which came into their hands, only showing that the defendants had paid for the paper in advance, to May 1, 1849.

After the payment of the bill and the giving of the receipt above recited, the paper continued to be regularly forwarded by its publishers, through the mail, to the defendants, from the date of said receipt until May 1, 1849, the expiration of the period named in said bill; and was in like manner forwarded from May 1, 1849, to January 1, 1860, or from vol. 5, No. 1, to vol. 15, No. 35, inclusive, the period claimed to be recovered for in this suit; and was during all that time constantly taken from the post-office by the parties employed by the defendants to take charge of their reading-room, build fires, &c., and placed in their reading-room. Payment was several times demanded during the latter period, of the defendants, by an agent or agents of the plaintiffs; but the defendants refused to pay, on the ground that they were not subscribers for the paper.

Conspicuously printed in each number of the paper sent to and received by the defendants, were the following

"Terms of Publication: By mail, express, or carrier, $1.50 a year, in advance; $2 if not paid within the year. No paper discontinued (except at the option of the publishers) unless all arrearages are paid."

The questions arising upon the foregoing case were reserved and assigned to the determination of the whole court.

Fowler & Chandler, for plaintiffs. W. H. Rollins and A. R. Hatch, for defendants.

NESMITH, J. There is no pretense upon the agreed statement of this case that the defendants can be charged upon the ground that they were subscribers for the plaintiffs' newspaper, or that they were liable in consequence of the existence of any express contract whatever. But the question now is, have the defendants so conducted as to make themselves liable to pay for the plaintiffs' newspaper for the six years prior to the date of the plaintiffs' writ, under an implied contract raised by the law and made applicable to this case?

If the seller does in any case what is usual, or what the nature of the case makes convenient and proper to pass the effectual control of the goods from himself to the buyer, this is always a delivery. In like manner, as to the question of acceptance, we must inquire into the intention of the buyer, as evinced by his declarations and acts, the

nature of the goods, and the circumstances of the case. If the buyer intend to retain possession of the goods, and manifests this intention by a suitable act, it is an actual acceptance of them; or this intention may be manifested by a great variety of acts in accordance with the varying circumstances of each case. 2 Pars. Cont. 325.

Again, the law will imply an assumpsit, and the owner of goods has been permitted to recover in this form of action, where they have been actually applied, appropriated and converted by the defendant to his own beneficial use. Helepen v. Campbell, 2 W. Bl. 827; Johnson v. Spiller, Doug. 167; Hill v. Davis, 3 N. H. 384, and the cases there cited.

Where there has been such a specific appropriation of the property in question, the property passes, subject to the vendor's lien for the price. Robae v. Thwaites, 6 Barn. & C. 392. In Bavin v. Jervas, 7 Car. & P. 617, the question was whether the defendant had purchased and accepted a fire engine. It was a question of fact for the jury to determine. Lord Abinger told the jury, if the defendant had treated the fire engine as his own, and dealt with it as such, the plaintiff was entitled to recover for its price. And the jury so found. 2 Greenl. Ev. § 108.

In Weatherby v. Bonham, 5 Car. & P. 228, the plaintiff was publisher of a periodical called the Racing Calendar. It appeared that he had for some years supplied a copy of that work, as fast as the numbers came out, to Mr. Westbrook. Westbrook died in the year 1820. The defendant, Bonham, succeeded to Westbrook's property, and went to live in his house, and there kept an inn. The plaintiff, not knowing of Westbrook's death, continued to send the numbers of the Calendar, as they were published, by the stage coach, directed to Westbrook. The plaintiff proved by a servant that they were received by the defendant, and no evidence was given that the defendant had ever offered to return them. The action was brought to recover the price of the Calendar for the years 1825 and 1826. Talford, for the defendant, objected that there never was any contract between the plaintiff and the present defendant, and that the plaintiff did not know him. But Lord Tenterden said: "If the defendant received the books and used them, I think the action is maintainable. Where books come addressed to the deceased gentleman whose estate has come to the defendant, and he keeps the books, I think, therefore, he is clearly liable in this form of action, being for goods sold and delivered."

The preceding case [Pembroke v. Epsom, 44 N. H. 113] is very similar, in many respects, to the case before us. Agreeably to the defendants' settlement with Hood & Co., their contract to take their newspaper expired on the 1st of May, 1849. It does not appear that the fact that the paper was then to stop was communicated to the present plaintiffs, who had previously become the proprietors and publishers of the newspaper establishment; having the defendants' name entered on their books, and having for some weeks before that time forwarded numbers of their newspaper, by mail, to the defendants, they, after the first day of May, continued so to do up to January 1, 1860. During this period of time the defendants were occasionally requested, by the plaintiffs' agent, to pay their bill. The answer was, by the defendants, "We are not subscribers to your newspaper." But the evidence is, the defendants used, or kept the plaintiffs' books, or newspapers, and never offered to return a number, as they reasonably might have done, if they would have avoided the liability to pay for them. Nor did they ever decline to take the newspapers from the post-office.

If the defendants would have avoided the liability to pay the plaintiffs, they might reasonably have returned the paper to the plaintiffs, or given them notice that they declined to take the paper longer.

We are of the opinion that the defendants have the right to avail themselves of the statute of limitations. Therefore, the plaintiffs can recover no more of their account than is embraced in the six years prior to the date of their writ, and at the sum of $2 per year, with interest, from date of writ, or the date of the earliest demand of the plaintiffs' claim upon the defendants.

DAY v. CATON.

(119 Mass. 513.)

Supreme Judicial Court of Massachusetts. Suffolk. Feb. 29, 1876.

Contract to recover the value of one-half of a brick party wall built by the plaintiff.

The defendant requested the judge to rule that: "(1) The plaintiff can recover in this case only upon an express agreement. (2) If the jury find there was no express agreement about the wall, but the defendant knew that the plaintiff was building upon land in which the defendant had an equitable interest, the defendant's rights would not be affected by such knowledge, and his silence and subsequent use of the wall would raise no implied promise to pay anything for the wall."

The judge refused so to rule, but instructed the jury as follows: "A promise would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall and the defendant used it, but it might be implied from the conduct of the parties. If the jury find that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection, then the jury might infer a promise on the part of the defendant to pay the plaintiff."

There was a verdict for the plaintiff. Defendant alleged exceptions.

F. W. Kittredge, for plaintiff. H. D. Hyde & M. F. Dickinson, Jr., for defendant.

DEVENS, J. The ruling that a promise to pay for the wall would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall, and that the defendant used it, was substantially in accordance with the request of the defendant, and is conceded to have been correct. Chit. Cont. (11th Ed.) 86; Wells v. Banister, 4 Mass. 514; Knowlton v. Plantation No. 4, 14 Me. 20; Davis v. School Dist., 24 Me. 349.

The plaintiff, however, contends that the presiding judge incorrectly ruled that such promise might be inferred from the fact that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, the defendant having reason to know that the plaintiff was acting with that expectation, and allowed him thus to act without objection.

The fact that the plaintiff expected to be paid for the work would certainly not be sufficient of itself to establish the existence of a contract, when the question between the parties was whether one was made. Taft v. Dickinson, 6 Allen, 553. It must be shown that in some manner the party sought to be charged assented to it. If a party, however, voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred. His knowledge that they were valuable, and his exercise of the option to avail himself of them, justify this inference. Abbot v. Hermon, 7 Greenl. 118; Hayden v. Madison, 7 Greenl. 76. And when one stands by in silence, and sees valuable services rendered upon his real estate by the erection of a structure (of which he must necessarily avail himself afterwards in his proper use thereof), such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefor, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it.

The maxim, "Qui tacet consentire videtur," is to be construed indeed as applying only to those cases where the circumstances are such that a party is fairly called upon either to deny or admit his liability. But, if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak. Lamb v. Bunce, 4 Maule & S. 275; Conner v. Hackley, 2 Metc. (Mass.) 613; Preston v. Linen Co., 119 Mass. 400.

If a person saw day after day a laborer at work in his field doing services, which must of necessity inure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury, and to them it was properly submitted in the case before us by the presiding judge.

Exceptions overruled.

ROYAL INS. CO. v. BEATTY.

(12 Atl. 607, 119 Pa. St. 6.)

Supreme Court of Pennsylvania. Feb. 20, 1888.

Error to court of common pleas, Philadelphia county.

This was an action by William Beatty against the Royal Insurance Company, on a policy of fire insurance, averring a renewal, and that it was in force at the time of the fire. There was a verdict and judgment for plaintiff. Defendant brings error.

R. C. McMurtrie, for plaintiff in error.

(1) If the facts as stated by the witnesses entitled a jury to infer that an assent was given, or that the plaintiff's agent was entitled to presume an assent, the judgment must be affirmed. It may even be conceded that if the defendant heard the request and said nothing, he may be within the rule relied on by the court. But what is the rule? It applies only where there is a duty to speak, and silence misleads. It is impossible to assert that if I do not hear and understand, I am compelled to speak on the pain of being concluded. Hearing and understanding are presupposed in the maxim.

(2) The plaintiff did not pretend to assert that the defendant heard him. He implies, of course, that he supposed he had; but when the denial came it was necessary to do something more than rely on the presumption that a remark had been heard. It was quite clear on the defendant's side that his agent had done nothing and said nothing to make a contract. He had told his master there was none made; that he had not been asked to make it, and his master had acted on this.

(3) Was there any evidence that warranted the inference that this was mistaken or false? No one asserted that he had heard, or that the speaking was such that he must have heard. And after the denial and proof corroborative that defendant had acted on the footing that there was no contract, there was no attempt to give any fact that could justify the assumption of the unproved and denied fact that a request to renew or bind was heard and known to have been made.

(4) Then, the case being that the plaintiff must affirmatively establish the making of the contract, and there being nothing more than a statement of a request not followed by any act or by any assertion that the request was so made as to be certainly heard, in judging between the two the court seemed to suppose it was a mere question of which was to be believed, not seeing that if both spoke the truth, which was at least possible, the plaintiff had certainly failed to prove his case.

George H. Earle, Jr., and Richard P. White, for defendant in error.

(1) It was established beyond controversy that it was the settled custom of the defendant company, in cases where a policy was about to expire, to continue it upon notification that the insured wanted it "bound." The broker's clerk testified positively that he had the policy so continued. The insurance clerk admitted all the facts stated by the witness, except that the particular policies in suit were named. The sole question, therefore, was the simple one whether it was the broker's clerk or the insurance clerk, who gave the correct testimony as to what took place.

(2) As it is conceded that, if the policies in suit were mentioned so as to be heard, according to the custom a verbal assent was not necessary, it seems unnecessary to quote authorities to show that the circumstances as testified to warranted the jury in finding a contract. In Chisman v. Count, 2 Man. & G. 307, several items were submitted, and, as in the present case, a part only were mentioned and objected to. Held, that there was evidence of a binding contract as to the balance. Admission by silence also, as well as admission by speech, may have a contractual force, and may bind as effectually as may words. When such silent admissions so operate as to put the actor in a specific attitude to other persons, by which such other persons are induced to do or omit to do a particular thing, then he is estopped from subsequently denying that he occupied such position, and is compelled to make good any losses which such other parties may have sustained by his course in this relation. Whart. Cont. § 6.

GREEN, J. We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing, nor upon any words, nor upon any act done by the defendant. It was founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character, and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some other element in them than mere silence which contributed to the establishment of the relation. But, in any point of view, it is difficult to understand how a legal liability can arise out of mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected, to the harm of the other party. If there was no duty of speech, there could be no harmful omission arising from mere silence. Take the present case as an illustration. The alleged contract was a contract of fire insurance. The plaintiff held two policies against the defendant, but they had expired before the loss occurred, and had not been formally renewed. At the time of the fire the plaintiff

held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk who took the two policies in question, along with other policies of another person, to the agent of the defendant to have them renewed, and this is the account he gives of what took place: "The Royal Company had some policies to be renewed, and I went in and bound them. Question. State what was said and done. Answer. I went into the office of the Royal Company, and asked them to bind the two policies of Mr. Beatty expiring to-morrow. The Court. Who were the policies for? A. For Mr. Beatty. The Court. That is your name, is it not? A. Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly up to the 1st of April. There was nothing more said about the Beatty policies at that time. The Court. What did they say? A. They did not say anything, but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject discussed." In his further examination he was asked: "Question. Did you say anything about those policies [Robert Beatty's] at that time? Answer. No, sir; I only spoke of the two policies for William Beatty. Q. What did you say about them? A. I went in and said, 'Mr. Skinner, will you renew the Beatty policies, and the night privilege for Mr. Priestly?' and that ended it. Q. Were the other companies bound in the same way? A. Yes, sir; and I asked the Royal Company to bind Mr. Beatty." The foregoing is the whole of the testimony for the plaintiff as to what was actually said at the time when it is alleged the policies were bound. It will be perceived that all that the witness says is that he asked the defendant's agent to bind the two policies, as he states at first, or to renew them, as he says last. He received no answer; nothing was said, nor was anything done. How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another, and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth of the declared fact. It would then be only a question of hearing, which would be chiefly, if not entirely, for the jury. But here the utterance was a question, and not an assertion; and there was no answer to the question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard, or that it was not intended to comply with the request. Especially is this the case when, if a compliance was intended, the request would have been followed by an actual doing of the thing requested. But this was not done; how, then, can it be said it was agreed to be done? There is literally nothing upon which to base the inference of an agreement, upon such a state of facts. Hence the matter is for the court, and not for the jury; for, if there may not be an inference of the controverted fact, the jury must not be permitted to make it.

What has thus far been said relates only to the effect of the non-action of the defendant, either in responding, or doing the thing requested. There remains for consideration the effect of the plaintiff's non-action. When he asked the question whether defendant would bind or renew the policies, and obtained no answer, what was his duty? Undoubtedly, to repeat his question until he obtained an answer; for his request was that the defendant should make a contract with him, and the defendant says nothing. Certainly, such silence is not an assent in any sense. There should be something done, or else something said, before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of agreement can stand. But what was the position of the plaintiff? He had asked the defendant to make a contract with him, and the defendant had not agreed to do so; he had not even answered the question whether he would do so. The plaintiff knew he had obtained no answer, but he does not repeat the question; he, too, is silent thereafter, and he does not get the thing done which he asks to be done. Assuredly, it was his duty to speak again, and to take further action, if he really intended to obtain the defendant's assent; for what he wanted was something affirmative and positive, and without it he has no status. But he desists, and does and says nothing further. And so it is that the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract. The other facts proved, and offered to be proved, but rejected, improperly as we think, and supposed by each to be consistent with his theory, tend much more strongly in favor of the defendant's theory than of the plaintiff's. It is not necessary to discuss them, since the other views we have expressed are fatal to the plaintiff's claim. Nor do I concede that if defendant heard plaintiff's request, and made no answer, an inference of assent should be made; for the hearing of a request, and not answering it, is as consistent, indeed more consistent, with a dissent than an assent. If one is asked for alms on the street, and hears the request, but makes no answer, it certainly cannot be inferred that he intends to give them. In the present case there is no evidence that defendant heard the plaintiff's request, and, without hearing, there was of course no duty of speech. Judgment reversed.

DUNLOP et al. v. HIGGINS et al.[1]

(1 H. L. Cas. 381.)

Feb. 24, 1848.

This was an appeal against a decree of the court of session, made under the following circumstances: Messrs. Dunlop & Co. were iron masters in Glasgow, and Messrs. Higgins & Co. were iron merchants in Liverpool. Messrs. Higgins had written to Messrs. Dunlop respecting the price of iron and received the following answer: "Glasgow, 22d January, 1845. We shall be glad to supply you with 2000 tons, pigs, at 65 shillings per ton, net, delivered here." Messrs. Higgins wrote the following reply: "Liverpool, 25th January, 1845. You say 65s. 382 net, for 2000 tons pigs. Does this mean for our usual four months' bill? Please give this information in course of post, as we have to decide with other parties on Wednesday next." On the 28th Messrs. Dunlop wrote, "Our quotation meant 65s. net, and not a four months' bill." This letter was received by Messrs. Higgins on the 30th of January, and on the same day and by post, but not by the first post, of that day, they dispatched an answer in these terms: "We will take the 2000 tons pigs you offer us. Your letter crossed ours of yesterday, but we shall be glad to have your answer respecting the additional 1000 tons. In your first letter you omitted to state any terms; hence the delay." This letter was dated 31st January. It was not delivered in Glasgow until 2 o'clock p. m. on the 1st of February; and on the same day Messrs. Dunlop sent the following reply: "Glasgow, 1st February, 1845. We have your letter of yesterday, but are sorry that we cannot now enter the 2000 tons pig iron, our offer of the 28th not having been accepted in course." Messrs. Higgins wrote on the 2d February to say that they had erroneously dated their letter on the 31st January; that it was really written and posted on the 30th, in proof of which they referred to the post mark. They did not, however, explain the delay which had taken place in its delivery. The iron was not furnished to them, and, having risen very rapidly in the market, the question whether there had been a complete contract between these parties was brought before a court of law. Messrs. Higgins instituted a suit in the court of session for damages as for breach of contract. The defence of Messrs. Dunlop was that, their letter of the 28th, offering the contract, not having been answered in due time, there had been no such acceptance as would convert that offer into a lawful and binding contract; that their letter having been delivered at Liverpool before eight o'clock in the morning of the 30th of January, Messrs. Higgins ought, according to the usual practice of merchants, to have answered it by the first post, which left Liverpool at three o'clock p. m. on that day. A letter so dispatched would be due in Glasgow at two o'clock p. m. on the 31st of January. Another post left Liverpool for Glasgow every day at one o'clock a. m., and letters to be dispatched by that post must be put into the office during the preceding evening, and if any letter had been sent by that post on the morning of the 31st it must have been delivered in Glasgow in the regular course of post at eight o'clock in the morning of the 1st of February. As no communication from Messrs. Higgins arrived by either of these posts, Messrs. Dunlop contended that they were entitled to treat their offer as not accepted, and that they were not bound to wait until the third post delivered in Glasgow at two o'clock p. m. of Saturday, the 1st of February, at which time Messrs. Higgins' letter did actually arrive, before they entered into other contracts, the taking of which would disable them from performing the contract they had offered to Messrs. Higgins.

The cause came before Lord Ivory as lord ordinary, who directed an issue, which he settled in following terms:

"Whether, about the end of January, 1845, Messrs. Higgins purchased from Messrs. Dunlop 2000 tons of pig iron at the price of 65s. per ton, and whether Messrs. Dunlop wrongfully failed to deliver the same, to the damage, loss, and injury of the pursuers? Damages laid at £6000." This issue was tried before the lord justice general, when it appeared that the letter of Messrs. Higgins accepting the offer was written on the 30th; that it was posted a short time after the closing of the bags for the dispatch at three o'clock p. m. on that day, and consequently did not leave Liverpool till the dispatch at one o'clock in the morning of the 31st; that in consequence of the slippery state of the roads the bag then sent did not arrive at Warrington till after the departure of the down train that ought to have conveyed it, and that this circumstance occasioned it to be delayed beyond the ordinary hour of delivery. The lord justice general told the jury "that he adopted the law as duly expounded in the case of Adams v. Lindsell, 1 Barn. & Ald. 681, and which is as follows: 'A., by a letter, offers to sell to B. certain specified goods, receiving an answer by return of post, the letter being misdirected. The answer notifying the acceptance of the offer arrived two days later than it ought to have done. On the day following that when it would have arrived if the original letter had been properly directed, A. sold the goods to a third person,' and in which it was held 'that there was a contract binding the parties from the moment the offer was accepted, and that B. was entitled to recover against A. in an action for not completing his contract.' "

The counsel for Messrs. Dunlop tendered the following exceptions: The first excep-

[1] Irrelevant parts of opinion omitted.

tion related to evidence, and alleged "that no evidence to show that the letter purporting to be dated on the 31st was really written on the 30th of January ought to have been admitted." The other exceptions related to the charge, and were as follows:

(2) In so far as his lordship directed the jury in point of law that if Messrs. Higgins posted their acceptance of the offer in due time according to the usage of trade, they are not responsible for any casualties in the post-office establishment.

(3) In so far as his lordship did not direct the jury in point of law that if a merchant makes an offer to a party at a distance by post-letter requiring to be answered within a certain time, and no answer arrives within such time as it should arrive if the party had written and posted his letter within the time allowed, the offerer is free, though the answer may have been actually written, and posted in due time, if he is not proved to be aware of accidental circumstances preventing the due arrival of the answer.

(4) In so far as his lordship did not direct the jury in point of law that in the case above supposed, if an answer arrives, bearing a date beyond the time limited as above for making answer, and arrives by a mail and is delivered at a time corresponding to such date, the offerer is entitled to consider himself free to deal with the goods as his own, either to sell or to hold if he be not in the knowledge that the answer received was truly written of an earlier date, and delayed in its arrival by accident.

(5) In so far as his lordship did not direct the jury in point of law that in case of failure to deliver goods sold at a stipulated price and immediately deliverable the true measure of damage is the difference between the stipulated price and the market price on or about the day the contract is broken, or at or about the time when the purchaser might have supplied himself.

These exceptions were afterwards argued before the judges of the First division, who pronounced an interlocutor disallowing the exceptions, and that interlocutor was the subject of the present appeal.

Mr. Bethell and Mr. Anderson, for appellants.

The question raised in this case is one of considerable importance, and the decision of it in accordance with the judgment of the court below will have the effect of rendering the acceptance of contracts a matter of doubt and uncertainty. If the decision of the judges of the court of session is right, a contract is complete when the acceptance of the offer to enter into it is posted, although such acceptance may not reach the person who made the offer till long after the time at which by the usage of trade he is entitled to expect it. Such a decision, if unreversed, will leave the person making an offer under the necessity of waiting for an indefinite time in order to know whether his offer has been accepted. During all this time he will be restrained from freely dealing with his own property.

The exceptions here ought to have been sustained by the court. The first of them relates to the evidence offered at the trial. That evidence was improperly admitted. The court ought not to have received evidence to contradict a written document. When a letter is sent to a party, he has a right to assume that it is properly written, and is entitled to rely on its contents. He is at least entitled to do so as against the writer of the letter. The writer is not at liberty to show those contents to be erroneous. At all events he is not at liberty to do so after the person receiving it has acted upon it, and thus to affect the rights of that party, and to give himself rights to which, if the letter had been correctly written, he would not have been entitled. To admit such evidence is to unsettle all the rules of business, and to prevent commercial men acting with that certainty and confidence which are necessary for the proper conduct of commercial affairs.

[THE LORD CHANCELLOR: When a party sends a letter actually sent on the 30th, but dated by mistake on the 31st, may he not shew that that date has been put in by mistake?]

It might be difficult to maintain the simple negative of that question, but in considering the admissibility of such evidence, all the circumstances of the case must be referred to. In the present case, for instance, as the letter was received on a day after that of its date, and when, therefore, the person receiving it had no reason to suspect that the date was erroneously given, his rights ought not to be affected by a subsequent explanation; and the evidence intended to afford that explanation ought not, therefore, to have been admitted.

Then, as to the second exception, if a letter sent is posted in due time, but is not received in due time, who is to bear the loss consequent upon its nondelivery? Certainly not the person to whom it is sent. The fact that it is sent by the post office makes no difference in the matter. It is the same as if the letter was sent by a special messenger, in which case it is plain that the person sending the messenger would be responsible for any accident or delay. The appellants are not to be made responsible for the casualties of the post office, and surely they cannot be made so in a case in which the persons sending an answer to an offer which they had made totally disregarded the ordinary usages of commercial houses as to the time of sending such answer.

The clear principle set forth in the third objection is that which ought to be adopted in all cases of this kind. Where an individual makes an offer by post, stipulating for or by the nature of the business, having the

right to expect an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness, such as may not be required where he is only endeavouring to excuse himself from a liability. The question of reasonableness of notice which may be admitted in cases of bills of exchange cannot be introduced in a case where one party seeks to enforce on another the acceptance of a contract. A bill of exchange is already a binding contract; no new right is acquired by notice; it is merely a necessary proceeding to enable the party giving it to enforce a right previously created. Then, as to the exception. In the case of a contract, the acceptance of the offer creates the contract. The acceptance implies that both parties have knowledge of all the circumstances. On principle, it is plain that the acceptance should be immediate, and that, if there is a delay in making that acceptance known, the offerer is free. In order to make the contract perfect, there ought to have been a co-existing assent. Countess of Dunmore v. Alexander, 9 Shaw & D. 190. There a lady, having written to another to engage a servant for her, and then sent a second letter to countermand the first, and the two letters having been delivered to the servant simultaneously, it was held that there was not a complete contract, and that the servant was not entitled to wages. The court of king's bench in Head v. Diggon, 3 Man. & R. 97, acted upon the same principle. There A. and B. being together, B. offered goods to A. at a certain price, and gave A. three days to make up his mind. The court held that this was not an absolute bargain, and that within the three days B. had a right to retract.

Such are the principles which ought to govern this case. Then as to authority: It is curious enough that this exact question seems never to have arisen. That circumstance is some proof of the clearness of the principle which is applicable to such transactions, for, had there been any question as to that principle,—had it been doubtful whether delay might be excused, and whether in spite of delay, a party guilty of it might not still insist on a contract being complete,—cases must have arisen as to the degree of laxity permitted by the law in acceptance of contracts. None such is to be found. The case of Adams v. Lindsell, 1 Barn. & Ald. 681, was the authority adopted by the lord justice general in his direction to the jury; but that case does not justify his ruling.

[THE LORD CHANCELLOR: If the letter of acceptance is sent in the usual way, is the sender still responsible for its due delivery?]

If not, then both parties are free. One cannot be bound while the other is free. Each party takes an equal risk, but supposing delay is to be permitted, to what extent is it to be allowed? May the delay last one, two, or three days, or a week, or a fortnight, or a month? If any delay is to be permitted, the extent of it must be defined. Otherwise, all commercial matters will be in a state of perpetual uncertainty. But, in fact, no delay is allowed. Each party is bound to write by return of post, and each is liable to the consequences of his own letter arriving in time. Such appears to be the mercantile usage on the subject. When an offer is made by one merchant to send another a particular commodity which varies in price, that offer is made subject to the obligation of its being answered by return post. It is therefore an offer subject to a condition. It is conditional in point both of time and manner of acceptance. As to time, the offer enures till it can be answered by return post. If it is made on a condition, then it is clearly not binding till that condition shall be accepted. Here, too, the condition is a condition precedent. Nothing, therefore, can be substituted for it.

[THE LORD CHANCELLOR: Where is this condition imposed?]

In mercantile usage, founded on law. The legal condition is to return an answer in a particular time. Mercantile usage has fixed that time as the return of post. No decision has ruled as a point of legal principle that, if an individual addressed fails in performing this condition, still that the person making the offer is bound. The principle of the Scotch law, as stated in M'Douall's Institutes, is the other way. It is there said (Book 1, tit. 4, p. 98, Fol. Ed.): "Conditional obligations properly so termed, are presently binding and irrevocable, and only the effect is suspended, but sometimes the obligation is only to be contracted upon a condition which affects the very substance of it. Thus an offer has an implied condition of acceptance whereby alone the consent of the other party accedes and converts the offer into a contract; so that it is not binding, but ambulatory or revocable, till it is accepted, and therefore either revocation by the offerer or death of either party before acceptance voids it. The same rule holds in mutual contracts, —the one party subscribing is not bound till the other subscribe likewise." The law of England is in conformity with the principle of the Scotch law.

As the revocation by either party before acceptance makes the offer void, the acceptance of the other side must be notified within a definite period of time. Stair's Inst. tit. 2, § 8. This rule of notification is a condition precedent in the English as well as the Scotch law. This principle was acted on by the court of king's bench in the case of Davison v. Mure, 3 Doug. 28. That was the case of a ship which was captured by

Americans while under convoy. The condition there was that the master should make the best defence, and without it appeared to a court-martial that he had done so, he was not to be allowed to recover. It was held that this condition was a condition precedent. The same doctrine was applied by that court to the condition in a policy of insurance against fire, that the party should obtain a certificate from the rector of his parish and a certain number of the inhabitants, before entitling himself to payment of his claim for loss. Worsley v. Wood, 6 Term R. 710. If this is a condition precedent, then it must be exactly performed, and nothing can be substituted for it. In this respect there is a difference between a condition precedent and a condition subsequent. The former must be performed before an estate can vest; while the performance of the latter, which is intended to defeat an existing estate, may be dispensed with. The act of God, the king's enemies, or the impossibility of performance will furnish an excuse as to a condition subsequent. This is a settled principle of our law, and the case of Brodie v. Todd, 17 Fac. Col., May 20, 1814, shows that the law of Scotland recognises the same rule. In that case, Arnot, a merchant of Leith, agreed to purchase from Todd & Co., of Hull, goods which were to be paid for by his acceptance. They put the goods on board a vessel at Hull; enclosed a bill of lading and a draft for the price in a letter advising Arnot of the shipment, and requesting him to return the draft accepted "in course." This letter was received by Arnot on the morning of the 24th of April, and if answered by him by return of post the answer might have been received by Todd & Co. on the morning of the 26th. Arnot, however, did not answer it till that day, when he sent back the draft accepted. In the course of the 26th, Todd & Co., not having received the draft as expected, relanded the goods. Arnot brought an action, and the question was whether the request to return "in course" meant a return by the earliest post, and constituted a condition precedent. The lords held that the words meant by return of post, and did constitute a condition precedent, and consequently that no action was maintainable by Arnot, since he had not complied with the condition on which the bargain was made. That case is completely decisive as to what is the doctrine of the Scotch law, and must govern the decision here.

[THE LORD CHANCELLOR: Is it not a question of fact whether the posting of the letter, in this case, on the 30th of January, was not a compliance with the duty of the party? Here is no distinct stipulation—it is all matter of inference. The question is whether putting in the post is not a virtual acceptance though by the accident of the post it does not arrive. In the case quoted, one whole day was allowed to intervene. But in this case if putting the letter in the post is a compliance with the condition, there is an end of the question.]

That would be so, if it was a condition subsequent, for then something could be substituted for actual performance. But this is a condition precedent, and must be literally performed.

In considering this question Lord Jeffrey observed: "The party here only says, 'If I do not hear by return of post.' I have yet to learn that the return of post is like the return of the sun to the meridian at a particular time. I do not think that the use of such a phrase is equivalent to the stipulation of a particular time. I am inclined to hold that the return of post means the actual return of the post. And the species facti here was, the letter accepting the offer having been sent in due time to the post office, that it did come to hand at the hour at which, according to the usual time required for its transmission, it should have come. But the actual course of that post was not till the morning of the 1st February." And the learned judge justifies his doctrine by referring to the case of the post coming by sea, where a general average time is fixed, but where return of post is not calculated by that average, but by the actual arrival of the post; and then he supposes a universal snow storm affecting the delivery by land, and argues that if matter of that general notoriety would affect the question, so does any other accident to the post, although not so generally known. But surely this is giving an entirely new interpretation to mercantile contracts, and is making accidental circumstances or natural delays, always counted upon, furnish ground for the construction of a delay occasioned by an accident which neither party anticipated. Besides, it is clear on the facts here, that had the letter been put into the early post of the 30th January, this accident would not have befallen it; so that the accidental delay in the post office was really the consequence of the delay in posting the letter, and was so far attributable to the respondents.

They cannot, therefore, claim any advantage, from their acceptance of the contract, which acceptance they did not notify, nor condemn the other parties for nonperformance of a contract, the acceptance of which they did not know. It is the acceptance which completes the contract. The agreement is not suspended till the offerer has actually received notice of the acceptance, but only until he might have received notice, had that notice been forwarded at the earliest moment. That is the rule declared in Bell's Principles of the Law of Scotland (page 35, § 78), and this rule must be applied to and must govern the decision of the present case.

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Stewart Wortley and Hugh Hill, for respondents, were not called on.

THE LORD CHANCELLOR. My lords, everything which learning or ingenuity can suggest on the part of the appellants has undoubtedly been suggested on the part of the learned counsel who have just addressed the house; and, if your lordships concur in my view, that they have failed in making out their case, you will have the satisfaction of knowing that you have come to that conclusion after having had everything suggested to you that by possibility could be advanced in favour of this appeal.

The case certainly appears to me one which requires great ingenuity on the part of the appellants, because I do not think that in the facts of the case there is anything to warrant the appeal. The contest arises from an order sent from Liverpool to Glasgow; or rather a proposition sent from Glasgow to Liverpool, and accepted by the house at Liverpool. It is unnecessary to go earlier into the history of the case than the letter sent from Liverpool by Higgins, bearing date the 31st January. A proposition had been made by the Glasgow house of Dunlop, Wilson & Co. to sell 2000 tons of pig iron. The answer is of that date of the 31st of January: "Gentlemen: We will take the 2000 tons, pigs, you offer us." Another part of the letter refers to other arrangements; but there is a distinct and positive offer to take the 2000 tons of pigs. To that letter there is annexed a postscript in which they say: "We have accepted your offer unconditionally; but we hope you will accede to our request as to delivery and mode of payment by two months' bill."

That, my lords, therefore, is an unconditional acceptance, by the letter dated the 31st of January, which was proved to have been put into the post office at Liverpool on the 30th; but it was not delivered, owing to the state of severe frosts at that time, which delayed the mail from reaching Glasgow at the time at which, in the ordinary course, it would have arrived there. The letter having been put in on the 30th of January, it ought to have arrived at Glasgow on the following day, but it did not arrive till the 1st of February. It appears that between the time of writing the offer and 1st of February the parties making the offer had changed their minds, instead of being willing to sell 2000 tons of pig iron on the terms proposed, they were anxious to be relieved from that stipulation, and on that day, the 1st of February, they say: "We have yours of yesterday, but are sorry that we cannot enter the 2000 tons of pig iron, our offer of the 28th not having been accepted in course."

Under these circumstances, the parties wishing to buy, and by their letter accepting the offer, instituted proceedings in the court of session for damages sustained by the nonperformance of the contract. And the first question raised by the first exception applies not to the summing up of the learned judge, but to the admission of evidence by him, for connected with that admission of evidence is the first exception. I need hardly say but little on this point, but, as it formed part of the proceedings on which the judgment must ultimately be pronounced, I will very shortly call your lordships' attention to the proposition presented for your decision by that first exception.

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

The counsel for the pursuer answered that nothing had been stated, but that the pursuers were bound instantly to answer the defenders' offer of the 28th of January, and that, according to the practice of merchants, it was sufficient if that letter was answered on that day on which it was received.

The lord justice general did overrule the objection, and admitted the evidence.

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

I pass on then to the fourth exception which is connected with this point, and which states that his lordship did not direct the jury in point of law; that in the case above supposed, if an answer arrives, bearing a date beyond the time limited as above for making answer, and arrives by mail, and is delivered at a time corresponding to such date, the offerer is entitled to consider himself free to deal with the goods as his own, either to sell or to hold, if he was not in the knowledge that the answer received was duly written at an earlier date, and delayed in its arrival by accident; that is to say, that

if a letter bears a date which, on the face of it, shows that it was written erroneously, nevertheless the party is bound by the date so written on the face of the letter, and you cannot go into the circumstances to explain how it happened that the letter did not arrive in time, but that you are bound to assume that it arrived on the day mentioned, and the party cannot give any evidence in explanation.

My lords, that falls with the other exception, and the two together go for nothing. I merely state it for the purpose of asking your lordships to concur in the opinion that I have formed that the learned judge was correct in the mode in which he left the question to the jury, and consequently that on that point the bill of exceptions cannot be supported.

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

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

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

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

My lords, the case of Stocken v. Collen, 7 Mees. & W. 515, is precisely a case of that nature, where the letter did not arrive in time. In that case Baron Parke says: "It was a question for the jury whether the letter was put into the post office in time for delivery on the 28th. The post-office mark certainly raised a presumption to the contrary, but it was not conclusive. The jurors have believed the testimony of the witness who posted the letter, and the verdict was therefore right. If a party puts a notice of dishonour into the post, so that in due course of delivery it would arrive in time, he has done all that can be required of him, and it is no fault of his if delay occurs in delivery." Baron Alderson says: "The party who sends the notice is not answerable for the blunder of the post office. I remember to have held so in a case on the Norfolk circuit, where a notice addressed to Norwich had been sent to Warwick. If the doctrine that the post office is only the agent for the delivery of the notice was correct, no one could safely avail himself of the mode of transmission. The real question is whether the party has been guilty of laches."

There is also the other case which has been referred to, which declares the same doctrine,—the case of Adams v. Lindsell, 1 Barn. & Ald. 681. That is a case where the letter went, by the error of the party sending it, to the wrong place, but the party receiving it answered it, so far as he was concerned, in proper time. The party, however, who originally sent the offer, not receiving the answer in proper time, thought he was discharged, and entered into a contract and sold the goods to somebody else. The question was whether the party making the offer had a right to withdraw after notice of acceptance. He sold the goods after the party had written the letter of acceptance, but before it arrived he said, "I withdraw my offer." Therefore he said, "Before I received your acceptance of my offer I had withdrawn it."

And that raised the question when the acceptance took place, and what constituted the acceptance. It was argued that "till the plaintiff's answer was actually received there could be no binding contract between the parties, and that before then the defendants had retracted their offer by selling the wool to other persons." But the court said: "If that was so, no contract could ever be completed by the post, for, if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered, in law, as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."

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

Now, whether I take that proposition as conclusive upon the objection, or whether I consider it as a question entirely open, whether the putting the letter into the post was, or not, in time to constitute a valid acceptance, it appears to me that the learned judge was right in the conclusion to which he came, that he was right in the mode in which he left the question to the jury, and that he was not bound to lay down the law in the manner alleged in the bill of exceptions.

The next exception is the third, which says: "In so far as his lordship did not direct the jury in point of law that if a merchant makes an offer to a party at a distance, by post letter, requiring to be answered within a certain time, and no answer arrives within such time as it should arrive, if the party had written and posted his letter within the time allowed, the offerer is free, though the answer may have actually been written and posted in due time, if he is not proved to be aware of accidental circumstances preventing the due arrival of the answer."

That, my lords, raises, first of all, a proposition that does not arise in this case at all. It assumes a contract that requires an answer within a certain stipulated time, and it assumes (which is already disposed of by what I have said in answer to the second exception) that the putting a letter into the post is not a compliance with the requisition of the offer. But there is no special contract here, and therefore this exception cannot be maintained.

* * * * * * *

I believe that in these remarks I have exhausted the whole of the objections made, and my advice to your lordships is to affirm the judgment of the court from which this is appealed.

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

MACTIER'S ADM'RS v. FRITH.

(6 Wend. 103.)

Court of Errors of New York. 1830.

Appeal from chancery. At New York, in the autumn of 1822, the respondent and Henry Mactier the intestate, agreed to embark in a commercial adventure, in which they were to be jointly and equally interested. Frith was to direct a shipment of 200 pipes of brandy from France to N. Y., to be consigned to Mactier, who was to ship to the respondent at Jacmel in St. Domingo, provisions to the amount of the invoice cost of the brandy, and the respondent was to place the shippers of the brandy in funds by shipments of coffee to France in French vessels, and the parties were to share equally in result of the speculation all around. In pursuance of this arrangement, Frith, Sep. 5, 1822, wrote Firebrace, Davidson & Co., a mercantile house at Havre, to ship 200 pipes of brandy to N. Y. to the consignment of Mactier. Dec. 24, Frith, who had returned to Jacmel, where he did business as a merchant, wrote a letter to Mactier on a variety of subjects, in which was contained a paragraph in these words: "I also have the pleasure of handing you copies of Messrs. Firebrace, Davidson & Co.'s letters regarding the brandy order. By-the-bye, as your brother before I left New York, declined taking the interest I offered him in this speculation, and wishing to confine myself in business as much as possible, so as to bring my concerns to a certain focus, I would propose to you to take the adventure solely to your own account, holding the value to cover the transaction to my account in New York." Jan. 17, 1823, Mactier wrote to Frith, acknowledging the receipt of his letter of the 24th ult.; thanks him for sending the copy of Firebrace, Davidson & Co.'s letter on the subject of the brandy order; says that he has received a letter from them, informing that the brandy would be shipped and leave Bordeaux about Dec. 1 then past; and adds: "This has been from the first a favorite speculation with me, and am pleased to say it still promises a favorable result; but to render it complete, I am desirous the speculation should go forward in the way first proposed, thereby making it a treble operation; as you have, however, expressed a wish that I should take the adventure to my own account, I shall delay coming to any determination till I again hear from you. The prospect of war between France and Spain may defeat the object of this speculation, as far as relates to the shipment of provisions hence to Hayti to be invested in coffee for France, in which case I will at once decide to take the adventure to my own account. Our London accounts, down to the fifth of December, speak confidently of a war between France and Spain, a measure which, if carried into effect, would operate to your disadvantage." Also: "The next arrival from Europe will probably decide the question of peace or war, and I will lose no time in communicating the same to you;" and also, "let what will happen, I trust you will in no way be a sufferer." Mar. 7, 1823, Frith wrote Mactier, making no other allusion to the last letter of Mactier than the following: "I have received your esteemed favors of the 17th and 31st January, and note their respective contents." Mar. 12, 1823, the ship La Claire arrived at N. Y., laden with the brandy in question, and was at the wharf on the morning of Mar. 13. A clerk of Mactier testified that he had a conversation with Mactier about the time the brandy arrived, perhaps the morning after, and Mactier then said he should take it to himself. A merchant of N. Y. also testified that Mactier consulted with him on the subject of some brandy which he expected to arrive; there was some offer for his taking it on his own account, and he appeared inclined to take it. From the state of things, he advised Mactier to take it, and there was a letter drafted by Mactier upon the subject, in which the merchant made some alterations. The letter stated that he, Mactier, should take the brandy to his own account. Mar. 17, Mactier entered the brandy at the custom-house as owner, and not as consignee, took the usual oath, and gave a bond for the duties. Mar. 22, he sold 150 pipes of the brandy on the wharf to several commercial houses, and took their notes for the price of the same. The remaining 50 pipes were put in the public store, and remained there in bond, the liquidated duties not having been secured to be paid by Mactier. Mar. 25, Mactier wrote a letter, directed to Frith at Jacmel, in which he said, "I have now to advise the arrival of French ship La Claire with the 200 pipes of brandy, and that in consequence of the probability of war between France and Spain, and in compliance with the wish expressed in your regarded favor of the 24th December and my answer thereto of the 17th January last, I have decided to take this adventure to my own account. I, therefore, credit you with the amount of the invoice," amounting to $14,-254.57. To this letter was attached a postscript, dated Mar. 31. Mar. 28, Frith wrote a letter to Mactier, dated at Jacmel, in which, speaking of the brandy in question, he says: "With regard to this adventure, I would wish to confirm, if altogether satisfactory to you, what I mentioned to you some time ago, and which I omitted to repeat to you in my previous letter, in reply to yours of the 17th January. I find the more one does in this country, in the present state of trade, the more one's affairs get shackled." Previous to the arrival of these last two letters at their respective places of direction, Mactier was dead, he having departed this life Apr. 10, 1823. Apr. 21, Frith again wrote a letter addressed to Mactier, in which he acknowledges the receipt of his letter of Mar. 25, says he has noted its contents, and requests Mactier to charter on his account a staunch first-class vessel, and send out to Jacmel by her

400 barrels of flour, 150 barrels of pork, 150 barrels of beef, 100 barrels of mackerel, &c., &c. In the mean time, however, Mactier having died, administration of his goods, &c., was granted to A. N. Lawrence and another, who in May, 1823, gave the requisite bonds to secure the duties on the 50 pipes of brandy which had not been bonded for by Mactier in his lifetime, except by the general bond on entering the goods at the custom-house, and took the 50 pipes from the public store and sold them at public auction.

The respondent, unwilling to come in as a general creditor of Mactier and receive a pro rata distribution, Apr. 1, 1824, filed his bill in the court of chancery, alleging that the brandy was shipped from France on his sole account, and that Mactier was only the consignee thereof. The respondent, in his bill, admits that he proposed to Mactier to become the purchaser of the brandy, but avers that after the receipt of his letter of Jan. 17, he considered him as having declined his proposal, and that no other offer was subsequently made by the respondent. He sets forth a letter written to him by Mactier Mar. 13, 1823, in which, speaking of the brandy ordered from France, he says: "I am looking daily for its arrival; it is to be regretted the order was not more promptly executed, as the delay, I fear, will operate to our disadvantage. We have London dates to the 30th January; war between France and Spain may now be considered inevitable; France has recalled her minister, and 100,000 Frenchmen have been ordered to march into Spain." He alleges that the letter of Mactier to him of Mar. 25 was not received until several days after the death of Mactier, and that his letter to Mactier of Apr. 21 was written in ignorance of the death of Mactier, and that he did not intend thereby, and he conceives he did not finally consummate the sale as claimed. He avers that the promissory notes received by Mactier from the purchasers of the 150 pipes of brandy remained in Mactier's possession at the time of his death, not discounted or passed away, and that the same came into the possession of, and were at maturity collected by the defendants; that the defendants, by wrongfully and collusively representing themselves as entitled to the 50 pipes of brandy remaining in the public store, obtained possession of and sold the same; and that July 2, 1823, he, by his attorney, claimed of the defendants the part of the shipment or invoice of brandy which remained unsold at the decease of Mactier, and also demanded the proceeds of that part of the invoice sold by Mactier existing in notes or otherwise, and the proceeds of the part sold by the defendants. The bill concludes by praying an account of the sales of the brandy, and a decree directing the defendants to retain in their hands sufficient of the funds belonging to the estate of Mactier to pay and satisfy the respondent when his accounts shall be settled and adjudged upon by the court.

The defendants put in their answer, insisting that the brandy, on its arrival at the port of New York, was the sole and exclusive property of Mactier, and that the portion thereof which came to their hands at his decease, and the proceeds of that part thereof which was sold by him in his lifetime, and which came to their hands, rightfully belonged to his estate, and was subject to be disposed of in a due course of administration. The defendants admit that they have in their hands $13,935, belonging to the estate of Mactier, after the payment of certain debts to the United States, and various other sums of money which they were directed to pay, have credit for the payment of and are authorized to retain, by virtue of a decree of the court of chancery of June 14, 1823, in a cause wherein A. Mactier, Sr., in behalf of himself and the creditors of Henry Mactier, deceased, is complainant, and themselves defendants; and they contend that such decree is in full force, and that by virtue thereof they are bound to pay the above mentioned sum of money and such as may come to their hands pro rata, or equally among all the creditors of Henry Mactier, pursuant to such decree.

By the answer it was admitted that the defendants had found among the papers of Henry Mactier two invoices of the 200 pipes of brandy, similar in all respects, except that one states the shipment to have been made "to the address and for the account of Henry Mactier," and the other states it to have been made "for the account of the complainant to the address of Henry Mactier." The first of the invoices was used upon entering the brandy at the custom-house. It also appeared in evidence that Mar. 1, 1823, Mactier effected an insurance on commissions arising on a consignment from Bordeaux to New York, to the amount of $1,500. In a petty cash-book of Mactier's there is the following entry: "1823, March 17, John A. Frith's sales of brandy, paid entry at custom-house, eighty cents." The clerk of Mactier, who made this entry, testified that the name of Frith prefixed to the entry in the petty cash-book does not necessarily prove that the brandy was Frith's, but it shows that he at that time supposed the brandy to be Frith's; if it had then belonged to Mactier, or if Mactier had decided to take it, and any entry in the books had been made showing that fact he would have entered it. "Sales of brandy, Dr. for entering, &c." At the time of making the entry he considered the fact of ownership contingent. Mactier afterwards directed the account to be opened in the books, charging the brandy to himself, the account to be "Sales of brandy." An entry was made in the day-book of Mar. 28, crediting Frith with the invoice amount of the brandy. Entries, he said, are sometimes made several days after the transaction; then the entry refers back to the true date of the transaction, mentioning the time. The entry was made by Mar. 31. He also testified that the letter of Mar. 13, men-

tioned in the complainant's bill, was copied on the night of that day, but he had no recollection when it left the office; it possibly might not have gone until the La Claire arrived.

May 20, 1825, Chancellor Sanford made an order of reference to a master to examine witnesses, and to report whether, in his opinion, the complainant was the owner of any part, and what part of the shipment of brandy at the time of the sale of the same or of any part thereof, and if so, whether, as such owner, he had a lien by virtue of such ownership on the brandy, or the proceeds thereof, in the hands of the defendants; and that if the master should be of opinion that he was entitled as a special creditor, or had a lien, that then he should take and state an account, and report the amount due the complainant as such special creditor, or having a lien. Under this order witnesses were examined, and a mass of documentary evidence produced before the master, who, Oct. 10, 1825, reported that the complainant was not the owner of the shipment of brandy, neither at the time of the sale of the part thereof made by Mactier in his lifetime, nor of the other part thereof made by the defendants as his administrators since his death, and had no lien on the brandy, or on the proceeds thereof in the hands of the administrators To this report the complainant excepted, and the cause was heard upon the exceptions before Chancellor Walworth, who, in Mar. 1829, allowed the exception to that part of the master's report above stated (other exceptions to other parts of the report, which it has not been deemed essential to state, were disallowed), and decreed that the report be referred back to the master to alter and correct the same, and to take and state an account, and report the amount due the complainant, on the principle that he, as survivor, is entitled to the net proceeds of the adventure of brandy so far as they can be traced and identified, and has a specific lien on the net proceeds of the 50 pipes of brandy sold by the administrators, and of the proceeds of the notes given for the 150 pipes which remained uncollected or not passed away at the time of Mactier's death, or on so much as is necessary to satisfy the balance due complainant for payment and disbursements on account of that adventure, after deducting from those proceeds the balance of the amount paid for duties and expenses, if any, over and above the amount of proceeds of the shipment of brandy which were received by Mactier in his lifetime. From this decree the defendants appealed. For the reasons of the chancellor, for the decree pronounced by him, see 1 Paige, 434. The cause was argued here by

S. Boyd and S. A. Talcott, for appellants.
S. Stevens and G. Griffin, for respondent.

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

The doctrine of relation was discussed on the argument, and its application urged on us. It was insisted that if nothing but a formal act was to be done, and it was done by the surviving party after the death of the other, and in ignorance of it, this act might be adjudged to relate to a period antecedent to the death of the party dying. If, as it was held in the court below, the bargain in this case could not be closed until Frith received Mactier's letter accepting his offer to sell, the receiving that letter, it was said, might be considered as having relation to the time when it was sent, upon the principle that courts often resort to this doctrine of relation to prevent an injury resulting to a party from the act of God. Where an agent without competent authority makes a contract, a subsequent ratification by the principal relates back to the time when the agent acted. The ratification is equivalent to an original authority; it is considered in law as furnishing proof of an authority in the agent at the time he assumed to have it. If, however, he had disclosed his want of authority, but had settled the terms of the contract, in the belief that what he did would be ratified, the doctrine of relation would not apply; the bargain would take effect from the time of the ratification. The reason of the distinction which I apprehend to exist in the two cases, is, that in the one acts are done which make a perfect contract, provided the actors had the authority they assumed to have, and the ratification of their acts by those from whom their power must

have been derived, if they had it, is legal evidence that they did have it when they acted. In the other case, the fact being made known that there was not competent power in one of the actors, the very foundation, on which alone the presumption of authority can rest, is destroyed. A presumption will not be called in to supply an impossibility. In a contract of sale all agree that there must be two minds, at least, concurring at the moment of its completion; but this cannot be if there be but one contracting party in existence. There is also, as I conceive, a difference between acts essential to perfect an agreement and those which relate to the forms prescribed in certain instances as modes of proof. This difference is illustrated by those cases which were referred to on the argument concerning the enrollment of deeds. The enrollment is a formal act, but necessary to be done, to enable the party to prove the bargain and sale, but when it is done it relates to the time when the indenture was executed. It is as Lord Bacon calls it, but a perfective ceremony of the first deed of bargain and sale. Regula., 14. So where chancery decrees the execution of a parol contract, on the ground of part performance, the title certainly, as between the parties, vests from the time of the contract, and not from the performance of those acts that remove the bar created by the statute of frauds. The doctrine of relation may be permitted to operate on these formal acts, but it cannot be used, as it is proposed to use it here, to supply a party to a contract who does not exist at the time when the act is done which fixes to it the seal of validity; or, what is the same thing, it cannot carry back that act to a time when parties capable of contracting did in fact exist. This view of the subject is conformable to the civil law as well as the law of France. By these laws, the death of the party offering to sell, is held to be a revocation of the offer, and an acceptance subsequent to that event, is ineffectual to close the bargain. Poth. Mar. Cont. p. 1, § 2, art. 3, No. 32. My conclusion, in regard to this objection to the alleged contract, is, that if any act was required to be done, even by Frith, to complete the sale when Mactier died, that act could not be subsequently performed.

I am now to consider whether there was a contract, before Mactier's death, which had the consent of the contracting parties so given and made known as to be binding on them. That a consent is necessary all agree, but what shall constitute it in a given case may admit of much diversity of opinion. The consent of the parties in a contract of sale, as explained by Pothier, consists in the concurrence of the will of the vendor to sell a particular thing to the purchaser for a specified price, with the will of the purchaser to buy the same thing for that price. Poth. Mar. Cont. pl. 1, § 2, art. 3, No. 31. Delvincourt, another eminent French writer on the Civil Code of France, says, that although it is impossible that there should be a contract without the consent of all parties, it is not indispensable that the wills of the parties should concur at the same instant, provided the will of the one that did not concur at first, is declared before the will of the other is revoked. 5 Cours de Code Civil, 93. Although the will of the party making the offer may precede that of the party accepting, yet it must continue down to the time of the acceptance. Where parties are together chaffering about an article of merchandise, and one expresses a present willingness to accept of certain terms, that willingness is supposed to continue, unless it is revoked, to the close of their interview and negotiation on the same subject, and if during this time the other party says he will take the article on the terms proposed, the bargain is thereby closed. Poth. Mar. Cont. p. 1. § 2, art. 3, No. 31. What I mean by its being closed is, that nothing mutual between the parties remains to be done to give to either a right to have it carried into effect; either can enforce it against the other, or recover damages for the nonfulfillment of it: but if there be conditions expressed or implied to be performed by the purchaser, he cannot compel the delivery until they are performed. If the price is to be immediately paid or security given, he cannot have the property until payment made, or security given, or a tender thereof. Touch. 204, 205; Noy, Max. c. 42; 2 Bl. Comm. 447.

Where the negotiation between the contracting parties residing at a distance from each other is conducted, as it usually is by letters, it is necessary, in order that their minds may meet, that the will of the party making the proposition to sell should continue until his letter shall have reached the other, and he shall have signified, or at least had an opportunity to signify his acceptance of the proposition. This Pothier holds to be the legal presumption unless the contrary appears. His language is: "Cette volonte est presumee tant qu'il ne parait rien de contrarie." This doctrine, which presumes the continuance of a willingness to contract after it has been manifested by an offer is not confined to the civil law and the codes of those nations which have constructed their systems with the materials drawn from that exhaustless storehouse of jurisprudence: it is found in the common law; indeed, it exists, of necessity, wherever the power to contract exists in parties separated from each other. The rule of the common law is, that wherever the existence of a particular subject-matter or relation has been once proved, its continuance is presumed till proof be given to the contrary, or till a different presumption be afforded by the nature of the subject-matter. 16 East, 55; 3 Starkie, Ev. 1252. The case of Adams v. Lindsell, 1 Barn. & Ald. 681, proceeds upon and affirms the principle that the willingness to contract thus manifested is presumed to continue for the time limited, and, if that be not indicated by the offer, until it is expressly

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

The principle of the decision of the king's bench is simply that the acceptance of an offer made, through the medium of a letter, binds the bargain if the party making the offer has not revoked it, as he has a right to do before it is accepted. The rule laid down by the supreme court of Massachusetts regards the contract as incomplete until the party making the offer is notified of the acceptance, or until the time when he should have received it, the party accepting having done what was incumbent on him to give notice. The chancellor in deciding this case gave his sanction to the latter rule: "To make a valid contract," he says, "it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but they must know that fact." The decision of the court of Massachusetts makes knowledge by the party tendering the offer of the other's acceptance essential to the completion of the contract. If one party is not bound till he knows or might know, and therefore is presumed to know that the other has accepted, the accepting party, on the same principle, ought not to be bound till he knows the offering party has not recalled the offer before knowledge of the acceptance. The principle of that case would bring the matter to the point stated by the chancellor, viz.: the parties must know that their minds meet on the subject of the contract. If a bargain can be completed between absent parties, it must be when one of them cannot know the fact whether it be or be not completed. It cannot begin to be obligatory on the one before it is on the other; there must be a precise time when the obligation attaches to both, and this time must happen when one of the parties cannot know that the obligation has attached to him; the obligation does not, therefore, arise from a knowledge of the present concurrence of the wills of the contracting parties. All the authorities state a contract or an agreement (which is the same thing) to be aggregatio mentium. Why should not this meeting of the minds, which makes the contract, also indicate the moment when it becomes obligatory? I might rather ask, is it not and must it not be the moment when it does become obligatory? If the party making the offer is not bound until he knows of this meeting of minds, for the same reason the party accepting the offer ought not to be bound when his acceptance is received, because he does not know of the meeting of the minds, for the offer may have been withdrawn before his acceptance was received. If more than a concurrence of minds upon a distinct proposition is required to make an obligatory contract, the definition of what constitutes a contract is not correct. Instead of being the meeting of the minds of the contracting parties, it should be a knowledge of this meeting. It was said on the argument that if concurrence of minds alone would make a valid contract, one might be constructed out of mere volitions and uncommunicated wishes; I think such a result would not follow. The law does not regard bare volitions and pure mental abstractions. When it speaks of the operations of the mind, it means such as have been made manifest by overt acts; when it speaks of the meeting of minds, it refers to such a meeting as has been made known by proper acts, and when thus made known it is effective, although the parties who may claim the benefit of, or be bound by a contract thus made, may for a season remain ignorant of its being made.

Testing the rules of the law laid down in the two cases to which I have referred by the authority of reason, and the practical results that are likely to flow from them, it does appear to me, that we are not left at liberty to hesitate about the choice. If we are inclined from the force of abstract reason, to prefer the rule laid down by the court of king's bench, that inclination will be greatly strengthened by a recurrence to the opinions of courts and jurists. The crown pleas in England seem to me to have given their approval to the decision of Adams v. Lindsell, 4 Bing. 653. Judge Washington, in delivering the opinion of the court, in Eliason

v. Henshaw, 4 Wheat. 228, said, "Until the terms of the agreement have received the assent of both parties the negotiation is open, and imposes no obligation on either." The inference from this proposition is that the assent of the parties to the terms of the agreement, and not their knowledge of it, completes the contract. It was decided in the circuit court of the United States, for Pennsylvania, that contracts are formed by the offer on the one hand, and an acceptance on the other. After acceptance, the contract is obligatory on both. Coxe, Dig. 192. In this case, knowledge of the acceptance is not brought into view as necessary to constitute the obligation. Both the Roman law and the French Civil Code, as we have seen by the references already made, contain a doctrine in accordance with the principle of these cases. I think I am, therefore, warranted in saying that the proposition may be considered as established, that the acceptance of a written offer of a contract of sale consummates the bargain, providing the offer is standing at the time of the acceptance.

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

I will now apply this law to the facts of this case. Frith's offer to sell his interest in the brandy certainly continued till his letter of Dec. 24 was received at New York and Mactier had a fair opportunity to answer it. If the answer of Jan. 17 had contained an unqualified acceptance, the bargain would have been closed when it was sent away for Jacmel; but the offer was not then accepted; there was a promise to accept upon a contingency, for Mactier says, after alluding to the prospect of a war between France and Spain, "in which case," that is in case of such a war, "I will at once decide to take the adventure to my own account." This concluded nothing. If the event had actually happened, and Frith had insisted on enforcing this conditional acceptance, it would not have been in his power to do so. The most that Mactier said was, that if an expected event happened, he would do an act which would complete the bargain. The happening of the event could not, without the act, complete it. The Roman law regarded the tense of the verb used by the contracting parties to determine whether the bargain was concluded: "Verbum imperfecti temporis rem adhuc imperfectam significat." There is a wide difference between a promise to give an assent to a proposition for a contract on the happening of a contingency, and the annunciation of a present assent to it. If the expected event happens, and the act promised is performed, the bargain is closed; but it is the promised acceptance, and not the happening of the event, that gives validity to the contract. If in this case the offer of Frith had been to Mactier to take the brandy on the happening of a French and Spanish war, and Mactier had promised to decide to take it in such an event, the simple fact of his taking it after the war would have enabled Frith to treat him as the purchaser of it. Such an act would have been a valid acceptance; but a conditional acceptance of an unconditional offer, followed up by acts of the acceptor after the condition was fulfilled on which the acceptance depended, might not be considered as completing the bargain without the acquiescence of the party making the offer in those acts, because the minds of the parties would not have met on the precise terms of the contract.

To conclude the bargain, Mactier must have accepted the offer as tendered to him by Frith, and that acceptance must have been while the offer, in contemplation of law, was still held out to him. That there was an acceptance, or rather that Mactier did all that was incumbent on him to do, to effect an acceptance, was not denied; but it was insisted, on the part of the respondent, that it was made after the offer was withdrawn. It will be necessary to consider when this acceptance took place, as preparatory to settling the fact of the continuance of the offer down to that time. There is not the slightest evidence of the determination on the part of Mactier to take the brandy before Mar. 17. The insurance that he effected on his commissions Mar. 1 disproves the existence of such a determination on that day; but if the situation of the parties was changed, and Frith was now endeavoring to set up the contract, I am at a loss to conceive how Mactier's representatives could withstand the force of the facts which took place Mar. 17. In answer to the offer, Mactier delayed coming to a determination thereon, but promised to accept it if there should be a war; Mar. 17, when that event was considered as settled, he entered

the brandy as his own property, and told his clerk that he had determined to take it. But if there should be any doubt as to the effect of this conduct, there can be none as to his subsequent acts. By a letter dated the 25th with a postscript of Mar. 31, he accepted the offer. This letter was immediately transmitted to Frith, and as soon as Mar. 28, entries were made in his books showing that he had become the purchaser. Enough was done by the 31st to constitute an acceptance of Frith's offer and to complete the bargain, if the offer can be considered as standing till that day.

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

Where both parties are under a mistake as to the existence of the thing contracted to be sold, the bargain fails. The cases put by Pothier and Chancellor Kent are, the sale of a horse which happens to be dead, or of a house consumed by fire before the contract was concluded. The law which has been applied to such cases is not, in my judgment, applicable to this. Property that has no actual existence is the subject of a valid contract of sale, as a carriage not yet made, or a crop not grown; they are considered to have a potential existence. A person may sell an article to which he has no title or pretense of title. Poth. Traite du Contract de Vente, p. 1, § 2, art. 1. There is, I apprehend, no just ground for saying that the principal part of this brandy was not in existence Mar. 31, the time when I consider the contract to have become perfected. Fifty pipes were in the public store; the remainder had been sold but a few days before, and was probably but partially consumed; but whether it was or not is not, in my view of it, material to this case. If the contract was obligatory on one, it was on both. Could Mactier have objected to it, and placed its nullity on the ground that he had consumed a part of the brandy before he accepted the offer for the purchase? Such a defense would not be listened to in any court; it could invoke no principle of justice to its aid.

Another objection to the contract was drawn from the alleged fraudulent conduct of Mactier. The bill does not seem to me to put the claim to the interference of the court below specifically upon that ground. It does not seek to avoid the contract on the ground that Frith was inveigled into it by the contrivance and artifice of Mactier, but it denies the existence of those formalities which are requisite to conclude a contract. Frith complains, it is true, that Mactier did not, by his letter of Mar. 25, or any other, inform him of the sale of the brandy, of its value in New York, or of the arrival of the vessel with the brandy on board. The letter of the 25th did apprise him that the brandy had arrived. If any act was to be done by Frith to complete the bargain, the concealment of any fact that might influence his determination with regard to that act, might give rise to the imputation of fraud; and if such fact was concealed with a view to procure an assent to a contract to which, it is probable, his assent would not have been given had he received information of the fact concealed, he might allege the concealment to exonerate himself from the obligation to fulfil it; but if he had no affirmative act to perform before the bargain might be closed, and Mactier was in a situation that gave him the right to close it, and he did so before the in-

formation which is alleged to have been kept back could have reached Frith, if it had been duly transmitted, he has suffered no injury; indeed there is no ground for a presumption of fraud. My conclusion, therefore, is, that the contract was consummated between the parties before the death of Mactier, by which he acquired all Frith's right to the 200 pipes of brandy.

The law in relation to the right of the vendor of goods to stop them during their transit to the purchaser, was much discussed on the argument; but I have been unable to discover how a question, in relation to such a right, can properly arise from the facts in this case. If there was not a sale, such a question certainly cannot arise, for then there would be no vendor or vendee and, consequently, no transit of the brandy from the one to the other. If there was a sale, and I hold there was, the question does not arise, because there was, in fact, no stoppage or any act that can in law be regarded as amounting to a stoppage. By virtue of the purchase the title to the brandy vested in Mactier; no actual delivery, if it was not in his possession, was necessary to perfect his title; if the brandy had been destroyed Apr. 1, or the notes taken for the portion previously sold had proved utterly valueless, the loss would have fallen entirely on Mactier. The unsold brandy was his absolute property, and on his death the title to it vested in his representatives. On the assumption that it was on its transit, the right of the representatives to it was subject to be affected in the same manner as Mactier's might have been if he had been in life; it might have been defeated by a stoppage in transitu. A right to stop goods in their transit does not arise from the circumstance that the bargain is not complete until the purchaser gets actual possession of them, but it is a right taking its origin undoubtedly in strong considerations of equity, and dependent upon a fact usually happening after the sale, and always unknown to the seller at the time of it—the insolvency of the purchaser. 3 Bos. & P. 584; 2 Kent, Comm. 393, 428. The stoppage does not take place on the happening of the insolvency, but the right to stop is thereby acquired. The acquisition of the right works no beneficial result to the seller unless he intercepts the goods in their transit. I have seen no case where this right has been held to attach on the death of the purchaser, if his estate was solvent. I think the seller could not, in such a case, justify an interference with the goods sold while on their transit. It arises in case of death and insolvency, but not otherwise than it would exist in the case of insolvency alone.

A question asked by Lord Kenyon, in Toole v. Hollingworth, 5 Term R. 226, has given rise to a suggestion, that death prevents the delivery; but the doubt entertained by that eminent judge did not spring from a case where there had been a sale. The property there had been sent to answer a particular purpose, which was to raise funds to meet the consignee's acceptances; he having become unable by reason of his insolvency to use them for that purpose, had no interest in them that went to his assignees. Where there is a general trading between two merchants residing at a distance from each other, and goods are sent by one to the other without being ordered, the title to them would not vest, as I conceive, in the merchant to whom they were sent until they were received and accepted. If he at once returned them as unfit for his use, or for any other cause, the title to them would not, in my opinion, have been changed. In such a case Lord Kenyon might well ask, and mean thereby to express a strong doubt, whether the goods could be received by the executor if the consignee was dead when they arrived. The sending of goods, under such circumstances, amounts to no more than an offer to sell them to the party to whom they are sent, and his acceptance of them would be necessary to complete a bargain. If he should be dead before they arrived, there would be no contracting party to close the bargain by an acceptance. Chancellor Kent's remarks, on the question put by Lord Kenyon, shows that he did not consider that a doubt of the nature of the one suggested could be indulged in a case where the title to the property had vested in the deceased person; for he says: "The language of the court," in the case last referred to, "seems to be, that goods sent to a person, who at the time was dead or disabled by bankruptcy from dealing, and under an incapacity to acquire property, could be recovered back upon the principle that there was no contract." 7 Johns. Ch. 275.

Waiving all the other difficulties that were presented in opposition to Frith's right to stop the 50 pipes of brandy, and granting at the same time that he had the right, and that they were to be considered as in their transit while they remained in the custody of the custom-house officer at N. Y., it may be asked what did he do to stay the delivery of them to the administrators of Mactier? Did he make an effort to get possession of them? Did he forbid the public officer to deliver them to the administrators? This I believe is not pretended. The administrators took possession of them in May or June, and sold them about that time as a part of the estate of their intestate, and the first act in relation to them on the part of Frith was in July. They had a right to the brandy as property vested in Mactier at the time of his death by virtue of the contract of sale; and they can rightfully hold the avails thereof, unless Frith had rescinded the contract by stopping the brandy in its transit before it came to their actual possession. This he did not do, nor did he perform any other act equivalent to it.

Upon the view of the whole of this case, I entertain the opinion that the decree of the chancellor ought to be reversed.

By Mr. Senator BENTON. From the pleadings and testimony in the cause, there can be no ground for the assumption set up by the respondent that he was the sole owner, and was alone interested in the brandy. The answer of the appellants is, in my opinion, substantially supported by the proofs. We are, then, to assume that the intestate and respondent were partners, or jointly interested in the 200 pipes of brandy; to share equally in the profits, or to bear the loss jointly, if any should be sustained. The transaction was to be extended so as ultimately to pay the invoice cost in France by a shipment of coffee from the West Indies, which latter operation was to result from provisions shipped from this country to the West Indies. It is worthy of notice that by the arrangement the brandy was to be shipped from France for New York, in an American vessel, and the coffee was to be sent in a French bottom from the West Indies; and this, undoubtedly, with a view to advantages to result to the parties to the speculation.

The respondent, by his letter, dated Sep. 5, 1822, to his agents in France, having ordered the brandy to be sent out to the consignment of the intestate, and directing the invoice amount to be insured, Dec. 24, 1822, wrote the intestate to the following effect: "I also have the pleasure of handing you copies of Messrs. Firebrace, Davidson & Co.'s letters regarding the brandy order. By-the-bye, as your brother, before I left New York, declined taking the interest I offered him in this speculation, and wishing to confine myself on business as much as possible, so as to bring my concerns to a certain focus, I would propose to you to take the adventure solely on your own account, holding the value to cover the transaction to my account in New York."

This, it appears to me, is a distinct and unconditional offer to dispose of the interest and property in the shipment of brandy at its value; that is, the invoice cost in France, or its value or price in the market of consumption. And in this case it cannot, I apprehend, be material which was intended by the respondent, because the question here presented does not involve that particular inquiry. And if the offer was accepted, the intestate was only to carry the amount to the credit of the respondent, holding the same to cover any transaction which he might deem it advisable to negotiate in New York.

On Jan. 17, 1823, the intestate, in answer to this proposition, wrote as follows: "I thank you for sending me the copy of Firebrace, Davidson & Co.'s letter on the subject of the brandy order. This has been, from the first, a favorite speculation with me, and am pleased to say it still promises a favorable result; but to render it complete, I am desirous the speculation should go forward in the way first proposed, thereby making it a treble operation. As you have, however, expressed a wish that I should take the adventure to my own account, I shall delay coming to any determination till I again hear from you. The prospect of war between France and Spain may defeat the object of this speculation, as far as relates to the shipment of provisions hence to Hayti, to be invested in coffee for France per French vessels, in which case I will at once decide to take the adventure to my own account." The intestate then states, as his opinion, that the war would operate to the disadvantage of the respondent, in relation, I suppose, to the transactions connected with the purchase of the brandy and the shipment of coffee to France. This letter, although it is not an acceptance of the proposition contained in the respondent's to take immediate effect, is not a rejection of it; the intestate replies, he should delay coming to any determination in regard to the wish expressed that he should take the adventure on his own account, until he again heard from the respondent; and in another part of the letter he states, that should a war intervene between France and Spain, which would, he assumes, defeat the objects of the speculation in the particulars therein enumerated, he would decide to take the adventure to his own account.

Under date of Mar. 7, 1823, the respondent wrote the intestate, acknowledging the receipt of the letter dated Jan. 17, above referred to; but nothing is said about this letter, except that the contents were noticed. The letter from the intestate to the respondent, dated Mar. 13, 1823, advised the respondent that he had been informed of the shipment of the brandy in a French ship, that he was looking daily for its arrival, and expressing his regrets that the order had not been more promptly executed, as the delay would be likely to prove disadvantageous to him and the respondent. At this time the intestate was advised that a war between France and Spain was inevitable; that France had recalled her minister, and that a large French army had been ordered into Spain, and that the American insurance offices declined insuring on French vessels.

On Mar. 28, 1823, the respondent wrote the intestate to the following effect, in relation to the brandy transaction: "I have not heard anything more from Firebrace, Davidson & Co. respecting the brandy, but I have little doubt of its having got out to you long ere this, unless the rupture which we have a report of between France and Spain took place before the sailing of the vessel, or that she has been captured by the Spaniards; if either be the case, it would be a pity, as its safe arrival with you would be much enhanced if there be a war. With respect to this adventure, I would wish to confirm, if

altogether satisfactory to you, what I mentioned to you some time ago, and which I omitted to repeat to you in my previous letter in reply to yours of the 17th January. I find the more one does in this country, in the present state of trade, the more one's affairs get shackled." The letter here mentioned as the one in reply to that of Jan. 17, is the letter from the respondent to the intestate, under date of Mar. 7, 1823. It is alleged that the above, under date of Mar. 28, did not arrive at its destination until after the death of the intestate.

But what inference can properly, and without violence, be drawn from the contents of this last letter from the respondent? What is the plain and fair import of it? It appears to me the respondent fully acquiesced in the proposal of the intestate to consider the offers made by the letter of Dec. 24, 1822, as open, and still at the option of the intestate to accept or refuse, as he might think proper. The respondent's mind had probably at all times no other inclination than to hold his offers open to the intestate, and he had so intended to have expressed himself in his reply under date of Mar. 7; for he says he wished to confirm what he mentioned sometime ago, and which he omitted to repeat in his previous letter in reply to the one from the intestate of Jan. 17. This letter, I apprehend, affords sufficient evidence of the fact that the respondent did not consider his propositions as rejected by the intestate, although they had not been in terms accepted by him, from any communications which had been received at its date. It would, I apprehend, be competent for the appellants in this case to prove that the respondent had, up to the date of this letter, considered the intestate at liberty, and that he had the right to take the adventure to his own account; that the offer contained in the letter of Dec. 24 was still open to him. If I am correct in this conclusion, then I do not perceive why this letter does not afford sufficient evidence that the respondent never considered the intestate as concluded or barred from accepting them.

Then, under date of Mar. 25, 1823, and within the time above assumed, the intestate wrote the respondent and said: "I have now to advise the arrival of the French ship La Claire with the 200 pipes of brandy, and that in consequence of the probability of war between France and Spain, and in compliance with the wish expressed in your regarded favor of the 24th December, and my answer thereto of the 17th January last, I have decided to take this adventure to my own account. I therefore credit you with the amount of the invoice, say fr. 76,978–58, which at the exchange of the day, 5–40, makes the sum of \$14,254 57/100 of which you will please to take note." Here the intestate closed with the respondent's proposal; and was it done in time to constitute a contract binding upon the parties? On Apr. 21, following, the respondent wrote the intestate, advising him of the receipt of the above letter of Mar. 25, noting particularly the contents, to which he had replied, he says, by his previous respects; and although he was then indebted to the intestate in a considerable sum, if we do not take into view the amount of the price or value of the brandy, he requested the intestate to charter on his account a staunch first class vessel, and send out to him by her a valuable cargo of provisions and merchandise; the vessel to proceed to Europe with a cargo of coffee. The intestate resided in New York, and it is admitted by the case that he died Apr. 10, 1823. The respondent, at the time this transaction and correspondence took place, was a resident of Jacmel, in the Island of St. Domingo. There are several other letters from the respondent to the intestate, which I deem not necessary to advert to in the view here taken of this case.

Upon a rigid and critical examination of the correspondence and the testimony, I am unable to perceive that the respondent ever intimated to the intestate that he withdrew his proposition of Dec. 24, offering to dispose of his interest in the shipment of brandy, or that he considered the intestate's letter of Jan. 17 as a rejection of that offer; but, on the other hand, the letter from the respondent of Mar. 28 shows pretty clearly, not only that this was not so considered by him, but that he wished to confirm what he had previously written, urging the intestate to close with the offer upon the terms proposed in the letter of Dec. 24. This would not probably have been done in the terms here used, if the proposition for the sale had been considered as rejected.

It cannot, I apprehend, be contended, with any probability of success, that the respondent's letter of Apr. 21 contains any matter which goes to show he did not consider the first offer of sale on his part, as still open. The respondent must have known, and did know no doubt, that when he wrote this last letter, his previous letter to the intestate, dated Mar. 28, had not been received when the letter under date of Mar. 25 was written, advising that the adventure had been taken agreeably to the proposition contained in the respondent's letter of Dec. 24.

In my opinion it was competent for the respondent to have limited the time in which his offer might have been accepted, and to have stated, "If you accept by Apr. 1 it will be in time," or he might have left the proposals open indefinitely. When advised of the safe arrival of the brandy, and that the intestate had decided to take it to his own account, and while he still supposed the intestate was alive, the respondent made no objection, but acquiesced in what had been done. It is not urged that the contract depends upon either of the letters written by the respondent which were not received by the intestate in his lifetime, any farther than those letters afford evidence of the mind and intent of the party.

If this mode of reasoning, in relation to the facts in this case, be correct, and the intestate accepted of an offer tendered to him by the respondent, then was it necessary for the intestate to know, before the contract was finally closed and binding upon the parties to it, whether the respondent assented or not.

This brings me to a consideration of the law involved in this case.

In the construction of contracts and agreements, the intention of the parties and the substance of the contract are to be sought for more than the form of the words. Pothier says we ought to examine what was the common intent of the contracting parties, rather than the grammatical sense of the terms (2 Com. Cont. 533); and Plowden lays down a rule, that in contracts it is not material which of the parties speaks the words, if the other agrees to them; for the agreement of the minds of the parties is the only thing the law respects in contracts; and such words as express the assent of the parties and have substance in them are sufficient. And again; if any persons are agreed upon a thing, and words are expressed or written to make the agreement, although they are not apt and usual words, yet, if they have substance in them tending to the effect proposed, the law will take them to be of the same effect as usual words; for the law always regards the intention of the parties, and will apply the words to that which in common presumption may be given to their intent. Ch. B. Comyn also states, that an agreement or contract shall have a reasonable construction according to the intent of the parties; and the rule of construction adopted by the courts in this state and in England, is that in case of doubt, the words of a promise or covenant shall be taken most strongly against the promisor or covenanter. An agreement is aggregatio mentium; that is, where two or more minds are united in a thing done or to be done, or where a mutual assent is given to do or not to do a particular act; and every contract or agreement ought to be so certain and complete that each party may have an action or other remedy upon it.

These general principles appear to be full of sound sense and good reason. A review of the numerous adjudged cases which have a bearing either directly or indirectly upon the questions now under consideration, seems to me not necessary. I shall, therefore, advert to one of them only.

The case of Cook v. Ludlow, 5 Bos. & P. 2. 119, was this: The defendant, who resided near Bristol, by letter, requested the plaintiff, who lived in London, to send by any conveyance which would reach Bristol a patent chaff-cutter and two or three pairs of knives, and also requested that he might be informed when the same were sent, that he might know when and where to send for the articles. The articles were sent to a wharf in London, directed to the defendant, and the wharfinger's receipt taken by the plaintiff. The defendant was advised by mail that the articles had been shipped by a vessel called the Commerce, Chas. Forquareau. The package containing the chaff-cutter and knives was not in fact shipped for Bristol by the Commerce, but was put on board the Nancy, which left London about three months after the articles were delivered at the wharf. No correspondence or communication passed between the parties for about fifteen months after the goods were actually shipped, when the plaintiff applied for payment of the demand, who shortly afterwards received a letter from the defendant stating that he had not received any chaff-cutter, although he had repeatedly inquired for it at Bristol until the time of the arrival of the Commerce. The plaintiff then wrote the defendant, informing him that on inquiry it was ascertained that the package, containing the chaff-cutter, had been sent by the Nancy to Bristol, and this was the first intimation the defendant received that the chaff-cutter had been sent by this vessel. The question in this case was, whether the plaintiff was entitled to recover, and the court held he was, observing, the article was sent in the common course according to order, and the defendant was bound to give notice in due time that he had not received it. Heath and Rooke, JJ., observing that the plaintiff had done everything in that case he was bound to do, and the defendant was guilty of gross negligence in not giving earlier notice. In this case, I apprehend, the contract of sale was consummated upon the delivery of the goods agreeable to the defendant's order, and took effect from the time of such delivery at the wharf or place from whence they were to be transported to the defendant at Bristol. The wharfinger or carrier was neither of them the agent of the plaintiff. Here the minds of the parties met, because the orders of the defendant had been strictly followed and attended to; but did the defendant know the fact at the time it was done? Let us suppose a case that might have arisen in the cause under consideration, and test it by the above rule. Had Firebrace, Davidson & Co. shipped the 200 pipes of brandy in conformity to the order of the respondent upon them, would he have been at liberty to refuse taking it, on its arrival in this country, and would he have been held not liable to pay the amount of the invoice price, suppose it to have been lost by shipwreck or capture. I do not doubt but the respondent would have been liable to pay for the shipment of brandy from the time the terms of his order had been fulfilled; and this too, although he might not have known that the article had been sent. The minds of the parties met at the time the brandy was actually shipped agreeably to directions.

Entertaining no doubt of the fact that the respondent at all times, up to Apr. 21, considered his offer of Dec. 24, 1822, as open to the intestate for his aceptance upon the terms offered, the letter of aceptance of Mar. 25.

1823, closing with the terms of the offer, consummated a valid and binding contract between the parties; and from that time the intestate was liable to the respondent for the full amount of the value. But it is now urged by the respondent that certain information was withheld by the intestate, and that he has lost the interest on the amount, and that there was a difference in the rate of exchange, which operated against him between the time the offer was made and the acceptance; such, however, was not his complaint when he wrote the intestate on the 21st April. As a general creditor, he might be entitled to interest, and compensation for any loss he might have sustained in consequence of the rate of exchange, being more to his disadvantage at the time the contract was closed, than it was when the offer was made. Sound policy forbids that mercantile contracts should depend for their validity upon considerations of this kind.

Having arrived at the conclusion, that here was an absolute sale of all the right and interest of the respondent to the shipment of brandy, it now remains to inquire, whether he has a lien upon the whole or any part of it as a creditor, and whether the doctrine of stoppage in transitu, is applicable. If I am right in respect to the sale of the respondent's interest, then clearly the transitus is gone as to 150 pipes of brandy, which were sold in the lifetime of the intestate; the subject was entirely out of the possession of the vendor; and I did not understand that it was contended upon the argument, that the right of the respondent to this portion of the adventure could be sustained upon this principle, if a contract had been made.

The question in regard to the 50 pipes seems to me to be presented in the following shape, and accompanied with these peculiar circumstances. The goods were in the possession of the vendor and vendee, as partners by legal construction. The respondent was never in actual possession, except by the intestate; and according to the position here assumed, the goods were in the actual and uncontrollable possession of the intestate, and when the contract was finally closed, the 50 pipes of brandy lay in the public store, under the direction of the vendee, who was himself joint owner with the respondent. The transitus of the goods and, consequently, the right of stoppage, is determined by the actual delivery to the vendee, or by circumstances which are equivalent to actual delivery. It will continue until the place of delivery be in fact the end of the journey of the goods, and they have arrived to the possession, or under the direction of the vendee himself. 2 Kent, Comm. 430. If the goods have arrived at an intermediate place, where they are placed under the orders of the vendee, and are to remain stationary until they receive his directions to put them again in motion for some new and ulterior destination, the transitus is gone. 2 Kent, Comm. 431. The goods in this case were not in their transit; they had arrived at their destination, and were under the dominion, and subject to the ownership of the intestate. Nothing remained to be done by the respondent to complete the transfer of the brandy.

But in my judgment, another view of the case is equally fatal to the claim here set up in regard to this lien. The brandy had been actually sold, and was out of the possession of the defendants, previous to the commencement of this suit. It had been taken from the custom house store, the duties paid, and actually sold to bona fide purchasers and, we must here assume, without notice, before the respondent made any claim. The administrators acting in good faith, and in pursuance of an equitable and legal right, are certainly to be protected, if it should be necessary for a court of equity to interpose.

Entertaining no doubt upon this branch of the case, and being of opinion that the respondent is not entitled to have the decree modified so as to give him a claim upon the 50 pipes of brandy, or the proceeds thereof, in the hands of the administrators, I am of opinion that so much of the decree of the court of chancery as is appealed from be reversed; that the respondent's first exception to the master's report be disallowed, and that the appellants recover their costs for prosecuting their appeal in this court.

On the subject of costs in this court, as they rest in discretion, it might perhaps be deemed equitable that neither party should have costs; but the appellants are prosecuting this appeal not in their own right, but as the personal representatives of the deceased, and to protect the interests of the general creditors. And if, as is here supposed, the respondent has no rights but those of a general creditor, it is not perceived why he should be entitled to any peculiar favor, when his case is not one of greater hardship than any one of those against whom he has been litigating.

By Mr. Senator MAYNARD. The most material question for decision in this case, is whether the respondent, John A. Frith, was the owner of the brandy mentioned in the case, or of any part thereof, at the time of the sale of a part by Henry Mactier, and of the residue at the period of his death; or whether Frith had sold his interest, whatever it had been, in that brandy to Mactier. From the letter of Mactier to Frith, of Sep. 4, 1822, and the order of Frith of the day following, it is evident that the brandy was purchased in France, on the joint account of Frith and Mactier. The agreement was that Frith should order the brandy, that Mactier should ship to Frith at Jacmel the invoice price of the brandy, in provisions, from the sale of which, Frith was to make a shipment of coffee to France, to pay for the brandy,

and the parties were to share equally in the speculation "all around." The testimony of Alexander Mactier proves, also, that such was the arrangement, and that it was clearly so understood by Frith. The brandy having been ordered on the joint account of Frith and Mactier, I agree perfectly with the chancellor in opinion, that Frith never was the "sole owner of the brandy." It is now contended that the decree is wrong, in giving to Frith the proceeds of the whole, even if he were entitled to a specific lien upon the brandy, to the extent of his interest. The conclusion to which I have arrived on the main question, renders a decision of this unnecessary.

On Dec. 24, 1822, Frith wrote from Jacmel to Mactier, conveying letters regarding the order for the brandy, and proposed to him to "take the adventure solely on his own account, holding the value to cover the transaction to the account of Frith." Mactier answered this letter Jan. 17, 1823, and informed Frith that he was desirous the speculation should go forward in the way first proposed, thereby making it "a treble operation;" and declaring that "he should delay coming to any determination until he again heard from him." He promised also, in the event of war between France and Spain, the prospect of which he mentioned to decide at once "to take the adventure to his own account." This was, undoubtedly, such an answer as absolved Frith from all obligation on account of his offer, but I cannot consider it as an absolute refusal on the part of Mactier. He engages absolutely to accede to the proposition in the event of a certain occurrence deemed to be disadvantageous to Frith, and declines coming to a determination until he again heard from him, in case the contingency contemplated should not happen. He certainly does not close the negotiation, but holds out to Frith, at least, the possibility of a compliance with his proposal, if he should continue to desire it. Mar. 13 Mactier wrote to Frith that war between France and Spain might then be considered as "inevitable," and gives him the facts upon which that opinion was founded; states that he was "looking daily for the brandy, and regretted that the order for it had not been more promptly executed, as the delay might operate to their disadvantage." At that time he had heard nothing further from Frith in relation to the proposal "to take the adventure" to his own account, and he did not then indicate a determination to do it. Frith, Mar. 7, in a hasty note, acknowledged the receipt of Mactier's letter of Jan. 17, and one of a subsequent date; and states that he "noted their respective contents," but says nothing directly on the subject of his previous proposition. On Mar. 28, Frith wrote to Mactier, that "he had little doubt of the brandy having got out to him long ere this." And he adds, "with regard to this adventure, I would wish to confirm, if altogether satisfactory to you, what I mentioned to you sometime ago, and which I omitted to repeat to you in my previous letter in reply to yours of the 17th of January." I know there is a difference in the reading of the two copies of this letter given in evidence, in the part relating to this subject. I adopt this as correct, because, according to the other, there is a palpable mistake, and I cannot perceive any difference in the meaning so far as they concern the question under consideration. According to either there is an express confirmation of the proposition to Mactier, "to take the adventure to his sole account;" and it is evident also, from that letter, that Frith intended to renew the offer in his letter of Mar. 7, in answer to the letter of Mactier of Jan. 17. It furnishes evidence, therefore, that his mind had undergone no change in relation to the proposition.

On Mar. 25 and 31, Mactier wrote to Frith that he had decided to take the brandy to his own account, according to the proposition contained in the letter of Dec. 24, 1822, and his own engagement in his letter in answer thereto, the contingency upon which it was made having occurred, and informed him that he had carried to his account the invoice price thereof, at a specified rate of exchange. The 21st of April, Frith answered this letter and another of the 5th, and assured him that he had "noted their respective contents," and refers him to his own letters of Mar. 28 and Apr. 12 for a reply. Frith wrote again Apr. 22, confirming his letter of the day before, and again May 6, confirming both the last mentioned letters, and May 15, confirming the last preceding letter. The brandy arrived, and was landed Mar. 15, and Apr. 10 Mactier died.

The question is then presented for decision, whether this correspondence and these acts of the parties constitute a sale of the brandy.

To make a contract there must be an agreement—a meeting of the minds of the contracting parties. On Mar. 28 the minds of these parties certainly did meet. On that day, Frith wrote to Mactier, renewing and confirming his previous proposition to him "to take the adventure to his sole account," and on that day Mactier actually did take it to his "sole account." Here was an actual meeting of the minds of the parties on the subject of the contract, and a decisive act of one of them, giving it entire effect. If the meeting of the minds of the parties, accompanied by the only act necessary to give complete effect to the contemplated contract, are all the circumstances requisite to constitute a valid contract, then there was in this instance a sale of the commodity in question. But his honor, the chancellor, has said, that, "to make a valid contract, it is not only necessary that the minds of the contracting parties should meet, but they should know that fact." If this be a correct principle, and of universal application, then surely in this case there was no contract. The letter of Frith,

of Mar. 28, and all subsequently written by him, did not reach this country until after the death of Mactier. Can this principle be correct and universal? The parties were distant, and negotiating for the sale of a commodity in the possession of one of them. The adventure was agreed upon, and the brandy ordered Sep. 5, "to be in New York by January following or sooner, if possible." When Frith wrote his letter of Dec. 24, he must have believed that the brandy would have arrived at New York before his letter, or, at all events, before he could receive an answer. If such had been the fact, and the brandy had been in the actual possession of Mactier, to whom it was consigned, will it be contended that he must have forborne "to take the adventure" to himself, according to the proposition, until he had informed Frith that he would do so, and received intelligence from him that he was in possession of that information? I cannot believe that the principle can be carried to that extent. Nor can I perceive why it would not have been a valid contract, if the brandy had actually arrived at the receipt of Frith's proposition, if Mactier had immediately "taken the adventure to himself," and credited Frith with the value. If that would have been a contract, binding upon the parties, then it is not universally true that the minds of contracting parties must not only meet, but that they must know that they do meet, before the agreement becomes a contract. If this principle be correct and universal, it is difficult to conceive when a contract would ever be concluded between distant parties. An offer may be revoked at any time before it is accepted. When a party, who has received an offer, sends his acceptance, he does not know that the minds of the parties meet, because he knows that a revocation of the offer may be on its way. When the party who made the offer receives the acceptance, he cannot know that there is a meeting of minds, because he knows that the acceptance may have been revoked. And when the party accepting receives information that his acceptance is received and the offer confirmed, he is in equal uncertainty as to the meeting of minds, because there may have been a revocation of that confirmation. Such a negotiation would be endless, for the parties could never know that their minds met. The impossibility of arriving at certainty and, consequently, the intrinsic difficulty of giving effect to this principle, shows that as a rule, it must have some exceptions. One of these instances, it appears to me, must be where the parties are distant, and one of them has the power by his own act to give full effect to the contract, and he does that act in accordance with the mind of the other. In support of the chancellor's opinion, reference has been made to the case of McCulloch v. Insurance Co., 1 Pick. 278, but I find nothing in that case decisive on this point. That was a case of revocation. On Dec. 29, the plaintiff sent a letter by mail to the defendants, making inquiries how they would insure a vessel and cargo, but making no offer by which he could be bound. On Jan. 1, the defendants wrote him that they would insure on certain terms, and the next day wrote him again, revoking that offer, and declining to effect any insurance. The plaintiff received the offer to insure on the third, and sent an acceptance before he received the revocation, which reached him in due course of the mail. The parties rested until the loss was ascertained; and the court held there was no contract; and surely, there was not, because the offer to insure was revoked before it was accepted, and on that point the cause was decided. The case would have been very different if the plaintiff had requested the defendants to make out a policy upon his vessel and cargo at a specified premium, and deliver it to his agent, and the defendants had actually complied with his request. In the present case, Frith proposed to Mactier "to take the adventure solely to his own account," on certain terms. Mactier replied, not accepting, discouraging but not rejecting the proposition; holding it for further negotiation in one event and promising absolutely to accede to it on the occurrence of another contingency. The proposition remained, neither rejected by one, nor revoked or modified by the other. The brandy arrived, preceded by information of the occurrence of the contingency on which Mactier had promised to take the adventure to himself. After a few days employed in consultation with his friends as to his obligation, he did accede to the proposition, and did all that was necessary to give effect to the contract. It is urged that the letters of Frith, which reached this country after the death of Mactier, cannot make a contract. Most certainly they cannot; but they furnish evidence that one had been made before, by proving an actual meeting of the minds of the parties, if a contract can be made without a mutual and reciprocal knowledge of such meeting. And if a contract cannot be made without that knowledge, those letters would not have constituted a contract, if they had reached this country in the lifetime of Mactier. They prove all now, that they would have proved, if the death had not occurred. They never would have proved that each party knew their minds met. They prove that the mind of Frith had undergone no change; that he continued the proposition; that his mind was the same, Mar. 28, as when Mactier actually took the adventure to himself, as it was Dec. 24, when he proposed to have him do it. A valid contract was, therefore, made, by the act of Mactier, Mar. 28, if the same act would have made one Jan. 17, when he wrote his reply to the proposition.

It is alleged that three fourths of the brandy had been sold by Mactier at a profit, before he decided to comply with the propo-

sition, and that a knowledge of that fact was essential to Frith, to enable him to act understandingly, and that he ought not to be bound, because it had not been communicated. The parties intended, when they engaged in the adventure, that the brandy should arrive in New York in or before the month of January. Frith, in his letter of Mar. 28, expresses the opinion that it had arrived long before that date. When he made the proposition in December, he acted upon the belief that the brandy would soon arrive, if it had not already arrived; and when he confirmed it, he acted upon the assumption that it had then been a long time in the possession of Mactier. Frith therefore acted precisely as he would have done if he had possessed positive knowledge of its arrival. Can it be contended that Mactier had not a right to sell the brandy? If it be true that he was bound to keep it until the completion of the contract between him and Frith, and if it be essential to the validity of that contract that the parties should reciprocally have had knowledge that their minds met, it is difficult to determine at what period he would have been at liberty to sell. If there was a sale to him of Frith's interest, he had a right to sell it as his own, and if there was not, he had a right in fulfillment of the original purpose of the adventure. His right to sell, therefore, in either alternative, was indisputable, and Frith must have presumed that he would embrace a good opportunity. I cannot perceive what bearing the fact of profit or loss has upon the question of contract. The parties engaged in the adventure in the hope of making profit. Nothing had occurred to diminish their expectations Dec. 24, when Frith made his proposition; and Mar. 28, when he renewed and confirmed it, he expresses the opinion that its "safe arrival," which he believed had taken place, "would be much enhanced, if there be a war," of which there was then, to his vision and in fact, a clear prospect. He believed, at first and always, that the adventure would be profitable; and when he confirmed his proposition to sell, he, for a manifest reason, anticipated larger profits than at the time of his engagement. It could not have been necessary that he should have had information of a fact of which he entertained a full belief, and the amount of profit actually realized was too small to justify an inference that it exceeded his expectations. He believed the adventure would be profitable, and it is incredible that he intended Mactier should take it to his sole account, only in the event of its proving disastrous. The arrival and sale of the brandy at a moderate profit were to him matters of no importance. He believed both, and made and confirmed his proposition to sell upon that assumption.

It is further alleged in the bill, that by the rate of exchange specified in Mactier's letter of Mar. 25, Frith would have been a loser in consequence of having placed his funds in France for the payment of the brandy at a higher rate of exchange, and also for the want of a provision for the payment of interest. The question is, did Mactier comply with Frith's proposition? In his letter of Dec. 24, Frith proposed to Mactier to take the adventure to his sole account, "holding the value to cover the transaction to his account in New York." What was its value in reference to covering the transaction? It had no value for that purpose other than its cost. There was no mention in the proposition of interest, or the rate of exchange. Mactier certainly intended to meet that proposition. He assumed upon himself the payment of all charges, and took the brandy at its invoice price as the evidence of its value, and at a rate of exchange which was the exchange of the day. There was, in his attempted compliance with the proposition, no intentional departure or omission; nor is there evidence that there was any in fact, but there is evidence that this allegation is groundless. When Frith wrote his letter of Apr. 21, he had Mactier's letter, and knew, therefore, precisely the terms on which the brandy had been taken. The price and the rate of exchange are expressly mentioned. He wrote three letters afterwards, with his mind turned to the subject, and without expressing in any one of them a single word of disapprobation or complaint. If the price at which Mactier had taken the brandy was not what he meant by its value, or the rate of exchange was inaccurate, it became him to speak immediately. When he had all needful information, and should have spoken if he had cause for dissatisfaction, he was silent. It is true, those letters arriving after the death of Mactier do not make a contract, but they prove that Frith was then satisfied, and did not imagine that injustice had been done him. He did more than acquiesce; he sought to avail himself of the funds which the transaction had placed to his credit in the hands of Mactier. To that period, Frith had been his debtor. In his letter of Dec. 24, he "promised it should not be long before he made a remittance and, he trusted, to his satisfaction." In his letter of Mar. 28, he regrets that he has not been able "to remit further, and hoped soon to put him in considerable funds of his." He had, pending the negotiation, supplied Mactier with some bills; but if the avails of them had been realized, he was still his debtor to the amount of several thousand dollars. In his letter of Apr. 21, written on the receipt of information that Mactier had taken the adventure to himself, he requests Mactier to charter for him a "first class vessel," for a voyage to the Mediterranean, and load her with a specified cargo on his account, and says not a word about funds, and makes no provision for payment. He had then before him Mactier's letter, informing him of the amount of the proceeds of the brandy, and that they were placed to

his credit. He then perceived that instead of being the reluctant debtor, he had become the creditor of Mactier, to the amount of more than $9,000. All his regrets at not being able to supply him with funds had vanished, and he sought immediately to avail himself of those which that transaction had placed at his command. From all this, I infer that he was content and satisfied not only with the fact that Mactier had taken the brandy to himself, but with all the terms upon which he had taken it.

I come, therefore, to the conclusion that the proposition from Frith to Mactier was continued, neither rejected, revoked nor modified; that its acceptance depended upon the act of Mactier; that he did the act which alone was necessary to meet the proposition and complete the contract, in exact accordance with the mind of Frith, and to his perfect satisfaction at the time; and that, consequently, a sale of his interest was effected, and he was not the owner of the brandy at the time of the sale of a part of it by Mactier, or the residue at his death, and that the decree of the chancellor should be reversed.

By Mr. Senator OLIVER. The first question which I deem important to the decision of this appeal is, was Mactier originally a joint owner with Frith in the 200 pipes of brandy?

From the form of the order and letter of Mactier to Frith of Sep. 4, 1822, the letter of Frith to Firebrace, Davidson & Co. ordering the brandy, and the testimony of Alexander Mactier, and Frith's letter of Dec. 24, 1822, in which he says, "By-the-bye, as your brother, before I left New York, declined taking the interest I offered him in this (the brandy) speculation, I would propose to you take the adventure solely on your own account." It seems to me that Mactier was originally equally interested with Frith in the 200 pipes of brandy; and when he speaks of Mactier taking the adventure solely on his own account, he must have meant that he should take the other half of the brandy off his hands. Again; this evidence proves the partnership was agreed upon for this adventure before the brandy was bought; that it was purchased by Frith for their joint benefit, and so they were joint vendees, and liable for the purchase money. 12 East, 421.

Did Mactier purchase the other half of the brandy? To answer this question, it becomes important to examine again a part of the correspondence between Frith and Mactier. Frith's letter of Dec. 24 contained, as we have seen, a distinct proposition to part with his interest in the adventure of brandy; that Mactier should take it solely to his own account; that is, take the brandy at the invoice price. All Frith wanted was to have the brandy off his hands. Jan. 17, 1823, Mactier writes to Frith on the subject of their business, and in answer to the proposition of taking the brandy to his own account, he says: "This has been from the first a favorite speculation with me, and am pleased to say it still promises a favorable result; but to render it complete, I am desirous the speculation should go forward in the way first proposed, thereby making it a treble operation; as you have, however, expressed a wish that I should take the adventure to my own account, I shall delay coming to any determination till I again hear from you. Prospects of war between France and Spain may defeat the object of this speculation, as far as relates to the shipment of provisions hence to Hayti, to be invested in coffee for France, in which case I will at once decide to take the adventure to my own account." Thus far, I am inclined to think, there was an agreement on the part of Mactier to accept the proposition on a certain event, and a mere postponement of accepting absolutely until he should hear from Frith, in hopes Frith would yet be willing to proceed with the speculation. It may be said that Mactier, in his letter of Mar. 13, speaks of the brandy as joint property. This is true; he had written to Frith that he should wait until he should hear from him. Frith must have known that Mactier considered the proposition as one under consideration, not rejected; for Mar. 7 he says, in answer to Mactier's letter of Jan. 17, "I have received your esteemed favor of the 17th and 31st of January, and note their respective contents." The effect of this letter was either an assent to Mactier's qualification to take the brandy on the happening of the war, or a continuance of his first proposal. Frith's answer, not declining this modification, was a virtual assent to it. If he did not mean to assent, he should have said so to Mactier, and not let Mactier go on as if he had agreed. I think good faith required Frith to make known his assent or dissent to this qualification of Mactier. What was Frith's meaning? "I have received your esteemed favors, and noted their respective contents." In Noy, Max. 91, it is said: "In all contracts he that speaketh obscurely or ambiguously is said to speak at his own peril, and such speeches are to be taken strongly against himself." In Pow. Cont. 80, and 1 Liv. 49, it is said: "A tacit assent may be inferred from inaction or forbearance of acting: Thus a man, by his silence, in case he be present and acquainted with what is doing, is supposed to give his assent, unless it appear that he was hindered from speaking." Again, if this was not an acceptance of Mactier's modification, it was virtually permitting the original offer to stand, that Mactier might determine to take the brandy or not, as he said he should on hearing further. In Poth. Mar. Cont. pt. 1, § 11, Nos. 31, 32, it is said that: "In the contract of sale, as in other contracts, the consent of the parties can intervene, not only between persons present, but between the absent, by letters or by messenger. In order that the consent should

intervene in the latter case, it is necessary that the will of the party who has written to the other to propose to him the bargain shall have continued until the time at which his letter shall have reached the other party, and at which the other party shall have declared that he accepted the bargain. This will is presumed to have continued, so long as nothing appears to the contrary." Must it not be so upon general principles? Again, in 3 Starkie, Ev. 1252, it is said: "Where the existence of a particular subject matter or relation has once been proved, its continuance is presumed till proof be given to the contrary." Lord Ellenborough, in 16 East, 55, remarks: "It is fair to presume things continue in the same state, in the absence of all proof of their having been altered."

I admit that this presumption may be rebutted by lapse of time, or by the fact that the brandy was in an unsafe or perishable condition, which is not the case here. In the present case the continuance of the vendor's proposition is not left to presumption alone, as in ordinary cases; Frith shows the continuance affirmatively by his letters, and thus places it beyond mere presumption, either one way or the other. He remarks in his letter of Mar. 28, "with regard to this adventure, I would wish to confirm, if altogether satisfactory to you, what I mentioned to you in my previous letter, in reply to yours of the 17th of January." It is manifest from this that he still wished to sell as he before offered. If this is not sufficient to show his intention to sell, his letters of Apr. 21 and 22 clearly prove that Frith never changed his mind as to selling the brandy; that he considered the offer to sell open, and not withdrawn or retracted, but accepted; for his letter of Apr. 21 was after receiving Mactier's letter saying that he had taken the brandy. Mar. 25 their minds meet. This completes the sale in the present case; a formal delivery of the brandy was not necessary, as it was in Mactier's possession. It was urged on the argument that these letters of April and May could not confirm the sale, as Mactier died before they were written, to wit: Apr. 10; but to my understanding there is sufficient without these letters. It appears to me, as I have before remarked, that Frith's letter of Mar. 28, and the two in April, and his last of May 6, are sufficient to show that the complainant's mind and continued desire was to sell.

Again, what must Mactier have supposed? He had done all in his power to the final consummation of this sale; Frith, by his subsequent act, it seems to me, ratified it, and Mactier's death could make no difference; it related to the time of Mactier's letter, and confirmed his acceptance and perfected the sale by that relation. 2 East, 227. Frith could have insisted upon and enforced the bargain, and the administrators could not have refused.

Again, in 2 Ld. Raym. 930, Holt says, "A consent subsequent will amount to an authority precedent." In 1 Liv. 445, 9, per Powell, J., "A subsequent ratification is equivalent to an original authority." Again, "There are three sorts of agreements—an agreement executed, an agreement subsequent to a thing done, and an agreement executory." Plowd. 5a, 6a. In Com. Dig. tit. "Agreement," A, 1, these rules are all cited. In 12 Johns. 300, and in 3 Cow. 281, it is settled. "A subsequent assent may be inferred from circumstances which the law considers equivalent to an express ratification." In Com. Dig. tit. "Agreement," A, 2. An agreement executed often amounts to a bargain and sale. So where an assent subsequent is given to an act precedent, by such assent the agreement is executed. Is it not then just to say this confirmation of Frith's shall relate to the lifetime of Mactier? In Com. Dig. tit. "Bargain and Sale," it is said: "If a bargainor or bargainee die after the indenture executed, and before enrollment, the estate passes to the bargainee and his heirs, if it be enrolled within six months, yet the seisin continues in the bargainee." So in Cro. Jac. 512, and Vin. Abr. tit. "Relation," F, 6, per Coke and Montague, "execution of all things executory, respects the original act, and have relation thereto, and all make but one act, though done at several times." So, where there are divers acts concurrent to make one estate, the original act shall be preferred, and to this the other acts shall come. So, where two times are requisite to the perfection of an act, it shall be said upon their consummation to receive its perfection from the first. Dyer, 244. So, of two acts, as in Bingham's Case, 2 Coke, 93. "Where to the perfection or consummation of a thing two accidents are requisite, and the one happens in the time of one, and the other in the time of the other, in such case neither the one nor the other shall take benefit of this, because both are requisite to the consummation of the thing." How, then, does death make any difference? If it does, it is to be referred to the consummation, to the first act, to the lifetime, where, if neither party had died, it would not have been referred to such first act. See Cro. Eliz. 622.

The view which I have taken of this case, renders it wholly unnecessary for me to examine the point of stoppage in transitu.

Considering, then, that this agreement was consummated in the lifetime of Mactier, upon the principles and cases above adverted to, I have come to the conclusion that the administrators had a right to act, and would have been justifiable in taking, if they had not already done so, the brandy into their own possession, as a part of the assets of the deceased. It is laid down by Winter's Office of Executor, 82, "Goods contracted for by testator, not delivered in his lifetime, must be delivered to his executors," and I can see no good reason why the same rule should not be extended to administrators.

The view, therefore, which I have taken of this case renders it unnecessary for me to discuss the other points made on the argument; my opinion is, that the decree of the chancellor, so far as it relates to the sale of the brandy, should be reversed.

By Mr. Senator THROOP. Mactier and the respondent were equally interested as partners in the triple adventure, of which the brandy shipment was the commencement, but which extended to a second shipment of provisions to the amount of the invoice cost of the brandy from New York by Mactier to the respondent at Jacmel, and a third shipment of coffee, with the proceeds, from thence to France in French vessels, to be there applied to the payment of the brandy. The order for the brandy was sent by the respondent to his friends in Havre, Sep. 5, 1822, expecting the arrival of the shipment "at New York, in January or before." As early as Oct., however, he evinces a desire to be released from the adventure, and offered his interest to the brother of Mactier, without success. This disposition appears to have continued, and is expressed in his letters on this subject.

The account current, and the correspondence show, that the respondent was largely in arrear to Mactier, and he frequently alludes to it, and excuses his inability or delay to make remittances. To have the value of the brandy shipment placed to his credit, or made to cover his transactions on account at New York, seems to have been one prevailing object in offering to part with his interest. He also wished to bring his concerns to a certain focus, and to confine his business as much as possible; and one other prevailing consideration was to be released from the two shipments originally planned, and consequent upon the brandy adventure. These considerations received additional weight and urgency from the prospect of a war between France and Spain, and the inevitable embarrassment of the trade of the island, thus likely to ensue, in which he was engaged. The joint adventure, in all the three operations, would in that event be subject to war risks, and even the brandy shipment became a hazardous and doubtful speculation. It was his desire to be released from all; and the tenor of all his letters evinces the continual interest which he had in effecting such an object. But the brandy had been ordered, and could not be refused by the parties; it was afloat, or would be so, before the order could be revoked; and the consequences of this part of the adventure were inevitable. Their interest was joint, the profits or losses were to be ascertained when the third and last shipment was closed, and then to be shared equally; and neither could arrest the adventure, or be released from any part of it, except by the consent of the other.

It appears from the correspondence that these parties were on terms of intimate and confidential friendship and intercourse, and when the respondent in his letter of Dec. 24, 1822, proposed to Mactier, "to take the adventure solely on your own account, holding the value to cover the transactions to my account in New York," the proposition was not probably new or unexpected to Mactier. His letter in reply seems intended, or is calculated to inspire greater confidence of a good issue, and to quiet any doubts of a favorable result. His answer is dated Jan. 17, 1823, saying that he is informed that the brandy would be shipped, and leave Bordeaux about Dec. 1. "This has been from the first a favorite speculation with me, and am pleased to say it still promises a favorable result; but to render it complete, I am desirous the speculation should go forward in the way first proposed, thereby making it a triple operation; as you have, however, expressed a wish that I should take the adventure to my own account, I shall delay coming to any determination, till I again hear from you. The prospect of war between France and Spain may defeat the object of this speculation, as far as relates to shipment of the provisions hence to Hayti, to be invested in coffee for France, per French vessels; in which case I will at once decide to take the adventure to my own account. "The next arrival from Europe will probably decide the question of peace or war, and I will lose no time in communicating the same to you." "Let what will happen, I trust you will in no way be a sufferer." He communicates all his information of the prospect of the war.

I consider this letter as declaring with sufficient certainty, to this effect, "notwithstanding my information which I communicate herein, our triple operation promises a favorable result and I shall delay till I hear from you again, and then determine upon your offer, either to take or reject. But if the prospect of war shall cut up our two adventures consequent upon this, I will at once decide to take your offer, and will lose no time in communicating the same to you. In either case, I trust you will not be a sufferer." I observe here, that from the tenor of this letter, and also of respondent's inclosing the order for the brandy, both parties expected its arrival daily, and that the respondent's offer and his answer were written under such expectation, and that in the respondent's letter of Mar. 28, the offer is renewed, when he supposed it had long since arrived.

That Mactier considered his reply to the offer and obligation on his part to take, so soon as the prospect of war was so far confirmed, as to render it proper to break up the two succeeding shipments, appears in two ways. The clerk of Mactier says, that when the brandy arrived, the war was uncertain. Mactier then concluded that the original voyage should be broken up, being unprofitable. He consulted Bane, and referred to this letter, and upon that consultation, it was concluded that "he was obliged to take the brandy, whether it came to a good or bad

market." It appears, from Alexander Mactier's testimony, that the speculation was profitless to Mactier. The consultation with Champlin agrees throughout so well with the transaction and letter of Jan. 17, and with no other, that it must have been at that time; for then, it would seem from his letter, "he was inclined to take the brandy."

But his letter of Mar. 25, explains and confirms his idea that this letter of Jan. 17 was obligatory upon him, whether the market was good or bad. He then says: "I have to advise the arrival of the 200 pipes of brandy, and in consequence of the probability of the war between France and Spain, and in compliance with the wish expressed in your regarded favor of the 24th December, and my answer thereto of the 17th January, I have decided to take the adventure to my own account." In consequence, he gave the respondent credit, according to his original proposition. Nothing more was wanting to prove and enforce this bargain against Mactier or his representatives, than these letters and acts. Notwithstanding the bargain was complete against Mactier, the fact of ownership, as expressed by Bane in his testimony, was contingent. The assent of the respondent was not then known; it had not been expressly given, and if the expected letter from the respondent, in reply to the one of Jan. 17, had contained his dissent or a retraction of his original offer, the adventure would have been thrown back to its original state and interests

Did the respondent ever assent to this contract, so as to vest the title of the brandy absolutely in Mactier before his death? An assent to a contract may be inferred from circumstances, from voluntary inaction or forbearance to act. Thus, a man by his silence, if he has an opportunity of speaking and knowledge of what is doing, is supposed to give his assent to what is done. On Mar. 25, when the credit was given, a long time had elapsed since Jan. 17, and no dissent to that letter or retraction of the offer, had been received; still the respondent's letter might have been sent, and the delay reasonably accounted for, if in fact he had dissented or retracted. And here, I remark, that this circumstance sufficiently explains the contents of Mactier's letter of Mar. 13, in which he informs the respondent that from the last dates received by him, war might be considered inevitable; and says of the brandy: "I am looking daily for its arrival; it is to be regretted the order was not more promptly executed, as the delay, I fear, will operate to our disadvantage." As promised in his letter of Jan. 17, he communicates the first intelligence of peace or war, but having no letter from the respondent since his of that date, he does not retract what he had then said, nor does he treat the lapse of time as an assent or confirmation of it by the respondent. The language, "our disadvantage," is used in reference to the then state of the correspondence, and expressed their joint interest in case the respondent had in fact dissented or retracted his offer.

But I consider the assent of the respondent to this contract to rest upon surer ground than any circumstance of the unsatisfactory and doubtful character of mere lapse of time. His letter of Mar. 7, must, under all the circumstances, be considered a legal acquiescence and consent on his part. And while I would admit that proof of any attempt by a "swift messenger," or any other less rapid means, to withdraw it, or to dissent from the conditional acceptance of Mactier, or to retract his original offer, would have materially weakened or annulled its effect, it is manifest that no such attempt was made, and that all the circumstances show a contrary intention. When the respondent wrote the lettter of Mar. 7, Mactier's letter of Jan. 17 was before him; and if he did not wish to have his original offer stand the chances mentioned by Mactier, he was bound to have improved the first opportunity to withdraw it. In 1 Liv. Ag. 48, and the cases there cited, is found this rule: "If a man receives a letter, the relation of the parties favoring the presumption, he is presumed to approve whatever is contained in the letter unless he immediately makes known his dissent. But the reception of a letter not contradicted, does not always amount to a ratification unless it is accompanied with circumstances capable of showing an intention to ratify." Also, 2 Johns. Cas. 424; 12 Johns. 300; 3 Cow. 281. This is the rule of reason and plain dealing, as well as of the law. If this letter contained no reference to the negotiation, his silence and forbearance to improve this opportunity to dissent should be held to bind him. He, however, says: "I have received your esteemed favors of the 17th and 21st January, and note their respective contents." Is there anything wanting to bring the respondent within the familiar case and known rule, of a man who, knowing what is doing and having an opportunity of speaking, by his silence is held to give his assent to what is done?

But if there could be any doubts of this case coming fully within the rule cited from Livermore, the letter of Mar. 7, is followed by another from the respondent of the 28th, and still another of Apr. 21, each capable of showing his intention to ratify his original offer, and confirming his assent to what had been done by Mactier. On Mar. 28, after expressing his expectation that the brandy had arrived long ere that time, unless the rupture we have a report of, between France and Spain took place before the sailing of the vessel, he says: "With regard to this adventure I wish to confirm, if entirely satisfactory to you, what I mentioned to you some time ago, and which I omitted to repeat in my previous letter, in reply to yours of the 17th January." In his letter of Apr. 21, he acknowledges the receipt of Mactier's "esteemed favor of the 25th, with that of the 5th inst, and notes par-

ticularly their respective contents, to which principally my previous respects (being his of the 28th March and 12th current) reply;" and he then ordered the shipment of a cargo to him. Hence it appears that the presumed legal effect of the letter of Mar. 7, is precisely the intended meaning of the respondent, and, as he expresses himself, "I note the contents," it means, he approves and assents to them.

Under all the circumstances, I can entertain no doubt that the letter of Mar. 7, was intended, and should be considered, as an express assent to the conditional acceptance and the reply of Mactier in his of Jan. 17. He allowed his correspondent and confidential friend to proceed to close the bargain, as he had informed him he should do upon the receipt of his letter then in writing, or upon the happening of the contingency then in prospect. His letters show of how little regard, in comparison to his anxiety to be released from the adventure, was the fact of the arrival of the brandy at New York, or the price at which it would sell; his readiness to bear the joint risks of transportation, if such was the intention of Mactier, in delaying to release him before its arrival, and his willingness to wait the happening of the event referred to by Mactier, upon which he would determine to take it to his own account. Mactier died Apr. 10; but from Apr. 21 (if not before), until that event was known at Jacmel, he could not have doubted, nor (as his letters show) have regretted one moment his release from the triple adventure, nor the absolute sale of the brandy to Mactier. Shall he now be heard to complain that Mactier did not close the bargain till its safe arrival at New York, and a sale of three quarters of the brandy?—that he had run all the risks of the sea? Before he does so, he must show that Mar. 7, or some other early opportunity, or in some way, he refused to encounter such risks; or dissented from any release after the brandy should have arrived, or expressed, or attempted to express his non-concurrence to the conditional acceptance and understanding of Mactier. Both parties expected its arrival before the day when he was writing; and from the contents of Mactier's letter of Jan. 17, he must have supposed that it was then a long time in New York; his letter was to encounter a further delay in its transmission, and when it should be received Mactier would see in it the usual approbatory expression, "I note its contents." It would be sanctioning a dangerous departure from good faith and plain dealing in a commercial correspondence if any other construction or effect should be given to this letter of Mar. 7. If this letter had been received by Mactier in his lifetime, and it is stated by the chancellor to have been so received Apr. 7, before which time he had taken the brandy to his own account, and given the correspondent credit according to his original proposition, nothing would have been wanting, according to my view of the effect of these letters, to a perfect and consummated bargain Mar. 25.

The doctrine of stoppage in transitu, and the question whether the representations of this or any other vendee can ratify, consent to or affirm a contract in fieri at the time of the death, do not appear to me to form appropriate or necessary inquiries in this case. The case of Conyers v. Ennis, decided by Judge Story (2 Mason, 236, Fed. Cas. No. 3,149), found in 6 Cow. 116, is strong upon both these inquiries, as they are raised in the present case. Here was a period of from Mar. 25 or 28 to Apr. 10, when Mactier died, and long afterwards, during which, both parties assented to the bargain, upon terms well understood and acceptable to both; when such consent had been committed to writing and dispatched to each other, and no effort at withdrawal or dissent attempted by either, until long after the arrival of the letter, and the actual sale of the whole, and the probable consumption of a considerable portion of the subject of the contract.

My opinion, therefore, is, that the letters of Dec. 24 and Jan. 17, assented to, explained and confirmed by the subsequent letters, acquiescence and acts of the parties, fully establish a contract of sale, and that the decree of his honor, the chancellor, in the points appealed from, should be reversed.

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

The decree of the chancellor was, accordingly, reversed, with costs.

HOUSEHOLD FIRE & CARRIAGE ACC. INS. CO., Limited, v. GRANT.[1]

(4 Exch. Div. 216.)

Court of Appeals. July 1, 1879.

Worthington Evans, for plaintiff. J. Davies, for defendant.

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

At the trial before Lopes, J., during the Middlesex sittings, 1878, the following facts were proved: In 1874 one Kendrick was acting in Glamorganshire as the agent of the company for the placing of their shares, and on the 30th of September the defendant handed to Kendrick an application in writing for shares in the plaintiff's company, which stated that the defendant had paid to the bankers of the company £5, being a deposit of 1s. per share, and requesting an allotment of 100 shares, and agreeing to pay the further sum of 79s. per share within twelve months of the date of the allotment. Kendrick duly forwarded this application to the plaintiffs in London, and the secretary of the company, on the 20th of October, 1874, made out the letter of allotment in favour of the defendant, which was posted addressed to the defendant at his residence, 16 Herbert street, Swansea, Glamorganshire. His name was then entered on the register of shareholders. This letter of allotment never reached the defendant. The defendant never paid the £5 mentioned in his application but, the plaintiffs' company being indebted to the defendant in the sum of £5 for commission, that sum was duly credited to his account in their books. In July, 1875, a dividend at the rate of 2½ per cent. was declared on the shares, and in February, 1876, a further dividend at the same rate. These dividends, amounting altogether to the sum of 5s., were also credited to the defendant's account in the books of the plaintiffs' company. Afterwards the company went into liquidation, and on the 7th of December, 1877, the official liquidator applied for the sum sued for from the defendant; the defendant declined to pay, on the ground that he was not a shareholder.

On these facts the learned judge left two questions to the jury: (1) Was the letter of allotment of the 20th of October in fact posted? (2) Was the letter of allotment received by the defendant? The jury found the first question in the affirmative and the last in the negative. The learned judge reserved the case for further consideration, and after argument directed judgment to be entered for the plaintiffs on the authority of Dunlop v. Higgins, 1 H. L. Cas. 381.

The defendant appealed.

Finlay & Dillwyn, for defendant, contended that the defendant was not a shareholder, for it was necessary that the allotment of shares should not only be made but also communicated to the defendant; that a letter posted but not received was not a communication to the defendant of the allotment, and that there was therefore no contract between the parties.

Mr. Wilberforce, and G. Arbuthnot (W. G. Harrison, Q. C., with them), for plaintiffs, contended that the contract was complete by acceptance when the letter was posted, and that the plaintiffs were not answerable for casualties at the post office preventing the arrival of the letter.

In addition to the authorities mentioned in the judgment, the following cases were cited during the argument: Reidpath's Case, L. R. 11 Eq. 86; Townsend's Case, L. R. 13 Eq. 148; Wall's Case, L. R. 15 Eq. 18; Gunn's Case, L. R. 3 Ch. 40; Dunmore v. Alexander, 9 Shaw & D. 190; Pellatt's Case, L. R. 2 Ch. 527: Ex parte Cote, L. R. 9 Ch. 27; Taylor v. Jones, 1 C. P. Div. 87; Pol. Cont. p. 13.

Cur. adv. vult.

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

The leading case upon the subject is Dunlop v. Higgins, 1 H. L. Cas. 381. It is true that Lord Cottenham might have decided that case without deciding the point raised in this. But it appears to me equally true that he did not do so, and that he preferred to rest and did rest his judgment as to one of the matters of exception before him upon a principle which embraces and governs the present case. If so, the court is as much bound to apply that principle, constituting as it did a ratio decidendi, as it is to follow the exact decision itself. The exception was that the lord justice general directed the jury in point of law that, if the pursuers posted their acceptance of the offer in due time, according to the usage of trade they were not responsible for any casualties in the post office establishment. This direc-

[1] Opinion of Baggallay, L. J., omitted.

tion was wide enough in its terms to include the case of the acceptance never being delivered at all; and Lord Cottenham, in expressing his opinion that it was not open to objection, did so after putting the case of a letter containing a notice of dishonour posted by the holder of a bill of exchange in proper time, in which case he said (1 H. L. Cas., at page 399): "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post office he is not responsible." In short, Lord Cottenham appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered. My view of the effect of Dunlop v. Higgins, 1 H. L. Cas. 381, is that taken by James, L. J., in Harris' Case, L. R. 7 Ch. 587. There, at page 592, he speaks of the former case as "a case which is binding upon us, and in which every principle argued before us was discussed at length by the lord chancellor in giving judgment." He adds, the lord chancellor "arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract; that is to say, the moment one man has made an offer, and the other has done something binding himself to that offer, then the contract is complete, and neither party can afterwards escape from it." Mellish, J., also took the same view. He says, at page 595: "In Dunlop v. Higgins, 1 H. L. Cas. 381, the question was directly raised whether the law was truly expounded in the case of Adams v. Lindsell, 1 Barn. & Ald. 681. The house of lords approved of the ruling of that case. The Lord Chancellor Cottenham said, in the course of his judgment, that in the case of a bill of exchange notice of dishonour, given by putting a letter into the post at the right time, had been held quite sufficient whether that letter was delivered or not; and he referred to Stocken v. Collin, 7 Mees. & W. 515, on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the same as the rule as to sending notice of dishonour of a bill of exchange. He then referred to the case of Adams v. Lindsell, 1 Barn. & Ald. 681, and quoted the observation of Lord Ellenborough, C. J. That case therefore appears to me to be a direct decision that the contract is made from the time when it is accepted by post." Leaving Harris' Case, L. R. 7 Ch. 587, for the moment, I turn to Duncan v. Topham, 8 C. B. 225, in which Cresswell, J., told the jury that if the letter accepting the contract was put into the post office and lost by the negligence of the post office authorities, the contract would nevertheless be complete; and both he and Wilde, C. J., and Maule, J., seem to have understood this ruling to have been in accordance with Lord Cottenham's opinion in Dunlop v. Higgins, 1 H. L. Cas. 381. That opinion therefore appears to me to constitute an authority directly binding upon us. But if Dunlop v. Higgins, 1 H. L. Cas. 381, were out of the way, Harris' Case, L. R. 7 Ch. 587, would still go far to govern the present. There it was held that the acceptance of the offer at all events binds both parties from the time of the acceptance being posted, and so as to prevent any retraction of the offer being of effect after the acceptance has been posted. Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless therefore a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord Ellenborough in the case of Adams v. Lindsell, 1 Barn. & Ald. 681, which is recognized authority upon this branch of the law. But on the other hand it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offerer, is no binding acceptance. How, then, are these elements of law to be harmonized in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post office as the agent of both parties, and it was so considered by Lord Romilly in Hebb's Case, L. R. 4 Eq., at page 12, when in the course of his judgment he said: "Dunlop v. Higgins, 1 H. L. Cas. 381, decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is that the post office is the common agent of both parties." Alderson, B., also, in Stocken v. Collin, 7 Mees. & W., at page 516,—a case of notice of dishonour, and the case referred to by Lord Cottenham,—says: "If the doctrine that the post office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission." But if the post office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has

been distinctly negatived? This difficulty was attempted to be got over in Telegraph Co. v. Colson, L. R. 6 Exch. 108, which was a case directly on all fours with the present, and in which Kelly, C. B., at page 115, is reported to have said: "It may be that in general, though not in all cases, a contract takes effect from the time of acceptance, and not from the subsequent notification of it. As in the case now before the court, if the letter of allotment had been delivered to the defendant in the due course of the post, he would have become a shareholder from the date of the letter. And to this effect is Potter v. Sanders, 6 Hare, 1. And hence perhaps the mistake has arisen that the contract is binding upon both parties from the time when the letter is written and put into the post, although never delivered; whereas, although it may be binding from the time of acceptance, it is only binding at all when afterwards duly notified." But with deference I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares, or, to put the question in the form in which it is put by Mellish, L. J., in Harris' Case, 7 Ch. App. 587, at page 596, how there can be any relation back in a case of this kind as there may be in bankruptcy. If, as the lord justice said, the contract, after the letter has arrived in time, is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted. The principle indeed laid down in Harris' Case, 7 Ch. App. 587, at page 596, as well as in Dunlop v. Higgins, 1 H. L. Cas. 381, can really not be reconciled with the decision in Telegraph Co. v. Colson, L. R. 6 Exch. 108. James, L. J., in the passage I have already quoted,—Harris' Case, L. R. 7 Ch. 592,—affirms the proposition that when once the acceptance is posted neither party can afterwards escape from the contract, and refers with approval to Hebb's Case, L. R. 4 Eq. 9. There a distinction was taken by the master of the rolls that the company chose to send the letter of allotment to their own agent, who was not authorized by the applicant for shares to receive it on his behalf, and who never delivered it; but he at the same time assumed that if, instead of sending it through an authorized agent, they had sent it through the post office, the applicant would have been bound although the letter had never been delivered. Mellish, L. J., really goes as far, and states forcibly the reasons in favour of this view. The mere suggestion thrown out at the close of his judgment, at page 597, when stopping short of actually overruling the decision in Telegraph Co. v. Colson, L. R. 6 Exch. 108, that although a contract is complete when the letter accepting an offer is posted, yet it may be subject to a condition subsequent that, if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of the judgment, be said to represent his own opinion on the law upon the subject. The contract, as he says, at page 596, is actually made when the letter is posted. The acceptor, in posting the letter, has, to use the language of Lord Blackburn, in Brogden v. Directors of Metropolitan Railway Co., 2 App. Cas. 666, 691, "put it out of his control, and done an extraneous act which clenches the mattter, and shews beyond all doubt that each side is bound." How, then, can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in nondelivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer; and I can see no principle of law from which such an anomalous contract can be deduced.

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

Upon balance of conveniences and inconveniences it seems to me, applying with slight alterations the language of the supreme court of the United States in Tayloe v. Insurance Co., 9 How. 390, more consistent with the acts and declarations of the parties in this

case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication that the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the judgment of Lopes, J., was right and should be affirmed, and that this appeal should therefore be dismissed.

* * * * * *

LEWIS v. BROWNING.

(130 Mass. 173.)

Supreme Judicial Court of Massachusetts. Suffolk. Jan. 6, 1881.

Action for breach of covenants in a lease. The question was whether the terms of a proposed new lease had been accepted by defendant. The negotiations with reference to the new lease were carried on by letter and telegraph. The facts sufficiently appear in the opinion of the court.

O. T. Gray, for defendant. D. E. Ware, for plaintiff.

GRAY, C. J. In M'Culloch v. Insurance Co., 1 Pick. 278, this court held that a contract made by mutual letters was not complete until the letter accepting the offer had been received by the person making the offer; and the correctness of that decision is maintained, upon an able and elaborate discussion of reasons and authorities, in Langd. Cont. (2d Ed.) 989–996. In England, New York and New Jersey, and in the supreme court of the United States, the opposite view has prevailed, and the contract has been deemed to be completed as soon as the letter of acceptance has been put into the post office duly addressed. Adams v. Lindsell, 1 Barn. & Ald. 681; Dunlop v. Higgins, 1 H. L. Cas. 381, 398–400; Newcomb v. De Roos, 2 El. & El. 271; Harris' Case, L. R. 7 Ch. 587; Lord Blackburn, in Brogden v. Railway, 2 App. Cas. 666, 691, 692; Insurance Co. v. Grant, 4 Exch. Div. 216; Lindley, J., in Byrne v. Van Tienhoven, 5 C. P. Div. 344, 348; 2 Kent, Comm. 477, note c; Mactier v. Frith, 6 Wend. 103; Vassar v. Camp, 11 N. Y. 441; Trevor v. Wood, 36 N. Y. 307; Hallock v. Insurance Co., 26 N. J. Law, 268, 27 N. J. Law, 645; Tayloe v. Insurance Co., 9 How. 390.

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

Exceptions overruled.

HARRIS v. SCOTT et al.

(32 Atl. 770.)

Supreme Court of New Hampshire. Rockingham. July 28, 1893.

Bill by Arthur Harris against Annie G. Scott, administratrix of the estate of George Scott, deceased, and others, for the specific performance of a contract for the sale to plaintiff by defendant administratrix of 20 shares of the capital stock of the Portsmouth Brewing Company. Bill dismissed.

The capital stock of the company consists of 80 shares, of the par value of $500 each. In March, 1888, the plaintiff, owning 21 shares, and George Scott, owning 20 shares, entered into the following written agreement: "For the purpose of having a better administration of the affairs of the Portsmouth Brewing Company, and to prevent deals and combinations between various stockholders for unworthy purposes, we hereby mutually and severally agree: (1) To vote the forty-one shares we own, control, or can influence, invariably, on the same side, for the purpose of election, or on any motion made at any meeting. (2) To prevent any disagreement for whom, or for what motions, our votes should be cast, we severally agree to vote at every election for every officer and director now in office, unless both parties to this contract agree not to so vote, and, in case of any vacancy, not to vote for any candidate unless both parties are in favor of his election, and, further, not to vote for any change of any kind, enlargement, alterations, improvements, purchase of real estate, or change in salaries or wages, unless both are willing to vote for such purpose or purposes. (3) This agreement to apply to directors' meetings, the same as stockholders'. No dividend to be declared unless both are in favor of it, and the amount determined beforehand. (4) Neither party to sell his shares, or any of them, nor to buy any other shares at a higher price than the holder paid for them. (5) Either party having his salary increased above the present amount, the other to have an increase of similar amount. (6) This agreement to remain in force two years from date." October 8, 1890, they agreed in writing that the foregoing contract, in all its provisions, be extended for five years from that date; and "that directions shall be left, by will or otherwise, to the executors of each, that, should either party to this agreement die during the continuance thereof, the survivor shall have a prior right, over any other party, to purchase the shares of the capital stock * * * hitherto the property of the deceased." George Scott died intestate April 24, 1892, and the defendant Annie Scott is administratrix of his estate. About the 1st of July, 1892, Annie, in answer to a letter of the plaintiff inquiring what she proposed to do with the stock, wrote him that she desired to sell it; that she had received several offers, and would give him the first right to purchase the 20 shares at $800 each. He replied July 5th, saying: "If you have a bona fide offer of $800 for the whole twenty shares, I will pay you the same, provided you send me the names of those who will pay you this amount, so that I may be able to resell without loss if I wish." He inclosed a check for $100, and an unconditional bill of sale for her to sign. After depositing the letter in a letter box, he received a telegram from Annie saying, "I wish to reconsider the letter I wrote you for the present." The next day, July 6th, the plaintiff replied as follows: "Your telegram received late yesterday afternoon. I had previously written you, accepting your offer." July 11th Mrs. Scott wrote the plaintiff: "I was informed, immediately after sending you the letter about the twenty shares at $800 a share, that the parties wanted to take only part of them, but my lawyer informed me that a gentleman wished to take the whole twenty shares at $815 a share, so I have concluded at that price. The gentleman's name is Mr. John Sise. * * * So, if you wish to accept that price, I will comply to your demands." And the next day she returned the check. This offer the plaintiff, by letter, July 13th, declined to consider, claiming that the shares had already been sold to him. Mrs. Scott afterwards sold the shares, through Sise, to the defendant Conlon, but the formal transfer has not been executed. The plaintiff prays for a specific performance of Mrs. Scott's contract of sale, or, if that is denied, that she be decreed "to give him the first right to purchase the shares at the expiration of the agreement of October 8, 1890."

S. W. Emery and W. H. Looney, for plaintiff. Frink & Batchelder, for defendant Annie G. Scott. C. Page, for defendants Sise and Conlon. Mr. Marvin and J. E. Young, for defendant Ellen T. Scott.

CARPENTER, J. No contract for the sale of the shares to the plaintiff was completed. His acceptance of Mrs. Scott's offer was conditional. Their minds did not meet. If, without disclosing the names of those who had offered her $800 a share, she had signed and returned to the plaintiff the bill of sale, he would have had the right to reject it and decline to take the stock. His letter of July 5th was a rejection of Mrs. Scott's offer, and a new proposal. Benj. Sales, § 39. To this proposal she did not assent. If the plaintiff's letter of the next day was an unconditional acceptance of her offer, it was ineffectual, because too late. It was made after he had notice that the offer was withdrawn. If, when she dispatched the telegram, she had known the contents of the plaintiff's letter of July 5th, it might be evidence tending to show that she did not object to the acceptance on the ground that it was conditional. But at that time she had neither actual nor constructive knowledge of the condition. She made the public post her agent to receive from the plaintiff an unqualified acceptance

of her offer, but not to receive a counter proposal or conditional acceptance. She was not chargeable with knowledge of the condition until she received the letter. Byrne v. Van Tienhoven, 5 C. P. Div. 344; Dunlop v. Higgins, 1 H. L. Cas. 381; Insurance Co. v. Grant, 4 Exch. Div. 216, 221, 228; Benj. Sales, §§ 68-75; Abbott v. Shepard, 48 N. H. 14.

The plaintiff is not entitled to a decree requiring Mrs. Scott to give him, now or at any time, the prior right to purchase the stock. The contract of March 5, 1888, was unlawful. Northern R. Co. v. Concord R. Co., 50 N. H. 166, 179, 180; Fisher v. Railroad Co., Id. 200, 205, 206, 209-211; Woodstock Iron Co. v. Richmond & D. Extension Co., 129 U. S. 643, 9 Sup. Ct. 402; West v. Camden, 135 U. S. 507, 520, 521, 10 Sup. Ct. 838; Fuller v. Dame, 18 Pick. 472; Guernsey v. Cook, 120 Mass. 501; Woodruff v. Wentworth, 133 Mass. 309; Mor. Priv. Corp. §§ 516-519. The contract of October 8, 1890, in so far as it provides for the survivor's prior right to buy the shares, is not, in itself, unlawful. Whether it is so connected with the previous contract as to be tainted with its illegality is a question not considered. If it is construed literally, it was broken when Scott died without leaving, by will or otherwise, directions that the plaintiff should have a prior right over any other party to purchase the shares, and the plaintiff's remedy for the breach is by action at law. Assuming that it may properly be construed as an agreement that the survivor should have the prior right to purchase the shares of the legal representatives of the deceased party, and that such an agreement is not a testamentary disposition of property (Towle v. Wood, 60 N. H. 434), the plaintiff has already received all that the contract secured to him. An opportunity to buy the shares at the price for which they were finally sold was offered to him, and rejected. Bill dismissed.

CLARK, J., did not sit. The others concurred.

THOMAS v. GREENWOOD et al.[1]

(37 N. W. 195, 69 Mich. 215.)

Supreme Court of Michigan. April 6, 1888.

Appeal from circuit court, Bay county; S. M. Green, Judge.

Henry H. Thomas sued George C. Greenwood et al. for damages for breach of contract. Judgment for defendants. Plaintiff appeals. All other material facts appear in the opinion.

Simonson, Gillett & Courtright, for appellant. Hatch & Cooley, for respondents.

CHAMPLIN, J. The defendants were, in 1886, doing business at Duluth, Minn., under the firm name of G. C. Greenwood & Co. The plaintiff on the 9th of February, 1886, wrote to defendants from Bay City, Mich., as to the purport of which letter we are not informed. Defendants replied February 11, 1886, as follows:

"Duluth, Minn., February 11, 1886.

"Mr. H. H. Thomas, No. 9 Munger Block, Bay City, Michigan—Dear Sir: We are just in receipt of yours of the 9th inst., in reference to Hercules powder. Replying, would say that we have the following in stock: 600 lbs. No. 2, 2¼ inch; 2,800 lbs. No. 2, 1¼ inch; 2,600 lbs. No. 2, S. 1½ inch; 1,150 lbs, No. 2, S. S. 1¼ inch; 1,550 lbs. No. 1, X. X. 1¼ inch. Of this we would like to reserve about 1,500 lbs. Our Mr. Mundy, who was talking with you, is not at home, and is bumming around the country in the cant-hook business. We quote this powder to you at 10c. per lb. f. o. b. here, we to reserve about amount stated. We also quote 4 X caps, see inclosed circular, which we are told are the best caps made, at $5.90 per thousand. Fuse, Lake Superior mining, single and double tape, at 20 per cent. off Toy & Bickford & Co.'s or Aetna Powder Co.'s list; terms, cash or approved notes. Should you decide to order these goods, you may give us indorsed note, that we can use the same as cash, dated March 1st four months, without interest.

"Hoping to receive your order, we remain,
"Yours truly, G. C. Greenwood & Co."

—Which said letter was duly received by said plaintiff, and immediately on the receipt of which said plaintiff wrote and mailed to said G. C. Greenwood & Co. a letter of which the following is a copy:

"Bay City, Mich., February 15, 1886.

"Messrs. G. C. Greenwood & Co., Duluth, Minnesota—Gentlemen: Your letter or statement, showing amount of Hercules powder to hand, showing 8,700 lbs. I will take 7,200 lbs. of same, leaving you the 1,500 lbs. in reserve, as you wished; so please ship promptly by freight.

1,900 lbs. No. 2, S. 1¼ inch, Hercules.
2,600 lbs. No. 2, S. 1½ inch, Hercules.
1,150 lbs. No. 2, S. S. 1¼ inch, Hercules.
1,550 lbs. No. 1, X. X. 1¼ inch, Hercules.

$720.00.

"Please ship above goods at once, and on receipt of invoice will forward indorsed note, due four months from March 1, 1886. I do not understand what grade No. 4 X. is. I use Tupper force caps of same brand in my trade here. You are too high on caps and fuse.

"Respectfully, H. H. Thomas."

These letters plaintiff claims made a binding contract between the parties on its receipt by defendants. They did not ship the goods as requested, and plaintiff brings this action to recover his damages based upon the alleged contract. He also added another count to his declaration, as follows: "And also for that whereas, the said defendants heretofore, to-wit, at Bay City, in the county of Bay, on, to-wit, the 20th day of January, 1887, were indebted to and justly owed said plaintiff the sum of three thousand dollars for damages sustained by him by reason of the failure of said defendants to ship, furnish, and deliver to plaintiff seven thousand two hundred pounds of Hercules powder, then before bought by plaintiff at Bay City of said defendants at Duluth, in the state of Minnesota." The court below sustained a demurrer to the declaration, and this ruling presents the only question for our decision.

Do these letters form a valid completed contract between the parties? Counsel for plaintiff concede that, to have this effect, the letter of acceptance must in every respect correspond with the offer, neither falling short nor going beyond the terms proposed; and they insist that it complies with the requirements of the law in this regard. Counsel for defendants dispute this, and insist that the minds of the parties never met, because—First. The offer is indefinite, and left two matters open for further consideration, namely, the grade, and quantity of each grade, of the 1,500 pounds of powder to be reserved by Greenwood & Co.; also the sufficiency of the note to be accepted in payment of the goods. We think the position of the counsel for defendants is correct. The right to select the powder reserved is clearly implied in the reservation. It applied to one grade no more than another, and the fact the price at which the whole quantity was offered being a uniform price of 10 cents a pound, made no difference with the exercise of this right. Presumably it was reserved to fill some other order, or to supply the wants of some other customer, and the selection must be made before a delivery could be enforced. They did not agree to take any indorsed note plaintiff might send. Quality was essential. It was to be such a note as

[1] Irrelevant part of opinion omitted.

they could use the same as cash. Who was to pass upon this qualification? Not the one who gave the note, but they who received it. But the plaintiff annexed a new condition. It was this: "On receipt of invoice, will forward indorsed note." The letter of Greenwood & Co. contains no such proposition. They did not say, "If you order these goods, we will ship them at once, and forward invoice, on receipt of which you may send us indorsed note due four months from March 1, 1886." Nor did the plaintiff say that he would forward defendants an indorsed note that they could use the same as cash. Second. The offer is for the sale of the powder, and of the caps and fuse. The offer is, "Should you desire to order these goods." The acceptance is of the powder only. We think this point is well taken. Caps and fuse cannot be used without powder. Would it be likely that defendants would offer to sell nearly all of their powder without trying to sell also the caps and fuse? They made their prices on each class of goods offered, and then said, "Should you decide to order these goods." Had plaintiff considered the price for the powder high, and caps and fuse low, we do not think he could accept or order the caps or fuse alone without the further assent thereto of defendants. Offers of this kind become binding only when the proposition is met with an acceptance which corresponds with it entirely and adequately, without qualification or the addition of new matter. 1 Pars. Cont. (7th Ed.) 476, 477. We do not think this has been done in this case.

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CARLILL v. CARBOLIC SMOKE BALL CO.[1]

([1893] 1 Q. B. 256.)

Court of Appeals. Dec. 7, 1892.

Appeal from a decision of Hawkins, J. [1892], 2 Q. B. 484.

The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," inserted in the Pall Mall Gazette of November 13, 1891, and in other newspapers, the following advertisement:

"£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, Regent Street shewing our sincerity in the matter.

"During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

"One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10s., post free. The ball can be refilled at a cost of 5s. Address, Carbolic Smoke Ball Company, 27 Princes Street, Hanover Square, London."

The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's and used it as directed, three times a day, from November 20, 1891, to January 17, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the £100. The defendants appealed.

Mr. Finlay, Q. C., and T. Terrell, for the defendants.

The facts shew that there was no binding contract between the parties. The case is not like Williams v. Carwardine, 4 Barn. & Adol. 621, where the money was to become payable on the performance of certain acts by the plaintiff. Here the plaintiff could not by any act of her own establish a claim, for to establish her right to the money it was necessary that she should be attacked by influenza,—an event over which she had no control. The words express an intention, but do not amount to a promise. Week v. Tibold, 1 Rolle, Abr. 6, M. The present case is similar to Harris v. Nickerson, L. R. 8 Q. B. 286. The advertisement is too vague to be the basis of a contract. There is no limit as to time, and no means of checking the use of the ball. Any one who had influenza might come forward and depose that he had used the ball for a fortnight, and it would be impossible to disprove it. Guthing v. Lynn, 2 Barn. & Adol. 232, supports the view that the terms are too vague to make a contract. There being no limit as to time, a person might claim who took the influenza ten years after using the remedy. There is no consideration moving from the plaintiff. Gerhard v. Bates, 2 El. & Bl. 476. The present case differs from Denton v. Railway Co., 5 El. & Bl. 860, for there an overt act was done by the plaintiff on the faith of a statement by the defendants. In order to make a contract by fulfilment of a condition, there must either be a communication of intention to accept the offer or there must be the performance of some overt act. The mere doing an act in private will not be enough. This principle was laid down by Lord Blackburn in Brogden v. Railway Co., 2 App. Cas. 666. The terms of the advertisement would enable a person who stole the balls to claim the reward, though his using them was no possible benefit to the defendants. At all events, the advertisement should be held to apply only to persons who bought directly from the defendants. But, if there be a contract at all, it is a wagering contract, as being one where the liability depends on an event beyond the control of the parties, and which is therefore void under 8 & 9 Vict. c. 109. Or, if not, it is bad under 14 Geo. III. c. 48, § 2, as being a policy of insurance on the happening of an uncertain event, and not conforming with the provisions of that section.

Mr. Dickens, Q. C., and W. B. Allen, for plaintiff.

[The court intimated that they required no argument as to the question whether the contract was a wager or a policy of insurance.] The advertisement clearly was an offer by the defendants. It was published that it might be read and acted on, and they cannot be heard to say that it was an empty boast, which they were under no obligation to fulfil. The offer was duly accepted. An advertisement was addressed to all the public. As soon as a person does the act mentioned, there is a contract with him. It is said that there must be a communication of the acceptance; but the language of Lord Blackburn in Brogden v. Railway Co., 2 App. Cas. 666, shews that merely doing the acts indicated is an acceptance of the proposal. It never was intended that a person proposing to use the smoke ball should go to the office and obtain a repetition of the statements in the advertisement. The defendants are endeavoring to introduce words into the advertisement to the effect that the use of the preparation must be with their privity or under their superintendence. Where an offer is made to all the world, nothing can be imported beyond the fulfilment of the conditions. Notice before the event cannot be required. The advertise-

[1] Opinion of Smith, L. J., omitted.

ment is an offer made to any person who fulfils the condition, as is explained in Spencer v. Harding, L. R. 5 C. P. 561. Williams v. Carwardine, 4 Barn. & Adol. 621, shews strongly that notice to the person making the offer is not necessary. The promise is to the person who does an act, not to the person who says he is going to do it and then does it. As to notice after the event, it could have no effect, and the present case is within the language of Lord Blackburn in Brogden v. Railway Co., 2 App. Cas. 666. It is urged that the terms are too vague and uncertain to make a contract; but as regards parties, there is no more uncertainty than in all other cases of this description. It is said, too, that the promise might apply to a person who stole any one of the balls. But it is clear that only a person who lawfully acquired the preparation could claim the benefit of the advertisement. It is also urged that the terms should be held to apply only to persons who bought directly from the defendants; but that is not the import of the words, and there is no reason for implying such a limitation, an increased sale being a benefit to the defendants, though effected through a middleman, and the use of the balls must be presumed to serve as an advertisement and increase the sale. As to the want of restriction as to time, there are several possible constructions of the terms. They may mean that, after you have used it for a fortnight, you will be safe so long as you go on using it, or that you will be safe during the prevalence of the epidemic. Or the true view may be that a fortnight's use will make a person safe for a reasonable time. Then as to the consideration. In Gerhard v. Bates, 2 El. & Bl. 476, Lord Campbell never meant to say that if there was a direct invitation to take shares, and shares were taken on the faith of it, there was no consideration. The decision went on the form of the declaration, which did not state that the contract extended to future holders. The decision that there was no consideration was qualified by the words "as between these parties," the plaintiff not having alleged himself to be a member of the class to whom the promise was made.

Mr. Finlay, Q. C., in reply.

There is no binding contract. The money is payable on a person's taking influenza after having used the ball for a fortnight, and the language would apply just as well to a person who had used it for a fortnight before the advertisement as to a person who used it on the faith of the advertisement. The advertisement is merely an expression of intention to pay £100 to a person who fulfils two conditions; but it is not a request to do anything, and there is no more consideration in using the ball than in contracting the influenza. That a contract should be completed by a private act is against the language of Lord Blackburn in Brogden v. Metropolitan Ry. Co., 2 App. Cas. 692. The use of the ball at home stands on the same level as the writing a letter which is kept in the writer's drawer. In Denton v. Railway Co., 5 El. & Bl. 86, the fact was ascertained by a public, not a secret, act. The respondent relies on Williams v. Carwardine, 4 Barn. & Adol. 621, and the other cases of that class; but there a service was done to the advertiser. Here no service to the defendants was requested, for it was no benefit to them that the balls should be used; their interest was only that they should be sold. Those cases also differ from the present in this important particular: that in them the service was one which could only be performed by a limited number of persons, so there was no difficulty in ascertaining with whom the contract was made. It is said the advertisement was not a legal contract, but a promise in honor, which, if the defendants had been approached in a proper way, they would have fulfilled. A request is as necessary in the case of an executed consideration as of an executory one (Lampleigh v. Braithwait, 1 Smith, Lead. Cas. [9th Ed.] pp. 153, 157, 159), and here there was no request. Then as to the want of limitation as to time, it is conceded that the defendants cannot have meant to contract without some limit, and three limitations have been suggested. The limitation "during the prevalence of the epidemic" is inadmissible, for the advertisement applies to colds as well as influenza. The limitation "during use" is excluded by the language "after having used." The third is, "within a reasonable time," and that is probably what was intended; but it cannot be deduced from the words; so the fair result is that there was no legal contract at all.

LINDLEY, L. J. (after stating the facts). I will begin by referring to two points which were raised in the court below. I refer to them simply for the purpose of dismissing them. First, it is said no action will lie upon this contract because it is a policy. You have only to look at the advertisement to dismiss that suggestion. Then it was said that it is a bet. Hawkins, J., came to the conclusion that nobody ever dreamt of a bet, and that the transaction had nothing whatever in common with a bet. I so entirely agree with him that I pass over this contention also as not worth serious attention.

Then, what is left? The first observation I will make is that we are not dealing with any inference of fact. We are dealing with an express promise to pay £100 in certain events. Read the advertisement how you will, and twist it about as you will, here is a distinct promise expressed in language which is perfectly unmistakable: "£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza after having used the ball three times daily

for two weeks according to the printed directions supplied with each ball."

We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is "No," and I base my answer upon this passage: "£1000 is deposited with the Alliance Bank, shewing our sincerity in the matter." Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as a proof of his sincerity in the matter—that is, the sincerity of his promise to pay this £100 in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it.

Then it is contended that it is not binding. In the first place, it is said that it is not made with anybody in particular. Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer. In point of law this advertisement is an offer to pay £100 to anybody who will perform these conditions, and the performance of the conditions, is the acceptance of the offer. That rests upon a string of authorities, the earliest of which is Williams v. Carwardine, 4 Barn. & Adol. 621, which has been followed by many other decisions upon advertisements offering rewards.

But then it is said, "Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to have been notified." Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified. But is that so in cases of this kind? I apprehend that they are an exception to that rule, or, if not an exception, they are open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required,—which I doubt very much, for I rather think the true view is that which was expressed and explained by Lord Blackburn in the case of Brogden v. Railway Co., 2 App. Cas. 666, 691,—if notice of acceptance is required, the person who makes the offer gets the notice of acceptance contemporaneously with his notice of the performance of the condition. If he gets notice of the acceptance before his offer is revoked, that in principle is all you want. I, however, think that the true view, in a case of this kind, is that the person who makes the offer shews by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance.

We, therefore, find here all the elements which are necessary to form a binding contract enforceable in point of law, subject to two observations. First of all it is said that this advertisement is so vague that you can not really construe it as a promise—that the vagueness of the language shows that a legal promise was never intended or contemplated. The language is vague and uncertain in some respects, and particularly in this, that the £100 is to be paid to any person who contracts the increasing epidemic after having used the balls three times daily for two weeks. It is said, when are they to be used? According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has made it, one might infer that any time was meant. I do not think that was meant, and to hold the contrary would be pushing too far the doctrine of taking language most strongly against the person using it. I do not think that business people or reasonable people would understand the words as meaning that if you took a smoke ball and used it three times daily for two weeks you were to be guaranteed against influenza for the rest of your life, and I think it would be pushing the language of the advertisement too far to construe it as meaning that. But if it does not mean that, what does it mean? It is for the defendants to shew what it does mean; and it strikes me that there are two, and possibly three, reasonable constructions to be put on this advertisement, any one of which will answer the purpose of the plaintiff. Possibly it may be limited to persons catching the "increasing epidemic" (that is, the then prevailing epidemic), or any colds or diseases caused by taking cold, during the prevalence of the increasing epidemic. That is one suggestion; but it does not commend itself to me. Another suggested meaning is that you are warranted free from catching this epidemic, or colds or other diseases caused by taking cold, whilst you are using this remedy after using it for two weeks. If that is the meaning, the plaintiff is right, for she used the remedy for two weeks and went on using it till she got the epidemic. Another meaning, and the one which I rather prefer, is that the reward is offered to any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball. Then it is asked, what is a reasonable time? It has been suggested that there is no standard of reasonableness; that it depends upon the reasonable time for a germ to develop! I do not feel pressed by that. It strikes me that a reasonable time may be ascertained in a business sense and in a sense satisfactory to a lawyer, in this way: Find out from a chemist what the ingredients are; find out from a skilled physician how long the effect of such ingredients on the system could be reasonably expected to endure so as to protect a person

from an epidemic or cold,—and in that way you will get a standard to be laid before a jury, or a judge without a jury, by which they might exercise their judgment as to what a reasonable time would be. It strikes me, I confess, that the true construction of this advertisement is that £100 will be paid to anybody who uses this smoke ball three times daily for two weeks according to the printed directions, and who gets the influenza or cold or other diseases caused by taking cold within a reasonable time after so using it; and if that is the true construction, it is enough for the plaintiff.

I come now to the last point which I think requires attention: that is, the consideration. It has been argued that this is nudum pactum—that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows: It is quite obvious that in view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise.

We were pressed upon this point with the case of Gerhard v. Bates, 2 El. & Bl. 476, which was the case of a promoter of companies who had promised the bearers of share warrants that they should have dividends for so many years, and the promise as alleged was held not to shew any consideration. Lord Campbell's judgment when you come to examine it is open to the explanation, that the real point in that case was that the promise, if any, was to the original bearer and not to the plaintiff, and that as the plaintiff was not suing in the name of the original bearer there was no contract with him Then Lord Campbell goes on to enforce that view by shewing that there was no consideration shewn for the promise to him. I cannot help thinking that Lord Campbell's observations would have been very different if the plaintiff in that action had been an original bearer, or if the declaration had gone on to shew what a société anonyme was, and had alleged the promise to have been, not only to the first bearer, but to anybody who should become the bearer. There was no such allegation, and the court said, in the absence of such allegation, they did not know (judicially, of course) what a société anonyme was, and, therefore, there was no consideration. But in the present case, for the reasons I have given, I cannot see the slightest difficulty in coming to the conclusion that there is consideration.

It appears to me, therefore, that the defendants must perform their promise, and, if they have been so unwary as to expose themselves to a great many actions, so much the worse for them.

BOWEN, L. J. I am of the same opinion. We are asked to say that this document was a contract too vague to be enforced.

The first observation which arises is that the document itself is not a contract at all; it is only an offer made to the public. The defendants contend next, that it is an offer the terms of which are too vague to be treated as a definite offer, inasmuch as there is no limit of time fixed for the catching of the influenza, and it cannot be supposed that the advertisers seriously meant to promise to pay money to every person who catches the influenza at any time after the inhaling of the smoke ball. It was urged also, that if you look at this document you will find much vagueness as to the persons with whom the contract was intended to be made; that, in the first place, its terms are wide enough to include persons who may have used the smoke ball before the advertisement was issued; at all events, that it is an offer to the world in general, and, also, that it is unreasonable to suppose it to be a definite offer, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense. It is also contended that the advertisement is rather in the nature of a puff or a proclamation than a promise or offer intended to mature into a contract when accepted. But the main point seems to be that the vagueness of the document shews that no contract whatever was intended. It seems to me that, in order to arrive at a right conclusion, we must read this advertisement in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it? It was intended unquestionably to have some effect, and I think the effect which it was intended to have, was to make people use the smoke ball, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from

the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the use of it should be increased. The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic after using the ball. It has been said that the words do not apply only to persons who contract the epidemic after the publication of the advertisement, but include persons who had previously contracted the influenza. I cannot so read the advertisement. It is written in colloquial and popular language, and I think that it is equivalent to this: "£100 will be paid to any person who shall contract the increasing epidemic after having used the carbolic smoke ball three times daily for two weeks." And it seems to me that the way in which the public would read it would be this: that if anybody, after the advertisement was published, used three times daily for two weeks the carbolic smoke ball, and then caught cold, he would be entitled to the reward. Then again it was said: "How long is this protection to endure? Is it to go on for ever, or for what limit of time?" I think that there are two constructions of this document, each of which is good sense, and each of which seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic, and it was during the epidemic that the plaintiff contracted the disease. I think, more probably, it means that the smoke ball will be a protection while it is in use. That seems to me the way in which an ordinary person would understand an advertisement about medicine, and about a specific against influenza. It could not be supposed that after you have left off using it you are still to be protected for ever, as if there was to be a stamp set upon your forehead that you were never to catch influenza because you had once used the carbolic smoke ball. I think the immunity is to last during the use of the ball. That is the way in which I should naturally read it, and it seems to me that the subsequent language of the advertisement supports that construction. It says: "During the last epidemic of influenza many thousand carbolic smoke balls were sold, and in no ascertained case was the disease contracted by those using" (not, "who had used") "the carbolic smoke ball," and it concludes with saying that one smoke ball will last a family several months (which imports that it is to be efficacious while it is being used), and that the ball can be refilled at a cost of 5s. I, therefore, have myself no hesitation in saying that I think, on the construction of this advertisement, the protection was to enure during the time that the carbolic smoke ball was used. My brother the lord justice who preceded me, thinks that the contract would be sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point; but it is not necessary for me to consider it further, because the disease here was contracted during the use of the carbolic smoke ball.

Was it intended that the £100 should, if the conditions were fulfilled, be paid? The advertisement says £1000 is lodged at the bank for the purpose. Therefore, it cannot be said that the statement that £100 would be paid was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.

But it was said there was no check on the part of the persons who issued the advertisement, and that it would be an insensate thing to promise £100 to a person who used the smoke ball unless you could check or superintend his manner of using it. The answer to that argument seems to me to be that if a person chooses to make extravagant promises of this kind he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them.

It was also said that the contract is made with all the world,—that is, with everybody,—and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to any one who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement. It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate, offers to receive offers, offers to chaffer, as, I think, some learned judge in one of the cases has said. If this is an offer to be bound, then it is a contract the moment the person fulfils the condition. That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century; and it cannot be put better than in Willes, J.'s, judgment in Spencer v. Harding, L. R. 5 C. P. 561, 563. "In the advertisement cases," he says, "there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that,

of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract, of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons." As soon as the highest bidder presented himself, says Willes, J., the person who was to hold the vinculum juris on the other side of the contract was ascertained, and it became settled.

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

That seems to me to be the principle which lies at the bottom of the acceptance cases, of which two instances are the well-known judgment of Mellish, L. J., in Harris's Case, L. R. 7 Ch. 587, and the very instructive judgment of Lord Blackburn in Brogden v. Railway Co., 2 App. Cas. 666, 691, in which he appears to me to take exactly the line I have indicated.

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer.

A further argument for the defendants was that this was a nudum pactum,—that there was no consideration for the promise; that taking the influenza was only a condition, and that the using the smoke ball was only a condition, and that there was no consideration at all; in fact, that there was no request, express or implied, to use the smoke ball. Now, I will not enter into an elaborate discussion upon the law as to requests in this kind of contracts. I will simply refer to Victors v. Davies, 12 Mees. & W. 758, and Serjeant Manning's note to Fisher v. Pyne, 1 Man. & G. 265, which everybody ought to read who wishes to embark in this controversy. The short answer, to abstain from academical discussion, is, it seems to me, that there is here a request to use involved in the offer. Then as to alleged want of consideration. The definition of "consideration" given in Selwyn, N. P. (8th Ed.) p. 47, which is cited and adopted by Tindal, C. J., in the case Laythoarp v. Bryant, 3 Scott, 238, 250, is this: "Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff, with the consent, either expressed or implied, of the defendant." Can it be said here that if the person who reads this advertisement applies thrice daily, for such time as may seem to him tolerable, the carbolic smoke ball to his nostrils for a whole fortnight, he is doing nothing at all; that it is a mere act which is not to count towards consideration to support a promise (for the law does not require us to measure the adequacy of the consideration). Inconvenience sustained by one party at the request of the other is enough to create a consideration. I

think, therefore, that it is consideration enough that the plaintiff took the trouble of using the smoke ball. But I think also that the defendant received a benefit from this user, for the use of the smoke ball was contemplated by the defendants as being indirectly a benefit to them, because the use of the smoke balls would promote their sale.

Then we are pressed with Gerhard v. Bates, 2 El. & Bl. 476. In Gerhard v. Bates, 2 El. & Bl. 476, which arose upon demurrer, the point upon which the action failed was that the plaintiff did not allege that the promise was made to the class of which alone the plaintiff was a member, and that therefore there was no privity between the plaintiffs and the defendants. Then Lord Campbell went on to give a second reason. If his first reason was not enough, and the plaintiff and the defendant there had come together as contracting parties and the only question was consideration, it seems to me Lord Campbell's reasoning would not have been sound. It is only to be supported by reading it as an additional reason for thinking that they had not come into the relation of contracting parties; but, if so, the language was superfluous. The truth is, that if in that case you had found a contract between the parties there would have been no difficulty about consideration; but you could not find such a contract. Here, in the same way, if you once make up your mind that there was a promise made to this lady who is the plaintiff, as one of the public,—a promise made to her that if she used the smoke ball three times daily for a fortnight and got the influenza, she should have £100,—it seems to me that her using the smoke ball was sufficient consideration. I cannot picture to myself the view of the law on which the contrary could be held when you have once found who are the contracting parties. If I say to a person, "If you use such and such a medicine for a week I will give you £5," and he uses it, there is ample consideration for the promise.

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Appeal dismissed.

PAINE v. CAVE.

(3 Term R. 148.)

Hilary Term, 29 Geo. III.

This was an action, tried at the sittings after last term at Guildhall before Lord Kenyon, wherein the declaration stated that the plaintiff on 22d September, 1788, was possessed of a certain worm-tub, and a pewter worm in the same, which were then and there about to be sold by public auction by one S. M., the agent of the plaintiff in that behalf, the conditions of which sale were to be the usual conditions of sale of goods sold by auction, &c. of all which premises the defendant afterwards, to wit, &c. had notice; and thereupon the defendant in consideration that the plaintiff, at the special instance and request of the defendant, did then and there undertake, and promise to perform the conditions of the said sale, to be performed by the plaintiff, as seller, &c. undertook, and then and there promised the plaintiff to perform the conditions of the sale, to be performed on the part of the buyer, &c. And the plaintiff avers, that the conditions of sale, herein after mentioned, are usual conditions of sale of goods sold by auction, to wit, that the highest bidder should be the purchaser, and should deposit five shillings in the pound, and that if the lot purchased were not paid for and taken away in two days time, it should be put up again and resold, &c. [stating all the conditions]. It then stated that the defendant became the purchaser of the lot in question for £40. and was requested to pay the usual deposit which he refused, &c. At the trial, the plaintiff's counsel opened the case thus;—The goods were put up in one lot at an auction; there were several bidders, of whom the defendant was the last, who bid £40; the auctioneer dwelt on the bidding, on which the defendant said "why do you dwell, you will not get more;" the auctionerr said that he was informed the worm weighed at least 1300 cwt., and was worth more than £40; the defendant then asked him whether he would warrant it to weigh so much, and received an answer in the negative, he then declared that he would not take it, and refused to pay for it. It was re-sold on a subsequent day's sale for £30 to the defendant, against whom the action was brought for the difference. Lord Kenyon, being of opinion on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff.

Walton now moved to set aside the nonsuit, on the ground that the bidder was bound by the conditions of the sale to abide by his bidding, and could not retract. By the act of bidding he acceded to those conditions, one of which was, that the highest bidder should be the buyer. The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller: in the mean time the person who bid last is a conditional purchaser, if nobody bids more. Otherwise it is in the power of any person to injure the vendor, because all the former biddings are discharged by the last: and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last out-bid would have given for them. The case of Simon v. Metivier, 3 Burrows, 1921, which was mentioned at the trial, does not apply. That turned on the statute of frauds.

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

Rule refused.

BOSTON & M. R. R. v. BARTLETT et al.

(3 Cush. 224.)

Supreme Judicial Court of Massachusetts. Suffolk. Nantucket. March Term, 1849.

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

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

The defendants demurred generally.

J. P. Healy, for defendants, contended, that there was no allegation in the bill of a consideration for the contract, as originally made, or as extended; and, consequently, that the same was not enforceable either at law or in equity. Howel v. George, 1 Madd. 1; 2 Story, Eq. § 787; Brownsmith v. Gilborne, 2 Strange, 738; Colman v. Sarel, 2 Brown, Ch. 12; 1 Madd. 328; 1 Fonbl. 42. The counsel also referred to 1 Harr. Dig. 603; Burnet v. Bisco, 4 Johns. 235; Tucker v. Woods, 12 Johns. 190; Bean v. Burbank, 16 Me. 458.

G. Minot, (with whom was R. Choate,) for the plaintiffs, suggested, that if the demurrer was sustained, it would not be for the reason stated, but on the authority of Cooke v. Oxley, 3 Term R. 653, and Tucker v. Woods, 12 Johns. 190, which are not now law. The question is one of mutuality rather than of consideration. The offer of the defendants was a continuing one, which might have been withdrawn at any time; but, when accepted, the effect was the same, as if the offer had only been made the moment before. Such an offer requires no consideration. When accepted, there is promise for promise.

The case of Cooke v. Oxley is overruled by Adams v. Lindsell, 1 Barn. & Ald. 681; Mactier v. Frith, 6 Wend. 103; Peru v. Turner, 10 Me. 185; Kennedy v. Lee, 3 Mer. 441; Averill v. Hedge, 12 Conn. 424; Carr v. Duval, 14 Pet. 77; 1 Sugd. Vend. 164; M'Culloch v. Insurance Co., 1 Pick. 278. It is virtually overruled by the following cases decided by this court: Thayer v. Insurance Co., 10 Pick. 326; Foster v. Boston, 22 Pick. 33; Bird v. Richardson, 8 Pick. 252. See, also, the remarks in 20 Am. Jur. 17, on the case of Cooke v. Oxley, and the case of Hamilton v. Insurance Co., 5 Pa. St. 339, in which it was virtually overruled.

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

FLETCHER, J. In support of the demurrer, in this case, the only ground assumed and insisted on by the defendants is, that the agreement on their part was without consideration, and therefore not obligatory. In the view taken of the case by the court, no importance is attached to the consideration set out in the bill, namely, "that the plaintiffs would take into consideration the expediency of buying the land." The argument for the defendants, that their agreement was not binding, because without consideration, erroneously assumes that the writing executed by the defendants is to be considered as constituting a contract at the time it was made. The decision of the court in Maine in the case of Bean v. Burbank, 16 Me. 458, which was referred to for the defendants, seems to rest on the ground assumed by them in this case.

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

But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There

was then nothing wanting, in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted and the bargain completed at once.

A different doctrine, however, prevails in France, and Scotland, and Holland. It is there held, that whenever an offer is made, granting to a party a certain time within which he is to be entitled to decide, whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity, that a person, who has been induced to rely on such an engagement, should have no remedy in case of disappointment. But, whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached.

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

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

DICKINSON v. DODDS.

(2 Ch. Div. 463.)

Chancery Division, Court of Appeal. April 1, 1876.

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

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

"£800. [Signed] John Dodds."

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

"[Signed] J. Dodds."

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

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

On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the Darlington railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but Dodds declined to receive it, saying: "You are too late. I have sold the property."

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

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

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

Mr. Kay, Q. C., and Mr. Caldecott, for plaintiff.

The memorandum of the 10th of June, 1874, being in writing, satisfies the statute of frauds. Though signed by the vendor only, it is effectual as an agreement to sell the property.

Supposing it to have been an offer only, an offer, if accepted before it is withdrawn, becomes, upon acceptance, a binding agreement. Even if signed by the person only who is sought to be charged, a proposal, if accepted by the other party, is within the statute. Reuss v. Picksley, L. R. 1 Exch. 342, following Warner v. Willington, 3 Drew, 523.

In Kennedy v. Lee, 3 Mer. 441, 454, Lord Eldon states the law to be that: "If a person communicates his acceptance of an offer within a reasonable time after the offer being made, and if, within a reasonable time of the acceptance being communicated, no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the court will execute." So that, not only is a parol acceptance sufficient, but such an acceptance relates back to the date of the offer. This is further shewn by Adams v. Lindsell, 1 Barn. & Ald. 681, where an offer of sale was made by letter to the plaintiffs "on receiving their answer in course of post." The letter was misdirected, and did not reach the plaintiffs until two days after it ought to have reached them. The plaintiffs, immediately on receiving the letter, wrote an answer accepting; and it was held that they were entitled to the benefit of the contract.

The ruling in Adams v. Lindsell, 1 Barn. & Ald. 681, was approved by the house of lords in Dunlop v. Higgins, 1 H. L. Cas. 381, as appears from the judgment of Sir G. Mellish, L. J., in Harris' Case, L. R. 7 Ch. 587, 595; and it is now settled that a contract which can be accepted by letter is complete when a letter containing such acceptance has been posted. The leaving by the plaintiff of the notice at Dodds' residence was equivalent to the delivery of a letter by a postman.

That Allan is a necessary party appears from Potter v. Sanders, 6 Hare, 1; and if Allan has had a conveyance of the legal estate, the court will decree specific performance against him.

Mr. Swanston, Q. C., and Mr. Crossley, for defendant Dodds.

The bill puts the case no higher than that of an offer. Taking the memorandum of the 10th of June, 1874, as an offer only, it is well established that, until acceptance, either party may retract. Cooke v. Oxley, 3 Term R. 653; Benj. Sales (2d Ed.) p. 52.

After Dodds had retracted by selling to Allan, the offer was no longer open. Having an option to retract, he exercised that option. Humphries v. Carvalho, 16 East, 45; Pol. Cont. p. 8; Routledge v. Grant, 4 Bing. 653.

In delivering judgment in Martin v. Mitchell, 2 Jac. & W. 413, Sir T. Plumer, M. R., put the case of a contract signed by one party only. He asked (page 428), "What mutuality is there, if the one is at liberty to renounce the contract, and the other not?" And in Meynell v. Surtees, 1 Jur. (N. S.) 737, the distinctions between an offer and an agreement in respect of binding land were pointed out. Fry, Spec. Perf. p. 80.

The postscript being merely voluntary, without consideration, is nudum pactum; and the memorandum may be read as if it contained no postscript.

Mr. Jackson, Q. C., and Mr. Gazdar, for defendant Allan.

Allan is an unnecessary party. If Dodds has not made a valid contract with the plaintiff, he is a trustee for Allan; if Dodds has made a binding contract, rights arise between Allan and Dodds which are not now in controversy.

We agree with the co-defendant that, in order that the plaintiff may have a locus standi, there must have been a contract. If the postscript is a modification of the offer, it is nudum pactum, and may be rejected.

It may be conceded that if there had been an acceptance, it would have related back in point of date to the offer. But there was no acceptance. Notice of acceptance served on Mrs. Burgess was not enough.

Even if it would have been otherwise sufficient, here it was too late. Dodds had no property left to contract for. The property had ceased to be his. He had retracted his offer; and the property had become vested in some one else. Hebb's Case, L. R. 4 Eq. 9, 12.

The plaintiff would not have delivered the notice if he had not heard of the negotiation between Dodds and Allan. What retractation could be more effectual than a sale of the property to some one else?

The defendant Allan was a bona fide purchaser without notice.

Mr. Kay, in reply.

The true meaning of the document was a sale. The expression is not "open," but "over." The only liberty to be allowed by that was a liberty for the plaintiff to retract.

But, taking it as an offer, the meaning was that at any day or hour within the interval named the plaintiff had a right to indicate to the defendant his acceptance, and from that moment the defendant would have had no right of retractation. Then was there a retractation before acceptance? To be a retractation, there must be a notification to the other party. A pure resolve within the recesses of the vendor's own mind is not sufficient. There was no communication to the plaintiff. He accepted on two several occasions. There could have been no parting with the property without communciation with him. He was told that the offer was to be left over.

The grounds of the decision in Cooke v. Oxley, 3 Term R. 653, have been abundantly explained by Mr. Benjamin in his work on Sales. It was decided simply on a point of pleading.

BACON, V. C., after remarking that the case involved no question of unfairness or inequality, and after stating the terms of the document of the 10th of June, 1874, and the statement of the defendant's case as given in his answer, continued:

I consider that to be one agreement, and I think the terms of the agreement put an end to any question of nudum pactum. I think the inducement for the plaintiff to enter into the contract was the defendant's compliance with the plaintiff's request that there should be some time allowed to him to determine whether he would accept it or not. But whether the letter is read with or without the postscript, it is, in my judgment, as plain and clear a contract for sale as can be expressed in words, one of the terms of that contract being that the plaintiff shall not be called upon to accept or to testify his acceptance, until 9 o'clock on the morning of the 12th of June. I see, therefore, no reason why the court should not enforce the specific performance of the contract, if it finds that all the conditions have been complied with.

Then, what are the facts? It is clear that a plain, explicit acceptance of the contract was, on Thursday, the 11th of June, delivered by the plaintiff at the place of abode of the defendant, and ought to have come to his hands. Whether it came to his hands or not, the fact remains that, within the time limited, the plaintiff did accept and testify his acceptance. From that moment, the plaintiff was bound, and the defendant could at any time, notwithstanding Allan, have filed a bill against the plaintiff for the specific performance of the contract which he had entered into, and which the defendant had accepted.

I am at a loss to guess upon what ground it can be said that it is not a contract which the court will enforce. It cannot be on the ground that the defendant had entered into a contract with Allan, because, giving to the defendant all the latitude which can be desired, admitting that he had the same time to change his mind as he, by the agreement, gave to the plaintiff, the law, I take it, is clear on the authorities, that if a contract,

unilateral in its shape, is completed by the acceptance of the party on the other side, it becomes a perfect valid and binding contract. It may be withdrawn from by one of the parties in the meantime, but, in order to be withdrawn from, information of that fact must be conveyed to the mind of the person who is to be affected by it. It will not do for the defendant to say: "I made up my mind that I would withdraw, but I did not tell the plaintiff. I did not say anything to the plaintiff until after he had told me by a written notice and with a loud voice that he accepted the option which had been left to him by the agreement." In my opinion, after that hour on Friday, earlier than 9 o'clock, when the plaintiff and defendant met, if not before, the contract was completed, and neither party would retire from it.

It is said that the authorities justify the defendant's contention that he is not bound to perform this agreement, and the case of Cooke v. Oxley, 3 Term R. 653, was referred to. But I find that the judgment in Cooke v. Oxley went solely upon the pleadings. It was a rule to shew cause why judgment should not be arrested, therefore it must have been upon the pleadings. Now, the pleadings were that the vendor in that case proposed to sell to the defendant. There was no suggestion of any agreement which could be enforced. The defendant proposed to the plaintiff to sell and deliver, if the plaintiff would agree to purchase upon the terms offered, and give notice at an earlier hour than 4 of the afternoon of that day; and the plaintiff says he agreed to purchase, but does not say the defendant agreed to sell. He agreed to purchase, and gave notice before 4 o'clock in the afternoon. Although the case is not so clearly and satisfactorily reported as might be desired, it is only necessary to read the judgment to see that it proceeds solely upon this allegation in the pleadings. Mr. Justice Buller says: "As to the subsequent time, the promise can only be supported upon the ground of a new contract made at 4 o'clock; but there was no pretense for that." Nor was there the slightest allegation in the pleadings for that; and judgment was given against the plaintiff.

Routledge v. Grant, 4 Bing. 653, is plainly distinguishable from this case upon the grounds which have been mentioned. There the contract was to sell on certain terms; possession to be given upon a particular day. Those terms were varied, and therefore no agreement was come to; and when the intended purchaser was willing to relinquish the condition which he imposed, the other said: "No; I withdraw. I have made up my mind not to sell to you;" and the judgment of the court was that he was perfectly right.

Then Warner v. Wellington, 3 Drew. 523, seems to point out the law in the clearest and most distinct manner possible. An offer was made,—call it an agreement or offer, it is quite indifferent; it was so far an offer, that it was not to be binding unless there was an acceptance,—and before acceptance was made, the offer was retracted, the agreement was rescinded, and the person who had then the character of vendor declined to go further with the arrangement, which had been begun by what had passed between them. In the present case I read the agreement as a positive engagement on the part of the defendant Dodds that he will sell for £800, and, not a promise, but an agreement, part of the same instrument, that the plaintiff shall not be called upon to express his acquiescence in that agreement until Friday at 9 o'clock. Before Friday at 9 o'clock the defendant receives notice of acceptance. Upon what ground can the defendant now be let off his contract? It is said that Allan can sustain his agreement with the defendant, because at the time they entered into the contract the defendant was possessed of the property, and the plaintiff had nothing to do with it. But it would be opening the door to fraud of the most flagrant description if it was permitted to a defendant, the owner of property, to enter into a binding contract to sell, and then sell it to somebody else and say that by the fact of such second sale he has deprived himself of the property which he has agreed to sell by the first contract. That is what Allan says in substance, for he says that the sale to him was a retractation which deprived Dodds of the equitable interest he had in the property, although the legal estate remained in him. But by the fact of the agreement, and by the relation back of the acceptance (for such I must hold to be the law) to the date of the agreement, the property in equity was the property of the plaintiff, and Dodds had nothing to sell to Allan. The property remained intact unaffected by any contract with Allan, and there is no ground, in my opinion, for the contention that the contract with Allan can be supported. It would be doing violence to principles perfectly well known and often acted upon in this court. I think the plaintiff has made out very satisfactorily his title to a decree for specific performance, both as having the equitable interest, which he asserts is vested in him, and as being a purchaser of the property for valuable consideration without notice against both Dodds, the vendor, and Allan, who has entered into the contract with him.

There will be a decree for specific performance, with a declaration that Allan has no interest in the property; and the plaintiff will be at liberty to deduct his costs of the suit out of his purchase-money.

From this decision both the defendants appealed, and the appeals were heard on the 31st of March and the 1st of April, 1876.

JAMES, L. J., after referring to the document of the 10th of June, 1874, continued: The document, though beginning "I hereby agree to sell," was nothing but an offer,

and was only intended to be an offer, for the plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed, there was no concluded agreement then made; it was in effect and substance only an offer to sell. The plaintiff, being minded not to complete the bargain at that time, added this memorandum: "This offer to be left over until Friday, 9 o'clock a. m. 12th June, 1874." That shows it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere nudum pactum, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This is evident from the plaintiff's own statements in the bill.

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

MELLISH, L. J. I am of the same opinion. The first question is, whether this document of the 10th of June, 1874, which was signed by Dodds, was an agreement to sell, or only an offer to sell, the property therein mentioned to Dickinson; and I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer, and, until both parties are bound, neither party is bound. It is not necessary that both parties should be bound within the statute of frauds, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document. But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, altogether worded as if it were an agreement. But it is hardly necessary to resort to that doctrine in the present case, because the postscript calls it an offer, and says, "This offer to be left over until Friday, 9 o'clock a. m." Well, then, this being only an offer, and the law says—and it is a perfectly clear rule of law—that, although it is said that the offer is to be left open until Friday morning at 9 o'clock, that did not bind Dodds. He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did) that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still in point of law that could not prevent Allan from making a more favorable

offer than Dickinson, and entering at once into a binding agreement with Dodds.

Then Dickinson is informed by Berry that the property has been sold by Dodds to Allan. Berry does not tell us from whom he heard it, but he says that he did hear it, that he knew it, and that he informed Dickinson of it. Now, stopping there, the question which arises is this: If an offer has been made for the sale of property, and before that offer is accepted the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by his promise to give that time; but, if he is not bound by that promise, and may still sell the property to some one else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance, how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to some one else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. If a man makes an offer to sell a particular horse in his stable, and says, "I will give you until the day after to-morrow to accept the offer," and the next day goes and sells the horse to somebody else, and receives the purchase money from him, can the person to whom the offer was originally made then come and say, "I accept," so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere nudum pactum, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead; and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer, and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson; and, even if there had been, it seems to me that the sale of the property to Allan was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between Dodds and Dickinson.

BAGGALLAY, J. A. I entirely concur in the judgments which have been pronounced.

JAMES, L. J. The bill will be dismissed, with costs.

Swanston, Q. C. We shall have the costs of the appeal.

Kay, Q. C. There should only be the costs of one appeal.

Sir H. Jackson, Q. C. The defendant Allan was obliged to protect himself.

MELLISH, L. J. He had a separate case. There might, if two contracts had been proved, have been a question of priority.

JAMES, L. J. I think the plaintiff must pay the costs of both appeals.

IDE v. LEISER.

(24 Pac. 695, 10 Mont. 5.)

Supreme Court of Montana. July 23, 1890.

Appeal from district court, Lewis and Clarke county; WILLIAM H. HUNT, Judge.

The plaintiff pleads the following instrument in writing: "For and in consideration of one dollar ($1.00) to me in hand paid, I hereby agree to give Frank L. Ide the sole right and option to purchase from me at any time within ten days from the date of this instrument the following described property, to-wit, [describing the property.] I furthermore agree to furnish a good and sufficient deed of conveyance of said property, and of the whole thereof. The price of said property to be one thousand dollars, ($1,000.) Helena, Montana, September 24, 1889. J. J. LEISER." "I hereby extend the above option for a period of ten days from this date. Helena, Oct. 3rd, 1889. J. J. LEISER." The complaint further sets forth that on October 11, 1889, the plaintiff tendered defendant $1,000, and demanded a conveyance of the property. That defendant refused to give the conveyance and still refuses. That plaintiff is still willing to pay said $1,000. Plaintiff demands judgment that defendant make conveyance to him of the real estate described. The defendant demurred to the complaint on the ground that it did not set forth facts sufficient to constitute a cause of action. Demurrer was sustained, and judgment entered for the defendant. Plaintiff appeals from the judgment. The question raised by the record, and discussed by counsel, is whether the instrument in writing pleaded, and the tender of $1,000 by plaintiff to defendant, October 11, 1889, are sufficient to entitle plaintiff to a conveyance as demanded. No tender of money or demand for a deed was made during the 10 days limited in the original instrument; but were made during the period defined in the extension indorsed on the instrument.

A. C. Botkin, for appellant. *McCutcheon & McIntire*, for respondent.

DE WITT, J., (after stating the facts as above.) For convenience of terms we will designate the original document pleaded as the first instrument, and the option therein as the first option, and the indorsement extending the time as the second instrument and option. We will not discuss the validity of the first instrument as a foundation for an action for specific performance. We will assume, for the purpose of this decision, that it is good. The option assumed to be granted therein was not exercised within the time limited, and expired October 4. The consideration for this option was one dollar, whether paid by Ide to Leiser, or still a debt owing from Ide to Leiser, is immaterial. That consideration was exhausted by the expiration of the option on October 4. Ide paid his money, the one dollar, and received his goods, the option. Leiser took the one dollar, and delivered a consideration therefor, viz., the option. The transaction was complete, and the terms performed by each party to the agreement.

We come to the second instrument and option. No consideration is named therein, specifically or by reference. The consideration for the first option cannot do service for the second. That consideration was *functus officio* in the first instrument. A consideration determined by the parties to be the consideration for the sale of one article on one day, and so declared in writing, cannot, in the face of such declaration, be construed by the court as a declaration for the sale of another article on another day. The first 10 days' option was a thing of value, and paid for as such. The second was another separate valuable article. Was there any consideration for its sale? We believe the same definitions and distinctions will aid this discussion. There may be (1) a sale of lands; (2) an agreement to sell lands; and (3) what is popularly called an "option." The first is the actual transfer of title from grantor to grantee by appropriate instrument of conveyance. The second is a contract to be performed in the future, and if fulfilled results in a sale. It is a preliminary to a sale, and is not the sale. Breaches, rescission, or release may occur by which the contemplated sale never takes place. The third, an option originally, is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property (real estate being the species we are now discussing) agrees with another person that he shall have the right to buy his property, at a fixed price, within a time certain. He does not sell his land; he does not then agree to sell it; but he does then sell something, viz., the right or privilege to buy at the election or option of the other party. The second party gets, *in præsenti*, not lands, or an agreement that he shall have lands, but he does get something of value; that is, the right to call for and receive lands if he elects. The owner parts with his right to sell his lands, except to the second party, for a limited period. The second party receives this right, or rather, from his point of view, he receives the right to elect to buy. That which the second party receives is of value, and in times of rapid inflations of prices, perhaps of great value. A contract must be supported by a consideration, whether it be the actual sale of lands, an agreement to sell lands, or the actual sale of the right to demand the conveyance of lands. A present conveyance of lands is an executed contract. An agreement to sell is an executory contract. The sale of an option is an executed contract; that is to say, the lands are not sold; the contract is not executed as to them; but the option is as completely sold and transferred *in præsenti* as a piece of personal property instantly delivered on payment of the price. Now this option, this article of value and of commerce, must have a consideration to support its sale. As it is distinct from a sale of lands, or an agreement to sell lands, so its consideration must be distinct; although, if a sale of the lands afterwards follows the option, the consideration for the option may be agreed to be applied, and often is, as a part payment on the price of the land. But there must be some consideration

upon which the finger may be placed, and of which it may be said, "This was given by the proposed vendee to the proposed vendor of the lands as the price for the option, or privilege to purchase." We have been led into this endeavor to make clear our views of these distinctions, because, in the argument, counsel did not seem to give them as much weight as they seem to us to demand. We refer to the following authorities: Gordon v. Darnell, 5 Colo. 302; Bradford v. Foster, 87 Tenn. 4, 9 S. W. Rep. 195; Railroad Co. v. Bartlett, 3 Cush. 224; Bean v. Burbank, 16 Me. 458; De Rutte v. Muldrow, 16 Cal. 505; Johnston v. Trippe, 33 Fed. Rep. 530; Thomason v. Dill, 30 Ala. 444; Mers v. Insurance Co., 68 Mo. 127; Thorne v. Deas, 4 Johns. 84; Burnet v. Biscoe, Id. 235; Lees v. Whitcomb, 5 Bing. 34; Bish. Cont. §§ 77, 78; McDonald v. Bewick, 51 Mich. 79, 16 N. W. Rep. 240; Schroeder v. Gemeinder, 10 Nev. 356; Woodruff v. Woodruff, 44 N. J. Eq. 355, 16 Atl. Rep. 4; Perkins v. Hadsell, 50 Ill. 216; Wat. Spec. Perf. § 200.

Examine the two options granted in the case before us. L. sold I. an option for 10 days from September 24th for one dollar. He then gives an option for another 10 days from October 3d, for what? For nothing. L. transfers this option, this incorporeal valuable something, for nothing. The transfer of the option was *nudum pactum*, and void. But, the point just discussed being conceded, appellant still contends that this second instrument or option was a continuing offer to sell, at a given price, and was accepted by respondent before retracted, and that such acceptance, evidenced by, and accompanied with, the tender of the price, and demand for a deed, constitute an agreement to sell land, which may be enforced in equity. We leave behind now our views of options, and consideration therefor, and meet a wholly different proposition.

Reading the two instruments together we find that on October 3d L. extended to I. an offer to sell his lands at the price of $1,000. There was no consideration for the offer, and it could have been nullified by L. at any time by withdrawal. But it was accepted by I., while outstanding, the price tendered, and deed demanded. It must be plain from the previous discussion that we do not hold that the offer, when made, or at any moment before acceptance, was a sale of lands, an agreement to sell lands, or an option. But upon acceptance and tender was not a contract completed? If one person offers to another to sell his property for a named price, and while the offer is unretracted the other accepts, tenders the money, and demands the property, that is a sale. The proposition is elementary. The property belongs to the vendee, and the money to the vendor. Such is precisely the situation of the parties herein. L. offered to sell for $1,000, I. accepted, tendered the price, and demanded the property. Every element of a contract was present, parties, subject-matter, consideration, meeting of the minds, and mutuality. And as to the matter of mutuality we are now beyond the defective option. We have simply an offer at a price, acceptance, payment or tender, and demand. That this was a valid contract we cannot for a moment doubt. In discussing a transaction of this nature, in Gordon v. Darnell, 5 Colo. 304, BECK, C. J., in one of his clear opinions, says: "Its legal effect is that of a continuing offer to sell, which is capable of being converted into a valid contract by a tender of the purchase money, or performance of its conditions, whatever they may be, within the time stated, and before the seller withdraws the offer to sell." LURTON, J., in Bradford v. Foster, 87 Tenn. 8, 9 S. W. Rep. 195, says: "Before acceptance, such an agreement can be regarded only as an offer in writing to sell upon specified terms the lands referred to. Such an offer, if based upon no consideration, could be withdrawn by the seller at any time before acceptance. It is the acceptance while outstanding which gives an option, not given upon a consideration, vitality." In Railroad Co. v. Bartlett, 3 Cush., 227, we find the following, by FLETCHER, J.: "In the present case, though the writing signed by the defendants was but an offer, and an offer that might be revoked, yet while it remained in force and unrevoked it was a continuing offer during the time limited for acceptance, and during the whole of that time it was an offer every instant; but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract." This case readily distinguishes Bean v. Burbank, 16 Me. 458, which may seem to hold a contrary doctrine. It also repudiates Cooke v. Oxley, 3 Term. R. 653, and claims that the English case is said to be inaccurately reported, and, in any event, entirely disregarded in the later decisions. See also De Rutte v. Muldrow, 16 Cal. 505; Thomason v. Dill, 30 Ala. 444; Goodpaster v. Porter, 11 Iowa, 161; Vassault v. Edwards, 43 Cal. 458; Black v. Woodrow, 39 Md. 194; Bish. Cont. §§ 77, 78; Woodruff v. Woodruff, 44 N. J. Eq. 355, 16 Atl. Rep. 4; Shirley v. Shirley, 7 Blackf. 452; Perkins v. Hadsell, 50 Ill. 216; Lowber v. Connit, 36 Wis. 176; Pom. Cont. § 169, note 1.

We cannot but conclude that the transaction in the case at bar constituted a valid contract, upon which specific performance may be had. But, conceding that the contract is *per se* good, it is urged that it is void, under the statute of frauds. The statute is as follows: "Every contract for the leasing for a longer term than one year, or for the sale of any lands, or interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made." Section 219, p. 652, div. 5, Comp. St. It is argued that the contract could not be enforced against the plaintiff if he were the party sought to be charged, as he has not signed the instrument in writing, and that if it cannot be invoked against the plaintiff, by reason of the statute of frauds, it also cannot be urged against the defendant. But our statute does not require the writing to be signed by the party sought to be charged, but only by the party by whom the sale is to be made. We have these facts: The party

by whom the sale was to be made (L.) signed the memorandum expressing the consideration. The buyer accepted. Not only was the contract complete, but the statute was satisfied. Bean v. Burbank, 16 Me. 458; Vassault v. Edwards, 43 Cal. 458; Shirley v. Shirley, 7 Blackf. 452; Champlin v. Parish, 11 Paige, 405; Clason v. Bailey, 14 Johns. 484; Lowber v. Connit, 36 Wis. 176. We believe that this discussion leaves it clear that these views are not in conflict with Ryan v. Dunphy, 4 Mont. 342, 1 Pac. Rep. 710; Mayger v. Cruse, 5 Mont. 485, 6 Pac. Rep. 333; Ducie v. Ford, 8 Mont. 233, 19 Pac. Rep. 414. The demurrer on the point just investigated should have been overruled.

On behalf of the demurrer it is again argued that the complaint is defective, in that it does not state that the plaintiff has no complete and adequate remedy at law in damages. It is undoubtedly the general rule that "in suits for specific performance the party complaining must not only show the acts relied on as part performance, his willingness and ability to perform his part of the contract, but it must also appear that his position is such that an action at law for damages will not afford him an adequate relief." Ducie v. Ford, 8 Mont. 240, 19 Pac. Rep. 414. But actions for the conveyance of real estate are an exception, or perhaps not an exception, but rather the presumption exists, from the nature of the case, that damages are not adequate relief. In Baumann v. Pinckney, 23 N. E. Rep. 918, the court says, (VANN, J.:) "Thus it happened that the court directed that the complaint should be dismissed, * * * because the plaintiff had an adequate remedy at law. According to a long and unbroken line of decisions the latter ground is clearly untenable. As early as 1835 it was said by Chancellor WALWORTH that a suit in equity against the vendee to compel a specific performance of a contract to purchase land had always been sustained as a part of the appropriate and acknowledged jurisdiction of a court of equity, although the vendor has in most cases another remedy, by an action at law upon the agreement to purchase * * *; the right of the vendee to maintain specific performance is too well settled to require further discussion." And see cases there cited. See also Pom. Eq. Jur. §§ 221, 1402; Story, Eq. Jur. § 746. We are of opinion that the demurrer on this ground also should have been overruled.

We are again asked to sustain the demurrer for the reason that the complaint does not allege that it is within the power of the defendant to make the conveyance in pursuance of a decree of the court so requiring him; that is to say, the complaint should allege that the defendant was still, at the time of filing the complaint, the owner of the land. The incapacity of the defendant to perform, to be an excuse, must exist at the time of the hearing. If he did not possess the subject-matter at the time of making the contract, this does not constitute a legal impossibility, if he acquired it subsequently, at, or before the hearing. Pom. Eq. Jur. § 1405, note 1, cases cited. We do not now know what may be made to appear on the hearing. That is not reached. We examine now only a demurrer to the complaint, which confesses all the facts alleged in the complaint. The complaint alleges that the defendant was the owner on September 24th, when he executed the writing. He has never withdrawn his offer to sell. The offer ripened into a contract October 11th. The complaint was filed the same day. If a person, having executed a contract for the sale of lands, knowingly executes any other agreement to sell or dispose of the same lands to another person, he is guilty of a felony. Section 200, Crim. Laws. Must the complaint allege that defendant has not committed a felony? If defendant has parted with the land *ad interim* it is a fact peculiarly within his own knowledge; knowledge which it may well be impossible to come to the plaintiff. "It must be that in an action of this kind the complaint must make a case in which the defendant is at least prima facie able to perform." Joseph v. Holt, 37 Cal. 256; ELLIOTT, C. J., in Cottrell v. Cottrell, 81 Ind. 88, says: "The principal objection urged against it [the complaint] is that the first paragraph does not allege that the ancestor of the appellants had any title to the property, which it is alleged he agreed to convey, and is therefore bad. There are facts stated which show title in the decedent. * * * If the appellee is content with such title as a conveyance from the heirs of the deceased vendor will convey, the appellants should not be allowed to prevent him from securing it. The ancestor had bargained away all the title he had, and, whether that was much or little, the appellee's contract vested in him the right to have that for which he had contracted. It cannot be of importance to appellants whether that title was perfect or imperfect, for the appellee has a right to it, whatever its character may be. If he is satisfied, they cannot complain, for it never descended to them, but had vested in the appellee prior to the death of their ancestor."

In the case before us the plaintiff could preserve the *status in quo* against innocent purchasers from the defendant, by filing a notice of *lis pendens*. It is not necessary to say what might be our views upon the question of the inability of the defendant to perform on the appearance of further facts at the hearing. We are of the opinion under all the circumstances of this case that the complaint shows a *prima facie* case, as to this point, and that the demurrer in this behalf should be overruled. These views seem to us to be the exercise of a sound discretion. Schroeder v. Gemeinder, 10 Nev. 369; Pom. Eq. Jur. §§ 860, 1404. The judgment of the district court is reversed, and the cause is remanded, with directions to that court to overrule the demurrer.

BLAKE, C. J., and HARWOOD, J., concur.

LONGWORTH et al. v. MITCHELL.[1]

(26 Ohio St. 334.)

Supreme Court of Ohio. Dec. Term, 1875.

On the 1st of August, 1857, Nicholas Longworth, the testator, being seised in fee of the undivided half of a lot in city of Cincinnati, by his deed of that date leased the entire lot to the defendant, Mitchell, for the term of fourteen years, reserving an annual rent of fifteen dollars per "front foot" for the first seven years; of eighteen dollars per front foot for the last seven years. The lease contained a covenant for quiet enjoyment, and Mitchell believed at the time of its execution that Longworth was the owner of the entire lot. The lease also contained a provision that Mitchell might elect to become the purchaser of the lot, and have a general warranty deed therefor, at any time within the first seven years, at the rate of $250 per front foot, or at any time within the last seven years, at the rate of $300 per front foot, with interest from the date of the lease, and that, in case of such election, the ground rent paid should be deducted from the interest.

Just before the close of the first seven years, Mitchell elected to become the purchaser of the lot, and tendered to the executors of Longworth the stipulated $250 per front foot, together with some $400 of ground rent then due, and demanded a deed for the lot, the executors being authorized and required by the will of the testator to execute and fulfil all his real estate contracts. The tender was made in United States treasury notes, and the executors refused to make a deed, but made no objection to the kind of money tendered, placing their refusal on other grounds; and the case below was an action brought by Mitchell against the executors to compel a specific execution of the contract by conveyance of the lot agreeably to the stipulations of the lease.

To this action the executors set up three several grounds of defense:

(1) That the testator owned only a moiety of the lot, and the contract could not therefore be specifically executed.

(2) That the tender should have been made in gold, the contract having been made prior to the passage of the legal tender act.

(3) That prior to the making of the tender, the executors being in negotiation with the Cincinnati and Indiana Railroad Company for the sale of the lot to that company, Mitchell, who was aware of said negotiation, agreed with the executors that he would surrender his lease to them if they would pay him $2,000 and receipt for the rent due, and gave them two weeks in which to accept and comply with the offer; that the executors, relying upon the faith of said agreement or offer, verbally contracted to sell the lot to the railroad company, and within said period of two weeks, to wit, on the 29th of May, 1864, accepted said offer, and demanded of Mitchell a surrender of his lease, tendering him at the same time said sum of $2,000 and a receipt for the rent; but that Mitchell refused to accept the tender, or to surrender the lease; and the executors say that they have since conveyed all their interest in the lot to said railroad company, in pursuance of their said verbal contract with the company.

Mitchell replied, denying that he ever made "any agreement" with the executors to surrender the lease, and alleging that his "offer" to do so was obtained by misrepresentations as to the value of the lot, and the price which the railroad company were to pay therefor.

Subsequently, the railroad company, and also the heirs of Nicholas Longworth, were made parties defendant, and the company filed an answer, insisting that the company was a bona fide purchaser without notice of Mitchell's alleged rights.

At the hearing, it was proven that Mitchell, at the time of these negotiations, was in possession of the lot. The fact that Mitchell made the offer to surrender the lease, on the terms set up in the answer of the executors, and that they accepted the offer, and offered to comply therewith on the said 29th of May, was also proven, or admitted; but there was a conflict of evidence as to whether this acceptance and offer by the executors was made within the two weeks allowed. The court found that the offer was made on the 13th of May, sixteen days before it was accepted by the executors, and thereupon rendered a judgment in favor of Mitchell, ordering a specific execution of the contract as to one moiety of the lot, with a release of title by the railroad company, and a compensation in money by the executors for the value of the other moiety. The record sets forth all the evidence in the case, and shows that a motion for a new trial was made by the plaintiffs in error, and overruled by the court.

The plaintiffs in error now seek to reverse the judgment of the superior court, assigning the following as grounds of error:

(1) The finding of the court that the offer of Mitchell was not accepted by the executors within the two weeks allowed is contrary to the evidence.

(2) The time allowed for acceptance of the offer was not material, and its acceptance two days after the expiration of the two weeks was sufficient.

Hoadly, Johnson & Colston, for plaintiffs in error. Lincoln, Smith & Stephens, for defendant in error.

WELCH, C. J. As to the question whether the finding of the court that the offer of Mitchell was not accepted within the two weeks is supported by the evidence, it need

[1] Irrelevant parts omitted.

only be said that a majority of us cannot answer the question in the negative with that certainty which would justify us in reversing the judgment and granting a new trial.

Nor do we think that the ground assumed by counsel for the plaintiffs in error, that time was not of the essence of Mitchell's offer, is maintainable. The rule frequently adopted in a court of equity that time is not of the essence of a contract does not apply, as we understand the law, to a mere offer to make a contract. The offer rests upon no consideration, and may be withdrawn at any time before acceptance. An offer without time given for its acceptance must be accepted immediately, or not at all; and a limitation of time for which a standing offer is to run is equivalent to the withdrawal of the offer at the end of the time named. A standing offer is in the nature of a favor granted to the opposite party, and cannot on any just principle be made available after the time limited has expired.

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MINNESOTA LINSEED OIL CO. v. COLLIER WHITE LEAD CO.

(Fed. Cas. No. 9,635.)

Circuit Court, D. Minnesota. 1876.

This action was removed from the state court and a trial by jury waived. The plaintiff seeks to recover the sum of $2,151.50, with interest from September 20, 1875—a balance claimed to be due for oil sold to the defendant. The defendant, in its answer, alleges that on August 3d, 1875, a contract was entered into between the parties, whereby the plaintiff agreed to sell and deliver to the defendant, at the city of St. Louis, during the said month of August, twelve thousand four hundred and fifty (12,450) gallons of linseed oil for the price of fifty-eight (58) cents per gallon, and that the plaintiff has neglected and refused to deliver the oil according to the contract; that the market value of oil after August 3d and during the month was not less than seventy (70) cents per gallon, and therefore claims a set-off or counter-claim to plaintiff's cause of action. The reply of the plaintiff denies that any contract was entered into between it and defendant.

The plaintiff resided at Minneapolis, Minnesota, and the defendant was the resident agent of the plaintiff, at St. Louis, Missouri. The contract is alleged to have been made by telegraph.

The plaintiff sent the following dispatch to the defendant: "Minneapolis, July 29, 1875. To Alex. Easton, Secretary Collier White Lead Company, St. Louis, Missouri: Account of sales not enclosed in yours of 27th. Please wire us best offer for round lot named by you—one hundred barrels shipped. Minnesota Linseed Oil Company."

The following answer was received: "St. Louis, Mo., July 30, 1875. To the Minnesota Linseed Oil Company: Three hundred barrels fifty-five cents here, thirty days, no commission, August delivery. Answer. Collier Company."

The following reply was returned: "Minneapolis, July 31, 1875. Will accept fifty-eight cents (58c), on terms named in your telegram. Minnesota Linseed Oil Company."

This dispatch was transmitted Saturday, July 31, 1875, at 9:15 p. m., and was not delivered to the defendant in St. Louis, until Monday morning, August 2, between eight and nine o'clock.

On Tuesday, August 3, at 8:53 a. m., the following dispatch was deposited for transmission in the telegraph office: "St. Louis, Mo., August 3, 1875. To Minnesota Linseed Oil Company, Minneapolis: Offer accepted—ship three hundred barrels as soon as possible. Collier Company."

The following telegrams passed between the parties after the last one was deposited in the office at St. Louis: "Minneapolis, August 3, 1875. To Collier Company, St. Louis: We must withdraw our offer wired July 31st. Minnesota Linseed Oil Company."

Answered: "St. Louis, August 3, 1875. Minnesota Linseed Oil Company: Sale effected before your request to withdraw was received. When will you ship? Collier Company."

It appeared that the market was very much unsettled, and that the price of oil was subject to sudden fluctuations during the month previous and at the time of this negotiation, varying from day to day, and ranging between fifty-five and seventy-five cents per gallon. It is urged by the defendant that the dispatch of Tuesday, August 3d, 1875, accepting the offer of the plaintiff transmitted July 31st, and delivered Monday morning, August 2d, concluded a contract for the sale of the twelve thousand four hundred and fifty gallons of oil. The plaintiff, on the contrary, claims, 1st, that the dispatch accepting the proposition made July 31st, was not received until after the offer had been withdrawn; 2d, that the acceptance of the offer was not in due time; that the delay was unreasonable, and therefore no contract was completed.

Young & Newel, for plaintiff.
Geo. L. & Chas. E. Otis, for defendant.

NELSON, District Judge. It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by corespondence through the post-office and by telegraph, and a contract is concluded when an acceptance of a proposition is deposited in the telegraph office for transmission. See 14 Am. Law Reg. 401, "Contracts by Telegraph," article by Judge Redfield, and authorities cited; also, Trevor v. Wood, 36 N. Y. 307.

The reason for this rule is well stated in Adams v. Lindsell, 1 Barn. & Ald. 681. The negotiation in that case was by post. The court said: "That if a bargain could not be closed by letter before the answer was received, no contract could be completed through the medium of the post-office; that if the one party was not bound by his offer when it was accepted (that is, at the time the letter of acceptance is deposited in the mail), then the other party ought not to be bound until after they had received a notification that the answer had been received and assented to, and that so it might go on ad infinitum." See, also, 5 Pa. St. 339; 11 N. Y. 441; Mactier v. Frith, 6 Wend. 103; 48 N. H. 14; 8 C. B. 225. In the case at bar the delivery of the message at the telegraph office signified the acceptance of the offer. If any contract was entered into, the meeting of minds was at 8:53 of the clock, on Tuesday morning, August 3d, and the subsequent dispatches are out of the case. 1 Pars. Cont. 482, 483.

This rule is not strenuously dissented from

on the argument, and it is substantially admitted that the acceptance of an offer by letter or by telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that when an offer is made by telegraph, an acceptance by telegraph takes effect when the dispatch containing the acceptance is deposited for transmission in the telegraph office, and not when it is received by the other party. Conceding this, there remains only one question to decide, which will determine the issues: Was the acceptance of defendant deposited in the telegraph office Tuesday, August 3d, within a reasonable time, so as to consummate a contract binding upon the plaintiff?

It is undoubtedly the rule that when a proposition is made under the circumstances in this case, an acceptance concludes the contract if the offer is still open, and the mutual consent necessary to convert the offer of one party into a binding contract by the acceptance of the other is established, if such acceptance is within a reasonable time after the offer was received.

The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject matter of the contract, and in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.

The rule in regard to the length of the time an offer shall continue, and when an acceptance completes the contract, is laid down in Parsons on Contracts (volume 1, p. 482). He says: "It may be said that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. * * * If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which as rational men they ought to have understood each other to have had in mind." Applying this rule, it seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. The delay here was too long, and manifestly unjust to the plaintiff, for it afforded the defendant an opportunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests.

Judgment will be entered in favor of the plaintiff for the amount claimed. The counter-claim is denied. Judgment accordingly.

HYDE v. WRENCH.

(3 Beav. 334.)

Rolls Court. Dec. 8, 1840.

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

The defendant being desirous of disposing of an estate, offered, by his agent, to sell it to the plaintiff for £1200, which the plaintiff, by his agent, declined; and on the 6th of June the defendant wrote to his agent as follows: "I have to notice the refusal of your friend to give me £1200 for my farm. I will only make one more offer, which I shall not alter from; that is, £1000 lodged in the bank until Michaelmas, when title shall be made clear of expenses, land tax, &c. I expect a reply by return, as I have another application." This letter was forwarded to the plaintiff's agent, who immediately called on the defendant; and, previously to accepting the offer, offered to give the defendant £950 for the purchase of the farm, but the defendant wished to have a few days to consider.

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

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

This letter being received on the 29th of June, the plaintiff's agent on that day wrote to the defendant as follows: "I beg to acknowledge the receipt of your letter of the 27th instant, informing me that you are not disposed to accept the sum of £950 for your farm at Luddenham. This being the case, I at once agree to the terms on which you offered the farm, viz. £1000 through your tenant, Mr. Kent, by your letter of the 6th instant. I shall be obliged by your instructing your solicitor to communicate with me without delay as to the title, for the reason which I mentioned to you."

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

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

Mr. Kindersley and Mr. Keene, in support of the demurrer.

To constitute a valid agreement there must be a simple acceptance of the terms proposed. Holland v. Eyre, 2 Sim. & S. 194. The plaintiff, instead of accepting the alleged proposal for sale for £1000 on the 6th of June, rejected it, and made a counter proposal. This put an end to the defendant's offer, and left the proposal of the plaintiff alone under discussion. That has never been accepted, and plaintiff could not, without the concurrence of the defendant, revive the defendant's original proposal.

Mr. Pemberton and Mr. Freeling, contra.

So long as the offer of the defendant subsisted, it was competent to the plaintiff to accept it. The bill charges that the defendant's offer had not been withdrawn previous to its acceptance by plaintiff. There, therefore, exists a valid subsisting contract. Kennedy v. Lee, 3 Mer. 454; Johnson v. King, 2 Bing. 270, were cited.

The MASTER OF THE ROLLS. Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for £1000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff made an offer of his own, to purchase the property for £950, and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties. The demurrer must be allowed.

WALLACE v. TOWNSEND.

(3 N. E. 601, 43 Ohio St. 537.)

Supreme Court of Ohio. Nov. 17, 1885.

Error to district court, Jefferson county.

The Cleveland, Tuscarawas Valley & Wheeling Railway Company brought its action in the court of common pleas of Jefferson county, upon the subscriptions set out in the findings of fact, which appear below, against William H. Wallace and Spalding K. Wallace, executors of Henry Wallace, deceased, for the recovery of the amount claimed to be due upon such subscriptions. The trial court, upon the request of each party, stated its findings of fact and conclusions of law separately, as follows:

"That in the early part of the year 1877, the Cleveland, Tuscarawas Valley & Wheeling Railway Company, being a railroad company duly incorporated under the laws of the state of Ohio, owning and operating a railroad from the mouth of Black river, on Lake Erie, to Urichsville, in Tuscarawas county, and contemplating an extension of its road beyond Urichsville, proposed to make such extension, by way of the valley of Stillwater and the valley of Wheeling creek, to the Ohio river at Bridgeport, opposite the city of Wheeling, provided that subscriptions to the capital stock of said company would be made by persons residing along the line of such proposed extension, and in the neighborhood of the southern terminus thereof, aggregating the sum of $250,000. That citizens of Wheeling, knowing of such proposition, and being desirous to promote such extension, held a public meeting, and at such meeting appointed a committee to solicit subscriptions to the capital stock of said company. That Henry Wallace, the testator of the defendants, then in full life, was present at the meeting, and thereafter, at the solicitation of said committee, subscribed, in a book furnished by the committee, a paper writing, of which the following is a copy: 'We, the undersigned, do hereby respectively subscribe to the capital stock of the Cleveland, Tuscarawas Valley & Wheeling Railway Company the number of shares, (50) fifty dollars each, we have set opposite our respective signatures, upon the conditions that the contemplated extended line of the railroad of said railway company shall be located in the valleys of Stillwater and Wheeling creeks to the Ohio river, in the town of Bridgeport, Ohio, opposite the city of Wheeling, and thence along the west bank of said river to a point on said river in the town of West Wheeling, Ohio; and as soon as said railroad shall be so located, and the work of construction commenced in Wheeling Creek valley, we agree to take the number of shares aforesaid, and then agree to pay five (5) dollars on each share of said stock so by us subscribed, and the residue thereafter in such installments and at such times and places as may be required by the directors of said company; but said installments shall not exceed ten (10) per cent. per month from the time when said first payment shall become due as aforesaid. It is hereby further conditioned that these subscriptions shall not be binding unless the work of construction shall be commenced on or before July 1, 1877. [Signed] H. Wallace, 20 shares,'—and delivered said book to said committee; such paper writing having been previously subscribed by divers other persons. And said Henry Wallace afterwards, at the solicitations of said committee, subscribed, in another book furnished by the committee, another paper writing, of which the following is a copy: 'We, the undersigned, do hereby respectively subscribe to the capital stock of the Cleveland, Tuscarawas Valley & Wheeling Railway Company the number of shares set opposite our names, of fifty dollars each, on the conditions that said railway shall be constructed to the Ohio river opposite the city of Wheeling, by the valley of Wheeling creek; and as soon as the work of construction is commenced of said railway on said creek, before July 1, 1877, we agree to pay five dollars on each share so subscribed, and the residue thereafter in such installments, at such times and places, and to such person or persons, as may be required by the directors of said railway; but said installments shall not exceed ten per centum per month after said first payment shall become due as aforesaid. Wheeling, West Va., March 1, 1877. [Signed] H. Wallace, by D. C. L., 20 shares,'—and delivered said last-mentioned book to said committee; such last-mentioned paper writing having been previously subscribed by divers other persons. Afterwards the said Henry Wallace departed this life; said books still remaining in the custody of said committee. After the death of said Henry Wallace, and all the subscriptions to the capital stock of said company which could be procured along the line of said proposed extension, and in the neighborhood of the southern terminus thereof, had been obtained, and which aggregated a sum less than $250,000, at the instance of surviving subscribers the evidences of all subscriptions which had been so procured, including the books aforesaid, were tendered to said company, and said company accepted the same as subscriptions to the capital stock of the company, and agreed to extend said railroad as had been proposed as aforesaid, and from the town of Bridgeport, along the west bank of the Ohio river, to a point on said river in the town of West Wheeling, Ohio. That at the time when said company accepted said subscriptions and agreed to make such extension, the officers of the company had no notice or information whatever of the death of Henry Wallace; and that the company did, before the first day of July, A. D. 1877, commence the construction of said railroad in the valley of Wheeling creek, and did, within a reasonable time thereafter, fully complete the same. And the court, being of

the opinion that upon the facts so found the law of this case is with the plaintiff, does consider and adjudge that the plaintiff recover of the defendant the sum of twenty-six hundred and four dollars and forty-four cents, and also their costs herein expended, taxed at \$——, to be made of the goods and chattels and effects which were of the said Henry Wallace remaining in their hands to be administered."

The district court affirmed the judgment so rendered upon these findings of fact. To reverse these judgments the present proceeding is prosecuted against Oscar Townsend, receiver of the plaintiff below.

Daniel Peck and Wm. P. Hayes, for plaintiffs in error. J. W. Tyler and Alexander & Macdonald, for defendants in error.

OWEN, J. As we rest the disposition of this case upon the single question whether the facts found by the trial court were sufficient to authorize the judgment rendered by it, none of the other numerous questions which the record presents are discussed in this opinion. By the findings of fact it will be seen that the railroad company proposed to construct its line of road, over a designated route, to the Ohio river opposite the city of Wheeling, provided that subscriptions to its capital stock would be made by persons residing along the proposed line, and near the southern terminus thereof, aggregating the sum ot \$250,000; that Henry Wallace, with other citizens of Wheeling, knowing of such propositicn, and being desirous to promote such extension, held a public meeting and appointed a committee to solicit subscriptions to the capital stock of the company; that Wallace thereafter, at the solicitation of this committee, signed the two papers declared upon, each in a book furnished by the committee; that other persons had previously signed these subscriptions; that upon his signing these writings, respectively, he delivered them to the committee; that he soon thereafter died,—these books remaining in the hands of the committee; that after his death, and when all the subscriptions to stock had been procured along the proposed line, and near the southern terminus, that the committee was able to secure, which aggregated less than the proposed \$250,000, the evidences of all these subscriptions were, at the instance of the surviving subscribers, tendered to and accepted by the company, which then agreed to extend its line of road as had before been proposed; that at the time of such acceptance and agreement the officers of the company had no notice or information of the death of Henry Wallace; that before the first day of July, 1877, the company commenced the construction of the proposed extension, and did, within a reasonable time thereafter, fully complete it.

Did the estate of Henry Wallace become bound by these subscriptions upon their delivery to and acceptance by the railroad company?

The proposition of the company was made at large, and not to these subscribers more than to any others who should first subscribe the required \$250,000. It does not even appear that the company knew, at any time prior to Wallace's death, of the existence of this committee, or that these subscriptions were being procured. The company was not bound to accept Wallace's subscription at any time during his life. It had made no agreement with Wallace nor with his co-subscribers. So far as the findings show, the company had no knowledge that Wallace had subscribed, and nothing was done by it on the faith of his subscription prior to his death. Suppose that another committee, having heard of the proposition of the company, had succeeded in procuring the requisite \$250,000 in subscriptions, tendered it to the company, which had accepted it, and agreed to perform its conditions, before this committee had tendered its subscriptions, would it be contended that the company would have been under any obligations to accept them? If anything is claimed from the proposition of the company, and its acceptance by the subscribers, it is a sufficient answer to say that the conditions of the proposition have never to this day been performed; that, after the death of Wallace, his surviving subscribers, finding that they had failed to raise the amount which the company had demanded in its proposition, proposed new terms to the company,—tendered a less amount in subscriptions, which was accepted,—and thereupon, for the first time in the history of these transactions, the company agreed, on its part, to perform the conditions upon which the subscriptions were made. And this was a new contract, to which Wallace was never a consenting party. Thus we see that the negotiations which actually led to the creation of mutual and binding obligations between the company and the surviving subscribers transpired after the death of Wallace.

It is maintained, however, that various persons subscribed after Wallace, and on the faith of his subscription. This does not appear from the findings of fact. For all that is shown by this finding Wallace may have been the very last subscriber. If these surviving subscribers consented to the delivery to the company of a dead man's subscription, they are in no situation to complain. It is also maintained that the company built the road on the faith of the subscription of Wallace and his co-subscribers. It appears that, at the time of the company's acceptance and agreement, its officers had no knowledge of Wallace's death, but, so far as the record shows to the contrary, it began the work with full knowledge that this committee had tendered it a dead man's paper. Counsel for the company maintain that "the committee so often referred to, which took these subscriptions. was rather the agent of the railway

company than of Wallace; * * * the company having ratified their action." If this view is tenable, then, by a familiar rule, notice to this committee was notice to the company of the death of Wallace; for it will be observed that there is no finding that the company had no notice of Wallace's death, but that its officers had none. Ordinarily, notice is carried to a corporation through its officers, but not necessarily so. While its officers are, in a sense, agents, its agents are not necessarily officers. Hence, if this committee was the agent of the company, by reason of the ratification of its acts by the latter, notice to the committee was notice to the company; and it would be incumbent on the latter to show that its agent had no notice of the death of Wallace. This is not shown. We do not deem it necessary, however, to rest our determination upon this view.

Until some action is taken on the basis of a subscription to a benevolent or other enterprise, it may be revoked. "The promise in such case stands as a mere offer, and may, by necessary implication, be revoked at any time before it is acted on. It is the expending of money, etc., or incurring of legal liability on the faith of a promise, which gives the right of action, and without which there is no right of action. Until action upon it, there is no mutuality, and being only an offer, and susceptible of revocation at any time before being acted upon, it follows that the death (or insanity) of the promisor, before the offer is acted upon, is a revocation of the offer." Pratt v. Trustees, 93 Ill. 475. See, also, Beach v. Church, 96 Ill. 179; 1 Whart. Cont. §§ 12, 528; Poll. Cont. 20; Dickinson v. Dodds, 2 Ch. Div. 475; Tayloe v. Insurance Co., 9 How. 390; 1 Redf. Ry. *203.

Here was an unaccepted conditional subscription by Wallace to the capital stock of the company. Indeed, looking to its substance and plain intent, rather than to its form, we find it to be no more than an offer to subscribe to stock upon certain named conditions. It was not a subscription to stock in the ordinary sense of that term. The company was not a party to it, and was under no obligation to accept it at any time during the life of Wallace. It was at best an unaccepted proposal. Before its acceptance, and, indeed, (so far as it is made to appear to us,) before the party to whom it was made had notice of it, the proposer died. It was a proposal capable of revocation at any time before acceptance, and death worked its complete revocation. There was error in rendering judgment upon it against the defendants below, for which error the judgments below are reversed.

STAMPER v. TEMPLE et al.

(6 Humph. 113.)

Supreme Court of Tennessee. Dec. Term, 1845.

This is an action of assumpsit brought in the county of Franklin. The declaration avers that defendant charged that G. B. and A. D. Alexander had murdered his son, D. M. Stamper; that he promised that if any person should arrest the said G. B. and A. D. Alexander, so that they should be brought to justice, he would pay to such person two hundred dollars; and that plaintiffs, after said promise, and confiding in the same, did arrest them and commit them to the custody of the sheriff of the county.

The defendant pleaded non assumpsit, and the case came on for trial, and was tried by Judge Marchbanks and a jury, and a verdict and judgment were rendered for the plaintiffs for $200. The defendant appealed.

Mr. Turney, for plaintiff in error. Mr. Venable, for defendants in error.

TURLEY, J. This is an action brought by Lassater and Temple against Stamper to recover the sum of two hundred dollars, which they allege is due to them as a reward for arresting Granville B. and Alfred D. Alexander, charged with murdering the son of Stamper.

The bill of exceptions discloses the following state of facts:

Some time in the month of September, 1843, the son of Stamper was killed, and himself severely wounded by the two Alexanders. On the evening after the unfortunate affray there were several persons at Stamper's house. He was lying on a bed, laboring under great bodily pain from his wounds, and great mental anguish for the loss of his son, who was at the time a corpse in his house, his wife and daughters half distracted. The subject of arresting the Alexanders was spoken of. Stamper said that he did not expect they would be taken that night; that he would put out a reward ahead of them; that he got up and went into the yard, where most of the company were assembled, and observed that he would give a reward of two hundred dollars to any person who would apprehend the Alexanders. To this remark one of the company observed, "Mr. Stamper, I don't want your money;" to which Stamper replied, "Gentlemen, I did not mean it for you."

This is all the proof as to the reward for the arrest being offered by Stamper.

Joseph Newman, the sheriff of the county, deposes that on the evening of a day in September, 1843, he received a message from Stamper informing him that his son had been murdered and himself severely wounded, and requesting him to come immediately to his house. Witness having just returned from Nashville, and being much fatigued, declined going, but sent his deputy Jonathan Lassater, one of the plaintiffs, who, on the next morning, delivered to him the bodies of the two Alexanders, whom he had arrested without process.

This was all the testimony in the case. The court charged the jury, "that to entitle the plaintiffs to recover against the defendant, he must have made himself liable to them by contract. If the Alexanders murdered his son and fled, and were arrested by the plaintiffs, the defendant, in the absence of a contract to that effect, would not be bound to pay them any reward. If the Alexanders killed defendant's son and fled, and upon that defendant offered a reward of two hundred dollars to any person who would arrest them, saying at the same time that he did not make his proposition to any person who was present, and the plaintiffs were present, they would not be entitled to a recovery; that if the defendant offered a reward of two hundred dollars to any person who would arrest the Alexanders, and the plaintiffs after the offering the reward by the defendant, but before they knew that it had been offered, arrested the Alexanders for the murder, the fact that they were at the time, ignorant that the reward had been offered would be no ground of defence against a suit brought for its recovery."

In this charge, the whole court agree that there is error. The judge in the first place charged the jury that there must be a contract of reward to be paid before a suit could be maintained for the recovery of the reward. To make a good contract there must be an aggregatio mentium, an agreement on the one part to give and on the other to receive. How could there be such an agreement if the plaintiffs in this case made the arrest in ignorance that a reward had been offered? The arrest would have been made not for the reward, but in discharge of the public duty.

But there are other objections arising out of the proof of higher character than this error in the charge of the judge.

We do not think that the proof establishes the fact that a reward of two hundred dollars was actually offered.

It appears that the defendant and his family were in deep affliction at the loss of his son; that he himself was laboring under the effect of severe wounds received from the same persons who had killed his son; that when the arresting of the persons who had perpetrated the outrage was spoken of he observed that he would give two hundred dollars to have them arrested. But to a remark of one of the company that he did not want any of his money, he said he did not intend it for them. Who did he intend it for then? For others who were not present? How did he suppose they were to know it? He made no public offer. He authorized no one to make it for him. We are constrained to believe that what is called an offered reward of two hundred dollars was nothing but a strong expression of his feelings of anxiety for the arrest of those who had so severely injured him, and this greatly increased by the

distracted state of his own mind, and that of his family; as we frequently hear persons exclaim, Oh! I would give a thousand dollars if such an event were to happen, or, vice versa. No contract can be made out of such expressions. They are evidence of strong excitement. but not of a contracting intention.

But, furthermore, Jonathan Lassater, in making the arrest, was in the line of his duty. He was deputy sheriff of the county where the outrage had been committed. He had been sent by the principal sheriff to attend to it in his stead. Under such circumstances, a majority of the court hold that as a matter of public policy he would not have been entitled to claim the reward had it been offered.

Upon the whole view of the case then, we reverse the judgment of the court, and remand the case for a new trial.

HEFFRON v. BROWN.

(40 N. E. 583, 155 Ill. 322.)

Supreme Court of Illinois. April 1, 1895.

Appeal from appellate court, First district. Assumpsit by Maggie Brown against Patrick H. Heffron. Plaintiff obtained judgment, which was affirmed by the appellate court. 54 Ill. App. 377. Defendant appeals. Affirmed.

Osborn Bros. & Burgett and W. J. Candlish, for appellant. L. M. Ackley and G. W. Brandt, for appellee.

MAGRUDER, J. This is an action of assumpsit brought by appellee against appellant for services as housekeeper and attendant in his household for a period of about five years and six months, from April, 1882, to November, 1887. Verdict and judgment were in favor of plaintiff below. The judgment has been affirmed by the appellate court, and the case is brought here by appeal from the latter court.

Prior to April, 1882, the family of appellant, who was a bachelor at that time, consisted of himself, his sister, and his mother, the latter being in feeble health. In April, 1882, his sister died of the smallpox, and he at once telegraphed to appellee, an adult woman, to come to Chicago, and take charge of his mother and the house. Appellee was a niece of his mother and his own cousin. She had worked for many years, from the time she was a little girl, in a family living in one of the suburban towns near Chicago, and had been in the habit of visiting her aunt and cousin at appellant's house about once in each month. She had never received her wages regularly while at work in the family employing her, but had allowed them to accumulate in their hands. She had $250 in money, saved from her previous earnings, when she went to live with appellant and his mother. She came to his house in response to his telegram, and remained an inmate of his family during said period of five years and a half, leaving shortly after his marriage, which occurred in the latter part of her stay there. When she came, appellant was living in a small cottage, but at the end of a month he moved into a three-story brick house, with dining room and kitchen in the basement, and sleeping rooms on the top floor. During said period, appellee was housekeeper, and had charge of the household generally. She did the marketing and cooking, and took care of the house, and acted as nurse and attendant for appellant's mother, who was sick with the asthma and rheumatism, and whose meals had to be carried to her. During the first three years there was a washerwoman to do the washing, and during the rest of the time a female servant was hired, on account of the increasing illness of the mother. There is evidence tending to show that appellee was treated as a member of the family, and came and went as she pleased, and received presents of money at Christmas, and sometimes used her cousin's carriage to ride in, and contracted some bills which were paid by him or his mother, but she received no compensation for her services, the money paid her for presents amounting during the whole time to not more than $80. It appears that she paid for her clothes, except one or two garments which were given her. and for some music lessons taken by her, out of her own money.

1. It is insisted that the court erred in admitting the testimony of two witnesses as to the value of appellee's services as housekeeper. We see no reason why the testimony was not properly admitted. As there was nothing to show that there was any agreement to pay appellee a particular amount, or at a particular rate, it was competent to show what her services were worth, if she was entitled to recover anything at all. One of these witnesses swore that she was a housekeeper, and had been such for four years, and knew the value of a housekeeper's services. The other swore that she had been 11 years in the employment business in Chicago, and was acquainted with the wages of housekeepers during that time. A sufficient foundation was laid to justify the expression of an opinion by each witness as to the value of the services rendered by appellee.

2. Objection is made to two instructions given for the plaintiff, and to the modification of two instructions asked by the defendant, and to the refusal of one instruction asked by the defendant. As to the latter, its substance is sufficiently embodied in the instructions given, and therefore no injury was done by its refusal. All the points urged against the instructions given and the instructions modified may be summed up in one objection,—that those instructions authorize the jury to find whether there was a contract, express or implied, to pay for appellee's services. It is claimed that no recovery could be had by the plaintiff unless there was an express contract by the appellant to pay her for her services, and that, if there was no express contract, none could be implied from the facts or circumstances. Where services are rendered by one admitted into the family as a relative, the presumption of law is that such services are gratuitous, and that the parties do not contemplate the payment of wages therefor. This presumption, however, may be overcome by proof. The proof necessary to overcome the presumption may be either of an express contract or of a contract established by such facts and circumstances as show that both parties, at the time the services were rendered, contemplated or intended pecuniary recompense other than that which arises naturally out of the family relation.

Miller v. Miller, 16 Ill. 296. A contract is express "when it consists of words written or spoken, expressing an actual agreement of the parties." It is implied "when it is evidenced by conduct manifesting an intention of agreement." 3 Am. & Eng. Enc. Law, p. 842. Anderson, in his Law Dictionary, says that a contract is express "when the agreement is formal, and stated either verbally or in writing, and is implied when the agreement is matter of inference and deduction." In Ex parte Ford, 16 Q. B. Div. 307, it was said that "whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted." In Marzetti v. Williams, 1 Barn. & Adol. 415, Lord Tenterden said: "The only difference between an express and an implied contract is in the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract, by circumstances, and the general course of dealing between the parties." In the same case Parke, J., said: "The only difference, however, between an express and an implied contract is as to the mode of proof. An express contract is proved by direct evidence, an implied contract by circumstantial evidence." And Patterson, J., said: "But the only distinction between the two species of contracts is as to the mode of proof. The one is proved by the express words used by the parties; the other, by circumstances showing that the parties intended to contract." An agreement may be said to be implied when it is inferred from the acts or conduct of the parties, instead of their spoken words. "The engagement is signified by conduct, instead of words." Bixby v. Moor, 51 N. H. 402.

This question has been before the supreme court of Wisconsin in a number of cases. In Hall v. Finch, 29 Wis. 278, where the plaintiff presented a claim against the estate of her deceased brother for the value of her services as housekeeper during several years while she resided in his house, acting and treated as the mistress thereof, the court, after stating the general rule that the relation existing between the parties, as parent and child, stepparent and stepchild, brother and sister, and the like, raises a presumption that no payment or compensation was to be made beyond that received by the claimant at the time, holds that this presumption can only be overcome by clear and unequivocal proof to the contrary; that the evidence must be clear, direct, and positive that the relation between the parties was that of debtor and creditor; that the party seeking to recover compensation for services rendered under such circumstances must show an "agreement or understanding that they were to be paid for." And the court there uses the following language: "In regard to such agreement or understanding, it is manifest from the nature of the case that it can in general be arrived at only by express stipulation between the parties, and accordingly we find the best considered authorities holding that an express contract must be shown." Then follows a review of quite a number of authorities, mostly Pennsylvania decisions, two of which (Hartman's Appeal, 3 Grant's Cas. 271, and Lynn v. Lynn, 29 Pa. St. 369) hold that there can be no recovery for services in such cases without proof of an express contract. In Pellage v. Pellage, 32 Wis. 136, where the action was by a son against his father for services rendered to the latter by the former after he became of age, it was held that, where such a relation of kindred exists, the law will imply no promise on the part of the father to pay for the services of the son, the presumption being that he rendered them gratuitously, or in consideration of having a home with his father, and being furnished with board and clothing and care and attention in sickness; that the son cannot recover for his services in such a case without showing that a contract existed between him and his father by which the latter agreed to pay for such services; that the proof of such contract is not to be placed upon the same grounds as a contract between strangers, unaffected by any personal relation; that the evidence of the contract must be positive and direct; that the contract cannot be inferred from circumstances and probabilities; and that "there should be evidence which would warrant a jury in finding that there was an express contract or agreement to that effect." In Tyler v. Burrington, 39 Wis. 376, where the plaintiff, having been received in infancy into a family not of kin to her, sought to recover for services rendered to such family, the doctrine of the Hall and Pellage Cases seems to be somewhat modified, it being held that "an express contract to pay, or the relation of master and servant, may be as fairly and incontrovertibly established by circumstantial evidence as by direct evidence"; that the mere fact of plaintiff's reception in her infancy into the family of the deceased implied no contract to pay her for any services she might render to it, "though such a contract might be implied from the surrounding circumstances"; "that, if it appeared expressly or from the surrounding circumstances that she was so received in the relation of a child, the law excludes an implied contract to pay her wages for her services; but that she could recover upon an express contract to pay her, which might be established by direct and positive evidence, or by circumstantial evidence equivalent to direct and positive"; that, failing to prove an express contract, "it rested with her to establish an implied contract by the surrounding circumstances"; that "mere expectation on his part to pay, and on her part to receive, wages, would not constitute an express contract, unless, by mutual expression of the expectation, it became con-

sensual"; that "expectation looks rather to an implied than an express contract"; and that, "if established by competent evidence as entering into the res gestæ, such expectations of these parties might give color to circumstances tending to show that they ripened into a mutual understanding,—an express contract." In Wells v. Perkins, 43 Wis. 160, where a stepson sued his stepfather for services rendered the latter after the plaintiff reached his majority, an instruction was condemned because it was open to the objection "of confounding circumstances from which a contract might be implied with circumstantial evidence of an express contract"; and it was held that the law excludes an implied contract, and that the plaintiff could only recover upon an express contract, which "might be established by direct and positive evidence, or by circumstantial evidence equivalent to direct and positive." It will be noticed that the cases in Wisconsin differ from the English cases in holding that an express contract may be established by circumstantial evidence.

In Ayers v. Hull, 5 Kan. 419, it was held that where the sister resides in the family of her brother, performing the ordinary services of a housekeeper, and receiving clothing and the benefit of a house for nearly eight years, without keeping any account, and without any promise or contract or understanding that she should receive wages, the law will not imply a contract for services rendered, nor hold the brother's estate chargeable with a claim made for such services for the first time after the death of the brother. See, also, Williams v. Hutchinson, 3 N. Y. 319, 5 Barb. 128. In Mills v. Joiner, 20 Fla. 479, where a daughter of full age brought suit against her father for services while living with him at his house and as one of his family, it was held to be a presumption of law that he was not bound to pay her, but that "this presumption may be overcome by proof of a special contract, express promise, or an implied promise, and such implied promise or understanding may be inferred from the facts and circumstances shown in evidence; and that "the jury should have been further instructed that if, under all the circumstances of the case, the services were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that compensation should be made for such services, then the jury should find an implied promise." In Scully v. Scully, 28 Iowa, 548, where a sister filed a claim against the estate of her deceased brother, a bachelor, for services in doing his housework while a member of his family, it was said: "Where it is shown that the person rendering the service is a member of the family of the person served, and receiving support therein, either as a child, a relative, or a visitor, a presumption of law arises that such services were gratuitous; and in such case, before the person rendering the service can recover, the express promise of the party served must be shown, or such facts or circumstances as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of making, compensation therefor." In Smith v. Johnson, 45 Iowa, 308, it was held that no recovery can be had in such cases where there is no express contract, and "it is not shown in the record that the services were performed with the expectation on the part of either that they were to be paid for."

We are inclined to hold that an express contract may be proved, not only by an actual agreement, by direct evidence, by the express words used by the parties, but also by circumstantial evidence; and that an implied contract may be proved by circumstances showing that the parties intended to contract, and by general course of dealing between them. In Miller v. Miller, supra, an instruction was approved which stated that it was "incumbent on the plaintiff to prove an express hiring or circumstances from which an express hiring may be reasonably inferred," etc. And in Brush v. Blanchard, 18 Ill. 46, it was said: "There is no evidence of an express contract to pay for services, nor are there any facts in evidence from which such contract can be implied." Similar language is also used in Faloon v. McIntyre, 118 Ill. 292, 8 N. E. 315, and in Collar v. Patterson, 137 Ill. 403, 27 N. E. 604. The strict rule laid down in the cases in Wisconsin and Pennsylvania has its basis in the danger of fraud and perjury by permitting any member of a family to insist on a greater share of the property of an estate than is given by the law, or by a will, upon the ground that it is due for services. The encouragement of claims for such services is to destroy the peace and harmony of families through the strife and controversy resulting therefrom. The rule in this state is stated in Miller v. Miller, supra, where we said: "Where one remains with a parent, or with a person standing in the relation of parent, after arriving at majority, and remains in the same apparent relation as when a minor, the presumption is that the parties do not contemplate payment of wages for services. This presumption may be overthrown, and the reverse established, by proof of an express or implied contract, and the implied contract may be proven by facts and circumstances which show that both parties, at the time the services were performed, contemplated or intended pecuniary recompense other than such as naturally arises out of the relation of parent and child." This language was quoted and approved in the recent case of Switzer v. Kee, 146 Ill. 577, 35 N. E. 160. But, where it is said that a contract to pay for such services may be implied, something more is meant than the mere promise to pay which the law implies where one person does work for another with the knowledge and approbation

of that other. The implied promise thus raised by the law is rebutted when there is shown such a relation between the parties as to exclude the inference that they were dealing on the footing of a contract. Ayers v. Hull, supra; 3 Am. & Eng. Enc. Law, p. 861. The evidence must show that, when the services were rendered, both parties expected them to be paid for. Miller v. Miller, supra; Byers v. Thompson, 66 Ill. 421; Fruitt v. Anderson, 12 Ill. App. 421. The facts and circumstances must be such as to show that, at the time the services were rendered, the one expected to receive payment and the other to make payment. Fruitt v. Anderson, supra.

If the expectation of each would not constitute a contract unless there was an expression of that expectation, such criticism would not apply here, because the jury were instructed as follows: "If the jury believe from the evidence that the defendant requested the plaintiff to do the services in question, and, by words or acts, knowingly gave her to understand that she would be paid for doing it, and that plaintiff, in compliance with such request (if there was any), did the work in question for the defendant, then she is entitled to recover." "The relationship existing between the parties, and the fact that they and defendant's mother lived together as a single household while the work was being done for which this suit is brought, will not bar a recovery in this case if the jury believe from the evidence that the defendant requested the plaintiff to do the service in question, and promised to pay her for it, or, by words or acts, knowingly led her to believe that she would be paid for doing it." The jury were further instructed that, where voluntary services are rendered by those sustaining family relations, the presumption of law is that the parties do not contemplate payment or receipt of wages; and that where services are rendered by those near of kin, or by those sustaining family relations, the law will imply no contract for compensation; and that, unless a contract to pay is shown in such case, no recovery can be had. It is true that in instructions asked by the defendant, and given for him, the jury were told that the plaintiff could not recover unless she proved by the preponderance of the evidence an express contract to pay for her services; but they were told, in another instruction, that an express contract might be established by circumstances and the conduct of the parties, or by words in connection therewith; and we do not think that the jury could have been misled when all the instructions are considered together as one charge, and in view of the evidence heretofore and hereinafter referred to. In Morton v. Rainey, 82 Ill. 215, plaintiff presented a claim for services against the estate of his deceased uncle, in whose family he had lived from the time he was 11 years old until he reached his majority, and during that time had labored for the deceased, and received his board, clothing, and medical attendance; and we there said: "While appellee, during minority, was provided by the deceased with clothing, medical attendance, and all the necessaries furnished by a parent to a child, after his majority he provided his own clothing, paid for his own washing, and in fact received nothing from the deceased except his board. Under such circumstances, the presumption that appellee was working as he did when a minor is removed, and the facts are sufficient to establish an implied contract on the part of the deceased to pay appellee what his services were reasonably worth." Such facts as were there held sufficient to establish an implied contract exist in the case at bar. In addition, appellee swore that, on three different occasions while she lived in appellant's house, she talked with his mother, in his presence, about her compensation, and during these conversations he said that he would pay her for her time. It is true that he contradicted her in reference to this matter, but it was for the jury to pass upon the evidence. The facts are settled by the judgment of the appellate court so far as we are concerned. We find no error in the record which, in our opinion, would justify a reversal. The judgment of the appellate court is affirmed. Affirmed.

MOULTON v. KERSHAW et al.

(18 N. W. 172, 59 Wis. 316.)

Supreme Court of Wisconsin. Jan. 8, 1884.

Appeal from circuit court, Milwaukee county.

Finches, Lynde & Miller, for appellants. Jenkins, Winkler & Smith, for respondent.

TAYLOR, J. The complaint of the respondent alleges that the appellants were dealers in salt in the city of Milwaukee, including salt of the Michigan Salt Association; that the respondent was a dealer in salt in the city of La Crosse, and accustomed to buy salt in large quantities, which fact was known to the appellants: that on the nineteenth day of September, 1882, the appellants, at Milwaukee, wrote and posted to the respondent at La Crosse a letter, of which the following is a copy:

"Milwaukee, September 19, 1882.

"J. H. Moulton, Esq., La Crosse, Wis.—Dear Sir: In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full car-load lots of 80 to 95 bbls., delivered at your city, at 85c. per bbl., to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order.

"Yours truly, C. J. Kershaw & Son."

The balance of the complaint reads as follows:

"And this plaintiff alleges, upon information and belief, that said defendants did not send said letter and offer by authority of, or as agents of, the Michigan Salt Association, or any other party, but on their own responsibility. And the plaintiff further shows that he received said letter in due course of mail, to-wit, on the twentieth day of September, 1882, and that he, on that day, accepted the offer in said letter contained, to the amount of two thousand barrels of salt therein named, and immediately, and on said day, sent to said defendants at Milwaukee a message by telegraph, as follows:

"'La Crosse, September 20, 1882.

"'To C. J. Kershaw & Son, Milwaukee, Wis.: Your letter of yesterday, received and noted. You may ship me two thousand (2,000) barrels Michigan fine salt, as offered in your letter. Answer. J. H. Moulton.'

"That said telegraphic acceptance and order was duly received by said defendants on the twentieth day of September, 1882, aforesaid; that two thousand barrels of said salt was a reasonable quantity for this plaintiff to order in response to said offer, and not in excess of the amount which the defendants, from their knowledge of the business of the plaintiff, might reasonably expect him to order in response thereto.

"That although said defendants received said acceptance and order of this plaintiff on said twentieth day of September, 1882, they attempted, on the twenty-first day of September, 1882, to withdraw the offer contained in their said letter of September 19, 1882, and did, on said twenty-first day of September, 1882, notify this plaintiff of the withdrawal of said offer on their part; that this plaintiff thereupon demanded of the defendants the delivery to him of two thousand barrels of Michigan fine salt, in accordance with the terms of said offer, accepted by this plaintiff as aforesaid, and offered to pay them therefor in accordance with said terms, and this plaintiff was ready to accept said two thousand barrels, and ready to pay therefor in accordance with said terms. Nevertheless, the defendants utterly refused to deliver the same, or any part thereof, by reason whereof this plaintiff sustained damage to the amount of eight hundred dollars.

"Wherefore the plaintiff demands judgment against the defendants for the sum of eight hundred dollars, with interest from the twenty-first day of September, 1882, besides the costs of this action."

To this complaint the appellants interposed a general demurrer. The circuit court overruled the demurrer, and from the order overruling the same the defendants appeal to this court.

The only question presented is whether the appellant's letter, and the telegram sent by the respondent in reply thereto, constitute a contract for the sale of 2,000 barrels of Michigan fine salt by the appellants to the respondent at the price named in such letter. We are very clear that no contract was perfected by the order telegraphed by the respondent in answer to appellants' letter. The learned counsel for the respondent clearly appreciated the necessity of putting a construction upon the letter which is not apparent on its face, and in their complaint have interpreted the letter to mean that the appellants by said letter made an express offer to sell the respondent, on the terms stated, such reasonable amount of salt as he might order, and as the appellants might reasonably expect him to order, in response thereto. If in order to entitle the plaintiff to recover in this action it is necessary to prove the allegations, then it seems clear to us that the writings between the parties do not show the contract. It is not insisted by the learned counsel for the respondent that any recovery can be had unless a proper construction of the letter and telegram constitutes a binding contract between the parties. The alleged contract being for the sale and delivery of personal property of a value exceeding $50, is void by the statute of frauds, unless in writing. Section 2308, Rev. St. 1878. The counsel for the respondent claim that the letter of the appellants is an offer to sell to the respondent, on the terms mentioned, any reasonable quantity of Michigan fine salt that he might see fit to order, not less than one car-load. On the other hand, the counsel for the appellants claim that the letter is not an

offer to sell any specific quantity of salt, but simply a letter such as a business man would send out to customers or those with whom he desired to trade, soliciting their patronage. To give the letter of the appellants the construction claimed for it by the learned counsel for the respondent, would introduce such an element of uncertainty into the contract as would necessarily render its enforcement a matter of difficulty, and in every case the jury trying the case would be called upon to determine whether the quantity ordered was such as the appellants might reasonably expect from the party. This question would necessarily involve an inquiry into the nature and extent of the business of the person to whom the letter was addressed, as well as to the extent of the business of the appellants. So that it would be a question of fact for the jury in each case to determine whether there was a binding contract between the parties. And this question would not in any way depend upon the language used in the written contract, but upon proofs to be made outside of the writings. As the only communications between the parties, upon which a contract can be predicated, are the letter and the reply of the respondent, we must look to them, and nothing else, in order to determine whether there was a contract in fact. We are not at liberty to help out the written contract, if there be one, by adding by parol evidence additional facts to help out the writing so as to make out a contract not expressed therein. If the letter of the appellants is an offer to sell salt to the respondent on the terms stated, then it must be held to be an offer to sell any quantity at the option of the respondent not less than one car-load. The difficulty and injustice of construing the letter into such an offer is so apparent that the learned counsel for the respondent do not insist upon it, and consequently insist that it ought to be construed as an offer to sell such quantity as the appellants, from their knowledge of the business of the respondent, might reasonably expect him to order. Rather than introduce such an element of uncertainty into the contract, we deem it much more reasonable to construe the letter as a simple notice to those dealing in salt that the appellants were in a condition to supply that article for the prices named, and requesting the person to whom it was addressed to deal with them. This case is one where it is eminently proper to heed the injunction of Justice Foster in the opinion in Lyman v. Robinson, 14 Allen, 254: "That care should always be taken not to construe as an agreement letters which the parties intended only as preliminary negotiations."

We do not wish to be understood as holding that a party may not be bound by an offer to sell personal property, where the amount or quantity is left to be fixed by the person to whom the offer is made, when the offer is accepted and the amount or quantity fixed before the offer is withdrawn. We simply hold that the letter of the appellants in this case was not such an offer. If the letter had said to the respondent, "We will sell you all the Michigan fine salt you will order, at the price and on the terms named," then it is undoubtedly the law that the appellants would have been bound to deliver any reasonable amount the appellant might have ordered, possibly any amount, or make good their default in damages. The case cited by the counsel decided by the California supreme court (Kleler v. Ybarru, 3 Cal. 147) was an offer of this kind with an additional limitation. The defendant in that case had a crop of growing grapes, and he offered to pick from the vines and deliver to the plaintiff, at defendant's vineyard, so many grapes then growing in said vineyard as the plaintiff should wish to take during the present year at 10 cents per pound on delivery. The plaintiff, within the time and before the offer was withdrawn, notified the defendant that he wished to take 1,900 pounds of his grapes on the terms stated. The court held there was a contract to deliver the 1,900 pounds. In this case the fixing of the quantity was left to the person to whom the offer was made, but the amount which the defendant offered, beyond which he could not be bound, was also fixed by the amount of grapes he might have in his vineyard in that year. The case is quite different in its facts from the case at bar. The cases cited by the learned counsel for the appellant, (Beaupre v. Tile Co., 21 Minn. 155, and Kinghorne v. Telegraph Co., U. C. 18 Q. B. 60,) are nearer in their main facts to the case at bar, and in both it was held there was no contract. We, however, place our opinion upon the language of the letter of the appellants, and hold that it cannot be fairly construed into an offer to sell to the respondent any quantity of salt he might order, nor any reasonable amount he might see fit to order. The language is not such as a business man would use in making an offer to sell to an individual a definite amount of property. The word "sell" is not used. They say, "We are authorized to offer Michigan fine salt," etc., and volunteer an opinion that at the terms stated it is a bargain. They do not say, "We offer to sell to you." They use general language proper to be addressed generally to those who were interested in the salt trade. It is clearly in the nature of an advertisement or business circular, to attract the attention of those interested in that business to the fact that good bargains in salt could be had by applying to them, and not as an offer by which they were to be bound, if accepted, for any amount the persons to whom it was addressed might see fit to order. We think the complaint fails to show any contract between the parties, and the demurrer should have been sustained.

The order of the circuit court is reversed, and the cause remanded for further proceedings, according to law.

MISSISSIPPI & DOMINION STEAMSHIP CO., Lim'ted, v. SWIFT et al.

(29 Atl. 1063, 86 Me. 248.)

Supreme Judicial Court of Maine. Feb. 24, 1894.

Report from supreme judicial court, Cumberland county.

Action by the Mississippi & Dominion Steamship Company, Limited, against Gustavus F. Swift and others. On report. Judgment for defendants.

This was an action for the recovery of $24,690.08 damages for breach of a contract claimed by the plaintiff to have been made with the defendants, by which it chartered to the defendants certain space, at a price designated, on the three steamers, Vancouver, Sarnia, and Oregon, owned by the plaintiff company, which space was to be fitted with refrigerators, and used by the defendants for the shipping of dressed meat.

The principal part of the evidence consists of letters and telegrams between David Torrance & Co., steamboat agents of the plaintiff company, who had an office both in Montreal and Portland, and these defendants, represented by Mr. Edwin C. Swift, at Boston. The correspondence, beginning November 19, 1889, and continuing until the latter part of 1890, is stated in the opinion of the court.

The plaintiff claimed that the minds of the parties were together, and that the contract was complete April 5, 1890. Plea, general issue, and the statute of frauds. The defendants denied that any contract was made or signed.

Symonds, Snow & Cook, for plaintiff. Savage & Oakes, Freedom Hutchinson, and Clarence Hale, for defendants.

EMERY, J. A full exposition of our judgment in this case requires an extended statement of the evidence and the authorities, notwithstanding constant effort at abridgment.

The plaintiff steamship company owned and operated a line of ocean steamships plying between Liverpool and Montreal in the summer, and between Liverpool and Portland in the winter. The American agents of the company were David Torrance & Co., with offices in Montreal and in Portland. Three of the steamships were named, respectively, Sarnia, Oregon, and Vancouver.

The defendants, Swift & Co., located at Boston, were large shippers of dressed meats from the United States to Europe. This kind of merchandise, being fresh meat, could not be shipped, stowed, and transported across the ocean like ordinary merchandise, upon mere bill of lading. Its suitable transportation required that certain spaces in the steamship should be set apart for its reception, refrigeration, and care during the voyage. This space was necessarily engaged for some time prior to the shipping, that it might be properly fitted up; and it was necessarily, to some extent, at the disposal of the shipper, and under his control, during the term of the contract. There were two modes of refrigeration in use,—one by ice, and a new one by the Kilbourn process, so called.

In this condition of affairs, Torrance & Co., November 19, 1889, opened a correspondence with Swift & Co. relative to space on the company's steamers for the transportation of dressed beef. In the first letter, November 19th, Torrance & Co. advised Swift & Co. that they were prepared to negotiate for such space on the Sarnia and Oregon, and were prepared to offer such space at 20 shillings per 40 cubic feet on those steamers, retaining liberty to substitute the Vancouver for one of the others later on. There was no reply to this letter, and on January 19, 1890, Torrance & Co. again wrote Swift & Co., naming the sailing dates of the various steamers, and inviting bids. No reply being received, Torrance & Co., on February 6th, again invited the attention of Swift & Co. to the matter. Swift & Co., February 12th, wrote Torrance & Co. that one of their men would call upon them with reference to the matter. There seems then to have been some verbal conference, for, on March 3d, Torrance & Co. wrote that the Liverpool managers were not inclined to accept the price named by Swift & Co., and "would only agree to fix the ships provided you are willing to pay twenty shillings, and take the space where we think it would be most profitable for the ship," and suggested that, if Swift & Co. were inclined to do anything on these terms, they might communicate with either the Montreal or Portland house. March 24th, Torrance & Co. again wrote (this time from Portland, the other letters having been from Montreal) that they would not be prepared to enter into a contract for the Vancouver, Sarnia, and Oregon unless for one year, from Montreal in summer, and Portland in winter, they reserving the right to withdraw the Vancouver in the winter.

The next day, March 25th, Swift & Co. wired in answer as follows: "Answering your letter, 24th, if accepted at once, we will take space in the three ships named, to be mutually agreed on at twenty shillings flat for summer navigation; we agreeing to continue shipments during the winter, if ships go from Portland or Boston, we paying your market price for beef space. As we are negotiating with other parties, would appreciate your answer at once." Torrance & Co. wired same day from Montreal as follows: "We cannot change offer already made by our Portland house under instructions from Liverpool." Their Portland house, on the next day, March 26th, wrote for an answer to their proposition. On March 27th, Swift & Co. wired to the Portland house as follows: "Your favor of 26th just received. We accept your proposition of 24th on three steamers. Please confirm by wire."

In the meantime, between the 24th and

27th of March, Torrance & Co., not hearing from Swift & Co., began negotiations with other parties, and so informed Swift & Co. In answer to their telegram of the 27th. March 29th, Swift & Co. wired that they wanted the space, and thought it should be accorded to them. April 1st, Torrance & Co. wired as follows: "The decision has been given in your favor, and the three ships mentioned are at your disposal. Sarnia expected Portland Thursday. Will sail following Thursday." On the same day Torrance & Co. wrote that they had been relieved of their negotiations, and said, "We hasten to advise you that we are willing to contract with you for the three steamers on the terms already mentioned, and conditional on your putting in the cold air blast instead of the ice, and we have wired you accordingly in these words: 'The decision has been given in your favor and the three ships mentioned are at your disposal. Sarnia expected Portland Thursday, and will sail the following Thursday.' You can arrange with our Portland house in reference to the contract. * * *" To this telegram, Swift & Co. wired answer as follows: "Your message received. Thanks for same. Shall we refrigerate Sarnia by old process this trip, or wait till first of May, and use Kilbourn machine? We have two machines to be delivered early in May." Torrance & Co. replied by wire same day, April 1st, as follows: "Wait till May. We don't want old process." On April 5th, Swift & Co. wrote as follows: "Your favor of April 1st received. Replying to same, will say we will arrange for fitting the three ships by the Kibourn process, as per your request. I notice you say: 'The Toronto, one of our steamers sailing between here and Liverpool all next season, is due at Portland on the 10th instant, and should sail about the 15th. We are open to negotiation for her, if you are so inclined.' I suppose 'all next season' means the coming summer navigation for Montreal. Will you kindly write us, saying where this ship will sail from during next winter. If she is to be in the regular service, we shall be pleased to negotiate with you."

Here the correspondence ceased for a time. In the meantime, about the last of March, Mr. Foster, agent of Swift & Co., visited the steamers in Portland, took measurements of space in different steerages, and had some conversation with the company's marine superintendent about the location of spaces for refrigerators. He indicated what spaces he should want, but no express stipulation was made that he should have them, or would take them. Swift & Co. did nothing toward refrigerating any space, and the steamers carried cargo in all the steerages as usual, leaving no space unoccupied.

July 8, 1890, Swift & Co. wired as follows: "Have no copy of contract. Please mail one to-day." On the same day, Torrance & Co. replied as follows: "We must apologize for not having earlier sent you copy of the contract for dead-meat space. We shall, however, mail it to you to-morrow without fail." The next day, July 9th, they further wrote as follows: "Owing to this being our English mail day, we have been unable to put your contract in form, as promised, but we will send it to you to-morrow." July 10th, they wrote again as follows: "We now inclose you copy of our proposed contract, which we trust may be found to be in accordance with the understanding arrived at last March. We must apologize for not sending this yesterday, but, as it was our mail day, we were more than busy, and this must be our excuse. We trust you may soon be prepared to begin your shipments." The draft of contracts inclosed was quite long. The only date on the draft was, "Montreal, 1890." This draft was never signed.

July 24th, Swift & Co. wired that they could not use Kilbourn process, and must use ice, and inquired if that would be satisfactory. July 26th, Torrance & Co. replied by wire as follows: "Have cable authorizing you using ice, but the other preferred. Can you refrigerate Vancouver? Will be here to-morrow. Sails Wednesday week."

Swift & Co. replied on July 28th that they could not refrigerate the Vancouver, and that their Mr. Foster would call on Torrance & Co. Wednesday morning. At this point the draft of contract had not been signed. Swift & Co. had taken no spaces, and had made no shipments. The company had set apart no spaces, but had filled them, as usual, with cargo.

This state of affairs continued till September 24, 1890, when Torrance & Co. wrote to persuade Swift & Co. to hasten matters. Swift & Co. replied, September 25th, that they did not feel like assuming the responsibility of shipments in warm weather by either process, as at present working. There was other correspondence following this, and running up to October, 1891, in which Torrance & Co. insisted that Swift & Co. should carry out the arrangement, and Swift & Co. refused to recognize any arrangement as concluded. The result was that March 19, 1892, this suit was brought to recover damages for the refusal of Swift & Co. to carry out the contract claimed by the plaintiffs to have been made. The company only claims as damages the profits at 20 shillings per 40 cubic feet, inasmuch as it filled the spaces, though at a less rate.

The plaintiff now contends that it appears from this correspondence, as explained by the oral testimony, that the terms of a complete contract were mutually agreed upon, April 5th, by Swift & Co.'s letter of that date, and that the parties then had mutually signified an intention to be bound. The defendants contend that the correspondence and the circumstances do not show that the terms of such a contract were then or ever agreed upon, and, further, that the correspondence and circumstances do show that the parties con-

templated that such terms as should be agreed upon should be expressed in some formal instrument, to be written and signed before any contract should be considered as complete. A formal draft of the terms of a contract was prepared by the plaintiff, but was not signed by either party. Was there a complete contract without that signing?

The burden is upon the plaintiff to maintain the affirmative.

Upon this question the diligent counsel have cited numerous cases where a similar question has arisen and been discussed. A study of these cases has not been profitless. We summarize a few, and quote from the opinions of several eminent judges. In Chinnock v. Ely, 4 De Gex, J. & S. 638, the defendant's solicitors wrote to the plaintiff, naming the price for an estate about which they had been negotiating. The plaintiff wrote a letter in which he agreed to give the price named, and then added, "I shall be obliged if you will forward me the usual contract." In reply the defendant's solicitors wrote: "We have been instructed by the Marchioness of Ely to proceed with the sale to you of these premises. The draft contract is being prepared, and will be forwarded to you for approval in a few days." Lord Chancellor Westbury held that, so far, the parties were in treaty, merely, and that without the execution of the draft mentioned there was no contract concluded. In Bonnewell v. Jenkins, 8 Ch. Div. 70, the defendant's agents offered certain premises for sale. The plaintiff wrote the agents, making an offer of £800 for the estate. The agents wrote in reply as follows: "We are instructed to accept your offer of £800 for these premises, and have asked Mr. Jenkins' solicitor to prepare contract." The lord justices of appeal held that there was a concluded contract. Thesiger, L. J., said, "The mere reference to a preparation of an agreement, by which the terms agreed upon would be put into a more formal shape, does not prevent the existence of a binding contract." In Rossiter v. Miller, 5 Ch. Div. 648, there was much correspondence about a sale of certain lots of land, and the question arose whether the correspondence showed a completed contract, without the formal draft which had been referred to in some of the letters. James, L. J., said, "The reasonable view of the case is that the parties intended the signing of the formal contract to be a condition precedent." Coleridge, C. J., said, "If a set of terms be agreed upon in writing, they constitute a contract, although it may be the intention of the parties that they should be put into a more formal shape; but here a set of terms was never agreed to." Baggallay, L. J., said, "The letters left the defendant a right to believe that the signing of a formal contract was necessary to create a binding agreement." In the same case, upon an appeal to the house of lords (3 App. Cas. 1124), Lord Hatherly said: "Although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is an agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, though only by letter, an acceptance clearly by letter will not the less constitute an agreement, in the full sense, between the parties, merely because the letter may say, 'We will have this agreement put in due form by a solicitor.'" Lord O'Hagan said, "The correspondence gives no color to the suggestion that the contract was not final, and was not considered to be final by all the parties to it, because the formal agreement, embodying its already settled terms, had not been furnished." Lord Blackburn said: "The mere fact that the parties have expressly stipulated that there shall be afterwards a formal agreement prepared, embodying the terms, which shall be signed by the parties, does not, by itself, show that they continue merely a negotiation. It is a matter to be taken into account, in construing the evidence, and determining whether the parties have really come to a final agreement or not; but as soon as the fact is established of the final mutual assent of the parties, so that those who draw up the final agreement have not the power to vary the terms already settled, I think the contract is completed." In the same opinion, Lord Blackburn further said: "Parties do often enter into negotiation, meaning that, when they have (or think they have) come to one mind, the results shall be put into formal shape, and then (if, on seeing the result in that shape, they find they are agreed) signed and made binding, but that each party is to reserve to himself the right to retire, if, on looking at the formal contract, he finds that, though it may represent what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think the parties ought not to be held bound till they have executed the formal agreement." In Ridgway v. Wharton, 6 H. L. Cas. 238, Lord Chancellor Cranworth said: "If parties have entered into an agreement, they are not the less bound by that agreement because they say, 'We sent it to a solicitor to have it reduced into form;' but when the parties negotiate, and do not say so, the mere fact that they do send it to a solicitor to have the matter reduced into form affords to my mind generally cogent evidence that they do not intend to bind themselves till it is reduced into form." Lord Wensleydale said: "These cases often occur in courts of law, and the question then always is whether the parties mean to embody the contract made by parol in writing. If they do, nothing binds them till it is written. If they enter into a contract with a view to a written agreement, nothing will bind them but that written agreement, and that quite independently of the statute of frauds, applying to all

agreements. * * * If the parties agree finally to be bound by any terms, and then, for the sake of preserving a memorial, having agreed to the original terms, they get a document drawn up, there is no doubt they are bound by the original terms." In Morrill v. Mining Co., 10 Nev., at page 135, the court declared the general rule to be that where the parties enter into any general agreement, and the understanding is that it is to be reduced to writing, or, if it is already in a written form, that it is to be signed before it is to be acted on or to take effect, it is not binding until it is so written or signed. In Methudy v. Ross, 10 Mo. App. 106, the court said: "The mere fact that a written contract was to be subsequently prepared does not show that a final agreement between the parties was not made, but it tends to show it; and in this case we think it clear that there was to be a more explicit agreement, which was to be reduced to writing, that this was not done, and that there was no meeting of minds." In Eads v. Carondelet, 42 Mo. 113, the plaintiff made to the city of Carondelet a written proposition, containing the terms on which he would build gunboats in that city. The city council passed an ordinance reciting the proposition, and expressly accepting it as made, but, in the second section of the ordinance, directed and empowered the mayor to enter into a written contract with the plaintiff, and employ counsel to draft the contract. The plaintiff carried out his proposition, but the city failed to perform any part. Held, that the city was not bound, as further formality was contemplated. In Commissioners v. Brown, 32 N. J. Law, 504, Brown made a proposition to the commissioners to do certain work in laying pipe. The commissioners accepted the proposition, and directed a written contract to be prepared. This was done, but it was not signed. Held, that the commissioners were not bound. In this case, however, the law provided that the contracts of the water commissioners should be in writing. This fact showed conclusively that a written contract must have been contemplated. In Congdon v. Darcy, 46 Vt. 478, the negotiation was for building a dwelling house by the plaintiff for the defendant. Everything was agreed upon, and it was also agreed that the contract should be put in writing if the defendant desired. The defendant afterwards expressed such desire, and a writing was prepared, embodying the agreement, but the defendant refused to sign it. Held, there was no completed contract.

From these expressions of courts and jurists, it is quite clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument, and attested by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: If the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract. If, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed.

In determining which view is entertained in any particular case, several circumstances may be helpful, as whether the contract is of that class which are usually found to be in writing, whether it is of such nature as to need a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract.

Still, with the aid of all rules and suggestions, the solution of the question is often difficult, doubtful, and sometimes unsatisfactory. An illustration of this is the case of Rossiter v. Miller, above quoted from. In that case, Lord Chief Justice Coleridge and Lord Justices James and Baggallay, three of England's most distinguished judges, were clear that there was no contract, for want of a formal draft. Lord Chancellor Cairns and Lords Hatherly, Blackburn, and Gordon, equally able and eminent jurists, were confident in the contrary opinion.

We come now to the consideration of the circumstances and correspondence in this case.

The attempt was to negotiate a contract for the use of space on ocean steamers, of which the shippers were to have control to some extent, and in which they were to set up their appliances, and load and care for their own merchandise. This arrangement is quite different from the ordinary contract of affreightment. It is like a charter party, which is almost universally reduced to formal written draft.

The negotiations contemplated not simply a contract for one area of space on a single steamer for a single trip. The contract was to be for a year, and for different areas of space on three different ships. The interests of the contracting parties in those spaces were so various, and, if not conflicting, yet in such close contact, that a contract would need to contain many stipulations in order to sufficiently define the rights and duties of the parties. The draft prepared by the

steamship company would, if printed in this type, occupy over three pages of this volume. It contained some 21 distinct stipulations, many of them nowhere alluded to in the correspondence or conversations, and yet seemingly essential to be agreed upon in a contract for chartering space on ocean steamers for the transportation of dressed meats. It had annexed, as a part of itself, a long, printed, blank bill of lading. The elder Torrance testified that all the details in the written draft were the well-understood custom of the trade, and understood in every similar contract. He also testified that "the contract was carefully drawn up," and that when he drew it he had before him several other contracts. So far as the case shows, the draft was entirely in manuscript. No printed blanks seem to have been in existence, as there probably would have been, had the numerous details become crystalized into a well-understood custom. The defendants deny the existence of any such custom or understanding.

The claim of the plaintiff company that it would have made nearly $25,000 profits by such a contract shows that the negotiations were not about a trifle.

The correspondence seems to indicate that a formal draft of the contract was in the minds of the parties, or at least in the mind of the defendants, as the only authoritative evidence of a contract. In the first letter,—that of November 19th,—Torrance & Co., the plaintiff's agents, write that they are authorized "to make a contract for dressed beef on our steamers Sarnia and Oregon, and we hasten to advise you that we are prepared to discuss the matter with you." In the second letter, they invite a bid. In the letter of March 3, 1890, they name terms, and then say, "If you are inclined to do anything on these terms, you might further communicate with us, or our Portland house." In the letter of March 24th, from Portland, they say, "We would not be prepared to enter into a contract with you for the Vancouver, Sarnia, and Oregon, unless for one year, from Montreal during the summer, and Portland in winter, we reserving the right to withdraw Vancouver during the winter." In the letter of April 1st, they say, "You can arrange with our Portland house in reference to the contract." July 8th the defendants wired for a copy of the contract to be sent. On the same day, Torrance & Co. write, apologizing for neglect to send copy. July 10th, Torrance & Co. send the written draft which has been above described, and write, "We now inclose you copy of our proposed contract, which we trust may be found in accordance with the understanding arrived at last March."

Neither party, during all the correspondence, seems to have made any change in his business operations by reason of anything in the correspondence. No dressed meats were shipped by the defendants, or offered for shipment. No space was reserved by the plaintiff, and there was no delay or hindrance suffered in its regular business.

The case is by no means free from doubt and difficulty, but due reflection and study of the evidence have at the last brought us to the conclusion that what the plaintiff claims to have become a perfected contract on April 5, 1890, by the defendants' letter of that date, was at the most only the acceptance of the proposed basis of a contract, which was yet to be perfected as to details, and put in writing, and that the defendants did not have, nor signify, any intention to be bound until the written draft had been made and signed.

Judgment for defendants.

MARTIN v. FLAHARTY et al.

(32 Pac. 287, 13 Mont. 96.)

Supreme Court of Montana. Feb. 6, 1893.

Appeal from district court, Gallatin county; Frank K. Armstrong, Judge.

Ejectment by J. P. Martin, administrator, against Martha Flaharty and others. Judgment for defendants. From an order refusing a new trial, plaintiff appeals. Affirmed.

E. P. Cadwell and J. L. Staats, for appellant. Luce & Luce, for respondents.

PEMBERTON, C. J. This is a suit in ejectment instituted in the court below by appellant as administrator of Rebecca Githens, deceased. The complaint is such a one as is ordinarily employed in such actions. The answer contains a denial of all of the material allegations contained in the complaint, and alleges affirmatively that the deceased was not the owner of the demanded premises at the time of her death, but was the tenant of the respondents; that, as she did not die seised of any estate in the premises, her administrator, the appellant, cannot maintain this action. Both parties in the court below having expressly waived a jury, the case was tried by the court. The findings and judgment of the court below were in favor of the respondents. The appellant filed his motion for a new trial, which was overruled, and from the order of the court, overruling his motion for a new trial, this appeal is taken.

The facts of the case are substantially as follows: The deceased, Rebecca Githens, was the mother of the respondents. On the 2d day of January, 1888, the deceased, who was then seised in fee of the premises in dispute, executed a deed to the demanded premises to the respondents. On the same day the respondents executed a lease to the same premises to the deceased for the term of her natural life, and delivered the same to the deceased. The proof is not positive that the deed was actually then delivered by the grantor to the grantees; that is, by manual delivery. Some months after the execution of the said deed and lease, the deceased, in company with Mrs. Flaharty, one of the grantees, took both of said instruments to the Gallatin Valley Bank, and delivered them to the assistant cashier. This inscription was written on the outside of said paper: "To deliver to Mrs. Githens, and, in case of her death, to Mrs. Flaharty." Mrs. Githens died some months after the delivery of these papers to the bank, without even calling for them, and without even attempting or expressing any desire to regain the possession of them. After the death of Mrs. Githens the papers were delivered to Mrs. Flaharty. While these papers were in the bank, Mrs. Githens spoke of them to witnesses, saying the "girls' deed" (meaning the respondents) was in the bank. The evidence also shows that the deceased occupied the demanded premises under said lease from its execution until her death. After the death of Mrs. Githens the respondents took possession of the demanded premises, and have exercised control thereof ever since. The deceased, in her lifetime, while said papers were in the bank, spoke of both the deed and lease being in the bank, and of the deed as belonging to the respondents. Upon this showing of facts appellant contends there was no delivery of said deed, that the deceased never lost control over it during her lifetime, and that the delivery thereof was void. Counsel for the appellant concedes that if the deed was delivered he has no case. Respondents, of course, claim that the deed was delivered. What, then, is a delivery? And how can the delivery be shown?

In 5 American and English Encyclopedia of Law, (page 447,) we find this doctrine asserted: "The intention always controls the determination of what constitutes a sufficient delivery; and it may be manifested by acts or by words, or by both, in the most informal manner. But either acts or words manifesting the intention must be present, in order to constitute a good delivery. But the deed need not be actually delivered, if the grantor intends the execution to have the effect of a delivery, and the parties act upon this presumption. Delivery will be presumed from the fact that the deed was executed before the witnesses, and declared to be delivered in their presence." And see cases cited in notes.

In Washburn on Real Property (volume 3, 5th Ed., p. 305, par. 28) the author says: "Thus, a deed may be delivered to the grantee himself, or it may be delivered to a stranger unknown to the person for whose benefit it is made, if so intended by the maker; and this may be an effectual delivery the moment it is assented to by the grantee, even though the grantor may in the mean time have deceased." See authorities cited in note.

In Devlin on Deeds (volume 1, § 262) the author holds the doctrine of delivery of a deed to be one of intention: "As no particular form of delivery is required, the question whether there was a delivery of a deed or not, so as to pass title, must in a great measure, where it is not clear that an actual delivery has been effected, depend upon the peculiar circumstances of each particular case. The question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed. 'The doctrine seems to be settled beyond a reasonable doubt,' remarks Justice Atwater, 'that where a party executes and acknowledges a deed, and afterwards, either by acts or words, expresses his will that the same is for the use of the grantee, especially where the assent of the grantee appears to the transaction, it shall be sufficient to convey the estate, though the deed remains in the hands of the grantor. * * * The main thing which the law looks at is whether the grantor indicates his will

that the instrument should pass into the possession of the grantee; and, if that will is manifest, then the conveyance inures as a valid grant, although, as above stated, the deed never comes into the hands of the grantee.' A deed does not become operative until it is delivered with the intent that it shall become effective as a conveyance. Whether such intent actually existed is a question of fact to be determined by the circumstances of the case, and cannot, in the majority of instances, be declared as a matter of law. A deed was held complete and valid where it had been prepared for execution, read, signed, and acknowledged before a proper officer, notwithstanding the testimony of the witnesses present at its execution that there was no formal delivery, and the fact that the deed, after the grantor's death, was found among his private papers in his desk."

In Doe dem. Garnons v. Knight, 11 E. C. L. 632, Bayley, J., holds that "where a party to an instrument seals it, and declares, in the presence of a witness, that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping of the deed in his hands, it is a valid and effectual deed; and delivery to the party who is to take by the deed, or to any person for his use, is not essential;" and cites a great number of cases in support of this doctrine.

In Wheelwright v. Wheelwright, 2 Mass. 447, in a case very similar to the one at bar, Parsons, C. J., delivering the opinion of the court, holds that "a deed signed, sealed, delivered, and acknowledged, which is committed to a third person, as the deed of the grantor, to be delivered over to the grantee on a future event, is the deed of the grantor presently; and the third person is a trustee of it for the grantee."

In Woodward v. Camp, 22 Conn. 459, 460, Waite, J., speaking of what constitutes a valid delivery of a deed, says: "And, in order to constitute a valid delivery, it is not necessary that it should be delivered personally to the grantee. It will be sufficient if delivered to some third person for the use of the grantee, although the latter was not present at the time, had no knowledge of the existence of the deed, and never gave any authority to the person receiving it to act in his behalf. Merrills v. Swift, 18 Conn. 257. And if a deed be delivered to a third person, to be by him kept, during the life of the grantor, subject to his order, and at his death, if not previously recalled, to be delivered over to the grantee, and the grantor die without having recalled the deed, such delivery will become effectual, and the title of the grantee consummated, in the death of the grantor. Belden v. Carter, 4 Day, 66. According to these authorities, had the deed, in the present case, been delivered to some third person, to have been kept during the life of Mrs. Camp, and then delivered to the grantee, such delivery, upon her death, would have become perfected, and the title would have vested in him."

In Farrar v. Bridges, 5 Humph. 411, the court say: "A formal, ceremonious delivery of a deed is not essential to its validity. If no condition be annexed, if nothing remains to be performed in order to give effect to the instrument, its signing, sealing, and attestation as a valid instrument between the parties will make it complete and effectual, although the instrument may be left in the possession of the bargainor or grantor." See authorities cited.

In Thatcher v. St. Andrew's Church, 37 Mich. 269, speaking of what constitutes the delivery of a deed, the court say: "The act of delivery is not, necessarily, a transfer of the possession of the instrument to the grantee, and an acceptance by him; but it is that act of the grantor, indicated either by acts or words, or both, which shows an intention on his part to perfect the transaction, by a surrender of the instrument to the grantee, or to some third person for his use and benefit. The whole object of a delivery is to indicate an intent upon the part of the grantor to give effect to the instrument. The deed may be delivered to the grantee, or to a stranger unknown to the person for whose benefit it is made; and it has been held that such was a good delivery, when assented to by the grantee after the death of the grantor." See authorities cited.

In McLure v. Colclough, 17 Ala. 96, the court say, speaking of what constitutes delivery: "Then, although there was no delivery by the hand, there was enough to constitute a good delivery in law. This may be accomplished by mere words, or by such words and actions as indicate a clear intention that the deed shall be considered as executed, as when a party to an instrument seals it, and declares in presence of a witness that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping of the deed in his hands, it is a valid and effectual deed; and actual delivery to the party who is to take by the deed, or to any person for his use, is not essential. Doe dem. Garnons v. Knight, 5 Barn. & C. 671."

In Belden v. Carter, 4 Day, 66, a Connecticut case, depending on this statement of facts: "Delivery of deed. When takes effect. A grantor, having signed, sealed, and acknowledged a deed, took it up, in the absence of the grantee, and said to another: 'Take this deed, and keep it. If I never call for it, deliver it to B. after my death. If I call for it, deliver it to me.' The party then took the deed, and the grantor dying soon afterwards, and never having called for it, it was delivered to the grantee." Upon these facts the court say and hold: "The grantor delivered

the deed to Wright with a reservation of a power to countermand it, but this makes no difference; for it was in the nature of a testamentary disposition of real estate, and was revocable by the grantor during his life, without an express reservation of that power. The case, then, stands upon the same footing as if there had been no reservation of a power to countermand the deed. It was a delivery of a writing as a deed to the use of the grantee, to take effect at the death of the grantor, deposited in the hands of a third person to hold till that event happened, and then to deliver it to the grantee. The legal operation of this delivery is that it became the deed of the grantor presently; that Wright held it as a trustee for the use of the grantee; that the title became consummate in the grantee by the death of the grantor; and that the deed took effect, by relation, from the time of the first delivery."

In Newton v. Bealer, 41 Iowa, 334, in a case nearly on all fours with the case at bar, Day, J., delivering the opinion of the court, on page 339, says: "Where one who has the mental power to alter his intention, and the physical power to destroy a deed in his possession, dies without doing either, there is, it seems to us, but little reason for saying that his deed shall be inoperative, simply because, during life, he might have done that which he did not do. It is much more consonant with reason to determine the effect of the deed by the intention existing up to the time of death than to refuse to give it that effect because the intention might have been changed. Applying this doctrine to the deed in question, there can be no doubt that it should be sustained. The deceased, as he frequently declared, had made all the provisions for his other children that he intended to make. When within a very few days of his death, and evidently, as appears, contemplating approaching dissolution, he says that he has his property all fixed, and points to the chest in which the deed would be found, which, as he supposed, had the effect to fix his property so that there would be no 'fussing' about it when he was gone. He thus manifested an unequivocal intention, within a very short time of his death, to have this deed operate as a disposition of his property; and any construction of the law which ignores this intention, and defeats this purpose, prefers shadow to substance." See cases cited.

In Hathaway v. Payne, 34 N. Y. 92, a case wherein the facts are as nearly like the facts in the case at bar as usually happens, the court hold that, "where a deed is to be delivered to the grantee on the death of the grantor, the title, by relation, passes at the time the deed was left for delivery." Potter, J., delivered the opinion in this case, and after viewing at great length the facts, in stating the law and citing the authorities, says: "Looking to the language of the agreement itself for the purpose and intent of this conveyance, it left no condition to be performed before delivery. It required nothing but the lapse of time, to wit, the death of both grantors, when Herrendeen, the agent, trustee, or depositary of the deed, (by whatever name he may be called,) by mutual direction of the parties, not alone that of the grantor, who alone could not revoke a mutual agreement, immediately to deliver it, as a good and valid conveyance of all the lands therein contained. If we look at the intent of the parties to the deed, as manifested by their acts, independent of the language of their agreement,—the one granting, the other accepting the grant of, this part of the same premises,—it is equally apparent that the parties intended the first deed as a present conveyance. In Ruggles v. Lawson, 13 Johns. 285, A. executed a deed of lands, in consideration of natural love and affection, to his two sons, and delivered it to C., to be delivered to his sons in case A. should die without making a will; and, A. having died without a will, C. delivered the deed to the sons. It was held that this was a valid deed, and took effect from the first delivery; that this was not an escrow. In Tooley v. Dibble, 2 Hill, 641, a father signed and sealed a deed purporting to convey to his son a farm, placing the deed in the hands of B., with instructions to deliver it after the father's death, but not before, unless both parties called for it; and after the father died B. delivered the deed accordingly. It was held that the title of the son took effect, by relation, from the time the deed was left with B., and that the son's quitclaim, executed intermediate the leaving the deed with B., and the father's death, though importing a mere conveyance of the son's 'right in expectancy' in the land, would pass his title. The cases of Goodell v. Pierce, Id. 659, and Hunter v. Hunter, 17 Barb. 25, are but confirmations of this view of the title taking effect from the first delivery of the deed. In the case of Belden v. Carter, reported in 4 Day, 66, a deed was delivered to a third person to keep, and, if not called for, to deliver it after the death of the grantor. It was held that by legal operation it became the deed of the grantor presently, and that the depositary held it as a trustee for the use of the grantee, and that the title became consummate in the grantee by the death of the grantor, and the deed took effect, by relation, from the time of the first delivery. In the case of Wheelwright v. Wheelwright, 2 Mass. 447, a distinction is made which I regard as sound, and which I think has not been questioned since, that applies to this case. It was held that a deed, signed, sealed, delivered, and acknowledged, which is committed to a third person as the deed of the grantor, to be delivered over to the grantee on a future event, is the deed of the grantor presently, and the third person is a trustee of it for the grantee. But if it be delivered to the third person as the writing or escrow of the grantor, to be deliv-

ered on some future event, it is not the grantor's deed until the second delivery. That is, its being a present deed depends upon the fact whether it was delivered as an escrow. The cases can be multiplied, each varying from every other by some nice shade of difference, upon the question whether, in the present case, the deed was an escrow in the hands of the depositary, or whether the depositary was made the trustee of the grantor. In the former case a second delivery is generally required before the title passes; in the latter, the title passes at the instant of delivering the deed to the depositary. This, I think, is the true distinction. In the case at bar there was no direction by the grantors that the deed was left as an escrow, and it presents no evidence of intent on the part of the grantors to make this deed an escrow. There is no condition mentioned in the agreement, to be performed before delivery, which in law would create it an escrow; and presumptions arising from the language of the agreement, being taken most strongly against the grantor, forbid any implication of its being an escrow. I think, therefore, that if the case depended upon this point, raised by the plaintiff on the assumption that there was no such delivery of the deed of 1839 as to pass the title to the defendant, he must also fail. There is another reason, which exists both at common law and by the statute, (which adopted the common law in this respect,) which is controlling,—'that, in the construction of every instrument creating or conveying any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law.' " And, in the case just cited, Denio, C. J., dissents from part of the opinion of the court, but agrees with the court as to the law concerning the delivery of deeds in such cases, and, on page 113 of the opinion cited, says: "They do, [referring to cases cited on the question as to what is a sufficient delivery of a deed,] however, I think, prove that a deed may be delivered to a third person, as this was, with instructions to be finally delivered to the grantee after the death of the grantor. In such a case the weight of authority is that no title passes until the final delivery, and that then and thereafter the title is, by relation, deemed to have vested as of the time of the first delivery to the third person. If it were an original question, I should suppose that such a transaction was of a testamentary character, and that it would be inoperative, for want of the attestation required by the statute of wills. But the cases establish the rule as I have stated, and they should not now be disturbed." See authorities he cites on this point.

Authorities might be cited to any extent in support of the doctrine that a manual delivery of a deed is not an absolutely essential requisite to its validity; that "the question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed." In this case, the grantor having executed the deed to the grantees, and having received back from them at the same time a lease for the term of her natural life, for the same premises, and she having accepted said lease, depositing it, with the deed to the demanded premises, with the depositary, with instructions to deliver the deed to the grantees in the event of her death, and having never recalled the deed, or made any attempt or expressed any desire to regain control thereof, but in the mean time spoke of the deed as being the deed of the grantees, in the hands of the depositary, and occupied the premises as the tenants of respondents, and in all respects having treated the deed as belonging to the grantees, and both parties having acted concurrently upon the theory that the deed was complete, as well as the delivery thereof, the opinion seems irresistible that the facts show a valid delivery of the deed in this case. Many of the authorities cited in this opinion have been so cited, not that we deemed it necessary to a determination of the case at bar, but more for the purpose of showing the trend of the authorities, and the extent to which they go in support of the doctrine discussed in this case. Some of these authorities go further than perhaps this court would go under like circumstances; but they all support the position we take,—that in the case at bar there was a valid delivery of the deed. The acts, words, and conduct of the parties,—especially the giving of the lease to the demanded premises by the grantees of the deed to the grantor contemporaneously with the execution of the deed, and her occupying the premises under said lease until her death, —establish beyond controversy that the parties considered the deed complete, as well as the delivery thereof. This opinion is not to be interpreted as establishing any new rule in relation to the testamentary disposition of property, or as expressing any opinion as to the rights of creditors in cases resting upon like facts and circumstances. We simply decide that in this case there was a delivery of the deed, and complete consummation thereof, before the death of the grantor.

Judgment of the lower court is affirmed.

HARWOOD and DE WITT, JJ., concur.

ALLER v. ALLER.

(40 N. J. Law, 446.)

Court of Errors and Appeals of New Jersey. Nov. Term, 1878.

The action was brought on the following instrument, viz.: "One day after date, I promise to pay my daughter, Angeline H. Aller, the sum of three hundred and twelve dollars and sixty-one cents, for value received, with lawful interest from date, without defalcation or discount, as witness my hand and seal this fourth day of September, one thousand eight hundred and seventy-three. $312.61. This note is given in lieu of one-half of the balance due the estate of Mary A. Aller, deceased, for a note given for one thousand dollars to said deceased by me. Peter H. Aller. [L. S.] Witnesses present: John J. Smith, John F. Grandin."

Both subscribing witnesses were examined at the trial, and it appeared that there was a note for $1,000, dated May 1st, 1858, given by said Peter H. Aller to Mary Ann Aller, upon which there were indorsements of payments, April 1st, 1863, $50; April 1st, 1866, $46; April 1st, 1867, $278.78.

Mary Ann Aller the wife, died, and on the day after her burial, Peter H. Aller told his daughter, the plaintiff, to get the note, which he said was among her mother's papers. She brought it; read the note. He said there was more money indorsed on it than he thought; requested the witness John F. Grandin to add up the indorsements and subtract them from the principal, to divide the balance by two, and draw a note to each of her daughters, Leonora and Angeline, for one-half. After they were drawn by the witness, Peter H. Aller said, "Now here, girls, is a nice present for you," and gave them the notes. Angelina was directed to put the old note back among her mother's papers. Grandin was afterwards appointed administrator of Mary A. Aller, and as such, he says, he destroyed the old note.

The letters of administration; a copy of the original note and endorsements thereon; a deed of release by Peter H. Aller to Leonora Sharp and Angeline H. Aller, in which, for the consideration of one dollar, and of natural love and affection, he released all his right and interest "by the curtesy" to all the real and personal estate of said Mary A. Aller, deceased, which is dated September 8th, 1873; and the last will and testament of Peter H. Aller,—were offered in evidence.

The action was brought by Angeline H. Aller, now Angeline H. McPherson, against Peter H. Aller, in his lifetime, and, after his death, continued against his executor, Michael Shurts.

The defendant, Peter H. Aller, was aged and feeble, and the plea was, therefore, filed in his lifetime, by consent, without affidavit.

Argued June term, 1878, before BEASLEY, C. J., and DEPUE, SCUDDER, and KNAPP, JJ.

G. A. Allen and J. R. Emery, for plaintiff. J. T. Bird, for defendant.

SCUDDER, J. Whether the note for $1,000 could have been enforced in equity as evidence of an indebtedness by the husband to the wife during her life is immaterial, for after her death he was entitled, as husband of his deceased wife, to administer on her estate, and receive any balance due on the note, after deducting legal charges, under the statute of distribution. The daughters could have no legal or equitable claim on this note against their father after their mother's decease. The giving of these two sealed promises in writing to them by their father was therefore a voluntary act on his part. That it was just and meritorious to divide the amount represented by the original note between these only two surviving children of the wife, if it was her separate property, and keep it from going into the general distribution of the husband's estate among his other children, is evident, and such appears to have been his purpose.

The question now is whether that intention was legally and conclusively manifested, so that it cannot now be resisted.

This depends on the legal construction and effect of the instrument which was given by the father to his daughter.

It has been treated by the counsel of the defendant in his argument, as a promissory note, and the payment was resisted at the trial on the ground that it was a gift. Being a gift inter vivos, and without any legal consideration, it was claimed that the action could not be maintained. But the instrument is not a promissory note, having the properties of negotiable paper by the law merchant; nor is it a simple contract, with all the latitude of inquiry into the consideration allowable in such a case; but it is in form and legal construction a deed under seal. It says in the body of the writing, "as witness my hand and seal," and a seal is added to the name of Peter H. Aller. It is not therefore an open promise for the payment of money, which is said to be the primary requisite of a bill or promissory note, but it is closed or sealed, whereby it loses its character as a commercial instrument, and becomes a specialty governed by the rules affecting common-law securities. 1 Daniel, Neg. Inst. §§ 1, 31, 34.

It is not at this time necessary to state the distinction between this writing and corporation bonds and other securities which have been held to have the properties of negotiable paper by commercial usage. This is merely an individual promise "to pay my daughter, Angeline H. Aller, the sum of $312.61, for value received," etc. It is not even transferable in form, and there is no intention shown upon its face to make it other than it is clearly expressed to be, a sealed promise to pay

money to a certain person or a debt in law under seal. How then will it be affected by the evidence which was offered to show that it was a mere voluntary promise, without legal consideration, or, as it was claimed, a gift unexecuted?

Our statute concerning evidence (Revision, p. 380, § 16) which enacts that in any action upon an instrument in writing, under seal, the defendant in such action may plead and set up as a defense therein fraud in the consideration, is not applicable, for here there is no fraud shown.

But it is said that the act of April 6th, 1875 (Revision, p. 387, § 52), opens it to the defense of want of sufficient consideration, as if it were a simple contract, and, that being shown, the contract becomes inoperative.

The statute reads: "That in every action upon a sealed instrument, or where a set-off is founded on a sealed instrument, the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted, as if such instrument was not sealed," etc.

Suppose the presumption that the seal carries with it, that there is a sufficient consideration, is rebutted, and overcome by evidence showing there was no such consideration, the question still remains whether an instrument under seal, without sufficient consideration, is not a good promise, and enforceable at law. It is manifest that here the parties intended and understood that there should be no consideration. The old man said, "Now here, girls, is a nice present for each of you," and so it was received by them. The mischief which the above-quoted law was designed to remedy was that where the parties intended there should be a consideration, they were prevented by the common law from showing none, if the contract was under seal. But it would be going too far to say that the statute was intended to abrogate all voluntary contracts, and to abolish all distinction between specialties and simple contracts.

It will not do to hold that every conveyance of land or of chattels is void by showing that no sufficient consideration passed when creditors are not affected. Nor can it be shown by authority that an executory contract, entered into intentionally and deliberately, and attested in solemn form by a seal, cannot be enforced. Both by the civil and the common law, persons were guarded against haste and imprudence in entering into voluntary agreements. The distinction between "nudum pactum" and "pactum vestitum," by the civil law, was in the formality of execution, and not in the fact that in one case there was a consideration and in the other none, though the former term, as adopted in the common law, has the signification of a contract without consideration. The latter was enforced without reference to the consideration, because of the formality of its ratification. 1 Pars. Cont. (6th Ed.) 427.

The opinion of Justice Wilmot in Pillans v. Van Mierop, 3 Burrows, 1663, is instructive on this point.

The early case of Sharington v. Strotton, Plowd. 308, gives the same cause for the adoption of the sealing and delivery of a deed. It says among other things: "Because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. And the reason is because it is by words which pass from men lightly and inconsiderately, but where the agreement is by deed there is more time for deliberation, etc. So that there is great deliberation used in the making of deeds, for which reason they are received as a lien final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made. And therefore in the case put in 17 Edw. IV., if I by deed promise to give you £20 to make your sale de novo, here you shall have an action of debt upon the deed, and the consideration is not examinable, for in the deed there is sufficient consideration, viz. the will of the party that made the deed." It would seem by this old law that in case of a deed the saying might be applied, "Stat pro ratione voluntas."

In Smith on Contracts, the learned author, after stating the strictness of the rules of law that there must be a consideration to support a simple contract to guard persons against the consequences of their own imprudence, says: "The law does not absolutely prohibit them from contracting a gratuitous obligation, for they may, if they will, do so by deed."

This subject of the derivation of terms and formalities from the civil law, and of the rule adopted in the common law, is fully described in Fonb. Eq. 335, note a. The author concludes by saying: "If, however, an agreement be evidenced, by bond or other instrument, under seal, it would certainly be seriously mischievous to allow its consideration to be disputed, the common law not having pointed out any other means by which an agreement can be more solemnly authenticated. Every deed, therefore, in itself imports a consideration, though it be only the will of the maker, and therefore shall never be said to be nudum pactum." See, also, 1 Chit. Cont. (11th Ed.) 6; Morly v. Boothby, 3 Bing. 107; Rann v. Hughes, 7 Term R. 350, note a.

These statements of the law have been thus particularly given in the words of others, because the significance of writings under seal, and their importance in our common-law system, seem in danger of being overlooked in some of our later legislation. If a party has fully and absolutely expressed his intention in a writing sealed and delivered, with the most solemn sanction known to our law, what should prevent its execution where

there is no fraud or illegality? But because deeds have been used to cover fraud and illegality in the consideration, and just defenses have been often shut out by the conclusive character of the formality of sealing, we have enacted in our state the two recent statutes above quoted. The one allows fraud in the consideration of instruments under seal to be set up as a defence, the other takes away the conclusive evidence of a sufficient consideration heretofore accorded to a sealed writing, and makes it only presumptive evidence. This does not reach the case of a voluntary agreement, where there was no consideration, and none intended by the parties. The statute establishes a new rule of evidence, by which the consideration of sealed instruments may be shown, but does not take from them the effect of establishing a contract expressing the intention of the parties, made with the most solemn authentication, which is not shown to be fraudulent or illegal. It could not have been in the mind of the legislature to make it impossible for parties to enter into such promises; and without a clear expression of the legislative will, not only as to the admissibility, but the effect of such evidence, such construction should not be given to this law. Even if it should be held that a consideration is required to uphold a deed, yet it might still be implied where its purpose is not within the mischief which the statute was intended to remedy. It was certainly not the intention of the legislature to abolish all distinction between simple contracts and specialties, for in the last clause of the section they say that all instruments executed with a scroll, or other device by way of scroll, shall be deemed sealed instruments. It is evident that they were to be continued with their former legal effect, except so far as they might be controlled by evidence affecting their intended consideration.

If the statute be anything more than a change of the rules of evidence which existed at the time the contract was made, and in effect makes a valuable consideration necessary, where such requisite to its validity did not exist at that time, then the law would be void in this case, because it would impair the obligation of a prior contract. This cannot be done. Cooley, Const. Lim. 288, and notes.

The rule for a new trial should be discharged.

McMILLAN v. AMES.

(22 N. W. 612, 33 Minn. 257.)

Supreme Court of Minnesota. March 11, 1885.

Appeal from an order of the district court, Hennepin county, denying new trial.

Scott Longbrake & Van Cleve and Arthur J. Shores, for appellant, James McMillan. Babcock & Davis, for respondent, Eli B. Ames.

VANDERBURGH, J. On the day it bears date the defendant executed and delivered to James McMillan & Co. the following covenant or agreement under seal, which was subsequently assigned to the plaintiff:

"Exhibit A.

"I, E. B. Ames, of Minneapolis, Minnesota, for the consideration hereinafter mentioned, do hereby promise and agree to grant, bargain, sell, and convey, by good and lawful warranty deed, unto James McMillan & Co., their heirs and assigns, in fee-simple, free from all incumbrances, at any time between the date of this instrument and the third day of August, 1884, that the said James McMillan & Co. may elect, that certain real estate situate in the county of Hennepin and state of Minnesota, and described as follows, to-wit, a part of lots nine (9) and ten (10), in block twenty (20), in the town of Minneapolis, being a tract of land twenty-seven (27) feet wide, fronting on First avenue south, and extending back ninety-nine (99) feet, together with the two-story brick and stone building standing thereon, together with all the appurtenances thereunto belonging.

"The consideration above mentioned and referred to is the payment to me, by the said James McMillan & Co., of the sum of thirty-five hundred dollars, and the further payment of the taxes duly assessed upon said real estate between the second day of August, 1879, and the date of the execution and delivery of said deed. Said payments to be made at the time of the execution and delivery of said deed, unless otherwise agreed to by said James McMillan & Co. and myself.

"It is hereby expressly understood and agreed that in case of a violation of the lease under which the said James McMillan & Co. now hold said real estate, I am to be released from any and all promises contained and by me made in this instrument.

"Witness my hand this sixth day of October, 1879, the same being the date of this instrument. E. B. Ames. [Seal.]"

By the terms of this instrument, which is admitted to have been sealed by defendant, he covenanted to convey the premises upon the consideration and condition of the payment by the covenantees of the sum named, on or before the date fixed in the writing. Before performance on their part, the defendant notified them of his withdrawal and rescission of the promise and obligation embraced in such written instrument, and thereafter refused the tender of payment and offer of performance by the plaintiff in conformity therewith, as alleged in the complaint, and within the time limited. On the trial, it appearing that such notice of rescission had been given, the court rejected plaintiff's offer to introduce the writing in evidence, and dismissed the action.

The only question presented on this appeal is whether plaintiff's promise or obligation was nudum pactum and presumptively invalid for want of a consideration, or whether, being in the nature of a covenant, the defendant was bound thereby, subject to the performance of the conditions by the covenantees. Apart from the effect of the seal as evidencing a consideration binding the defendant to hold open his proposition, or rather validating his promise subject to the conditions expressed in the writing, it is clear that such promise, made for a consideration thereafter to be performed by the plaintiff at his election, would take effect as an offer or proposition merely, but would become binding as a promise as soon as accepted by the performance of the consideration, unless previously revoked or it had otherwise ceased to exist. Langd. Cont. § 70; Railroad v. Bartlett, 3 Cush. 227, 228. In the case cited there was a proposition to sell land by writing not under seal. The court held the party at liberty to withdraw his offer at any time before acceptance, but not after, within the appointed time, because until acceptance it was a mere offer, without a consideration or a corresponding promise to support it, and the court say: "Whether wisely or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached." If, however, his promise is binding upon the defendant, because contained in an instrument under seal, then it is not a mere offer, but a valid promise to convey the land upon the condition of payment. All that remained was performance by plaintiff within the time specified to entitle him to a fulfillment of the covenant to convey. Langd. Summary, §§ 178, 179, (vol. 2, Cases on Contract.) As respects the validity or obligation of such unilateral contracts, the distinction between covenants and simple contracts is well defined and established. Anson, Cont. 12; Chit. Cont. *5; Leake, Cont. 146; 1 Smith, Lead. Cas. (7th Ed.) 698; Wing v. Chase, 35 Me. 260; Willard v. Tayloe, 8 Wall. 564.

In Pitman v. Woodbury, 3 Exch. 11, Parke, B., says: "The cases establish that a covenantee in an ordinary indenture, who is a party to it, may sue the covenantor, who executed it, though he himself never did; for he is a party, though he did not execute, and it makes no difference that the covenants of the defendant therein are stated to be in consideration of those of the covenantee. Of this there is no doubt, nor that a covenant binds without consideration." Morgan v. Pike, 14 C. B. 484; Leake, Cont. 141. The covenantee in such cases may have the benefit of the contract, but subject to the condi-

tions and provisos in the deed. These obligations frequently take the form of bonds, which is only another method of forming a contract, in which a party binds himself as if he had made a contract to perform; a consideration being necessarily implied from the solemnity of the instrument. The consideration of a sealed instrument may be inquired into; it may be shown not to have been paid, (Bowen v. Bell, 20 Johns. 338,) or to be different from that expressed,—Jordan v. White, 20 Minn. 99, (Gil. 77;) McCrea v. Purmort, 16 Wend. 460,—or as to a mortgage that there is no doubt to secure, (Wearse v. Peirce, 24 Pick. 144,) etc.; but, except for fraud or illegality, the consideration implied from the seal cannot be impeached for the purpose of invalidating the instrument or destroying its character as a specialty. It is true that equity will not lend its auxiliary remedies to aid in the enforcement of a contract which is inequitable, or is not supported by a substantial consideration, but at the same time it will not on such grounds interfere to set it aside. But no reason appears why equity might not have decreed specific performance in this case, (had the land not been sold,) because the substantial and meritorious consideration required by the court in such cases would consist in that stipulated in the instrument as the condition of a conveyance, performance of which by the plaintiff would have been exacted as a prerequisite to relief, so as to secure to defendant mutuality in the remedy, and all his rights under the contract. The inquiry would not, in such case, be directed to the constructive consideration evidenced by the seal, for a mere nominal consideration would have supported defendant's offer or promise upon the prescribed conditions. Leake, Cont. 17, 18; Railroad v. Babcock, 6 Metc. (Mass.) 353; Yard v. Patton, 13 Pa. St. 285; Candor's Appeal, 27 Pa. St. 119.

If, then, defendant's promise was irrevocable within the time limited, plaintiff might certainly seek his remedy for damages, upon the facts alleged in the pleadings, upon showing performance or tender thereof on his part. There is a growing tendency to abrogate the distinction between sealed and unsealed instruments; in some states by legislation, in others to a limited extent by usage or judicial recognition. State v. Young, 23 Minn. 557; 1 Pars. Cont. *429. But the significance of the seal as importing a consideration is everywhere still recognized, except as affected by legislation on the subject. It has certainly never been questioned by this court.

In Pennsylvania the courts allow a party, as an equitable defense in actions upon sealed instruments, to show a failure to receive the consideration contracted for, where an actual valuable consideration was intended to pass, and furnished the motive for entering into the contract. Candor's Appeal, 27 Pa. St. 119; Yard v. Patton, supra. But whatever the rule as to equitable defenses and counter-claims under our system of practice may be held to be in the case of sealed instruments, it has no application, we think, to a case like this, where full effect must be given to the seal. Under the civil law the rule is that a party making an offer, and granting time to another in which to accept it, is not at liberty to withdraw it within the appointed time, it being deemed inequitable to disappoint expectations raised by such offer, and leave the party without remedy. The common law, as we have seen, though requiring a consideration, is satisfied with the evidence thereof signified by a seal. Railroad v. Bartlett, supra. The same principle applies to a release under seal, which is conclusive though disclosing on its face a consideration otherwise insufficient. Staples v. Wellington, 62 Me. 9; Wing v. Chase, 35 Me. 260.

These considerations are decisive of the case, and the order denying a new trial must be reversed.

THOMPSON v. BLANCHARD.[1]

(3 N. Y. 335.)

Court of Appeals of New York. April, 1850.

N. Hill, Jr., for appellant. S. Stevens, for respondent.

GARDINER, J. The undertaking of the appellant in this case was drawn with reference to, and is in precise conformity with, the requirements of section 335 of the Code. In this we all agree. It is a necessary implication from the statute, that an undertaking thus executed shall be effectual to sustain an appeal and an action in behalf of the appellee, if the judgment appealed should be affirmed in whole or in part. The legislature, however, have not left the matter to implication. They have enacted that "when an appeal shall be perfected as provided by the 335th section, it shall stay all proceedings in the court below upon the judgment appealed from, or the matter embraced therein." Section 339.

It is objected, notwithstanding, that the instrument is nudum pactum, not because there is no consideration in fact, but because none is expressed in the writing. The answer is, that the statute required an undertaking in writing with certain prescribed stipulations, and nothing else. An undertaking is a promise. Bouv. Law Dict. It may be made with or without consideration. If the promise was in writing, the consideration need not be expressed, it might be proved in all cases by parol. The common law was satisfied if there was a consideration in fact to sustain the undertaking. Neither before nor since the statute of frauds, has it ever been held that an undertaking, or promise, ex vi termini, imports a consideration. In Wain v. Warlters, 5 East, 10, under the English statute of frauds, it was for the first time decided that the word agreement implied a consideration. But that case proceeded upon the distinction between an agreement and an undertaking. Lord Ellenborough stated the question to be, whether "agreement, in the statute, was synonymous with promise or undertaking, or signified a mutual contract upon consideration." And all the judges concurred in saying, that had the statute required only that the promise should be in writing, instead of the agreement in respect to which the promise was made, their opinion would have been different.

The legislature, in the section referred to, have said that an undertaking, to the effect prescribed, shall be effectual. We have no authority to add other conditions. If it be said that such an instrument would not be obligatory by the statute of frauds, the very obvious answer is, that the legislature of 1848 had the same power to restore the common law, as to this class of securities, that their predecessors had to abolish it. 2d. The undertaking prescribed by the 335th section is a statute security and not a common-law agreement. Agreements which derive their obligation from the common law, and no others, are enumerated in our statute, and required to be made in writing, expressing a consideration. 2 Rev. St. 136. The objection I am considering assumes that the undertaking in question falls within one of the classes of agreements there specified. It has, however, been generally supposed that the assent of more than one party was essential to the validity of an agreement at common law. Lord Ellenborough calls it a mutual contract upon consideration. The consideration being one element of the agreement, must, of course, be the subject of arrangement between the parties before it can be expressed in writing. Accordingly where a contract has been executed by both parties, evidence is required, in addition, of delivery and acceptance, or something equivalent, in order to show their assent to it as a perfected instrument, mutually obligatory upon them. The necessity for this, when it is executed by one of the parties only, is apparent. Now the undertaking in question was properly prepared, executed, and filed with the clerk by the appellant, without any communication or arrangement with the appellee. Sections 343, 340. The assent of the latter was not necessary to the creation of the obligation, nor would his dissent defeat or in the slightest degree modify its effect upon his own, or the rights of the other party. And so we have in effect decided, in a case between these parties. 2 N. Y. 562. The only consideration that can be imagined, for the undertaking of the defendant and his sureties, is the stay of proceedings upon, and the right to review the judgment obtained by the plaintiff. But this delay and privilege is the act of the law, against the wishes and in spite of the opposition of the respondent. What possible application, therefore, has the statute designed to prevent frauds and perjuries in reference to common-law contracts, to an undertaking, the contents and legal effect of which are written on the face of the statute? What fraud is to be suppressed, or perjury avoided, by making this appellant certify, under his signature, to a consideration which, if it exist at all, did not arise from the agreement of parties, but from a law which this court, and all others, are bound judicially to notice? At most it would be but cumulative evidence of the provisions of a statute.

We think, for the reasons assigned, the undertaking sufficient and the appeal well brought.

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[1] Dissenting opinion of Bronson, C. J., omitted.

STONE v. DENNISON.[1]

(13 Pick. 1.)

Supreme Judicial Court of Massachusetts. Sept. Term, 1832.

At the trial, before Wilde, J., the plaintiff proved that he had been in the service of the defendant from October, 1818, to October, 1828, when he became twenty-one years of age; and he introduced evidence tending to show that his services were worth more than the support and education furnished him by the defendant. Evidence was offered by the defendant tending to show the contrary, and that the agreement was a reasonable one.

The defendant contended that he was not liable, because at the time when the plaintiff was fourteen years of age, his father being dead, George Eels was duly appointed his guardian, and it was agreed between the plaintiff, the defendant and the guardian that the plaintiff should continue in the service of the defendant, until he should arrive at the age of twenty-one, for his board, clothing and education, and the defendant had performed the contract on his part.

The plaintiff objected to the admission of evidence to prove these allegations:

(1) Because the supposed contract was void by the statute of frauds, it not being in writing.

(2) Because, the plaintiff having no property and his mother being living at the time, the appointment of the guardian was void; or, at least, if valid, it gave the guardian no power to bind the plaintiff by the contract stated; and the plaintiff could not be bound by any assent given by himself to the agreement, during his infancy.

But the judge admitted the evidence, and instructed the jury that if the plaintiff entered into this agreement as contended for by the defendant, and entered into the service of the defendant in pursuance of the same, and continued in it during all the time agreed upon, he could not waive the contract and go upon a quantum meruit, unless the contract was obtained by unfair means, and so was fraudulent on the part of the defendant; and that, if the contract was so unreasonable as to show that the plaintiff was overreached, that would be evidence of fraud and would render the contract null and void.

The jury found a verdict for the defendant, and the plaintiff moved for a new trial. If the foregoing opinions and instructions were erroneous, a new trial was to be granted; otherwise judgment was to be rendered on the verdict.

Mr. Wells, for plaintiff. Bates & Dewey, for defendant.

SHAW, C. J. Several points were left to the jury in the present case, which may be considered as settled by their verdict.

By the report it appears that after the plaintiff arrived at the age of fourteen years, having then lived several years with the defendant, it was agreed between the plaintiff and his guardian on the one side, and the defendant on the other, that the plaintiff should continue in the service of the defendant until he should arrive at the age of twenty-one, for his board, clothing and education. By the finding of the jury, under the instructions given to them by the court, it must be taken to have been settled, that the contract was not obtained by any unfair means, or fraudulent, on the part of the defendant, and that it was not unequal, so as to show that the plaintiff was overreached.

The case then is one of a minor over fourteen years of age, entering into an agreement with a person, for labor and service to be furnished on one side, and subsistence, clothing and education on the other, an agreement in which the minor was not overreached, which was not so unreasonable as to raise any suspicion of fraud, and which was assented to and sanctioned by the guardian of the minor. This agreement is fully executed on both sides. The labor and services are performed by the minor, and the stipulated compensation is furnished by his employer. And the question is, whether the plaintiff, notwithstanding such agreement, can maintain a quantum meruit for his services, merely by showing that in the event which has happened his services were worth more than the amount of the stipulated compensation; and we think he cannot.

The first point taken by the plaintiff is that the evidence of the agreement ought not to have been admitted, because the agreement, not being to be performed within a year, and not being in writing, was void by the statute of frauds. St. 1788, c. 16, § 1.

But we think this objection is answered by the consideration that here the contract has been completely performed on both sides. The defendant is not seeking to enforce this agreement as an executory contract, but simply to show that the plaintiff is not entitled to recover upon a quantum meruit as upon an implied promise. But the statute does not make such a contract void. The provision is, that no action shall be brought, whereby to charge any person upon any agreement, which is not to be performed within the space of one year, unless the agreement shall be in writing. The statute prescribes the species of evidence necessary to enforce the execution of such a contract. But where the contract has been in fact performed, the rights, duties, and obligations of the parties resulting from such performance stand unaffected by the statute.

In the case of Boydell v. Drummond, 11 East, 142, a case was put in the argument of goods sold and delivered at a certain price, by parol, upon a credit of thirteen months. There, as a part of the contract was the payment of the price, which was not to be per-

[1] Irrelevant parts omitted.

formed within the year, a question is made, whether by force of the statute the purchaser is exempted from the obligation of the agreement as to the stipulated price, so as to leave it open to the jury to give the value of the goods only, as upon an implied contract. "In that case," said Lord Ellenborough, "the delivery of the goods, which is supposed to be made within the year, would be a complete execution of the contract on the one part; and the question of consideration only would be reserved to a future period."

If a performance upon one side would avoid the operation of the statute, a fortiori would the entire and complete performance on both sides have that effect. Take the common case of a laborer entering into a contract with his employer towards the close of a year, for another year's service, upon certain stipulated terms. Should either party refuse to perform, the statute would prevent either party from bringing any action whereby to charge the other upon such contract. But it would be a very different question were the contract fulfilled upon both sides, by the performance of the services on the one part and the payment of money on account, from time to time, on the other, equal to the amount of the stipulated wages. In case of the rise of wages within the year, and the consequent increased value of the services, could the laborer bring a quantum meruit, and recover more; or in case of the fall of labor and the diminished value of the services, could the employer bring money had and received and recover back part of the money advanced, on the ground that by the statute of frauds the original contract could not have been enforced? Such, we think, is not the true construction of the statute. We are of the opinion that it has no application to executed contracts, and that the evidence of this contract was rightly admitted.

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BELLOWS v. SOWLES.

(57 Vt. 164.)

Supreme Court of Vermont. Montpelier. Oct., 1884.

Assumpsit. Heard on demurrer to the declaration, September Term, 1883, Franklin County, ROYCE, Ch. J., presiding. Demurrer overruled. The declaration alleged in substance: That the plaintiff was a relative and heir-at-law of Hiram Bellows, deceased; *that by the terms *165 of said Bellows' will, presented to the Probate Court for allowance, no provision was made for the plaintiff; that the plaintiff "claimed and insisted that he was left out of said will, and that no provision * * * was made for the plaintiff through undue influence had and used upon said Bellows by said defendant and his wife, Maggie Sowles, and that said will was void, and should not be approved; that he had employed counsel to test the validity of said will before the Probate Court; that similar claims were made by other heirs"; "and whereas the said defendant being then and there the executor named in said will, and being largely interested pecuniarily in said estate as legatee and the husband of the principal legatee under said will, and well knowing the claim of the plaintiff, and that he had employed counsel as aforesaid, and that other heirs were then and there making similar claims, and being anxious to have said will sustained, had also employed counsel for that purpose; and it was then and there expected by the parties that a contest would be had upon the approval of said will, which would involve the expenditure of a large amount of money, and hinder and delay the settlement of said Bellows' estate, and the receipt by the said defendant and his said wife of their said legacies"; that the plaintiff met the defendant by appointment at defendant's house, and that the matters relating to the will were talked over; that "the plaintiff, at the special instance and request of the said defendant, would see one Charlotte Law, who was one of the heirs of said Bellows, and who was then and there intending to contest the validity of said will, and use his influence to have her allow said will to be approved, and that the plaintiff forbear to contest the approval of said will of said Bellows, and allow the same to be approved by the Probate Court aforesaid, and would not appeal from the decision of said court, he, the said defendant, undertook, and then and there faithfully promised to pay the plaintiff the sum of $5,000, whenever, after twenty days had elapsed from the date of the approval of said will by said Probate Court, he should be thereunto requested." * * * "And the plaintiff avers, that, confiding in the promise and undertaking of the said defendant so made as aforesaid, afterwards, to wit, on the day and year aforesaid, he did see said Charlotte Law, and did use his influence with her to *166 allow said will to be ap*proved, and did forbear to contest the approval of said will of said Bellows, and did allow the same to be approved by said Probate Court, and did not appeal from said approval"; * * * that said will was duly approved on the 7th day of December, 1876; that no appeal was taken; that the twenty days has elapsed; and that defendant, though requested, has wholly neglected and refused to pay the said $5,000, &c. There was a second count, substantially like the first, alleging, that the plaintiff was heir-at-law of said Bellows; that he received nothing under the will; that the will was made as it was, and plaintiff left out, "through undue influence and by procurement of the said defendant and his said wife, and that said will was void"; that he had arranged to contest the validity of the will; that this was known to the defendant; that it was "expected by the parties that long and expensive litigation would ensue, which would delay the settlement of said Bellows' estate, and prevent the said defendant and his said wife from receiving the large sums of money which they expected from said estate, as they otherwise would"; that the defendant "being pecuniarily interested in said estate to a large amount as legatee, as husband of the largest legatee under the will," &c.; that defendant promised to pay plaintiff the sum of $5,000 if he would forbear to contest the will; that he did forbear, in consideration of the promise, &c., &c. The common counts followed.

Geo. A. Ballard, Farrington & Post, Wilson & Hall, and Noble & Smith, for plaintiff. Defendant pro se (with him H. S. Royce and L. P. Poland).

POWERS, J. Counsel for the defendant have demurred to the declaration in this case upon two grounds; first, that the consideration alleged is insufficient; secondly, that the promise not being in writing comes within, and is therefore not enforceable under, the Statute of Frauds.

It has been so often held that forbearance of a legal right affords a sufficient consideration upon which to found a valid contract, and that the consideration required by the Statute of Frauds does not differ from that required by the common law, it does not appear to us to be necessary to review the authorities, or discuss the principle. As to the second point urged in behalf of the defendant, this case presents greater difficulties. Although the Statute of Frauds was enacted two centuries ago, and even then was little more than a re-enactment of the pre-existing common law, and though cases have continually arisen under it, both in England and America, yet so confusing and at times inconsistent are the decisions, that its consideration is always attended with difficulty and embarrassment.

The best understanding of the statute is derived from the language itself, viewed in the light of the authorities which seem to us to interpret its meaning as best to attain its object. That clause of the statute under which this case falls, reads: "No action at law or in equity shall be brought * * * upon a special promise of an executor or administrator to answer damages out of his own estate."

This special promise referred to is, in

short, any actual promise made by an executor or administrator, in distinction from promises implied by law, which are held not within the statute.

The promise must be "to answer damages out of his own estate." This phraseology clearly implies an obligation, duty, or liability on the part of the testator's estate, for which the executor promises to pay damages out of his own estate. The statute, then, was enacted to prevent executors *or administrators *170 from being fraudulently held for the debts or liabilities of the estates upon which they were called to administer. In this view of the case, this clause of the statute is closely allied, if not identical in principle, with the following clause, namely: "No action, etc., upon a special promise to answer for the debt, default or misdoings of another." And so Judge ROYCE, in delivering the opinion of the court in Harrington v. Rich, 6 Vt. 666, declares these two classes of undertakings to be "very nearly allied," and considers them together. This seems to us to be the true idea of this clause of the statute:—that the undertaking contemplated by it, like that contemplated by the next clause, is in the nature of a guaranty; and that reasoning applicable to the latter is equally applicable to the former.

We believe this view to be well supported by the authorities. Browne, in his work on the Statute of Frauds, p. 150, says: "In the fourth section of the Statute of Frauds, special promises of executors and administrators to answer damages out of their own estates appear to be spoken of as one class of that large body of contracts known as guaranties." And so on page 184, he interprets "to answer damages" as equivalent to pay debts of the decedent. This seems to be the construction given to the statute by Chief Justice REDFIELD, in his work on Wills. Vol. II. p. 290, et seq.

The Revised Statutes of New York, Vol. II. p. 113, have improved upon the phraseology of the old statute as we have adopted it, by adding, or to pay the debts of the testator or intestate out of his own estate.

If we are correct in this view of the relation between these two clauses, the solution of the question presented by this case is comparatively easy.

It has been held in this State, that when the contract is founded upon a new and distinct consideration moving between the parties, the undertaking is original and independent, and not within the statute. Templeton v. Bascom, *33 Vt. 132; Cross v. Richardson, 30 *171 Vt. 641; Lampson v. Hobart, 28 Vt. 697. Whether or not it would be safe to announce this as a general rule of universal application, it is a principle of law well fortified by authority, that where the principal or immediate object of the promisor is not to pay the debt of another, but to subserve some purpose of his own, the promise is original and independent, and not within the statute. Brandt Sur. 72; 3 Par. Cont. 24; Rob. Fr. 232; Emerson v. Slater, 22 How. 28. And this seems to be the real ground of the decisions above cited in the 28th and 30th Vt., in which the court seems to blend the two rules just laid down.

PIERPOINT, J., in delivering the opinion of the court in Cross v. Richardson, supra, says: "The consideration must be not only sufficient to support the promise, but of such a natnre as to take the promise out of the statute; and that requisite, we think, is to be found in the fact that it operates to the advantage of the promisor, and places him under a pecuniary obligation to the promisee, entirely independent of the original debt."

Apply this rule to this case. Here the main purpose of this promise was, not to answer damages (for the testator) out of his own estate, but was entirely to subserve some purpose of the defendant. The consideration did not affect the estate, but was a matter purely personal to the defendant. Here there was no liability or obligation on the part of the estate to be answered for in damages. It could make no difference to the executor of that estate whether it was to be divided according to the will, or by the law of descent. If the subject matter of this contract had been something entirely foreign to this estate, no one would maintain that the defendant was not bound by it, because he happened to be named executor in this will. Here the subject matter of the contract was connected with the estate, but in such a way that it was practically immaterial to the estate which way the question was decided. There exists, *172 therefore, in *this case, no sufficient, actual, primary liability to which this promise could be collateral. This seems to us to be the fairest interpretation of the law. The statute was passed for the benefit of executors and administrators; but it might be said of it, as has been said of the protection afforded to an infant by the law of contracts, that "it is a shield to protect, not a sword to destroy." If this class of contracts was allowed to be avoided under it, instead of being a prevention of frauds, it would become a powerful instrument for fraud. As in this case, the plaintiff would be deprived of his legal right to contest the will, by a party who has reaped all the benefit of the transaction, and is shielded from responsibility by a technicality. We do not believe this was the result contemplated by the statute.

The judgment of the County Court overruling the demurrer and adjudging the declaration sufficient is affirmed, and case remanded with leave to the defendant to replead on the usual terms.

LARSON v. JENSEN.

(19 N. W. 130, 53 Mich. 427.)

Supreme Court of Michigan. April 23, 1884.

Error to Manistee.

L. W. Fowler, for plaintiff. L. G. Rutherford, for defendant and appellant.

CHAMPLIN, J. The plaintiff claimed that he entered into an agreement with defendant by which he was to furnish and deliver to one John Labonta an unlimited amount of merchandise, as he, Labonta, might call for, or order by mail, or otherwise; and defendant was to pay plaintiff for all the goods so ordered or called for by Labonta; that in pursuance of that agreement plaintiff delivered goods to Labonta, from time to time, at the request of defendant, and, at the time this action was brought, plaintiff claimed a balance due him of about $400. On the trial the plaintiff gave evidence tending to prove the contract as alleged in the declaration. The plaintiff was the only witness who testified to the contract. and his statement of it was denied by the defendant, who testified that he told plaintiff that Labonta, his son-in-law, was intending to engage in trade in a small way; that he had a little money and that he would help him a little; and asked plaintiff if he could not let Labonta have some goods, and he said he would.

The defendant contends that the contract, as set out in the plaintiff's declaration, is void as being against the statute of frauds, for the reason that the promise of defendant is collateral, and is only to pay the debt or default of Labonta. This is a mistake. The promise and undertaking of defendant, as alleged in the declaration, is an original promise, and rests upon a sufficient consideration. The goods were to be furnished to Labonta, it is true, but upon the express agreement that defendant should pay for them. Under the declaration, the entire credit was originally given to defendant.

The defendant also insists that, under the evidence, which is all returned in the record, it was the duty of the trial judge to have taken the case from the jury, and decide the case as matter of law in favor of defendant. But this the trial judge could not do, if there was any evidence tending to prove the plaintiff's claim. The testimony of the plaintiff, however inconsistent with itself, tended, in some parts thereof, to sustain the declaration, and the effect and weight to be given to it was solely a question for the jury, and it would have been error in the court to have taken the case from them.

The court instructed the jury that the burden of proof was upon the plaintiff to show by a fair preponderance of evidence of the existence of the contract, and that in pursuance of such contract he delivered the goods, relying entirely upon the promise of Jensen to pay the debt. And if the jury was satisfied by a fair preponderance of evidence that the bargain was made as plaintiff claimed, and that he relied entirely upon it and never looked to Labonta for his pay, then he was entitled to recover; otherwise he was not entitled to recover. But if the jury believed the theory of defendant, that no contract of this kind was ever made, and that he never agreed to pay any sum whatever absolutely, he is not liable and they should find no cause of action. The circuit judge placed the case very fully and fairly before the jury, and at the conclusion instructed them as follows: "The only question for you to determine is, 'Was this bargain made between the plaintiff and defendant, whereby goods were to be delivered to Labonta upon the credit of the defendant, and did the plaintiff, relying upon it, deliver the goods solely upon the credit of this man Jensen, and looking to no one else at all for his pay?' That is the question. If you solve that question in favor of the plaintiff, then he is entitled to a verdict; if you solve it against him, then he is not entitled to a verdict. The plaintiff must have looked to the defendant, Jensen, from the beginning to the end of the transaction." There is no error in the charge of the court. We do not think it is open to the criticism that "the charge, as given, assumed that the evidence made out an absolute promise to pay." On the contrary, it was the very question he submitted to the jury, to be determined by them from all the evidence in the case.

The plaintiff testified: "Last August Mr. Jensen came up to me, in Manistee, and made arrangements to furnish his son-in-law goods when he called for them. The object that Mr. Jensen wanted goods for his son-in-law was because he was a roving character, and he would see them paid for. I should deliver the goods to John Labonta, and he would see them paid. He stated the object in wanting the goods: His son-in-law was a sailor by profession, and he wanted to settle him down. He wanted his daughter to run the store, and his son-in-law to work around the mills, if the store didn't require his services. And I agreed to do so."

If this testimony of the plaintiff was found by the jury to be true, the agreement was not within the statute of frauds. The statute does not prevent a person from buying goods on his own credit, to be delivered to another, unless in writing. In such case the important question is, to whom was the credit given? And this question the court fairly submitted to the jury. And the fact that the goods are charged on the books of the seller to the person to whom they were delivered is not conclusive that they were sold upon his credit. Foster v. Persch, 68 N. Y. 400; Huzen v. Bearden, 4 Sneed, 48; Walker v. Richards, 41 N. H. 388; Swift v. Pierce, 13 Allen, 136; Barrett v. McHugh, 128 Mass. 165; Champion v. Doty, 31 Wis. 190; Ruggles v. Gatton, 50 Ill. 412. The plaintiff charged the goods delivered as follows: "John Labonta, by order

of Charles Jensen." The plaintiff testified that he gave credit to the defendant when he let the goods go, and, in response to a question put to him on cross-examination by defendant's attorney, "Who did you look to for pay for those goods?" replied: "Jensen;" and that he did not look to Labonta for it. The court instructed the jury that "the way the goods are charged upon the books does not exclude the parties from showing the exact fact to whom the credit was given." While there was no error in this portion of the charge, we think the charge made upon the books is quite as consistent with the view that credit was originally given to defendant as to Labonta; and the testimony received upon the subject as to whom credit was given was unexceptionable.

There are no errors in the record that call for a reversal of the judgment, and therefore it is affirmed.

The other justices concurred.

CRANE v. WHEELER.

(50 N. W. 1033, 48 Minn. 207.)

Supreme Court of Minnesota. Jan. 25, 1892.

Appeal from district court, Mower county; FARMER, Judge.

Petition of Henry Wheeler for allowance of a claim against insolvents, of whom F. I. Crane was assignee. Judgment for petitioner. The assignee appeals. Reversed.

Kingsley & Shepherd, for appellant. *French & Wright*, for respondent.

GILFILLAN, C. J. In the insolvency proceedings Wheeler filed his petition, verified by his attorney, setting forth his claim against the insolvents. The assignee disallowed the claim, and the claimant appealed to the district court. Upon such appeal the claim is to be tried as other civil actions. Laws 1881, c. 148, § 8. When the appeal came on for trial the assignee objected to evidence being offered to prove the claim on about this proposition, as near as we can tell from the statement of the objection in the settled case and from the brief: That the court is to hear the appeal only upon such proof of the claim as was offered before the assignee, and, if none was offered before him, then none can be received by the court. There is nothing in the statute to suggest such an idea. No trial except upon an appeal is contemplated. The claim was based upon the insolvent's guaranty of a promissory note. The facts found by the court and the evidence fully sustained the findings. Stating such facts briefly, they are: That in June, 1882, Wheeler left with Wilkins & Smith, to loan for him, a sum of money, with instructions to make no loan except upon security of first-class real estate, and paper indorsed by good indorsers. That, contrary to such instructions, they, in said June, loaned of said money $1,500 to one Gregson, taking his note therefor, payable to said Wheeler in one year. Afterwards, when informed they had made said loan to Gregson, Wheeler stated to them that he should look to them for the money they had loaned contrary to his instructions, and they agreed to be responsible for the same, as though they had borrowed the money, and to pay the note in case Gregson made default in payment; and they thereupon wrote and signed this guaranty on the note: "We hereby guaranty the collection of the within note. June 2, 1885." The note seems, up to that time, to have been in the possession of Wilkins and Smith. The question mainly argued in the case is, does the guaranty come within the statute of frauds, so as to be void because it does not express the consideration? In form, at least, it is a promise to answer for the debt or default of another. The form, however, is not decisive; for where the leading purpose of the promise is, not to become surety for another, not for the benefit in any way of such other, but to promote the interest, to effect some purpose, of the promisor, as independent of the debt or contract guarantied, as where it is to enable the guarantor to transfer the debt or contract, (Nichols v. Allen, 22 Minn. 283; Wilson v. Hentges, 29 Minn. 102, 12 N. W. Rep. 151,) or to satisfy or discharge an obligation resting on himself, (Sheldon v. Butler, 24 Minn. 513,) it is, notwithstanding its form, and although it incidentally guaranties the debt of another, regarded as an original, and not a collateral, undertaking, and so not within the statute of frauds. This case cannot be distinguished from Sheldon v. Butler. The insolvents had misappropriated Wheeler's money, and they were liable to him for it. If he could be induced to accept the Gregson note, and thus ratify what they had done, it would discharge their liability. To induce him to do it they guarantied the note. Under the circumstances, the guaranty, while in form a promise to answer for the default of another, was in fact and in substance a promise to pay and discharge their own liability if Wheeler could not collect it from Gregson. The claimant must stand on the terms and nature of the guaranty. It is a guaranty of collection,—*i. e.*, that the note is collectible. The condition of the guarantor's liability is that the creditor shall be unable to collect the debt, he using due diligence. Ordinarily, in such cases, due diligence requires of the creditor to promptly bring suit, and diligently prosecute it to the return of an execution. There may be circumstances that will excuse omission to bring suit,—as, if the principal debtor be insolvent, so that a suit against him would be fruitless; or if the guarantor should waive the use of diligence. The only effort which the court finds the claimant made to collect the debt from Gregson was that September 20, 1886, he brought an action against him, in due time recovered judgment and issued execution, which was returned unsatisfied. The note was past due when the guaranty was made, so that there was a delay of nearly 15 months before suit was brought. No fact is found to excuse this delay. The court found that since October 8, 1886, Gregson has been insolvent, but that, of course, would not excuse the prior delay. Whether the question of due diligence in such cases be one of law or of fact, or a mixed question of law and fact, an unexplained delay of nearly 15 months in bringing suit makes a case of omission to use due diligence. Moakley v. Riggs, 19 Johns. 69; Kies v. Tifft, 1 Cow. 98; Penniman v. Hudson, 14 Barb. 579; Craig v. Parkiss, 40 N. Y. 181. For failure of claimant to show due diligence to collect from Gregson, or to show any excuse for omitting it, there must be a new trial. Order reversed.

WAIT v. WAIT'S EX'R.

(28 Vt. 350.)

Supreme Court of Vermont. Rutland. Feb. Term, 1856.

Appeal from the decision and report of commissioners, disallowing a part of the appellant's claim against the estate of Joseph H. Wait, deceased. The nature of the claim, and the facts in relation thereto, sufficiently appear in the opinion of the court. The county court, September Term, 1855,—PIERPOINT, J., presiding,—rendered judgment in favor of the appellant for the amount of his claim. Exceptions by the appellee.

*351 **D. E. Nicholson* and *C. L. Williams* for the appellant.

B. Frisbie and *E. Edgerton* for the appellee.

The opinion of the court was delivered by

ISHAM, J. This is an appeal from the decision of the probate court, disallowing the plaintiff's claim against the estate of Joseph H. Wait. The plaintiff claims the sum of $140,00 for his expenses in erecting a barn on premises then owned by Joseph Wait. The barn was erected at the request of Joseph Wait, under his assurance that by some arrangement the premises should be conveyed to the plaintiff, so that he should have the benefit of his labor and expenses; or if the premises were conveyed to another, that person should pay the amount expended in erecting the building. In 1847, Joseph Wait conveyed these premises and this barn to Joseph H. Wait, and they now constitute a part of his estate. The fact is found by the auditor, that soon after that conveyance, Joseph H. Wait informed the plaintiff that there was an understanding between him and Joseph Wait, that he was to pay him for building the barn, and that he would do it as soon as he could. This promise the auditor finds was repeated on several occasions down to 1851, and that in their last conversation, the deceased recognized the debt as due from him, and promised to pay it. It is now insisted that this promise to pay the plaintiff his claim is void under the statute of frauds, it not being in writing, and being a promise to pay the debt of another. The payment of this claim due the plaintiff was a part of the consideration for which those premises were conveyed to the deceased, and was made at the request of Joseph Wait, in fulfilment of those assurances which had been given to the plaintiff. That is plainly the finding of the auditor, and the only reasonable construction that can be given to his language throughout his report. Under those circumstances, we think, the authorities are clear that this promise is founded upon a sufficient consideration, and that it is to be regarded as an original and binding contract. There is no doubt that a promise to pay the debt of another, though made at the same time the credit was given to the principal debtor, will be void, under the statute, if not in writing. The same result follows, where such a promise is subsequently made, if the consideration of that promise is the subsis*ting liability of the *352 original debtor. The promise in those cases is collateral, and therefore void; and the promise will be deemed collateral, so long as the liability of the original debtor continues. The cases of Fish v. Hutchinson, 2 Wils. 94; Chater v. Beckett, 7 Term R. 201, and Wain v. Warlters, 5 East 10, are illustrations of that principle. But that principle has no application to cases where the original debtor places property of any kind in the hands of a third person, and that person promises to pay the claim of a particular creditor of the debtor. The promise in such case is an original promise, and the property placed in his hands is its consideration. In this class of cases, it is immaterial whether the liability of the original debtor continues or not. In the case of Farley v Cleveland, 4 Cowen 432, SAVAGE, CH. J. observed that "when there is a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, the subsisting liability of the original debtor, is no objection to the recovery " In 1 Smith's Lead. cases 329, this subject is examined by the American editor, and from a review of the authorities on this question, he observes that "a promise to pay an antecedent debt, in consideration of property placed in the hands of the promisor by the debtor, has been held not to require a writing to give it validity, and that it seems reasonably well settled, that a verbal promise to be answerable for the antecedent debt of another will be valid, where it is made upon a new and independent consideration, although the debt itself still remain in full force; but that where the consideration grows out of the original contract, the promise will be within the statute." The cases there referred to on this subject are numerous, and fully sustain this principle. The case under consideration clearly falls within the application of that doctrine. The promise by the defendant to pay this debt of the plaintiff is fully found by the auditor; its consideration was not the subsisting liability of Joseph Wait, neither did it arise out of the original contract, but from property placed in the defendant's hands for that purpose by the original debtor. We are satisfied that the promise of the defendant in this case, is to be regarded as an original promise founded upon a new consideration, and legally binding upon him.

On the trial of this case it was insisted *353 that parol evidence was *inadmissible to show that the payment of this debt was a part of the consideration for which the premises were conveyed by Joseph Wait to the deceased, as it contradicted the deed and bond which is made part of this case. The consideration of the deed is expressed to be for the sum of three thousand dollars. The bond was given to support the grantor and his wife during their lives, and to pay specified sums in money to his three daughters, amounting to the sum of five hundred dollars. As between Joseph Wait and the deceased, it is possible the bond would be evidence of the extent of his claim. The object of the bond was to secure the support of the grantor and his wife, and the payment of certain sums as a family settlement of his estate. It was not intended to cover all the obligations assumed by the grantee. The plaintiff is not a party to the deed or bond. The object of the testimony is not to show a different obligation from that expressed in the bond, nor to vary or affect the legal operation of the deed, but to show that the payment of this debt was a part of the three thousand dollars which is expressed to be the consideration of the deed. The execution of the bond was reducing to writing only a part of the consideration of the deed, and that part only, which was to be rendered to the grantor. In such case, it is competent to prove an additional and suppletory agreement by parol, as that the remaining part of the consideration was to be paid to the plaintiff: Bowen v. Bell 20 John. 341; Greenl. Evid. § 284, a. § 304; Jeffery v Walton, 1 Starkie 267; Rockwood's case, 1 Cro. Eliz. 164. We think the testimony was admissible, and that the plaintiff is entitled to recover the amount of his claim.

The judgment of the county court is affirmed, and the case is to be certified to the probate court.

MALLORY v. GILLETT.

(21 N. Y. 412.)

Court of Appeals of New York. June, 1860.

George T. Spencer, for appellant. Henry M. Hyde, for respondent.

COMSTOCK, C. J. This case ought to be one of first impression. By the statute of frauds, all promises to answer for the debt of a third person are void unless reduced to writing. One Haines owed the plaintiff a debt for repairs on a boat, for which the latter had a lien on the chattel. In consideration of the relinquishment of that lien, and of forbearance to sue the original debtor, the defendant promised the plaintiff, without writing, to pay the debt at a certain future time. There is no pretense that the defendant's promise was given or accepted as a substitute for the original demand, or that such demand was in any manner extinguished. The promise was, therefore, to answer for the existing and continuing debt of another, or, in the language of the books, it was a collateral promise. The consideration was perfect, but as there was no writing, the case seems to fall within the very terms of the statute. Authorities need not be cited to prove that the sufficiency of the consideration never takes a case out of the statute. Indeed, there can be no question under the statute of frauds in any case, until it is ascertained that there is a consideration to sustain the promise. Without that element the agreement is void before we come to the statute. A naked promise is void on general principles of law, although it be in writing. The mere existence of a past debt of a third person will not sustain an agreement to pay it, unless there be forbearance to sue, or some other new consideration. In such a case, when we find there is a new consideration, we then, and not till then, reach the inquiry whether the agreement must be in writing. Such is this case. It is nothing to say that here was a new consideration. If such was not the fact, there would be no question in the case.

There is sometimes danger of error creeping into the law through a mere misunderstanding or misuse of terms. The words "original" and "collateral" are not in the statute of frauds, but they were used at an early day—the one to mark the obligation of a principal debtor, the other that of the person who undertook to answer for such debt. This was, no doubt, an accurate use of language; but it has sometimes happened that, by losing sight of the exact ideas represented in these terms, the word "original" has been used to characterize any new promise to pay an antecedent debt of another person. Such promises have been called original, because they are new; and then as original undertakings are agreed not to be within the statute of frauds, so these new promises, it is often argued, are not within it. If the terms of the statute were adhered to, or a more discriminating use were made of words not contained in it, there would be no danger of falling into errors of this description.

What is a promise to answer for the "debt or default" of another person? Under this language, perplexing questions may arise, and many have arisen, in the courts. But some propositions are extremely plain: and one of them is, that the statute points to no distinction between a debt created at the time when the collateral engagement is made, and one having a previous existence. The requirement is, that promises to answer for the debt, etc., of a third person, be in writing. The original and collateral obligations may come into existence at the same time, and both be the foundation of the credit, or the one may exist and the other be created afterward. In either case, and equally in both, the inquiry under that statute is, whether there be a debtor and a surety, and not when the relation was created. The language of the enactment is so plain that there is no room for interpretation; and its policy is equally clear. If A. say to B.: "If you will suffer C. to incur a debt for goods which you will now or hereafter sell and deliver to him, I will see you paid," the promise is within the statute. This no one ever doubted. But if A. say to B.: "If you will forbear to sue C. for six months on a debt heretofore incurred by him for goods sold and delivered to him, I will see you paid"—is not the case equally plain? So, if, in such a case, instead of forbearance, there is some other sufficient consideration, for example, forgiving a part of the debt or relinquishing some security for it, the difference is still one of circumstance, but not of principle. In the case first put, the consideration of the guaranty is the original sale of the goods on the faith of it; in the other, it may be forbearance or the relinquishment of some advantage, the original debt still remaining. Looking at the comparative merit of these considerations, it would seem to be the highest in the first case, for the whole debt owes its origin to the collateral promise, while in the other the debt remains as before, and only some collateral advantage is lost. But the application of the statute depends on no such test. These considerations are, all of them, sufficient, and simply sufficient, to sustain the auxiliary undertaking. But if they also dispense with a writing, then, so far as I can see, there are no cases to which this branch of the statute of frauds can be applied.

Such an extreme position has not been taken; but it is said that the promise now in question need not be in writing, because it was new and original, and was founded on the relinquishment to the debtor of a security which the creditor held. To say that it was new and original expresses no idea of

any importance. Every promise is new and original that was never made before. An undertaking to answer for an old debt of a third person certainly has no more of originality than one to answer for a debt now contracted. As to the relinquishment of the lien or security, this, although a meritorious consideration, is, in judgment of law, no more so than any other which is sufficient to sustain a contract. Forbearance to sue has the same legal merit, and so has the release of a part of the debt.

There is nothing so remarkable or peculiar about this case that it may not be included in some general proposition which involves a principle of law. Now, one of these two propositions must, I think, be true: 1. The statute of frauds never applies to a promise, the subject of which is an antecedent debt of a third person to whom it is collateral; or, 2. It applies to all such promises where the consideration moves solely between the creditor and original debtor and the debt still remains. If the first is true, then the promise in question is valid without a writing, and so would any such promise be, without regard to the particular nature of the consideration; it being necessary, of course, that there should be some sufficient consideration. If the first be not true, and the second is, then the promise in this case is void, because it falls directly within it. The first proposition cannot be true, upon the plain terms and evident policy of the statute; and no such doctrine was ever asserted. The universal truth of the second one necessarily follows, unless the law will discriminate between different promises according as the consideration may differ in the particular nature or kind. But is such a discrimination possible, so long as, in any given case, the consideration is sufficient in the eye of the law, and moves solely between the original parties? No one, it seems to me, can hesitate to answer such a question in the negative. Yet we are told, without reason or principle, that when a creditor releases a security to the debtor, although without releasing the debt, a promise of another person, founded on that peculiar consideration, is not within the statute. The inevitable logic of such a proposition will include a like promise founded on any other consideration equally sufficient to sustain a contract; and, therefore, we are carried back to the first general proposition above stated, which is admitted to be false. It has already been observed, that, without a consideration, no question on the statute of frauds can arise.

In this elementary view of the question, I do not understand that much difference of opinion exists. It is claimed, however, that the course of adjudication has been such, that we cannot determine the case before us according to a consistent rule of law. This argument is founded in a misapprehension of the authorities, some reference to which will be necessary.

In this state, an early case, and one of very high authority, is that of Leonard v. Vredenburgh, 8 Johns. 29, in which Chief Justice Kent divided the cases on this branch of the statute of frauds into three classes, as follows: (1) Where the promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the original credit. (2) "Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise." "Here," the chief justice observed, "there must be some further [or new] consideration shown, having an immediate respect to such liability; for the consideration of the original debt will not attach to this subsequent promise. (3) Cases where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties." "The two first classes," he further observed, "are within the statute of frauds, but the last is not." I suppose, in the light of later decisions, that the opinion of that great jurist, delivered in the case cited, may contain some inaccurate remarks respecting the right to prove a consideration for a collateral agreement where none appeared in the writing. It would be so considered, especially since the change we have made in the language of the statute of frauds, requiring the consideration to be expressed in the collateral instrument. But the above classification of the cases, and the connected remarks respecting each class, are strictly correct, and they have been a landmark of the law for forty years. Does the present case belong to the second class, which is within the statute, or to the third, which is not? Manifestly it belongs to the second, because that is a class where the undertaking is subsequent to the creation of the debt. It does not fall without that class in consequence of the newness of the consideration, because, the learned chief justice said, "here must be some further [new] consideration having an immediate respect to such liability." It cannot fall within the third class, because if we arrange it there, we necessarily compress the two classes into one, or, more properly speaking, we merge the second wholly into the third. In such a disposition of the present question no second class is left of collateral undertakings subsequent to the creation of the original debt, founded, as they must be, on some new or "further consideration."

The classification referred to, on a casual reading, is perhaps open to some misapprehension, and I think it has been occasionally misapprehended. What, then, is the true distinction between the second and third classes? They are both of them promises, in form at least, to pay the antecedent debt of a third person, and in that respect they are alike. The distinction, therefore, is in the consideration of the promises which be-

long to the two classes; not in respect to its particular nature or kind, but in respect to the parties between whom it moves. In the one class, the consideration is characterized as a "further one, having immediate respect to the [original] liability" of the debtor; in the other, as "new and original moving between the newly contracting parties." In the second class, the new or "further" consideration moves to the primary debtor. It may consist of forbearance to sue him, of a release to him of some security, or of any sufficient benefit to him or harm to the creditor, but in which the collateral promisor has no interest or concern. In the third class, the consideration, whatever its nature, moves to the person making the promise, and that also, as in all other cases of contract, may consist of benefit to him or harm to the party with whom he is dealing. This distinction is also extremely well expressed by Chief Justice Shaw of the supreme court of Massachusetts. One class of cases (within the statute), he says, is "where the direct and leading object of the promise is to become the surety or guarantor of another's debt;" the other class (not within the statute) is "where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own." Nelson v. Boynton, 3 Metc. (Mass.) 396–400. Chief Justice Savage, in this state (Farley v. Cleveland, 4 Cow. 432, 439), made the same classification. "In all these cases," he observed, referring to those which fall within the third class, "founded on a new and original consideration of benefit to the defendant or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or original debtor, the subsisting liability of the original debtor is no objection to a recovery." In one respect, this language of Chief Justice Savage, has greater precision than that of Chief Justice Kent. The latter speaks of the consideration as "moving between the newly contracting parties." The former characterizes it as moving to the party making the promise. This description is more exact, as well as more comprehensive, because it includes a variety of cases found in the books, where the new consideration springs from the original debtor and not the creditor, as, for example, where the debtor, by conveyance of property or otherwise, places a fund in the hands of a third person, the latter promising, in consideration thereof, to pay the debt. But the difference is not one of principle, because there is a sense in which, even in such cases, the new consideration moves from the creditor through the debtor to the person making the promise, and on that ground many cases hold that the creditor may himself sue on the promise, although it was made to the debtor. Lawrence v. Fox, 20 N. Y. 268, and the cases cited. Where the promise in this particular description of cases has been made directly to the creditor, the only question has been on the statute of frauds; and the rule is very properly settled that they are not within the statute. The cases of Farley v. Cleveland, supra, Gold v. Phillips, 10 Johns. 412, and Olmstead v. Greenly, 18 Johns. 12, belong to this class.

Omitting, then, the first class of collateral undertakings—I mean those made at the same time with the creation of the debt—as having nothing to do with the present question, there are two kinds of promises of extensive use in the dealings of community, which, in form and effect, very much resemble each other; each being to answer for or pay a debt already due or owing from a third person, yet wholly different in respect to the motive and consideration. In the one class the promisor has no personal interest or concern, and his undertaking is made solely upon some fresh consideration passing between the creditor and his debtor. This class is within the statute. In the other, the promise may be in the same form, and, when performed, may have the same effect, but it is made as the incident of some new dealing in which the promisor is himself concerned, and upon a consideration passing between the creditor or the debtor and himself. This class, which may include a great variety of particular examples, is not within the statute. The distinction is broad and intelligible, although the formal resemblance in such transactions may have occasionally led to inaccuracy of expression or decision. The great body of the cases, however, will be found to illustrate this distinction, and to establish it firmly as a guide in this branch of the law. If such a distinction were a questionable one, the tendency of the doubt would necessarily be in the direction of holding both classes of cases to be within the statute, but never in the direction of placing without the statute any one of the cases belonging to the first of these classes.

With this classification before us, it will be proper to notice more in detail the cases cited on the argument, and others not cited. In Skelton v. Brewster, 8 Johns. 376, the promise was held not within the statute, because the debtor had delivered goods to the defendant as the consideration of the undertaking, and the plaintiff, the creditor, had discharged the debt. For two reasons, therefore, the promise by parol was good: First, it was founded on a new consideration received by the promisor; and, second, it was accepted as a substitute for the original debt; it could not be collateral.

In Gold v. Phillips, 10 Johns. 412, one Wood owed the plaintiffs. He conveyed land to the defendants, who, upon that consideration, bound themselves to him to pay that and other debts. Being thus bound, they so informed the plaintiffs, and agreed to pay them. The case, therefore, very distinctly falls within the third class, according to the distinctions above set forth. Bailey v. Free-

man, 11 Johns. 221, was on a written guaranty made at the same time with the principal contract, and it has nothing to do with the present question. Nelson v. Dubois, 13 Johns. 175, is equally foreign to the inquiry. The plaintiff sold a horse to one Brundige, taking therefor the note of Brundige, payable to himself or bearer, and indorsed by the defendant. The legal proposition in the case was, that a guaranty might be written over the defendant's name, it being a condition of the sale that he should become security for the price. In Myers v. Morse, 15 Johns. 425, the plaintiffs were liable as indorsers of a note of one H. Morse, and they held a note of the same person indorsed by the defendant. The declaration set forth that the plaintiffs had agreed not to hold the defendant liable on his indorsement, in consideration of which, the defendant agreed to indemnify them against one-third of any loss they might sustain on their own indorsement of the same person's note. A plea of the statute of frauds was held bad. This was plainly a case where the consideration moved to the defendant himself, and, therefore, it was held to fall within the third class of cases, according to the distinction which has been explained. The definition of Chief Justice Kent, in Leonard v. Vredenburgh, was expressly adopted and applied to the facts. In Olmstead v. Greenly, 18 Johns. 12, the plaintiff was an accommodation indorser on the note of B., and B. also owed him a sum of money; B. thereupon placed money and property in the hands of the defendant to provide for paying the note and the debt, and upon that consideration the defendant promised the plaintiffs to make such payment. The court said this was an original contract on an independent consideration received by the defendant. Farley v. Cleveland, 4 Cow. 432, and same case in error, 9 Id. 639, already mentioned, was entirely similar. The plaintiff held the note of one Moon, which the defendant promised to pay in consideration of fifteen tons of hay sold to him by Moon. The promise was held to be not within the statute. The reporter's note truly expresses the principle of the decision. It is as follows: "Where a promise to pay the debt of a third person arises out of some new consideration of benefit to the promisor or harm to the promisee, moving to the promisor, either from the promisee or the original debtor, such promise is not within the statute of frauds, although the original debt still subsists and remains entirely unaffected by the new agreement." In Chapin v. Merrill, 4 Wend. 657, the promise was not within the statute, because it was not collateral to any debt or liability of a third person to the promisee. The third person proposed to contract a debt with fourth parties, and the plaintiff agreed to guarantee that debt, the defendant at the same time agreeing to indemnify him for so doing. The plaintiff might have invoked the statute, if his guaranty had not been in writing. But the defendant was his indemnitor merely. It was a contingent liability, of necessity original, because there was nothing to which it could be collateral. There was no debt of the third person to the plaintiff. The case therefore, had not even the formal resemblance to the present one, which, existing in other cases, has misled the plaintiff's counsel. The cases of Gardiner v. Hopkins, 5 Wend. 23; Ellwood v. Monk, Id. 235; King v. Despard, Id. 277; and Meech v. Smith, 7 Wend. 315,—are, all of them, in principle, with differences of detail, like Farley v. Cleveland, supra. In each of them the consideration of the new promise moved to the defendant, proceeding either from the original debtor or the creditor, and the decisions were placed distinctly on that ground.

It cannot fail to be seen, that nearly all the cases which have been mentioned: in fact, all of them which exhibit a promise to pay or answer for the debt of another person, are essentially of one type. With great variety in the circumstances, one controlling characteristic pervades them all. In every instance the consideration of the promise was beneficial to the person promising. This was the feature which imparted to the promise the character of originality, as that term is used with reference to the statute of frauds. In not one of them is it true that the undertaking was entered into upon a consideration merely beneficial to the debtor, but of no concern to the promisor; and I can confidently say that not one of those cases contains even a dictum, which, being understood, countenances the doctrine contended for on the part of the plaintiff in this case. The principle involved is the same which runs through other cases that have not been cited. For example, A., holding the note of B., transfers it to C. upon a consideration moving from C. to him, and with a parol guaranty of the payment. This, in a merely formal sense, is a promise to answer for the debt of the maker of the note, and it has been strenuously contended that such a promise is within the statute. But the rule is otherwise; it being considered that such transactions, however close to the letter, are not within the intent of the statute; because they have their root in a new dealing which concerns the promisor, and in a new consideration which moves to him. Brown v. Curtiss, 2 N. Y. 225, was such a case, in which Judge Bronson remarked: "This belongs to the third class of cases mentioned by Kent, C. J., in Leonard v. Vredenburgh; there was a new and distinct consideration independent of the debt of the maker, and one moving between the parties to the new promise." Such are also the cases of Johnson v. Gilbert, 4 Hill, 178, and the very recent one in this court of Cardell v. McNiel (decided at the last term) 21 N. Y. 336.

I have not yet referred to the case of Slin-

gerland v. Morse, 7 Johns. 463, which seems to be much relied on; but it does not present the question now before us. The plaintiff had distrained the goods of his tenant for rent, but did not remove them. Thereupon the defendants signed a writing in these words: "We do hereby promise to deliver to Peter Slingerland all the goods and chattels contained in the within inventory in six days after demand, or pay the said Peter $450." Looking at the face of that writing, it is only surprising that any one could ever think it was within the statute of frauds. In its very terms it was original, and not collateral. It discloses no debt of any one else than the defendant who signed it. Looking outside of it, we learn there was at least a claim made for rent due from another person, but it is quite obvious that, as a substitute for that claim, the creditor accepted the original promise of the defendant to deliver the goods or pay a sum of money. This is the evident import of the agreement itself, for it recognizes no continuing debt or liability of the tenant, nor does it undertake to pay his debt or answer for him in any way. The goods were the fund. The defendant took them under his own control (a fact which the agreement assumes), and upon that consideration made himself the primary debtor, and not the guarantor or surety. I think the case was well decided, although it is very obscurely and scantily reported.

So far, then, we find no cases or dicta in point. Yet it would not be true to say that the plaintiff's position is wholly unsupported by any authority in the courts of this state. In Mercein v. Andrus, 10 Wend. 461, Savage, C. J., made this remark on a motion for a new trial: "The judge correctly stated to the jury that where the promise of one person to pay the debt of another was founded upon the consideration of surrendering up property levied on by an execution, the promise was an original undertaking, and need not be in writing to be valid." Of course, no such point was decided, because the decision granted a new trial upon another question not material to the present inquiry. The chief justice cited no authority. If he meant to lay down the doctrine, that a new consideration, moving from the creditor to the debtor, the debt still remaining, would sustain the unwritten promise of another person to pay the debt, there was no authority to be cited, for no such proposition had ever been advanced in this state. If, however, the charge at the trial and the observation of the chief justice assumed, as the law was, that the levy of an execution extinguished the debt, and that the release of the levy remitted the creditor to the new promise as his only remedy, then the remark was strictly correct, but it has no application to this case. Such is probably the true explanation; and we shall presently see there are English cases under the statute standing on that ground. The plaintiff's counsel has been able, however, to cite one case which is entirely to his purpose. In Fay v. Bell, Lalor's Supp. 251, the plaintiff had a lien on a pair of boots which he had mended, and in consideration of releasing that lien and giving up the boots, the defendant promised to pay his demand, which amounted to fifty cents. So far as appears, the debt still remained. The case went up from a justice's court, through the common pleas, to the supreme court, where the question was disposed of with the single observation that the promise was "a new undertaking, founded on a new and distinct consideration, the relinquishment by the plaintiff of his lien on the boots, and which was sufficient to uphold the promise made." The remark, as made, is strictly true. The consideration was clearly sufficient to uphold the promise, but the statute of frauds requires not only a consideration but a writing. The case was of very slight importance, and the principles of the question were not examined. In the same book is another case, precisely the other way, the opinion being given by another judge. In Van Slyck v. Pulver, Lalor's Supp. 47, the promise was made in consideration that the plaintiff would suspend proceedings on an execution against his debtor. This forbearance was admitted to be a sufficient consideration, and it was certainly a new one; but the promise was held void within the statute.

In all the judicial history of this state, then, there is but one adjudged case which sustains the doctrine contended for, and that is one entitled to no great consideration. I will now refer to several of a very decisive character, which furnish a true exposition of the statute, and show that the rule is the other way. One case I have just mentioned, which is directly in point, and is of a date comparatively recent. Going back to an early day, in Simpson v. Patten, 4 Johns. 422, the plaintiff forebore to sue his debtor, and upon that consideration the defendant promised to pay the debt as soon as he could sell a piece of land which belonged to the debtor. The promise was held void within the statute of frauds, the court observing: "A promise to pay the debt of a third person must be in writing, notwithstanding it is made on a sufficient consideration." I have some hesitation in citing Jackson v. Rayner, 12 Johns. 291, because it seems to me to have gone too far. The defendant had received an assignment of the debtor's property, and upon that consideration, as well as forbearance, the defendant promised to pay the demand. The court regarded the unconditional promise as evidence that the fund was adequate. Upon the discrimination made in the later cases (heretofore cited), the conveyance of the property to the defendant was a new consideration, moving to him from the debtor, and made the promise an original one. Nevertheless, on the ground that the original debt still remained, the promise was held void under the statute. In Smith v.

Ives, 15 Wend. 182, the declaration was on a written guaranty of a note, the consideration alleged being forbearance to sue the maker. Plea, that no consideration was expressed in the writing. The plea was held good, the court saying: "Forbearance has never been considered a new consideration passing between the newly contracting parties, so as to take the case out of the statute." In Packer v. Willson, 15 Wend. 343, a guaranty of the same nature, and upon the same consideration, was again held to be void. In Watson v. Randall, 20 Wend. 201, these propositions were expressly affirmed: (1) An agreement to forbear to sue a debtor is a good consideration for the promise of a third person to pay the debt, but, to render the promise obligatory, it must be in writing. (2) While the debt remains a subsisting demand against the original debtor the promise of a third person is collateral, and must be in writing. In Barker v. Bucklin, 2 Denio, 45, a new trial was ordered upon a point not now material; but the present question was quite fully examined by Mr. Justice Jewett. According to his views, the promise in this case is clearly void. If I were to criticise his opinion, I should say he goes somewhat too far, by reason of not discriminating so as to uphold promises where (the original debt still remaining) the new consideration moves from the creditor to the promisor as well as from the primary debtor. In Kingsley v. Balcome, 4 Barb. 131, the principal cases were reviewed by Mr. Justice Sill, and his conclusion is thus stated: "The true rule is, that the new original consideration spoken of must be such as to shift the actual indebtedness to the new promisor, so that, as between him and the original debtor, he must be bound to pay the debt as his own, the latter standing to him in the relation of surety." I do not think this a perfect definition of an original promise to pay a sum for which another was previously bound as the primary debtor, because, as I have shown, there are many cases which such a definition does not include. The more we examine the original classification of Chief Justice Kent in Leonard v. Vredenburgh, the more we shall find it the result of a profound and masterly view of the subject; it being necessary, however, to the completeness of his definition, that the new or original consideration may move to the promisor as well from the debtor as the creditor, the fundamental requisite being that such consideration must not be one wholly existing or moving between the debtor and the creditor.

These numerous authorities are decisive. They all present examples where the collateral undertaking was founded on a consideration sufficient to sustain the promise, but of no personal concern to the promisor; yet the promises were void, because they fell within the precise terms and the undoubted policy of the statute of frauds. Certainly that statute was not enacted for cases where the promise would be void at the common law for want of a consideration to sustain it. If it was not enacted for the very cases where a new consideration arises, additional to the original debt, that being insufficient according to all authority, then why was it ever passed? Indeed, the struggle in the courts has been to withdraw from its influence, not such cases as these, but others having a close formal resemblance, yet distinguishable, not because there is a consideration, but because it moves to the promisor, and so gives to his undertaking an original character. A person who receives a consideration may be bound by any lawful promise founded upon it, and that promise may as well lie to pay another man's debt as to do any other act. The success of this struggle, in a variety of instances not within the intent of the statute, should not overthrow the very object for which it was enacted.

This discussion would be incomplete without referring to the rule elsewhere than in this state. I have already mentioned the case of Nelson v. Boynton, 3 Metc. (Mass.) 396, which may be regarded as settling the question in Massachusetts. The creditor in that case sued his debtor, and seized his property under an attachment. The defendant promised to pay the debt in consideration of a discontinuance of the suit. The suit was discontinued accordingly, and the lien of the attachment was thereby lost, but the debt remained against the original debtor. It was held, upon the fullest consideration, Chief Justice Shaw giving the opinion, that the promise was void because it was not in writing. I regard the decision as of great value, because the cases were examined, and the discrimination between the different classes was made with entire accuracy.

Upon the argument of the present case a passage from an English text-book was read (Add. Cont. 38), to the effect that, if the creditor has a lien or security which he is induced to part with on the faith of a promise of another person to pay the debt, the promise so made is not within the mischief intended to be provided against by the statute of frauds, and may be good by parol. This extract, according to its apparent meaning, seemed to indicate that in England the statute of frauds was essentially disregarded. The authorities referred to by the writer to sustain the proposition are: Barker v. Birt, 10 Mees. & W. 61; Haigh v. Brooks, 10 Adol. & E. 309–335; Barrell v. Trussell, 4 Taunt. 117; Meredith v. Short, 1 Salk. 25; Castling v. Aubert, 2 East, 325; and Walker v. Taylor, 6 Car. & P. 752. I have looked at these cases, and find that none of them have the slightest connection with such a proposition, except the two last, which are alike, and do not sustain it. In the last case, the creditor had the possession and a lien upon certain licenses as a security for his demand, and he gave them up to the defendant, who

promised to pay the debt. The case was at nisi prius. Tindal, C. J., said: "It is a new contract, under a new state of circumstances. It is not, 'I will pay, if the debtor cannot;' but it is, 'in consideration of that which is an advantage to me, I will pay you this money.'" "There is a whole class of cases in which the matter is excepted from the statute on account of a consideration arising immediately between the parties." Here is the very distinction so well established in our own cases. It should be added, that the text-writer referred to could not have intended what his language apparently means; for he adds, in the same connection, "In these cases, the plaintiff must so shape his case as not to show or admit that there is a principal debtor liable, and that the promise of the defendant is a promise to pay that debt."

The early case in England, of Williams v. Leper, 3 Burrows, 1886, 2 Wils. 308, is cited and relied on to sustain the plaintiff's position; and it is, perhaps, the only one in the English courts capable of a misinterpretation. But the case does not, in fact, sustain any such doctrine, and it has never been so understood in the courts of that country. One Taylor owed the plaintiff £45 for rent. He conveyed all his effects for the benefit of his creditors, who employed Leper, the defendant, to sell them; and he advertised them for sale accordingly. The plaintiff then came to distrain, and the defendant promised to pay the rent if he would not distrain; and he desisted accordingly. Lord Mansfield said the defendant was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien. Justice Wilmot said the defendant became the bailiff of the landlord, and, when he had sold the goods, the money was the landlord's in his own bailiff's hands. Therefore, he said, an action would have lain against the defendant for money had and received to the plaintiff's use. Justice Yates said, it was an original consideration to the defendant. Justice Aston thought the goods were a fund between both, "and on that foot he concurred." From the reasoning of these judges, it seems to me perfectly evident that, if the tenant had not assigned his goods, and the defendant had no connection with them as trustee or otherwise, but the plaintiff had simply released his distress, or right to distrain, for the benefit of the debtor alone, the promise to pay the debt on that consideration would have been held within the statute. But as the facts were, the law would imply an obligation on the defendant's part to pay over the money to the plaintiff after selling the goods; and where the law will imply a debt or duty against any man, his express promise to pay the same debt, or perform the same duty, must, in its nature, be original. The distinguishing feature of the case was, that the creditor relinquished his distress, not to the debtor, but to other creditors of the same debtor who beneficially owned the goods, and the defendant was the representative of those creditors, having the fund in his possession. If this early case had not been sometimes misapprehended, it is probable that no doubt would ever have arisen in questions like the one before us.

The cases also cited of Houlditch v. Milne, 3 Esp. 86; Castling v. Aubert, 2 East, 325; Edwards v. Kelly, 6 Maule & S. 204; Bird v. Gammon, 3 Bing. N. C. 883; Bampton v. Paulin, 4 Bing. 264; Walker v. Taylor, 6 Car. & P. 752; and Stephens v. Pell, 2 Cromp. & M. 710,—differing only in immaterial circumstances, all involved the same general principles as Williams v. Leper. In each of them the creditor relinquished some lien or advantage incident to his debt; but in each of them whatsoever he relinquished was acquired by the defendant—either as a matter of personal interest and concern to himself or to other parties whom he represented—and on that consideration he promised to pay. In none of them was any such doctrine asserted as the plaintiff contends for in this case. In all of them the engagement was deemed original, either because the primary debt was gone or because the consideration moved to the promisor; and in some of them the decision was put on both these grounds. These cases not only elucidate more perfectly the principle of Williams v. Leper, but they are in themselves illustrations of the distinction which, as we have seen, is recognized in our own courts. Referring now to Read v. Nash, 1 Wils. 305, it was the case of a promise to pay the plaintiff a certain sum if the latter would withdraw his record in an action of assault and battery against another person, and would not proceed to trial. This promise was held not to be within the statute of frauds; the decision being placed on the ground that the person sued for the assault was not a debtor at all within the meaning of the statute, and could not be so considered until after verdict against him. "For aught we can tell," the court said, "the verdict might have been in his favor." The promise, therefore, stood as at the common law. In Goodman v. Chase, a debtor, taken on a ca. sa. at the suit of the plaintiff, was discharged with the plaintiff's consent on the defendant's promise to pay the debt. This was held an original promise, because the debt itself was extinct and satisfied by the ca. sa. and its discharge; and the principle of the decision is a very plain one.

I have now referred to all the decisions in the English courts which can be supposed to favor in any degree the doctrine on which the plaintiff in this case relies; and I think it may be safely affirmed, that no case has ever been determined in those courts tending to the proposition that a parol promise to pay the debt of another person is valid where the consideration is beneficial only to the debtor, and where there is a debt which

still remains against him. I will now mention a few cases, among many others, which show what the law in England is upon the precise question now to be decided.

In Fish v. Hutchinson, 2 Wils. 94, the plaintiff had commenced a suit against his debtor, and the defendant, in consideration that he would stay that suit, promised by parol to pay the debt. The whole court of king's bench were of opinion that the undertaking was void by the statute of frauds; observing that there was a debt still subsisting against another person and a promise to pay it. The consideration was manifestly good, but that, moving as it did to the debtor only, did not sustain the promise without a writing. This case was decided just one hundred years ago, and the principle of it was never departed from in succeeding times. Coming down to a recent period, in Clancy v. Piggott, 2 Adol. & E. 473, one Moore was indebted to the plaintiff, for which the latter held his goods in pledge. In consideration of surrendering the pledge to the debtor, the defendant promised, by a writing which did not express the consideration, to pay the plaintiff his debt. Williams v. Leper, and the other cases above referred to, belonging to that class, were cited to sustain the undertaking; but the court held it within the statute and void. Williams v. Leper, and the kindred decisions, were not overruled, or even questioned, and the case, therefore, shows how those decisions are understood in England. In Tomlinson v. Gell, 6 Adol. & E. 564, the plaintiff's client was indebted to him for costs in a pending chancery suit, and in consideration of a discontinuance of that suit, the defendant promised to pay those costs to the plaintiff. Held void within the statute. Patterson, J., observed: "It is said that a new consideration arose from the discontinuance of the suit. But I do not think it is a new one. The cases on that point are where something has been given up by the plaintiff, and acquired by the party making the promise, as a security of goods for a debt."

Without pursuing this discussion further, the general rule is, that all promises to answer for the debt or default of a third person must be in writing, whether the promise be made before, at the time, or after the debt or liability is created. Such is the rule, because so is the statute of frauds. The statute makes no exception of any promise which is of that character. The courts have made no exceptions; as clearly they should not. But a considerable variety of undertakings, having points of resemblance and analogy to such promises, have been held not to be within the statute. These may be chiefly, if not wholly, arranged in the following classes: (1) Where there was no original debt to which the auxiliary promise could be collateral; for example where the promisee was a mere guarantor for the third person to some one else, and the promisor agrees to indemnify him, or where his demand was founded in a pure tort. (2) Where the original debt becomes extinguished, and the creditor has only the new promise to rely upon; for example where such new undertaking is accepted as a substitute for the original demand, or where the original demand is deemed satisfied by the arrest of the debtor's body or a levy on his goods, the arrest or levy being discharged by the creditor's consent. (3) Where, although the debt remains, the promise is founded on a new consideration which moves to the promisor. This consideration may come from the debtor, as where he puts a fund in the hands of the promisee, either by absolute transfer or upon a trust, to pay the debt, or it may be in his hands charged with the debt as a prior lien, as in the case of Williams v. Leper, and many others. So the consideration may originate in a new and independent dealing between the promisor and the creditor, the undertaking to answer for the debt of another being one of the incidents of that dealing. Thus, A., for any compensation agreed on between him and B., may undertake that C. shall pay his debt to B. So A., himself being the creditor of C., may transfer the obligation to B. upon any sufficient consideration, and guarantee it by parol. If we go beyond these exceptional and peculiar cases, and withdraw from the statute all promises of this nature, where the debtor alone is benefited by the consideration of the new undertaking, and the debt still subsists, then we leave absolutely nothing for the statute to operate upon.

The judgment should be affirmed.

BACON, J. (dissenting). This case presents a single question, and a proposition apparently so simple that the first emotion is, perhaps, one of surprise that there could be any question in regard to it, since, in the multitude of decisions with which the books are filled touching the construction of the statute of frauds, it would seem that the rule applicable to a case which, in its essential features, must so often have arisen, must be settled by authority. My own conviction is, that the rule which governs this case has been long and well established in opposition to the conclusion of the referee and the judgment of the supreme court; but, at the same time, it may readily be admitted that reservations and doubts have been suggested, and discriminations attempted, from time to time, that if they have served no other purpose, have at least involved the matter in some obscurity.

"Every special promise to answer for the debt, default or miscarriage of another person," the statute declares, "shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged therewith." 2 Rev. St. 135, § 2. This statute, as is well known, is

an almost literal transcript of the English statute of frauds (29 Car. II. c. 3); the only noticeable change being, that in our statute the consideration is required to be expressed in the writing. This, however, so far as the construction of the two statutes is concerned, is of no special moment, inasmuch as the courts, both in England and in this state, had held, before the words were inserted in the section as it now stands, that it was necessary to a valid agreement that the consideration should, in some terms, be incorporated therein. Whatever, then, has, by the course of adjudication in England upon this clause of the statute, been deemed or acquiesced in as the settled law, must be accepted with us as controlling authority, unless, upon due consideration, and by the solemn judgment of some court whose decisions are recognized, any peculiar and special construction has been questioned or repudiated.

It would probably have been better if there had been less of what may, perhaps, without irreverence, be called legal, and even judicial tampering with the words of the statute, to force, at times, a construction seemingly at war with its natural and more obvious import. But all regrets on this subject are vain, since the business of construction began with the infancy of the law, and has not yet ceased, and will doubtless attend it even down to old age. One of the earliest attempts to create and define a distinction by which agreements were to be held within or without the scope of the statute was to express them by the terms "original" and "collateral." It is true that neither of these words is to be found in the statute, but they have been so long employed in connection with it as to have attached to them an established and recognized meaning; and the struggle always is, in determining the validity of such an agreement as seems to fall within the general purview of the law, to ascertain whether it is collateral and ancillary to the principal contract, having no aliment whatever independently of that, or whether it can be sustained and enforced as an independent, original undertaking altogether outside of, and, therefore, not needing to be evidenced by the written agreement required by the statute.

An attempt was made as early as 1811 by Chancellor Kent, then chief justice of the supreme court, in the well-known case of Leonard v. Vredenburgh, 8 Johns. 29, to arrange into three classes the cases where a promise, to be answerable for the debt of another, was within or without the statute. They are familiar to the profession, and for a long time stood their ground as a just exposition of the law. The third class, in which he held that a promise to pay the debt of another was not within the statute "when it arose out of some new and original consideration of benefit or harm moving between the newly contracting parties," has been subjected to much criticism; and it may be fairly admitted that it is not now, in the naked and unqualified terms in which it is expressed, to be received as the true construction of the statute. And yet this rule did obtain, and was followed in several well-considered cases in our own courts. Thus, in Farley v. Cleveland, 4 Cow. 432, the classification of Kent was stated and reaffirmed, and the case then on argument held to fall within his third class; and the court lay down the broad proposition, that, where a promise to pay the debt of a third person arises out of some new consideration of benefit to the promisor, or harm to the promisee, moving to the promisor either from the promisee or the original debtor, such promise is not within the statute. And it is added, that this is so, although the original debt still subsists, and is entirely unaffected by the new agreement. This case was carried up to the court of errors, and was there affirmed. 9 Cow. 639. The doctrine of the supreme court is reiterated in the precise language of the marginal note in 4 Cow., and by an entirely undivided court; the report merely stating that Jones, Ch., examined the question, and was of opinion that the judgment should be affirmed; "whereupon, per totam curiam, the judgment was affirmed."

In Meech v. Smith, 7 Wend. 315, the same rule is again repeated and the court say that it has long been settled, that, although the promise be by parol, yet, if it arises out of some new and original consideration of benefit or harm moving between the newly contracting parties, the case is not within the statute. Alluding to Leonard v. Vredenburgh, and the above cited case of Farley v. Cleveland, the court say: "This rule has been recognized by all writers upon contracts, and by the highest court in the state, and is, therefore, as much the law of the land as the statute itself." The authority of Leonard v. Vredenburgh, and especially the third class of Chancellor Kent, has been cited approvingly and followed in the courts of several of our sister states; and in the case of De Wolf v. Raband, 1 Pet. 476, the judgment of the supreme court of the United States proceeded substantially upon an affirmance of the authority of Leonard v. Vredenburgh, as a just construction of the statute of this state.

If these cases are to be received as approved law at the present day, they decide more than enough to reverse the judgment now before us; and there need be no further examination of authorities upon the discussion which this case has opened. But it is important to a just appreciation of the ground upon which, as I suppose, the agreement in this case, and the consequent right of the plaintiff to recover, is to be upheld, to notice the several cases in which the discrimination between original and collateral promises has been established, or affirmed, by the courts. This discrimination will be found to exist, I think, and the requirements of the statute not to apply, under four conditions, within some one of which most of the authorities upon this particular section of the statute, and which,

in some respects, have been thought to conflict with each other, may be arranged.

1. Where the primary agreement has been in effect extinguished, and the promise superseded, by the new agreement and promise which have taken their place, and the credit is given wholly to the new promisor.

2. Where a fund has been provided, or property has been placed in the hands of the newly contracting party, from which the means are to be procured to pay, or the promisor derives an equivalent or advantage therefrom.

3. Where the purport and intent of the agreement is to accomplish the payment of the promisor's own debt, although the effect is to pay the debt of another, and where that debt is used to measure the extent of the liability, as where A. owes B., and C. is indebted to A., and in consideration of that liability promises, at A.'s request, to pay B. the debt A. is owing him.

4. Where the creditor, in consideration of the promise, surrenders some pledge, or relinquishes some lien actually held by him and capable of enforcement, and by means of which the original debt was rendered secure.

In all these classes, excepting the first, it does not affect the liability of the newly contracting party that the original debt subsists and the liability of the debtor remains in full force. Wherever the conditions exist which I have arranged under these four heads, there is not only a sufficient consideration for the promise to pay another's debt, but the promise is good although by parol.

Numerous illustrations might be gathered from the authorities under these several heads; and although it must be admitted that the current of decisions is not uniform, and some apparently irreconcilable cases may be found, I am persuaded that a careful sifting of the facts, and an attention to the proper discrimination which should be made, would reconcile many which stand seemingly in conflict, and in the result make this branch of the law more homogeneous and reliable. At present, however, it only concerns us to trace the course of decisions which have established the distinction expressed under the fourth head of exceptions to the operation of the statute; and if it shall be found, as I think it will, a distinction fully recognized and upheld by a long and almost unbroken series of decisions, the right of the plaintiff to recover upon the facts of this case will be put beyond question.

And, first, as to the condition of the English law upon this subject. One of the earliest cases to be found in the books is Tomlinson v. Gill (decided by Lord Hardwicke, in 1756) Amb. 330. That case was briefly this: Gill, the defendant, promised the widow and administratrix of the intestate that, if she would permit him to be joined with her in the letters of administration, he would make good any deficiency of assets to discharge the debts of the intestate; and the action was brought by a creditor to enforce that agreement. The defendant insisted that the promise was void by the statute of frauds. It was holden to be not within the statute. Here was the relinquishment by the widow of a part of her exclusive lien upon and interest in the goods and effects of her husband, and which were a fund in her hands for the payment of the debts of the estate, and the defendant, by the agreement, acquired that interest. Lord Hardwicke goes even further than this in his decision, wherein he says it is not within the statute, "for there is," he adds, "a distinction between a promise to pay the original debt and on the foot of the original contract, and where it is on a new consideration. Here is quite a new consideration."

There is a short case reported in Salkeld, standing apparently upon the same ground. It was to this effect: The sheriff took goods upon an execution, and a stranger promised the officer to pay the debt in consideration that he would restore them. The action was brought upon that promise, and on demurrer it was held to be a good consideration. No benefit, so far as the case discloses, accrued to the promisor, the goods being restored to the debtor; but the consideration which upheld the promise, and which was good as an original undertaking, was the relinquishment of the lien which the sheriff had upon the property by virtue of the levy under his execution. Love's Case, 1 Salk. 28. It is true that the statute of frauds is not called in question in this decision, but the case clearly presented that objection, which would, beyond doubt, have been urged if either the counsel or the court had deemed it tenable.

The next case, and the one, perhaps, most frequently cited and commented on in connection with the particular question we are considering, is Williams v. Leper, 3 Burrows, 1886, and reported also more briefly in 2 Wils. 308. The case was tried before Lord Mansfield, at Guildhall, and a verdict taken for the plaintiff upon the following state of facts: One Taylor was indebted to the plaintiff in the sum of £45 for rent of premises he held of him as his landlord. Taylor, becoming insolvent, conveyed his property to the defendant, Leper, for the benefit of his creditors. Leper took possession, when the plaintiff came as landlord, to distrain for the rent due him; whereupon Leper promised that, if he would desist from distraining, he would pay the debt. The plaintiff, accordingly, in consideration of this promise, refrained from enforcing his distress, and the action was brought upon that agreement. In the court of king's bench, all the judges gave brief opinions. Lord Mansfield said, emphatically: "The case has nothing to do with the statute of frauds. The landlord had a legal pledge. He enters to distrain, and has the pledge in his custody. The defendant agrees that the goods shall be sold, and the plaintiff be paid in the first place. The goods are the fund. Leper was obliged to pay the landlord, who had the prior lien." The other judges con-

curred in the result; but Justice Aston was inclined to put it upon the footing that the goods were a fund and Leper the bailiff of the landlord, and when he had sold the goods the money was in his hands substantially as the landlord's agent. The case may, perhaps, be safely maintained upon that special ground, and is thus an authority within what I have ventured to designate as the second class of promises not within the statute; but I think the language of Lord Mansfield presents very clearly the ground of the distinction to be, that the plaintiff had, in consequence of the promise of defendant, relinquished a lien operative and efficient to produce satisfaction of the debt, and that it is a very ample authority to support the validity of such a promise upon that consideration.

The case of Houlditch v. Milne, 3 Esp. 86, presents the point more clearly, and is a very decisive authority on the proposition we are discussing. The plaintiff had repaired carriages for one Cofey, and charged the account to him. The defendant sent an order to have them packed and sent on board a ship, and promised to pay the bill. On the trial the defendant's counsel asked that the plaintiff be nonsuited, on the ground that the promise being to pay a debt of Cofey, who was himself liable, and not being in writing, it was void by the statute. But Lord Eldon refused to nonsuit the plaintiff, and held that it was an original undertaking. He cited the case of Williams v. Leper, saying that it appeared to apply precisely to the case then before him. "The plaintiff," he adds, "had, to a certain extent, a lien upon the carriages, which he parted with on the defendant's promise to pay. This took the case out of the statute, and made the defendant liable."

Castling v. Anbert, 2 East, 325, presented the following facts: The plaintiff was a broker, and had in his hands policies of insurance upon which he had a lien for certain acceptances he had given for one Grayson. The defendant, upon the plaintiff delivering him the policies that he might collect them, promised that he would provide for the acceptances as they became due. The plaintiff, being prosecuted on one of his acceptances, brought this suit to recover of the defendant upon his promise. It appeared that the defendant had collected the policies. This was held to be an original undertaking, and not within the statute. It is true that it presented another ground upon which the recovery could be sustained, to-wit, that the defendant had possessed himself of the fund created for the express purpose of meeting the debt, and this would sustain a count for money had and received. Lord Ellenborough puts it in both aspects, and says, at the close of his opinion, citing Williams v. Leper, that he agrees with that decision to the full extent of it. "I agree," he says, "with those of the judges who thought the case not within the statute at all, and I also agree with the ground on which Mr. Justice Aston proceeded, that the evidence sustains the count for money had and received."

A distinction had crept into the books founded upon a remark of Buller in Matson v. Wharam, 2 Term R. 80, to the effect that if the person to whose use goods are furnished or property delivered is liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds; and upon this distinction the case of Croft v. Smallwood, 1 Esp. 121, was decided. But this distinction was repudiated in the cases already cited, in all which it is manifest that the original debt was still subsisting and remained unaffected by the new undertaking; and in this state that precise point has been expressly adjudged in the case of Farley v. Cleveland, heretofore referred to, and in Rogers v. Kneeland, 13 Wend. 114.

The principle of the cases I have thus cited has been affirmed, and the doctrine fully recognized in two or three modern English cases, among which are Edwards v. Kelly, 6 Maule & S. 204; Bird v. Gammon, 3 Bing. N. C. 883; and Walker v. Taylor, 6 Car. & P. 752 (which is, perhaps, the most recent one), and is to the following effect: The widow of a publican employed an undertaker to conduct the funeral of her deceased husband, and deposited with him the licenses of the house as a security for the payment of his bill. A., one of a firm who supplied the house with liquors, took out letters of administration on the estate, and B., the other partner, promised the undertaker that, if he would give up the licenses to him, he would pay the funeral expenses. It was held that the undertaker, having surrendered the licenses, might recover his bill against B., although the widow was his employer and he had charged the administrator as his debtor. Tindal, C. J., said on the trial: "Here is a new contract, under a new state of circumstances. It has nothing whatever to do with the statute of frauds."

In view of these authorities, I think it may be safely affirmed that the rule in England is too well settled to admit of question that the promise in this case is not within the statute of frauds. No case that fairly holds the contrary has been produced, or even referred to, on the argument; and so well established does this doctrine seem to be, that the elementary writers substantially concur in the principle derived from them. Thus Chitty says: "Although the debt of another form the subject-matter of the defendant's undertaking, still, if he promised to pay the debt upon some new consideration raised by himself, and the consideration be the resignation of a charge or lien which afforded a remedy, or fund, to enforce the payment, the case does not fall within the statute." Chit. Cont. (Springfield Ed. 1851) p. 446.

Thus, also, Burge, Surety. 26, expresses in substance the same proposition: "Though the debt of another may have been the original cause of the promise, yet, if the person to

whom it is made relinquishes some right or advantage which he possessed, and which might have enabled him to obtain satisfaction of his debt, the promise by a third party to pay the debt in consideration of such relinquishment is an original promise, and not within the statute." See, also, Fell, Guar. c. 2, §§ 7, 8, to the same effect.

The rule is, perhaps, still more clearly and strongly stated by Addison, in his recent treatise on Contracts, who, on a collation of the authorities, both ancient and modern, states his conclusion in the following terms: "A contract or promise, although made concerning the debt or default of a third party, may yet be an original promise, not within the statute. If the plaintiff has a lien upon the property of his debtor in his possession, or holds securities for the payment of his debt, and is induced to give up the lien, or part with his securities, upon the faith of the defendant's promise to pay the debt, the promise so made is not within the mischiefs provided against by the statute, although the amount promised to be paid, on the surrender of the securities, may be the subsisting debt of the third party due to the plaintiff, and the possession of the promise may have the effect of discharging the debt." Add. Cont. 38, 39.

To the English cases above cited and commented on, I add that of Barrell v. Trussell, 4 Taunt. 117, where the same point is adjudged. It was a case where the plaintiff was about to sell the property of one Abbott, under a bill of sale executed to him by Abbott. Having taken the property, the defendant, in consideration that the plaintiff would relinquish the possession to Abbott, promised verbally to pay the plaintiff £122, being the debt of Abbott due to the plaintiff, and to collect which the plaintiff was about to make the sale. The plaintiff obtained a verdict, but, on a rule to show cause, the defendant insisted that the plaintiff was not entitled to recover because this was an agreement to answer for the debt of another, and there was no signature of the party sought to be charged. The counsel for the defendant, on the argument, insisted that here was no benefit derived to the defendant, as there was no delivery of the goods to the defendant; but Heath, J., said: "There was a detriment moving to the plaintiff, which is a good consideration; for in consequence of his forbearance, the goods were afterward taken and sold on an execution against Abbott." At a subsequent day the rule was discharged, Mansfield, C. J., saying: "What is this but the case of a man, who, having the absolute power of selling goods, refrains upon the request of another? It is not a promise to pay another's debt."

The cases decided in this state, with perhaps an occasional exception, affirm the same rule, even if they do not carry the doctrine somewhat further. It will be sufficient for our present purpose, however, if they shall be found to be substantially in accordance with the English cases. I will examine them very briefly:

Slingerland v. Morse, 8 Johns. 474, is the earliest reported case where this question was presented. The plaintiff in that case had distrained the goods of his tenant for rent. The defendant agreed that he would deliver the goods in six days, or pay the amount of the rent, and thereupon the distress was abandoned and the goods left with the tenant. This was held to be an original, and not a collateral undertaking, and that no writing was, therefore, necessary. It was decided, substantially, upon the authority of Williams v. Leper. It has been said in regard to this case, that it may perhaps be sustained on the ground that the goods were a fund in the hands of the defendant, from the possession of which his liability resulted. But in answer to this it is only necessary to say, that no such reason is given for the decision, and in the case it is expressly stated that the goods were left with the tenant.

The cases of Skelton v. Brewster, 8 Johns. 376, and Gold v. Phillips, 10 Johns. 412, I do not cite in this connection; for, although they both recognize the doctrine of Chancellor Kent in Leonard v. Vredenburgh, and hold the promise good because it was founded upon a distinct consideration arising between the newly contracting parties, yet, as in both cases property had been delivered to the defendant to enable him to discharge the debt, they do not fall within that precise class to which this case belongs.

The case of Chapin v. Merrill, 4 Wend. 657, was an agreement to indemnify another for becoming the guarantor of a third; and it was held not to be within the statute, and is in point to show that it is not necessary that the defendant should receive any benefit from what was done by the plaintiff, the consideration in that case being purely harm to the plaintiff.

Jackson v. Rayner, 12 Johns. 291, is sometimes cited as conflicting with the prior cases of Skelton v. Brewster and Gold v. Phillips, and with the distinction I am seeking to illustrate. It clearly does not with the latter, for no lien was surrendered or benefit waived by the plaintiff. The case came fairly within that class where the agreement is valid by reason of property being placed in the hands of the promisor to pay the debt, in consideration of which he agrees to discharge it. The court put the decision, however, upon the express ground that the original debt was still subsisting; a distinction which is no longer recognized. There cannot be a doubt that, on the precise state of facts disclosed in that case, the decision would now be the other way.

In the case of Gardiner v. Hopkins, 5 Wend. 23, the plaintiff had a lien upon the sheets of a law-book he was printing for one Wiley, and the defendant promised that, if he would deliver the sheets, he would pay the balance

of his account—the claim against Wiley still remaining in force. The case, as stated, leaves it a little uncertain whether the delivery was made to Wiley, or to the defendant, who was his assignee. The decision proceeded upon the ground that the plaintiff gave up what was claimed to be a valid lien, and the defendant derived a benefit from the surrender by obtaining the property. It is not a case proceeding upon the simple ground of a lien surrendered; although, if that had been the only feature presented, I think it clear the verdict would have been sustained.

The case of Mercein v. Andrus, 10 Wend. 461, presented the precise point. The plaintiff had a levy by virtue of an execution upon the property of one Reed; and one of the defendants agreed that, in consideration of the release of the levy, the defendants would pay the plaintiff $150 at the expiration of some eighty days, or give their note for that amount. The judge at the trial ruled that a promise founded upon the consideration of surrendering up property levied on by execution is an original undertaking and need not be in writing; and on the other ground, of the partnership liability, he left it to the jury to say, upon the evidence, whether the firm was bound by what had been shown upon that point. A new trial was granted for a misdirection of the court upon this branch of the case; but upon the other, Chief Justice Savage stated that the ruling was right, and that a promise made upon such a consideration as appeared in the case was not within the statute of frauds. In reference to this case, it is said, in the able opinion of the supreme court given in the present case at the general term, that what was said by Judge Savage in his decision on this point was entirely obiter, and that he cited no authority to support his conclusion. I cannot agree with the learned justice who gave the opinion, on this point. So far from the remark being obiter, the precise question was presented. If the ruling at the circuit had been wrong, that would have been an end of the case, and a new trial would have been, perhaps, unnecessary on the other ground. If, however, it was to be sent back, it was equally necessary to determine the other question, which was vital to the maintenance of the action itself; and as to the remark that no authority was cited, the chief justice probably deemed that the doctrine had been so often and well settled as to have become almost elementary, and requiring no array of cases to sustain it.

Indeed, so well had the rule been established, that in the case of Smith v. Weed, 20 Wend. 184, the point was not even raised by the counsel on the argument. It presented the case of a naked parol promise of a third person to pay the debt to the plaintiff, in consideration of the release of an attachment which the plaintiff had levied on the property of his debtor; and the court held, without any hesitation, that the lien was valid, and the release thereof constituted a sufficient consideration for the undertaking of the defendant to pay the debt. Being an original promise, it was, of course, not within the statute.

The last case which has arisen in our courts where this precise question has been presented is Fay v. Bell, Lalor, Supp. 251. The decision is brief, but emphatic, and is given by an able and eminent judge, who, until his recent lamented decease, continued, with intellectual vigor unimpaired, and "natural force" almost unabated, by his large learning and ripened experience, to enlighten the tribunal over which he once presided. The facts were briefly these: One Daharch had employed the plaintiff to mend a pair of boots. The work had been done, and the boots remained in the possession of the plaintiff, and he had, of course, a lien for the amount of his charge. Upon the promise of the defendant to pay the demand, the boots were delivered to Daharch. There was a recovery, and on appeal it was insisted that the promise was within the statute of frauds; but the court held otherwise. Beardsley, J., who gave the decision, enters upon no argument to vindicate it. He simply says: "It was a new undertaking, founded on a new and distinct consideration, to-wit, the relinquishment by the plaintiff of his lien on the boots, and which was sufficient to uphold the promise made. It was not within the statute of frauds." He then adds the authorities, some ten or twelve in number, among which are several we have particularly considered. Here, then, is an opinion not obiter—not unsustained, but fortified by authority, and presenting a state of facts absolutely identical with the case now before us. The decision has never been questioned or doubted by any succeeding case; and I propose to abide by it, as a clearly expressed, well-considered and authoritative exposition of the law, and which determines the present case in favor of the plaintiff. Whatever we might be disposed to say of this as an original question—(and, were I at liberty to view it as such, I confess I should find difficulty in so construing the language of the statute as to exempt these cases from its operation)—I think the current of authority has too long and steadily set in one direction to be now turned aside, and that the rule stands too firmly, not only "super antiquas," but "super novas vias," to be disturbed.

I need scarcely add that the cases of Barker v. Bucklin, 2 Denio, 45, and Brewster v. Silence, 8 N. Y. 207, to which we have been referred by the defendant's counsel, hold no doctrine whatever inconsistent with the great "cloud of witnesses" that have been summoned to the stand. The former case was where property had been sold to the defendant, in consideration of which he promised to pay the debt of the party delivering the property to the plaintiff. It was not a promise to pay the debt of a third party merely, but was, in effect, an agreement to pay the defendant's own debt. The case was rightly decided upon all the authorities, and it was unnecessary to

go beyond this simple and plain proposition to uphold the recovery. The case of Brewster v. Silence is purely that of a naked written guaranty to pay another's debt, expressing no consideration. The court held that the consideration could not be supplied by parol proof. There was no pretense that, in consideration of the undertaking, any lien was surrendered or right relinquished which the plaintiff held, and which was operative in his hands. Some evidence was attempted to be given on the trial that the property was placed in the hands of the defendant, on which fact his undertaking was founded; but the court of appeals held that this was not only outside of the issue, but that the evidence given did not conduce to prove the point sought to be established. This case also finally settled the doctrine which had been floating loosely through the reports, that a guaranty could not be changed into a promissory note so as to charge the party by some other contract than the one he had in fact entered into; but beyond this, and the other proposition that a guaranty which does not express the consideration is void under the statute of frauds, the case is not to be invoked as authority. The decision is not, therefore, in conflict with the rule which is to be applied to this case, which is controlling upon the question before us.

My opinion is, that the judgment should be reversed, and a new trial granted, with costs to abide the event.

DAVIES and WRIGHT, JJ., also dissented.

Judgment affirmed.

MALLORY'S ADM'R v. MALLORY'S ADM'R et al.

(17 S. W. 737, 92 Ky. 316.)

Court of Appeals of Kentucky. Dec. 3, 1891.

Appeal from circuit court, Todd county. "To be officially reported."

Action by C. L. Mallory's administrator against A. W. Mallory's administrator and others to recover personal property. Judgment for defendants. Plaintiff appeals. Reversed.

E. W. Hines and Ben T. Perkins, Jr., for appellant. H. G. Petrie and W. B. Rives, for appellees.

BENNETT, J. A. W. Mallory, the appellee's intestate, was a widower with children, and C. L. Mallory, the appellant's intestate, was a widow with one child, a son. Both of these persons owned property, and married each other. The husband, the appellee's intestate, died, and in a few days thereafter, and before the personal property that the statute gives to the widow, and which is to be set apart to her, was set apart, C. L. Mallory, wife of A. W. Mallory, and the appellant's intestate, died. This suit was instituted by appellant's administrator to recover of the appellee, as administrator, the value of the said personal property, the same not having been set apart, and was, or some of it, on hand at the death of A. W. Mallory, but disposed of by the appellee. The contention of appellee is that, as there was an antenuptial contract between C. L. and A. W. Mallory, that entitled each to retain the title of his and her property, and dispose of the same as though no marriage had taken place, C. L. Mallory was not entitled to the property that the statute directs to be set apart to the widow upon the death of her husband. It is not alleged that the antenuptial contract was in writing; and as chapter 22, § 1, requires contracts in consideration of marriage to be in writing, if the contract relied upon comes within said provision, it was necessary to allege that the contract was in writing; and the answer, because of not alleging that fact, is not sufficient. Besides, the proof fails to show that the contract was in writing. Does the alleged contract come within said provision? It seems that the question has been settled and put beyond dispute by this court in the case of Potts v. Merritt, 14 B. Mon. 406. That case, like this, was a case of verbal and antenuptial contract, and the Revised Statutes, then in force, had the same provision, as to requiring the antenuptial contract to be in writing, as the General Statutes, supra; and this court held that the contract was not enforceable, in law or in equity, unless it was in writing. An antenuptial contract is one by which the parties agree to anticipate the general law controlling the marital relation, and make a law in that regard to suit themselves; and consideration for the contract is the agreement to marry each other, which must be consummated, else the consideration fails. So the contract clearly comes within the provision, supra, requiring contracts in consideration of marriage to be in writing. If they are not in writing, no action can be maintained on them, and, in a case like this, such contract is no defense to an action by the widow or her representative to enforce her marital rights. It is a mistake to say that the property that chapter 31, § 11, Gen. St., directs to be set apart to the widow, only vests in the widow upon the setting the same apart to her. By said statute the right to a certain kind of property, if on hand, if not, its value, etc., vests eo instanti, by operation of law, in the widow upon the death of her husband. The setting apart of said property is merely for the purpose of designating the individual pieces of property, and valuing them, and supplying their places with other property when required. Said property vests in the widow, and must be set apart to her whether or not she has any infant children; the only difference being that, if there are no infant children residing in the family, there shall be nothing set apart for their support. The case of Southerland v. Southerland's Adm'r, 5 Bush, 591, is relied on as establishing the fact that a verbal antenuptial agreement is valid between the contracting parties and volunteers. The leading facts of that case are that the husband before marriage verbally agreed that his intended wife should retain her slaves, etc., after marriage, as her separate estate; and after marriage, and until her death, he uniformly adhered to that agreement, and recognized said property as her separate estate, and she always claimed it and controlled it, as such; and, after the husband's death, the court said that, as between volunteers claiming the property by virtue of the husband's marital rights and the wife, equity would uphold that agreement as consistent with the husband's power, he being sui juris all the time, to let the wife retain her property as her separate estate; but the wife has no power to relinquish her marital rights unless she pursues the law in that regard. The fact that the agreement was called antenuptial simply had reference to the fact in that case that it was made before marriage. The judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

HAVILAND v. SAMMIS et al.

(25 Atl. 394, 62 Conn. 44.)

Supreme Court of Errors of Connecticut. May 28, 1892.

Case reserved from court of common pleas, Fairfield county.

Action by Annie C. Haviland against William A. Sammis and others to recover money paid by plaintiff to defendants under a misapprehension, as part of the purchase price of land, and which defendants had promised orally to repay. Case reserved for advice of this court on demurrer to the complaint. Advice that the demurrer be overruled.

R. Frost, for plaintiff. M. W. Seymour and H. H. Knapp, for defendants.

ANDREWS, C. J. The complaint alleges, in substance, that on the 26th day of June, 1888, the defendants were the owners of a tract of land on West avenue, in the city of Norwalk, which they represented to the plaintiff to be 110 feet wide; that the plaintiff, relying on their representation, agreed to buy the land, and made on that day a part payment of the purchase money, and on the 29th day of the same month paid the balance of the purchase price to the defendants; that thereafter the defendants tendered to the plaintiff a deed, which described the land to be 110 feet, more or less, wide on West avenue, and 89 feet wide in the rear. Apparently the plaintiff refused to accept the deed, for the complaint avers "that the said defendants, by their said agent, agreed by parol with the plaintiff, through her said agent, that if she would accept said deed they would pay her the difference between the value of the tract described in the deed and the value of the tract as represented by them, and that the plaintiff, under this agreement, accepted said deed." The complaint alleges the difference in the value to be $750, and that the defendants have refused to pay it. The plaintiff claims damages to the amount of $800. The defendants demur to the complaint, "because it appears from the allegations thereof that the agreement upon which the plaintiff seeks to maintain her action, if any such was made, was for the sale of real estate, or an interest in or concerning it, and was by parol, and not in writing, as required by the statute of frauds." The proposition of law maintained by the defendants, "that when an entire and indivisible contract is partially within the statute of frauds, the whole is avoided by the statute if that part is by parol," is undoubtedly correct. But this case is not affected by that proposition. The defendants had contracted to convey to the plaintiff a certain piece of land, for which she had paid them. They proposed to convey a smaller piece. She refused to accept it. They then say to her: "If you will accept the deed of the smaller piece, we will return to you the difference in value between the piece of land we agreed to convey to you and the piece of land which in fact we do convey to you." The promise to return the excess of money is not affected by any sale of land.

Analyze the transaction between these parties more minutely, and this becomes clear. The defendants had had negotiations with the plaintiff by which they had contracted to convey to her a certain piece of land, for which she had paid them. They tender her a deed of a smaller piece, which she refuses to accept. At that moment all contract for the sale of that piece of land is at an end. Then the parties begin to negotiate for the sale by the defendants to the plaintiff of a different piece of land,—a smaller piece. The plaintiff consents to take a smaller piece at a smaller price. This is a new contract. A deed is given and accepted. The price had been paid. All contracts respecting land or any interest in or concerning land between these parties were then concluded,—executed on both sides. But the money representing the difference in price between the piece of land agreed by the first negotiation to be conveyed and the price of the land actually conveyed remained in the hands of the defendants. They had promised to return it to the plaintiff. They have not done so. This action is brought to recover it. "The statute of frauds does not apply to such an action, whether brought on an implied or upon an express agreement. The obligation to repay the money advanced by the plaintiff is independent of the character of the consideration upon which the advance was made. And if an express promise to that effect be separable from the principal agreement to which it is an incident, it may be enforced, although the principal agreement might be avoided. The fact that a certain stipulation is made at the same time, and forms a part of an arrangement for the sale of an interest in land, does not prevent an action from being maintained upon it: provided—First, that the action does not tend to enforce the sale or purchase of the interest in land; and, second, that in other respects the stipulation is susceptible of being separately enforced by action. Such stipulations, collateral to the sale, but contained in the same contract, have been repeatedly enforced." Wetherbee v. Potter, 99 Mass. 354, 361; Wilkinson v. Scott, 17 Mass. 258; Hall v. Solomon, 61 Conn. 476, 23 Atl. 876. The court of common pleas is advised to overrule the demurrer. The other judges concurred.

MUMFORD v. WHITNEY.[1]

(15 Wend. 380.)

Supreme Court of New York. May, 1836.

This was an action on the case tried at the Monroe circuit, in April, 1832, before the Hon. Addison Gardiner, one of the circuit judges.

The suit was brought for the recovery of damages for the flowing of lands, by the erection of a dam by the defendant, in the Genesee river. The plaintiff showed title to the premises, and proved the injury alleged in his declaration. The dam complained of was erected in 1826, abutting upon the land of the plaintiff and partly placed upon it. The defendant proved a parol licence from the plaintiff for the erection of the dam, and also insisted that the plaintiff had recognized its existence in deeds executed by him, conveying mill-sites supplied with water for hydraulic purposes by means of such dam. To support this ground of defence the defendant gave in evidence: (1) A deed from the plaintiff to one Sylvester Felt, bearing date 1st December, 1825, conveying a mill-site, on a canal situate on the westerly side of the river, which was supplied with water from the westerly channel of the Genesee river, formed by an island near Rochester owned by the plaintiff; together with the privilege of taking such proportion of the water as the width of the lot conveyed, bore to the whole length of the line of the canal; to be held and enjoyed in common with the other proprietors upon the canal, and subject to a proportion of the expense of repairs, &c. (2) A contract dated 2d December, 1825, whereby the plaintiff agreed to convey unto one Silas Ball a lot upon the same canal, with the same rights as to the use of water, and subject to the same limitations and restrictions as contained in the plaintiff's deed to Sylvester Felt. And (3) a deed from the plaintiff to Sidney S. Allcott, dated 7th April, 1828, conveying another lot on the canal, with the like privilege of water and with the like conditions as contained in the deed to Felt and in the contract with Ball; and then proved that those several lots were supplied with water for hydraulic purposes by means of the dam erected by the defendant. To rebut this evidence, it was shown on the part of the plaintiff, that previous to 1826 the canal mentioned in the plaintiff's deeds was supplied with water by means of a dam erected across the Genesee river in 1812, at the upper or southerly end of the island owned by the plaintiff, the half of which dam was cut away in 1824, by one Solomon Cleveland, an owner of property on the east side of the river, who then erected a dam near the lower or northerly end of the island, which, after being carried off by a freshet, rebuilt, and again swept away, was replaced in 1826 by the dam in question. The plaintiff also proved that the deed from him to Allcott was executed pursuant to the terms of a contract entered into between him and Allcott in October, 1825, and that the description of the lot with the water privileges connected therewith, as expressed in the deed, had been taken verbatim from the contract.

Several minor questions arose on the trial. The plaintiff had examined a witness as to declarations made by the defendant at and about the time of the erection of the dam in 1826, and of and concerning such erection. The defendant's counsel, on the cross-examination of the same witness, asked him whether, in the same conversation, the defendant had said that the plaintiff had given his consent to the erection of the dam. The plaintiff's counsel objected to proof of the defendant's declarations, except for the purpose of explaining the declarations called for by the plaintiff, and insisted that the defendant was not entitled to give proof of his own declarations upon a distinct subject, although made in the course of the same conversation. The judge overruled the objection, and the witness testified that the defendant did at that time say that the plaintiff had consented to the erection of the dam. Another question arose as follows: it was proved, on the part of the plaintiff, that in 1824 an agreement took place between him and Cleveland, who cut away the old dam in 1824, in respect to the building of a dam on the site of the dam subsequently erected, in 1826; that the agreement was reduced to writing, but not executed; that Cleveland took a copy of it to show to others interested in the matter, and that shortly afterwards he commenced the erection of the dam. After showing these facts, the plaintiff offered the agreement thus reduced to writing in evidence; but the judge refused to receive it. The witness who had given this account of the written agreement, also testified that Cleveland, at the time, agreed to construct a stone wall along the east line of the island, to protect it from injury; and after giving such testimony, the plaintiff's counsel enquired of the witness whether it was understood between the plaintiff and Cleveland, that Cleveland should not build the dam, unless he built a wall to secure the island. To this enquiry the defendant's counsel objected, and was sustained by the judge.

The judge charged the jury, as to the ground of defence assumed by the counsel for the defendant, that by virtue of the plaintiff's contract and deed, executed previous to the year 1826, the grantee acquired the right to locate the dam in question where it had been placed, or to maintain it, that those instruments were to be construed in reference to the actual state of things and the nature of the plaintiff's rights, and could have no application to the dam erected in 1826; and also that those instruments could not be used by the defendant as constituting an estoppel to the plaintiff's right of action against the defendant, because the defendant was not a party to them; but he charged them that a licence, by the plaintiff to the defendant and others, to construct

[1] Irrelevant parts omitted.

the dam in question, would constitute a valid defence to the action, because the plaintiff would thus be a party to the nuisance, and he could not recover for any injury it produced, and submitted the evidence on the subject of the licence to the consideration of the jury. The judge also charged the jury that the conveyance by the plaintiff to Allcott of mill privileges and the right of using water on the canal, referred to and adopted the means of furnishing water to the canal as they existed at the date of the deed, and as the present dam was then erected the deed was a full confirmation and recognition of it, and that such confirmation and recognition applied to the effects of the dam upon the property of the plaintiff. He told the jury that it had been fully proved that the plaintiff had sustained some injury, and that as to the measure of damages, they were the exclusive judges. The jury found a verdict for the defendant. The plaintiff's counsel having excepted to the charge of the judge and to various decisions in the progress of the trial, now moved to set aside the verdict.

The cause was argued by

J. C. Spencer, for plaintiff. F. M. Haight and D. D. Barnard, for defendant.

SAVAGE, C. J. The questions are: (1) Whether the defendant was entitled to prove his own declarations, made in the same conversation about which the plaintiff had examined the witness; (2) whether the copy of the agreement reduced to writing, but not executed, should have been received in evidence; (3) whether the witness should have been permitted to testify as to the licence being conditional; (4) whether a parol licence in this case is valid; (5) whether the deed to Allcott was a recognition of the dam erected by the defendant.

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4. Suppose, however, the licence to have been properly and fully proved, was it valid and available as a defence to this action? Did it purport to convey an interest in or concerning the lands of the plaintiff, which required an agreement in writing? The 9th section of the statute of frauds of 1813 (1 R. L. 78, § 9) declares that all leases, estates, interest of freeholds or terms of years, or any uncertain interests of, in, to or out of any lands, made by parol and not in writing, shall have the effect of estates at will only. This clause excepts leases for three years. The 10th section declares that no such interest shall be assigned, granted or surrendered, unless in writing. The 11th section declares that no action shall be brought upon any contract for sale of lands, or any interest in or concerning them, unless the agreement be in writing. It must be conceded that the decisions on the question, what is an interest in lands within the meaning of the statute, are not easily reconcilable with the statute or with each other. In an old case, before the passing of the 29 Car I (Webb v. Paternoster, Palm. 71), a licence was given to a party to erect a stack of hay till he might conveniently sell it; it stood two years, and then a lease of the land was granted to a stranger, who gave notice to remove it, and half a year after turned his beasts into the field, who ate the hay; yet, because of the convenient time to remove, the judgment was for the defendant. Viner, Abr. tit. "Licence," F, pl. 2. Upon the authority of this case, it is said by Mr. Sugden (Sugd. Vend. 56), the case of Wood v. Lake, Sayer, 3, was determined. There was a parol agreement to stack coals on part of a close for seven years, with the use of that part of the close. The court held the agreement good. They said the agreement was only for an easement, and not for an interest in the land; it did not amount to a lease, and it was held good for seven years. It has been held that timber growing may be sold by parol (1 Ld. Raym. 182); but grass growing cannot, because such a contract is a sale of an interest in, or at least an interest concerning lands (Crosby v. Wadsworth, 6 East, 611). So, also, that a sale of turnips growing must be in writing (2 Taunt. 38); but in the case of Parker v. Stainland, 11 East, 362, a parol sale of potatoes in the ground was held valid, and not within the statute. The difference between this case and Crosby v. Wadsworth, as stated by Lord Ellenborough, is this: that in that case the contract for the grass was made while growing, but the contract was for the potatoes in a matured state. The grass was to grow before cut, but the potatoes were to be removed immediately. In this court, however, it has been expressly adjudged that wheat or corn growing is a chattel, and may be levied on and sold as such by virtue of an execution. 2 Johns. 418, 421; 9 Johns. 112; 9 Cow. 42. The case of Crosby v. Wadsworth, was doubted by Spencer, J., in Frear v. Hardenbergh, 5 Johns. 276, where he remarks that the statute could have in view, to avoid such agreements in relation to lands as rested in parol, only where some interest was to be acquired in the land itself, and not such as were collateral, and by which no kind of interest was to be gained by the agreement, in the land. A licence to enter upon land does not purport to convey an interest in the land; it is substantially a promise, without any consideration to support it, and while it remains executory, may be revoked at pleasure; but when executed, it in general can only be revoked by placing the other party in the same situation, in which he stood before he entered on its execution. So a promise to give may be rescinded before execution, but not after. It is said, however, that if a rule of law would be transgressed by holding an executed licence irrevocable, it cannot be done; the law must stand and the licence be revoked. Hammond, N. P. 207. In the case of Winter v. Brockwell, 8 East, 308, the plaintiff complained that the defend-

ant had placed a sky light over an opening area above the plaintiff's window, by means of which light and air were prevented from entering. The defence was, that the area belonged to the defendant's house, and the sky light was put over it by the express consent and approbation of the plaintiff before the enclosure, who, after it was done, gave notice to have it removed. Lord Ellenborough, before whom the cause was tried, was of opinion that the licence of the plaintiff having been acted upon and expense incurred, it could not be recalled without offering to pay all expenses incurred under it. The defendant had a verdict, and a new trial was denied. On the trial, the question was raised, whether a parol licence, as this was, was good by the statute of frauds, but it was overruled. In Taylor v. Waters, 7 Taunt. 374, it was held that a beneficial licence to be exercised upon land may be granted without deed and without writing. The plaintiff was the bearer of an opera ticket which gave him admission to the opera house for twenty-one years, and was denied admission by the defendant, for which an action was brought. One ground of defence was, that this was an interest in land, and could not pass without a writing. To this it was answered that it was not an interest in land, but a licence irrevocable to permit the plaintiff to enjoy certain privileges thereon, and therefore need not be in writing; and of this opinion was the court. Gibbs, C. J., cited the cases of Webb v. Paternoster, Winter v. Brockwell, and Wood v. Lake, and remarks: "These cases abundantly prove that a licence to enjoy a beneficial privilege on land may be granted without deed, and notwithstanding the statute of frauds without writing."

These cases relate to some privilege to be exercised upon the land. The case of Fentiman v. Smith, 4 East, 108, decides that a parol licence to make a tunnel through the defendant's land, to carry water to the plaintiff's mill, was revocable at any time. The defendant had agreed for the consideration of a guinea, to be paid by the plaintiff, to let the plaintiff lay a tunnel through his land for carrying the water; and even assisted in making it; but there was no conveyance. The guinea was afterward tendered, but the defendant refused to receive it, and cut a channel, by which the water was diverted. Lord Ellenborough says, the title to have the water flowing in the tunnel over the defendant's land could not pass by parol licence, without deed; and if by licence, it was revocable at any time. A case in some respects resembling the last is found in 14 Serg. & R. 267. Kern sued Rurick in a court of common pleas, for diverting a watercourse, in consequence of which he lost the use of his saw-mill. It appeared that before he built his mill he applied to Rurick for permission to turn the water from what was called the right hand stream into the left hand stream, which, without the water of the former, would have been wholly insufficient; permission was given to turn the stream through R.'s land, but no deed was given, nor any consideration paid; a mill was built on the left hand stream, which would not have been done but for the permission to turn the water. Subsequently R., the defendant below, turned away the water of the right hand stream. The court below decided, in substance, that the licence might have been revoked before Kern had incurred the expense of building his mill, on the faith of Rurick's promise; or he might have revoked it, if it had been given after the mill had been built, but not after he had induced Kern to be at the expense of building his mill. Upon a writ of error brought into the supreme court the plaintiff's counsel relied upon the above case of Fentiman v. Smith, and Dexter v. Hazen, 10 Johns. 246, where the defendant, having given permission to the plaintiff to pass over his land with teams, revoked it; and the court said that it was a mere licence, gratuitously given, and revocable at pleasure, being still executory. On the other side it was contended that the licence was irrevocable, after expense had been incurred upon the faith of such licence; and it was compared to a parol gift of land, accompanied with possession, and also that it was a fraud for Rurick to witness the expenditure of money upon his land, and afterwards revoke his licence. Gibson, J., gave the opinion of the court, and held that a licence may become an agreement on valuable consideration, as when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. He held that equity would decree the specific performance of such an agreement. That a right, under a licence, when not specially restricted, is commensuate with the thing of which the licence is accessory; that relating to a permanent eviction, it was of unlimited duration. It had been previously decided in that court, in the case of Le Fevre v. Le Fevre, 4 Serg. & R. 241, that after the execution of a deed, conveying a right to lay down pipes to conduct water through the granted land by courses and distances, the route might be altered by parol, and be valid, after it was carried into effect.

This subject has been viewed very differently by the supreme court of Massachusetts, in Cook v. Stearns, 11 Mass. 536. That was an action of trespass, for entering upon the plaintiff's close, and digging up his soil. The defendant pleaded that he was the owner of a mill and dam, near the plaintiff's close; part of the dam being made upon the plaintiff's close, by the consent of the then owners; and that it was necessary to repair the same, and the defendant entered for the purpose of repairing. The plaintiff demurred, assigning for cause, that there was no conveyance. For the defendant it was, among other things, contended that there was a licence, which being once executed was not revocable. Par-

ker, C. J., gave the opinion of the court, and states the defendant's claim a permanent interest in the plaintiff's close; a right to maintain the dam and canal, which was formerly placed there by consent; and to enter at any time, to make repairs. This, he says, is an interest in lands which cannot pass without deed or writing. The counsel for the defendant had contended that such a licence might be by parol, and that it could not be countermanded. The learned judge says: "This argument had some plausibility in it, when first stated; but upon more mature consideration it seems to have no foundation in principles of law. A licence, he says, is technically an authority given to do some one act, or series of acts, on the land of another, without passing any estate in the land: as to hunt, to cut down trees; these are, when executory, revocable, but not when executed; but licences which, in their nature, amount to the granting of an estate, for ever so short a time, are not good, without deed, and are considered as leases, and must be pleaded as such." He adds: "The distinction is obvious. Licences to do a particular act do not, in any degree, trench upon the policy of the law, which requires that bargains respecting the title or interest in real estate shall be by deed, or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass; but a permanent right to hold another's land for a particular purpose, and to enter upon it at all times, without his consent, is an important interest, which ought not to pass without writing, and is the very object provided for by our statute." He concedes that the licence authorized the particular act, but not a repetition of it; and says, that the transfer of the land to another was a countermand of the licence. The court held the plea bad, not showing such a licence as may be pleaded, and the interest claimed being not in the nature of a licence but of an estate, or at least an easement in the land, which cannot be acquired without writing or prescription, or such a possession as furnishes a presumption of a grant. If the plea were held to be a bar to the action, all the mischiefs and uncertainties which the legislature intended to avoid, by requiring such bargains to be put in writing, would be revived; and purchasers of estates would be without the means of knowing whether incumbrances existed or not on the land which they purchase.

In Ex parte Coburn, 1 Cow. 570, this court said, that a right of way is a real or chattel interest, according to the term of its duration, and the former is well known as an incorporeal hereditament; not so of a licence to enter upon another's land, without consideration. This is not an interest, it is a mere authority, revocable at any moment; not in its nature assignable, but limited to the person of the grantee. Giving permission to walk over one's land is but an excuse for a trespass. The case of Thompson v. Gregory, 4 Johns. 81, has been much relied on by the plaintiff's counsel, as containing the principle for which he contends. Thompson sued Gregory, for damages for overflowing his land, by means of a dam on Gregory's own land. The defence set up was that S. Van Rensselaer had leased both plaintiff's and defendant's land, and reserved to himself and his assigns the privilege of building dams and flowing lands, and that this right had been assigned by parol to the defendant. The court say the right in question could not pass by parol; the right reserved to the grantor was an incorporeal hereditament. It was not the land itself, but a right annexed to it, and it could only pass by grant. No such interest could be assigned or granted without writing, according to the express provision of the statute of frauds. And in Jackson v. Buel, 9 Johns. 298, it was held that ejectment would lie by the grantor for such a reservation. Chancellor Kent, in his Commentaries, 3 Kent, Comm. 452, says, that the modern cases distinguish between an easement and a license. A claim for an easement must be founded upon grant, by deed or writing, or upon prescription which presupposes one, for it is a permanent interest in another's land, with a right, at all times, to enter and enjoy it; but a license is an authority to do a particular act, or a series of acts upon another's land, without possessing any estate therein. It is founded in personal confidence, and is not assignable. This distinction between a privilege or easement carrying an interest in land, and requiring a writing within the statute of frauds to support it, and a license which may be by parol, is quite subtle, and it becomes difficult, in some of the cases, to discern a substantial difference between them.

I shall not undertake to reconcile these various cases. It is evident the subject has been understood very differently by different judges. But in this all agree, that according to the statute of frauds, any permanent interest in the land itself, cannot be transferred, except by writing. Much of the discrepancy may have arisen from the different ideas attached to the word license. If we understand it as Chancellor Kent defines it, it seems to me there can be no difficulty. It is an authority to do a particular act upon another's land; is founded in personal confidence, and is not assignable. For example, A. agrees with B. that B. may hunt or fish on his, A.'s land; A. thereby gives B. a licence for that purpose. This gives B. no interest in the land; he cannot authorize any other person to go upon the land; it is a personal privilege granted to B. alone. If, after A. has given his consent, and before B. has entered upon his land A. changes his mind, he has a right to do so, and forbid B. from entering upon his land for the specified purpose. The licence is thus far executory, and may be revoked at pleasure; if B. afterwards enters, he is a trespasser. If, however, B. enters before any revocation of licence, the

licence is then executed; and it is not competent for A. to revoke it, and make B. a trespasser. This doctrine is applicable only to the temporary occupation of land, and confers no right nor interest in the land. If A. agrees with B. that he may enter upon his land, and occupy it for a year, that is not properly speaking, a licence merely; it is more—it is a lease, and if no term be specified in the agreement, it is an estate at will. If the period of occupation expressed or implied previous to 1830 was more than three years, it required an agreement in writing to support it. If there was no written agreement, the right of occupancy could certainly not extend beyond three years. Where an interest greater than a temporary occupation was to be created, it might be an easement, as a right of way; such an easement is, or may be, a permanent interest in the land over which the right of way exists, and must be founded upon grant or prescription, which supposes a grant. Such an interest is not properly a licence; it may be assigned, and cannot be revoked. If A. agree with B. that B. may build a dam upon the land of A., or across an island, as in the present case, if it is to be permanent, or any thing more than a mere temporary erection, such an agreement is not technically a licence. The object of A. is to grant, and of B. to acquire an interest which shall be permanent; a right not to occupy for a short time, but as long as there shall be employment for the water power to be thus created; can such an interest, such a right be created by parol? As Mr. Sugden says of the case of Wood v. Lake, "It appears to be in the very teeth of the statute which extends generally to all leases, estates or interests." It declares that all leases, estates, interest of freehold, or terms of years, or any uncertain interests, of, in, to or out of any lands, made by parol, and not in writing, shall have the effect of estates at will only. To decide that a right to a permanent occupation of the plaintiff's land may be acquired by parol, and by calling the agreement a licence, would be in effect to repeal the statute.

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GREEN v. ARMSTRONG.[1]

(1 Denio, 550.)

Supreme Court of New York. Oct., 1845.

O. S. Williams, for plaintiff in error. John Dean, for defendant in error.

BEARDSLEY, J. A verbal contract was made between these parties, by which the defendant agreed to sell certain trees then standing and growing on his land, to the plaintiff, with liberty to cut and remove the same at any time within twenty years from the making of the contract. A part of the trees were cut and removed under this agreement, but the defendant then refused to permit any more to be taken, and for this the plaintiff brought his action in the justice's court, where a judgment was rendered in his favor. On the trial of the cause the defendant objected to proof of such parol contract, but the objection was overruled. The judgment was removed by certiorari to the court of common pleas of Oneida county, and was reversed by that court, on the ground, as the record states, that the contract, not being in writing, was void by the statute of frauds.

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The Revised Statutes declare that no "interest in lands" shall be created, unless by deed or conveyance in writing; and that every contract for the sale of "any interest in lands" shall be void unless in writing. 2 Rev. St. 134, §§ 6, 8. Certain exceptions and qualifications to these enactments are contained in the sections referred to, but none which touch the question now before the court: and so far as respects this question the former statute of New-York, and the English statute of 29 Car. II. c. 3, contain similar provisions. 1 R. L. 1813, p. 78; Chit. Cont. 299.

The precise question in this case is, whether an agreement for the sale of growing trees, with a right to enter on the land at a future time and remove them, is a contract for the sale of an interest in land. If it is, it must follow that the one declared on in this case, not being in writing, was invalid, and the judgment of the common pleas, reversing that of the justice, was correct and must be affirmed.

And in the outset I must observe, that this question has not, to my knowledge, been decided in this state. It has, however, arisen in the English courts, and in some of those of our sister states; but their decisions are contradictory, and the views of individual judges wholly irreconcilable with each other. Greenl. Ev. (2d Ed.) § 271, and notes; Chit. Cont. 299-302; 4 Kent, Comm. (5th Ed.) 450, 451. We are, therefore, as it seems to me, at full liberty to adopt a broad principle, if one can be found, which will determine this precise question in a manner which our judgments shall approve, and especially if it be equally applicable to other and analogous cases.

By the statute, a contract for the sale of "any interest in lands" is void unless in writing. The word land is comprehensive in its import, and includes many things besides the earth we tread on, as waters, grass, stones, buildings, fences, trees and the like; for all these may be conveyed by the general designation of land. 1 Shep. Touch. (by Preston), 91; 1 Inst. 4; 1 Preston, Est. 8; 2 Bl. Comm. 17, 18; 1 Rev. St. 387, § 2; 2 Rev. St. 137, § 6. Standing trees are therefore part and parcel of the land in which they are rooted, and as such are real property. They pass to the heir by descent as part of the inheritance, and not, as personal chattels do, to the executor or administrator. Toller, Ex'rs, 193-195; 2 Bl. Comm. (by Chitty) 122, note; Rob. Frauds, 365, 366; Liford's Case, 11 Coke, 46; Com. Dig. "Biens," (H). And being strictly real property, they cannot be sold on an execution against chattels only. Scorell v. Boxall, 1 Younge & J. 396; Evans v. Roberts, 5 Barn. & C. 829.

It is otherwise with growing crops, as wheat and corn, the annual produce of labor and cultivation of the earth; for these are personal chattels, and pass to those entitled to the personal estate, and not to the heir. Toller, 150, 194; 2 Bl. Comm. 404. They may also be sold on execution like other personal chattels. Whipple v. Foot, 2 Johns. 418; Jones v. Flint, 10 Adol. & E. 753; Peacock v. Purvis, 2 Brod. & B. 362; Hartwell v. Bissell, 17 Johns. 128.

These principles suggest the proper distinction. An interest in personal chattels may be created without a deed or conveyance in writing, and a contract for their sale may be valid although by parol. But an interest in that which is land, can only be created by deed or written conveyance: and no contract for the sale of such an interest is valid unless in writing. It is not material and does not affect the principle, that the subject of the sale will be personal property when transferred to the purchaser. If, when sold, it is, in the hands of the seller, a part of the land itself, the contract is within the statute. These trees were part of the defendant's land and not his personal chattels. The contract for their sale and transfer, being by parol, was therefore void.

The opinion of the court in the case of Dunne v. Ferguson, 1 Hayes, 542, contains one of the best illustrations of this question. That case is thus stated in Steph. N. P. 1971: "The facts of the case were, that in October, 1830, the defendant sold to the plaintiff a crop of turnips, which he had sown a short time previously, for a sum less than ten pounds. In February, 1831, and previously, while the turnips were still in the ground, the defendant severed and carried away considerable quantities of them, which he converted to his own use. No note

[1] Irrelevant parts omitted.

in writing was made of the bargain. It was contended for the defendant, that the action of trover did not lie for things annexed to the freehold, and that the contract was of no validity for want of a note or memorandum in writing pursuant to the statute of frauds. Upon the foregoing facts Chief Baron Joy observed (Barons Smith, Pennefeather and Foster, concurring): 'The general question for our decision is, whether there has been a contract for an interest concerning lands, within the second section of the statute of frauds? or whether it merely concerned goods and chattels? And that question resolves itself into another, whether or not a growing crop is goods and chattels? In one case it has been held, that a contract for potatoes did not require a note in writing, because the potatoes were ripe: and in another case, the distinction turned upon the hand that was to dig them, so that if dug by A. B. they were potatoes, and if by C. D. they were an interest in lands. Such a course always involves the judge in perplexity, and the case in obscurity. Another criterion must, therefore, be had recourse to; and, fortunately, the later cases have rested the matter on a more rational and solid foundation. At common law, growing crops were uniformly held to be goods; and they were subject to all the leading consequences of being goods, as seizure in execution, &c. The statute of frauds takes things as it finds them, and provides for lands and goods according as they were so esteemed before its enactment. In this way the question may be satisfactorily decided. If, before the statute, a growing crop has been held to be an interest in lands, it would come within the second section of the act, but if it were only goods and chattels, then it came within the thirteenth section. On this, the only rational ground, the cases of Evans v. Roberts, 5 Barn. & C. 829; Smith v. Surman, 9 Barn. & C. 561; and Scorell v. Boxall, 1 Younge & J. 396,—have been decided. And as we think that growing crops have all the consequences of chattels, and are like them, liable to be taken in execution, we must rule the points saved for the plaintiff.' "

Various other decisions have proceeded on the same principle, although it has no where been stated and illustrated with the same clearness and force as in the opinion of Chief Baron Joy.

The following cases may be cited to show that growing crops of grain and vegetables, fructus industriales, being goods and chattels, and not real estate, may be conveyed by a verbal contract, as they may also be sold on execution as personal chattels. Carrington v. Roots, 2 Mees. & W. 248; Sainsbury v. Matthews, 4 Mees. & W. 343; Randall v. Ramer, 2 Johns. 421, note; Mumford v. Whitney, 15 Wend. 387; Austin v. Sawyer, 9 Cow. 39; Jones v. Flint, 10 Adol. & E. 753; Warwick v. Bruce, 2 Maule & S. 205; Graves v. Weld, 5 Barn. & Adol. 105.

But where the subject matter of a contract of sale, is growing trees, fruit or grass, the natural produce of the earth, and not annual productions raised by manurance and the industry of man, as they are parcel of the land itself, and not chattels, the contract, in order to be valid, must be in writing. Teal v. Auty, 2 Brod. & B. 99; Putney v. Day, 6 N. H. 430; Olmstead v. Niles, 7 N. H. 522; Crosby v. Wadsworth, 6 East, 602; Rodwell v. Phillips. 9 Mees. & W. 501; Jones v. Flint, 10 Adol. & E. 753.

The contract in this case was within the statute, and being by parol was void. The judgment of the common pleas must be affirmed.

Judgment affirmed.

HIRTH v. GRAHAM.[1]

(33 N. E. 90, 50 Ohio St. 57.)

Supreme Court of Ohio. Jan. 24, 1893.

Error to circuit court, Morrow county.

Action for breach of contract by one Hirth against one Graham. Plaintiff recovered a judgment before a justice of the peace of Morrow county, which, upon error being brought to the court of common pleas, was affirmed. The case was then taken on error to the circuit court, where the judgments of the court of common pleas and of the justice were both reversed, and plaintiff brings error. Affirmed.

James H. Beebe, for plaintiff in error. Andrews & Simms, for defendant in error.

BRADBURY, J. The plaintiff in error brought an action before a justice of the peace to recover of the defendant in error damages alleged to have been sustained on account of the refusal of the latter to perform a contract by which he had sold to the plaintiff in error certain growing timber. The defendant attempted to secure the dismissal of the action, on the ground that the justice had no jurisdiction of an action for the breach of such a contract. Failing in this, and the action being tried to a jury, he requested the justice to instruct the jury "that if they find from the evidence that the trees about which this action is brought were at the time of said alleged contract then growing upon the land of defendant, and that no note or contract or memorandum was made of the contract of sale was at the time made in writing, the plaintiff cannot maintain this action, and your verdict should be for the defendant," which instruction the justice refused to give, but on the contrary gave to them the following instructions on the subject: "This is an action for damage, not on the contract, nor to enforce the same; and if you find that a contract was made verbal or otherwise and the defendant refused or failed to comply with its terms, the plaintiff is entitled to any damage you may find him to have sustained by way of such noncompliance." The defendant in error, who was also the defendant in the justice's court, excepted, both to the charge as given and to the refusal to charge as requested; the verdict and judgment being against him, he embodied the charge as given, as well as that refused, in separate bills of exceptions, and brought the cause to the court of common pleas on error, where the judgment of the justice of the peace was affirmed. He thereupon brought error to the circuit court, where the judgments of the court of common pleas and that of the justice were both reversed, and it is to reverse this judgment of the circuit court, and reinstate and affirm those of the court of common pleas and justice of the peace, that this proceeding is pending.

[1] Irrelevant parts omitted.

Counsel for plaintiff in error contends that the record contains nothing to show that the trees which were the subject of the contract were standing or growing, and that therefore it does not appear that the defendant was injured by the instructions given and refused. The record does not support this contention. During the trial three separate bills of exceptions were taken, and, when all of them are considered together, it clearly appears that evidence was given tending to prove that the trees, the subject of the contract, were growing on the land at the time it was made, and that the contract was not evidenced by any note or memorandum in writing. The instruction refused was, therefore, pertinent, and if it contained a sound legal proposition the refusal to give it in charge to the jury was prejudicial to the defendant. The court, however, not only refused to give the instructions requested by the defendant, but told the jury in substance that no written memorandum was necessary.

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Whether a sale of growing trees is the sale of an interest in or concerning land has long been a much controverted subject in the courts of England, as well as in the courts of the several states of the Union. The question has been differently decided in different jurisdictions, and by different courts, or at different times by the same court within the same jurisdiction. The courts of England, particularly, have varied widely in their holdings on the subject. Lord Mansfield held that the sale of a crop of growing turnips was within this clause of the statute. Emmerson v. Heelis, 2 Taunt. 38, following the case of Waddington v. Bristow, 2 Bos. & P. 452, where the sale of a crop of growing hops was adjudged not to have been a sale of goods and chattels merely. And in Crosby v. Wadsworth, 6 East, 602, the sale of growing grass was held to be a contract for the sale of an interest in or concerning land, Lord Ellenborough saying: "Upon the first of these questions," (whether this purchase of the growing crop be a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them,) "I think that the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or at least an interest concerning, lands." Id. 610. Afterwards, in Teal v. Auty, 2 Brod. & B. 99, the court of common pleas held a contract for the sale of growing poles was a sale of an interest in or concerning lands. Many decisions have been announced by the English courts since the cases above noted were decided, the tendency of which have been to greatly narrow the application of the fourth section of the statute of frauds to crops, or timber, growing upon land. Crops planted and raised annually by the hand of man are practically withdrawn from its operation, while the sale of other crops, and in some in-

stances growing timber, also, are withdrawn from the statute, where, in the contemplation of the contracting parties, the subject of the contract is to be treated as a chattel. The latest declaration of the English courts upon this question is that of the common pleas division of the high court of justice, in Marshall v. Green, 1 C. P. Div. 35, decided in 1875. The syllabus reads: "A sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land, or any interest therein, within the fourth section of the statute of frauds." This decision was rendered by the three justices who constituted the common pleas division of the high court of justice, Coleridge, C. J., Brett and Grove, JJ., whose characters and attainments entitle it to great weight; yet, in view of the prior long period of unsettled professional and judicial opinion in England upon the question, that the court was not one of final resort, and that the decision has encountered adverse criticism from high authority (Benj. Sales [Ed. 1892] § 126), it cannot be considered as finally settling the law of England on this subject. The conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky, and Connecticut sales of growing trees, to be presently cut and removed by the vendee, are held not to be within the operation of the fourth section of the statute of frauds. Claflin v. Carpenter, 4 Metc. (Mass.) 580; Nettleton v. Sikes, 8 Metc. (Mass.) 34; Bostwick v. Leach, 3 Day, 476; Erskine v. Plummer, 7 Me. 447; Cutler v. Pope, 13 Me. 377; Cain v. McGuire, 13 B. Mon. 340; Byassee v. Reese, 4 Metc. (Ky.) 372; Smith v. Bryan, 5 Md. 141. In none of these cases, except 4 Metc. (Ky.) 373, and in 13 B. Mon. 340, had the vendor attempted to repudiate the contract before the vendee had entered upon its execution, and the statement of facts in those two cases do not speak clearly upon this point. In the leading English case before cited, (Marshall v. Green, 1 C. P. Div. 35,) the vendee had also entered upon the work of felling the trees, and had sold some of their tops before the vendor countermanded the sale. These cases, therefore, cannot be regarded as directly holding that a vendee, by parol, of growing timber to be presently felled and removed, may not repudiate the contract before anything is done under it; and this was the situation in which the parties to the case now under consideration stood when the contract was repudiated. Indeed, a late case in Massachusetts, (Giles v. Simonds, 15 Gray, 441), holds that "the owner of land, who has made a verbal contract for the sale of standing wood to be cut and severed from the freehold by the purchaser, may at any time revoke the license which he thereby gives to the purchaser to enter his land to cut and carry away the wood, so far as it relates to any wood not cut at the time of the revocation." The courts of most of the American states, however, that have considered the question, hold expressly that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the statute of frauds. Green v. Armstrong, 1 Denio, 550; Bishop v. Bishop, 11 N. Y. 123; Westbrook v. Eager, 16 N. J. Law, 81; Buck v. Pickwell, 27 Vt. 157; Cool v. Lumber Co., 87 Ind. 531; Terrell v. Frazier, 79 Ind. 473; Owens v. Lewis, 46 Ind. 488; Armstrong v. Lawson, 73 Ind. 498; Jackson v. Evans, 44 Mich. 510, 7 N. W. 79; Lyle v. Shinnebarger, 17 Mo. App. 66; Howe v. Batchelder, 49 N. H. 204; Putney v. Day, 6 N. H. 430; Bowers v. Bowers, 95 Pa. St. 477; Daniels v. Bailey, 43 Wis. 566; Lillie v. Dunbar, 62 Wis. 198, 22 N. W. 467; Knox v. Haralson, 2 Tenn. Ch. 232. The question is now, for the first time, before this court for determination; and we are at liberty to adopt that rule on the subject most conformable to sound reason. In all its other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends with the land to the heir, and passes to the vendor with the soil. Jones v. Timmons, 21 Ohio St. 596. Coal, petroleum, building stone, and many other substances constituting integral parts of the land, have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances, with a view to their immediate removal, would not be within the statute. Sales of growing timber are as likely to become the subjects of fraud and perjury as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands should depend not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty. This rule has the additional merit of being clear, simple, and of easy application,—qualities entitled to substantial weight in choosing between conflicting principles. Whether circumstances of part performance might require a modification of this rule is not before the court, and has not been considered. Judgment affirmed.

BLAKE v. COLE.[1]

(22 Pick. 97.)

Supreme Judicial Court of Massachusetts. March Term, 1839.

This was an action brought by the plaintiff as administrator of the estate of Jabez Hatch senior, deceased, to recover the sum of $2000 paid by the plaintiff as such administrator to the use of the defendant.

At the trial, before Shaw, C. J., it appeared, that on the 11th of August, 1834, the plaintiff's intestate and the defendant became sureties on a bond at the probate office, given by Jabez Hatch junior (son of the intestate) as principal, on his appointment as the administrator of one Gallagher; that the principal made default, and he and his sureties became liable to the amount of $4000; and that the plaintiff, as administrator of Hatch senior, was duly called upon to pay, and out of the assets of his intestate did pay that sum, as surety. And he brought this suit against the defendant as his co-surety, for a contribution.

The defence was, that the defendant was induced to sign the bond by the express request of Hatch senior, and upon his verbal promise to indemnify the defendant and save him harmless from any responsibility he might incur by reason of his so becoming surety.

This defence was placed upon two grounds in law: (1) That a parol promise to indemnify against a responsibility undertaken upon request, is a good and valid contract, and not within the statute of frauds; and if the defendant had been called upon as surety, he might have maintained an action against the intestate, and after his decease, against the plaintiff, for the whole amount thus paid; and (2) that even if an action could not have been maintained in such case, yet when the party at whose express request the bond was executed by one surety, has been obliged to pay money in consequence of such suretyship, he has no legal claim for contribution against the surety who executed it at his request. Both of these grounds were contested by the plaintiff.

Mr. Blake, pro se. W. Phillips and Robbins, for defendant.

PUTNAM, J., delivered the opinion of the court. No question can be made of the general rule, that if one surety pays the whole debt or more than his part, he has a right to recover at law a contribution against his co-surety. Batchelder v. Fiske, 17 Mass. 468. The defendant then must be charged, unless he can show some defence exempting him from the operation of the general rule. And for this purpose he relies upon the fact, that he became surety at the request of the plaintiff's intestate, upon his verbal promise to indemnify him.

It is contended for the plaintiff, that the verbal promise was void by St. 1788, c. 16, § 1, commonly called the statute of frauds, as it was a special promise to answer for the debt, default or misdoing of another person, upon an agreement that was not to be performed within the space of one year from the making thereof. And the plaintiff says, that by no possibility could the bond be performed within the year. The plaintiff relies much upon the case of Boydell v. Drummond, 11 East, 155, relating to the publication of prints from the scenes in Shakspeare's plays; where it was held, that it must be a complete performance within the year, to take the case out of the statute. And the court said, that the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole within a year.

But the bond in the case at bar might be forfeited for breaches within the year; and such forfeiture would have rendered the sureties liable to a judgment for the penalty.

The administrator, for example, was liable to claims of creditors within the year, which were not affected by the insolvency of the estate, and it might be that these debts would absorb all the property, and so the estate would be settled within the year, and the contract would thus be completely performed within the year. It might be, that a forfeiture would be incurred for not returning an inventory within three months, or that the principal in the bond might have rendered himself liable for waste, within the year; and other causes of forfeiture might have happened within the year, which would have subjected the sureties to judgment for the whole penalty of the bond.

Comyn, Cont. (3d Am. Ed.) 232. The statute does not embrace cases which may be performed in a year, or which depend on a contingency. It must be an express and specific agreement not to be performed in one year, to come within the act. If it may be performed within the year, it does not come within it. Moore v. Fox, 10 Johns. 244. Thus, where the promise was to pay so many guineas on the day of the plaintiff's marriage, it was held not within the statute. Where the promise was upon a contingency, and it did not appear that it was to be performed after the year, there a note in writing was held not necessary, for the contingency might happen within the year. Peter v. Compton, Skin. 353. So, where it was to pay so much money on the return of such a ship, which ship happened not to return in two years, it was held by all the judges that it was not within the statute, for by possibility the ship might have returned within the year. It applies to a promise where by the express appointment of the party it is not to be performed in a year. Anon., 1 Salk. 280. So in Fenton v. Emblers, 3 Burrows, 1278; the statute applies to promises expressly and specifically agreed not to be performed within the year; nor is any case upon a contingency within it. Smith v. Westall, 1 Ld. Raym. 316; Gilbert v. Sykes, 16 East, 150.

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Plaintiff nonsuit.

[1] Irrelevant parts omitted.

DOYLE v. DIXON.[1]

(97 Mass. 208.)

Supreme Judicial Court of Massachusetts. Hampden. Sept. Term, 1867.

Action by John Doyle against John Dixon for breach of a contract by which the defendant, on selling his stock of groceries and good will to the plaintiff, agreed not to go into the grocery business in Chicopee for a period of five years. The defendant contended that the agreement was within the statute of frauds as an agreement not to be performed within a year, and that, as it was not in writing, the plaintiff could not recover; but the judge ruled the contrary. There was a verdict for the plaintiff, and the defendant excepted.

G. M. Stearns, for plaintiff. A. L. Soule, for defendant.

GRAY, J. It is well settled that an oral agreement which according to the expression and contemplation of the parties may or may not be fully performed within a year is not within that clause of the statute of frauds, which requires any "agreement not to be performed within one year from the making thereof" to be in writing in order to maintain an action. An agreement therefore which will be completely performed according to its terms and intention if either party should die within the year is not within the statute. Thus in Peters v. Westborough, 19 Pick. 364, it was held that an agreement to support a child until a certain age at which the child would not arrive for several years was not within the statute, because it depended upon the contingency of the child's life, and, if the child should die within one year, would be fully performed. On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute. It was therefore held in Hill v. Hooper, 1 Gray, 131, that an agreement to employ a boy for five years and to pay his father certain sums at stated periods during that time was within the statute; for although by the death of the boy the services which were the consideration of the promise would cease, and the promise therefore be determined, it would certainly not be completely performed. So if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. It has accordingly been repeatedly held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute, because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his legal representatives, it would be fully performed if he died within the year. Lyon v. King, 11 Metc. (Mass.) 411; Worthy v. Jones, 11 Gray, 168. An agreement not to engage in a certain kind of business at a particular place for a specified number of years is within the same principle; for whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life. An agreement to do a thing for a certain time may perhaps bind the promisor's representatives, and at any rate is not performed if he dies within that time. But a mere agreement that he will himself refrain from doing a certain thing is fully performed if he keeps it so long as he is capable of doing or refraining. The agreement of the defendant not to go into business again at Chicopee for five years was therefore not within the statute of frauds.

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Exceptions overruled.

[1] Irrelevant parts omitted.

BALDWIN v. WILLIAMS.

(3 Metc. 365.)

Supreme Judicial Court of Massachusetts. Nov. Term, 1841.

This case was tried before Wilde, J., who made the following report of it:—

This was an action of assumpsit, and the declaration set forth an agreement of the plaintiff that he would bargain, sell, assign, transfer, and set over to the defendant, and indorse without recourse to him, the plaintiff, in any event, two notes of hand by him held, signed by S. J. Gardner; one dated April 24th, 1835, for the payment of $1,500; the other dated May 5th, 1836, for the payment of $500; and both payable to the plaintiff or order on the 3d of April, 1839, with interest from their dates. The declaration set forth an agreement by the defendant, in consideration of the plaintiff's agreement aforesaid, and in payment for said Gardner's said notes, to pay the plaintiff $1,000 in cash, and to give the plaintiff a post note, made by the Lafayette Bank, for $1,000, and also a note signed by J. B. Russell & Co. and indorsed by D. W. Williams for $1,000.

The plaintiff at the trial proved an oral agreement with the defendant as set forth in the declaration, and an offer by the plaintiff to comply with his part of said agreement, and a tender of said Gardner's said notes, indorsed by the plaintiff without recourse to him in any event, and a demand upon the defendant to fulfil his part of said agreement, and the refusal of the defendant to do so. But the plaintiff introduced no evidence tending to show that any thing passed between the parties at the time of making the said agreement, or was given in earnest to bind the bargain.

The judge advised a nonsuit upon this evidence, because the contract was not in writing nor proved by any note or memorandum in writing signed by the defendant or his agent, and nothing was received by the purchaser, nor given in earnest to bind the bargain. A nonsuit was accordingly entered, which is to stand if in the opinion of the whole court the agreement set forth in the declaration falls within the statute of frauds (Rev. St. c. 74, § 4); otherwise, the nonsuit to be taken off, and a new trial granted.

Mr. Clarke, for plaintiff. S. D. Parker, for defendant.

WILDE, J. This action is founded on an oral contract, and the question is, whether it is a contract of sale within the statute of frauds.

The plaintiff's counsel contends in the first place that the contract is not a contract for the sale of the notes mentioned in the declaration, but a mere agreement for the exchange of them; and in the second place that if the agreement is to be considered as a contract of sale, yet it is not a contract within that statute.

As to the first point, the defendant's counsel contends that an agreement to exchange notes is a mutual contract of sale. But it is not necessary to decide this question, for the agreement of the defendant, as alleged in the declaration, was to pay for the plaintiff's two notes $2,000 in cash, in addition to two other notes; and that this was a contract of sale is, we think, very clear.

The other question is more doubtful. But the better opinion seems to us to be, that this is a contract within the true meaning of the statute of frauds. It is certainly within the mischief thereby intended to be prevented; and the words of the statute, "goods" and "merchandise," are sufficiently comprehensive to include promissory notes of hand. The word "goods" is a word of large signification; and so is the word "merchandise." "Merx est quicquid vendi potest."

In Tisdale v. Harris, 20 Pick. 9, it was decided that a contract for the sale of shares in a manufacturing corporation is a contract for the sale of goods or merchandise within the statute; and the reasons on which that decision was founded seem fully to authorize a similar decision as to promissory notes of hand. A different decision has recently been made in England in Humble v. Mitchell, 3 Perry & D. 141, 11 Adol. & E. 207. In that case it was decided that a contract for the sale of shares in a joint-stock banking company was not within the statute of frauds. But it seems to us that the reasoning in the case of Tisdale v. Harris is very cogent and satisfactory; and it is supported by several other cases. In Mills v. Gore, 20 Pick. 28, it was decided that a bill in equity might be maintained to compel the redelivery of a deed and a promissory note of hand, on the provision in the Rev. St. c. 81, § 8, which gives the court jurisdiction in all suits to compel the redelivery of any goods or chattels whatsoever, taken and detained from the owner thereof, and secreted or withheld, so that the same cannot be replevied. And the same point was decided in Clapp v. Shephard, 23 Pick. 228. In a former statute (St. 1823, c. 140), there was a similar provision which extended expressly to "any goods or chattels, deed, bond, note, bill, specialty, writing, or other personal property." And the learned commissioners, in a note on the Rev. St. c. 81, § 8, say that the words " 'goods or chattels' are supposed to comprehend the several particulars immediately following them in St. 1823, c. 140, as well as many others that are not mentioned."

The word "chattels" is not contained in the provision of the statute of frauds; but personal chattels are movable goods, and so far as these words may relate to the question under consideration they seem to have

the same meaning. But however this may be, we think the present case cannot be distinguished in principle from Tisdale v. Harris; and upon the authority of that case, taking into consideration again the reasons and principles on which it was decided, we are of opinion that the contract in question is within the statute of frauds, and consequently that the motion to set aside the nonsuit must be overruled.

GODDARD v. BINNEY.

(115 Mass. 450.)

Supreme Judicial Court of Massachusetts. Suffolk. Sept. 4, 1874.

Contract to recover the price of a buggy built by plaintiff for defendant. Plaintiff agreed to build a buggy for defendant, and to deliver it at a certain time. Defendant gave special directions as to style and finish. The buggy was built according to directions. Before it was finished, defendant called to see it, and in answer to plaintiff, who asked him if he would sell it, said no; that he would keep it. When the buggy was finished, plaintiff sent a bill for it, which defendant retained, promising to see plaintiff in regard to it. The buggy was afterwards burned in plaintiff's possession. The case was reported to the supreme judicial court.

C. A. Welch, for plaintiff. G. Putnam, Jr., for defendant.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the statute of frauds, or a contract for labor, services and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other states of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. Crookshank v. Burrell, 18 Johns. 58; Sewall v. Fitch, 8 Cow. 215; Robertson v. Vaughn, 5 Sandf. 1; Downs v. Ross, 23 Wend. 270; Eichelberger v. M'Cauley, 5 Har. & J. 213. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in Lee v. Griffin, 1 B. & S. 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. See Maberley v. Sheppard, 10 Bing. 99; Howe v. Palmer, 3 B. & Ald. 321; Baldey v. Parker, 2 B. & C. 37; Atkinson v. Bell, 8 B. & C. 277.

In this commonwealth, a rule avoiding both of these extremes was established in Mixer v. Howarth, 21 Pick. 205, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. Spencer v. Cone, 1 Met. 283. "The distinction," says Chief Justice Shaw, in Lamb v. Crafts, 12 Met. 353, "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In Gardner v. Joy, 9 Met. 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are Waterman v. Meigs, 4 Cush. 497, and Clark v. Nichols, 107 Mass. 547. It is true that in "the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. St. c. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject matter. It is proper to say also that the present case is a much stronger one than Mixer v. Howarth. In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action.

Independently of that statute, and in cases to which it does not apply, it is well settled that as between the immediate parties, property in personal chattels may pass by bargain and sale without actual delivery. If the parties have agreed upon the specific thing that is sold and the price that the buyer is to pay for it, and nothing remains to be done but that the buyer should pay the price and take the same thing, the property passes to the buyer, and with it the risk of loss by fire or any other accident. The appropriation of the chattel to the buyer is equivalent, for that purpose, to delivery by the seller. The assent of the buyer to take the specific chattel is equivalent for the same purpose to his acceptance of possession. Dixon v. Yates, 5 B. & Ad. 313, 340. The property may well be in the buyer, though the right of possession, or lien for the price, is in the seller. There could in fact be no such lien without a change of ownership. No man can be said to have a lien, in the proper sense of the

term, upon his own property, and the seller's lien can only be upon the buyer's property. It has often been decided that assumpsit for the price of goods bargained and sold can be maintained where the goods have been selected by the buyer, and set apart for him by the seller, though not actually delivered to him, and where nothing remains to be done except that the buyer should pay the agreed price. In such a state of things the property vests in him, and with it the risk of any accident that may happen to the goods in the meantime. Noy's Maxims, 89; 2 Kent, Com. (12th Ed.) 492; Bloxam v. Sanders, 4 B. & C. 941; Tarling v. Baxter, 6 B. & C. 360; Hinde v. Whitehouse, 7 East, 571; Macomber v. Parker, 13 Pick. 175, 183; Morse v. Sherman, 106 Mass. 430.

In the present case, nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials. The plaintiff had not undertaken to deliver it elsewhere than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough has been done, in a case not within that statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession.

According to the terms of the reservation, the verdict must be set aside, and judgment entered for the plaintiff.

COLT and ENDICOTT, JJ., absent.

COOKE et al. v. MILLARD et al.

(65 N. Y. 352.)

Commission of Appeals of New York. 1875.

Action to recover the price of certain lumber sold and delivered. The referee found that plaintiffs were copartners and wholesale lumber merchants, and proprietors of a planing mill, at Whitehall, N. Y., and defendants were partners and lumber merchants, at New Hamburgh, on the Hudson. The course of business is, that the lumber is shipped from Whitehall by canal to Troy, and thence to New Hamburgh by the Hudson river. On the 5th day of Sept., 1865, the defendants desiring to purchase certain kinds of lumber, were shown by the plaintiffs the lumber then in their yard at Whitehall. This was of the desired quality, but needed to be dressed and cut into the different sizes which they wished. There was much more lumber in the yard shown to the defendants than was requisite for their purposes. The defendants thereupon orally gave to the plaintiffs an order for certain quantities and sizes of lumber, at specified prices, amounting in the whole to $918.22. A memorandum of the order so agreed to was made by the plaintiffs, but was not subscribed by any one. No particular lumber was selected or set apart to fill the order, nor was any part of it then in condition to be accepted or delivered. The defendants told the plaintiffs that Percival, a forwarder at Whitehall, would send a boat to take the lumber, when notified that it was ready to be delivered. Percival, during the same season, and prior to Sept. 5, had taken up a boat for the defendants, and shipped a part of a load of lumber from the plaintiffs' dock, making up the residue from his own yard. He had frequently shipped lumber for the defendants. By the course of trade, a boat could not be obtained to carry a part of a load of lumber from Whitehall to New Hamburgh, except for the price of a full load. To avoid paying such full price, arrangements had to be made to fill out the load. The defendants knew of this when they made the order of Sept. 5. The order only amounted to one-half a boat-load. Percival then had a pile of lumber (seventeen thousand six hundred and seventy-one feet of culls) to ship to the defendants, which was no part of the lumber to be dressed by plaintiffs. The lumber ordered on Sept. 5 was to be taken from the lots examined by the defendants, and the lumber dressed and piled on the plaintiffs' dock, was all taken from the lumber shown. After the oral order defendants went into the lumber yard with the plaintiffs' foreman, Martin, and pointed out to him some of the piles from which they desired the lumber to be manufactured, and directed plaintiffs to put the lumber, when ready, on plaintiffs' dock and to notify Percival; and told plaintiffs that when this was done, Percival, who was also a lumber dealer, would take up a boat and ship the lumber, and make out the load from his yard. Subsequently, the 15th of Sept., the lumber having been prepared and dressed, according to the oral agreement, it was piled upon the dock of the plaintiffs at Whitehall, along the front of the planing-mill, and was, on the 16th of that month, measured by plaintiffs, and was in all respects ready for delivery by them, according to the oral agreement.

The plaintiffs, on the same day, gave notice to Percival that the lumber was ready for delivery, and requested him to send a boat and take it away. Percival had not been notified that he was to ship the lumber, and paid no attention to the notice given him by plaintiffs. On the other hand, the plaintiffs did not ascertain that Percival did not know of the arrangement, which the defendants had told them they would make with Percival as to shipping the lumber, until after the fire hereinafter mentioned. On the next day, Sunday, the lumber being still on the dock, as it was at the time Percival was notified, was consumed by an accidental fire, with the planing-mill and much other property. Judgment for defendants.

Martin W. Cooke, for appellants. Thompson & Weeks, for respondents.

DWIGHT, C. No exceptions were taken in this cause, except to the conclusions of law derived by the referee from the facts as found in the report. There are but two questions to be considered: One is, whether the contract is within the statute of frauds; the other is, if it be held that it is within the statute, were the acts, done by the parties, sufficient to comply with its terms, so as to make the contract enforceable in a court of justice?

In order to determine whether the contract is within the statute, it is important briefly to state the exact acts which the plaintiffs were to perform.

The contract was plainly executory in its nature. There were no specific articles upon which the minds of the buyer and seller met, so that it could be affirmed that a title passed at the time of the contract. The seller was to select from the mass of lumber in his yard, certain portions that would comply with the buyer's order. The purposes of the parties could not even be accomplished by the process of selection. The lumber must be put in a condition to answer the order. It must be dressed and cut into required sizes. The contract called for distinct parcels of surface pine boards, clapboards and matched ceiling. Part of the lumber was surfaced, and a portion of it still in the rough. The clapboards were manufactured from stuff one and a quarter-inch thick. It had to be split, surfaced and rabbeted. The order for the various items was a single one,

there being fifteen thousand four hundred and forty-one feet of the surface pine, ten thousand one hundred and forty-four feet of clapboards, and eight thousand feet of matched ceiling. The surface boards and the ceiling were in existence, and only needed dressing to comply with the order. Whether the clapboards can be deemed to have been in existence may be more doubtful. If a part of the order is within the statute of frauds, and a portion of it without it, the whole transaction must be deemed to be within it, as an entire contract cannot, in this case, be divided or apportioned. Cocke v. Tombs, 2 Anst. 420; Chater v. Beckett, 7 T. R. 201; Mechelen v. Wallace, 7 A. & E. 49; Thomas v. Williams, 10 B. & C. 664; Loomis v. Newhall, 15 Pick. 159. I think it clear that the contract was in its nature entire. It was in evidence that the intention was to buy enough, in connection with what Percival had on hand, to make up a boatload. This could only be accomplished by using the entire amount of the order. Accordingly even if the contract for the clapboards was not a sale, it cannot be separated from the rest of the order, and the cases above cited are applicable.

The question is thus reduced to the following proposition: Is a contract which is, in form, one of sale of lumber then in existence for a fixed price, where the seller agrees to put it into a state of fitness to fill the order of the purchaser, his work being included in the price, in fact a contract for work and labor and not one of sale, and accordingly not within the statute of frauds?

The New York statute is made applicable to the "sale of any goods, chattels or things in action," for the price of $50 or more. The words "goods and chattels" are, literally taken, probably more comprehensive than the expressions in the English statute "goods, wares and merchandise." It will be assumed however in this discussion, that they are equivalent.

There are at least three distinct views as to the meaning of the words in the statute. These may be called, for the sake of convenience, the English, the Massachusetts and the New York rules, as representing the decisions in the respective courts.

The English rule lays especial stress upon the point, whether the articles bargained for can be regarded as goods capable of sale by the professed seller at the time of delivery, without any reference to the inquiry whether they were in existence at the time of the contract or not. If a manufacturer is to produce an article which at the time of the delivery could be the subject of sale by him, the case is within the statute of frauds. The rule excludes all cases where work is done upon the goods of another, or even materials supplied or added to the goods of another. Thus if a carriage-maker should repair my carriage, both furnishing labor and supplying materials, it would be a contract for work and labor, as the whole result of his efforts would not produce a chattel which could be the subject of sale by him. If on the other hand, by the contract he lays out work or materials, or both, so as to produce a chattel which he could sell to me, the contract is within the statute. This conclusion has been reached only after great discussion and much fluctuation of opinion, but must now be regarded as settled. The leading case upon this point is Lee v. Griffin, 1 Best & S. 272; Benj. Sales, 77. The action was there brought by a dentist to recover £21 sterling for two sets of artificial teeth, made for a deceased lady of whose estate the defendant was executor. The court held this to be the sale of a chattel within the statute of frauds. Blackburn, J., stated the principle of the decision in a clear manner: "If the contract be such that it will result in the sale of a chattel, then it constitutes a sale, but if the work and labor be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, the action is for work and labor."

The Massachusetts rule, as applicable to goods manufactured or modified after the bargain for them is made, mainly regards the point whether the products can, at the time stipulated for delivery, be regarded as "goods, wares and merchandise," in the sense of being generally marketable commodities made by the manufacturer. In that respect it agrees with the English rule. The test is not the non-existence of the commodity at the time of the bargain. It is rather whether the manufacturer produces the article in the general course of his business or as the result of a special order. Goddard v. Binney, 115 Mass. 450, 15 Am. Rep. 112. In this very recent case, the result of their decisions is stated in the following terms: "A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser and upon his special order, and not for the general market, the case is not within the statute." Under this rule it was held in Gardner v. Joy, 9 Metc. 177, that a contract to buy a certain number of boxes of candles at a fixed price per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale. On the other hand in Goddard v. Binney, supra, the contract with a carriage manufacturer was that he should make a buggy for the person ordering it, that the color of the lining should be drab, and the outside seat of cane, and have on it the monogram and initials of the party for whom it was made. This was held not to be a contract of sale within the statute.

See, also, Mixer v. Howarth, 21 Pick. 205, 32 Am. Dec. 256; Lamb v. Crafts, 12 Metc. 353; Spencer v. Cone, 1 Metc. 283.

The New York rule is still different. It is held here by a long course of decisions that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The New York rule lays stress on the word "sale." There must be a sale at the time the contract is made. The latest and most authoritative expression of the rule is found in a recent case in this court. Parsons v. Loucks, 48 N. Y. 17, 19, 8 Am. Rep. 517. The contrast between Parsons v. Loucks, in this state, on the one hand, and Lee v. Griffin, supra, in England, on the other, is that in the former case the word sale refers to the time of entering into the contract, while in the latter, reference is had to the time of delivery, as contemplated by the parties. If at that time it is a chattel it is enough, according to the English rule. Other cases in this state agreeing with Parsons v. Loucks are Crookshank v. Burrell, 18 Johns. 58; Sewall v. Fitch, 8 Cow. 215; Robertson v. Vaughn, 5 Sandf. 1; Parker v. Schenck, 28 Barb. 38. These cases are based on certain old decisions in England, such as Towers v. Osborne, 1 Strange, 506, and Clayton v. Andrews, 4 Burrows, 2101, which have been wholly discarded in that country.

The case at bar does not fall within the rule in Parsons v. Loucks. The facts of that case were that a manufacturer agreed to make for the other party to the contract, two tons of book paper. The paper was not in existence, and so far as appears, not even the rags, "except so far as such existence may be argued from the fact that matter is indestructible." So in Sewall v. Fitch, supra, the nails which were the subject of the contract were not then wrought out, but were to be made and delivered at a future day.

Nothing of this kind is found in the present case. The lumber, with the possible exception of the clapboards, was all in existence when the contract was made. It only needed to be prepared for the purchaser—dressed and put in a condition to fill his order. The court accordingly is not hampered in the disposition of this cause by authority, but may proceed upon principle.

Were this subject now open to full discussion upon principle, no more convenient and easily understood rule could be adopted than that enunciated in Lee v. Griffin. It is at once so philosophical and so readily comprehensible, that it is a matter of surprise that it should have been first announced at so late a stage in the discussion of the statute. It is too late to adopt it in full in this state. So far as authoritative decisions have gone, they must be respected, even at the expense of sound principle. The court however in view of the present state of the law, should plant itself, so far as it is not precluded from doing so by authority, upon some clearly intelligible ground, and introduce no more nice and perplexing distinctions. I think that the true rule to be applied in this state, is that when the chattel is in existence, so as not to be governed by Parsons v. Loucks, supra, the contract should be deemed to be one of sale, even though it may have been ordered from a seller who is to do some work upon it to adapt it to the uses of the purchaser. Such a rule makes but a single distinction, and that is between existing and non-existing chattels. There will still be border cases where it will be difficult to draw the line, and to discover whether the chattels are in existence or not. The mass of the cases will however readily be classified. If, on further discussion, the rule in Lee v. Griffin should be found most desirable as applicable to both kinds of transactions, a proper case will be presented for the consideration of the legislature.

The view that this case is one of sale is sustained by Smith v. Central R. Co., *43 N. Y. 180, and by Downs v. Ross, 23 Wend. 270.

In the first of these cases there was a contract for the sale and delivery of a quantity of wood, to be cut from trees standing on the plaintiff's land. The court held that it could not be treated as an agreement for work and labor in manufacturing fire-wood out of standing trees. The cases already cited were distinguished in the fact that no change in the thing sold and to be delivered was contemplated, and that the transaction could be regarded as a sale in perfect consistency with the cases which hold that where the substance of the contract consists in the act of converting materials into a new and wholly different article, it is an agreement for work and labor. It was further considered that the case of Towers v. Osborne, 1 Strange, 506, where an agreement for the manufacture of a chariot was a contract for work and labor, was extreme in its nature, and was not to be carried any further. Page 200. The cases of Garbutt v. Watson, 5 B. & Ald. 613, and Smith v. Surman, 9 B. & C. 561, were cited with approval. In Garbutt v. Watson a sale of flour by a miller was held within the statute, although not ground when the bargain was made.

In Downs v. Ross there was a contract for the sale of seven hundred and fifty bushels of wheat, two hundred and fifty of the quantity being in a granary, and the residue unthreshed, but which the vendor agreed to get ready and deliver. The court held the contract to be within the statute of frauds, notwithstanding that the act of threshing was to be done by the vendor. The rule that governed the court was that if the

thing sold exist at the time in solido, the mere fact that something remains to be done to put it in a marketable condition will not take the contract out of the operation of the statute. Page 272. This proposition is in marked contrast to the view expressed by Cowen, J., in a dissenting opinion. His theory was that where the article which forms the subject of sale is understood by the parties to be defective in any particular which demands the finishing labor of the vendor in order to satisfy the bargain, it is a contract for work and labor and not of sale. The two theories (where the goods exist at the time of sale) have nowhere been more tersely and distinctly stated than in the conflicting opinions of Bronson and Cowen, JJ., in this case. See also Courtright v. Stewart, 19 Barb. 455.

The fallacy in the proposition of Cowen, J., is in assuming that there is any "work and labor" done for the vendee. All the work and labor is done on the vendor's property to put it in a condition to enable him to sell it. His compensation for it is found in the price of the goods sold. It is a juggle of words to call this "a mixed contract of sale and work and labor." When the goods leave the vendor's hands and pass over to the vendee they pass as chattels under an executed contract of sale. While any thing remained to be done the contract was executory. There is abundance of authority for maintaining that a contract in its origin executory may, by the performance of acts under its terms, by one of the parties, become in the end executed. Rohde v. Thwaites, 6 B. & C. 388; Benj. Sales, chap. 5, and cases cited.

The case of Donovan v. Willson, 26 Barb. 138, and Parker v. Schenck, 28 Barb. 38, are to be upheld as falling within the principle of Parsons v. Loucks, supra. Both of these cases concerned articles not in existence, but to be produced by the manufacturer; in the one case beer was to be manufactured, and in the other a brass pump. So in Passaic Manuf. Co. v. Hoffman, 3 Daly, 495, the contract was for the manufacture and delivery of fifty warps. None of these were in existence when the order was received. While the case appears to fall within the rule of Parsons v. Loucks, the eminent judge who wrote an elaborate opinion expressing the views of the court would seem to rely upon the Massachusetts rule rather than our own. Whatever view might be entertained of the soundness of that distinction it is now too late to adopt it here, and the case cannot be sustained on that ground.

The only case in our reports appearing to stand in the way of the conclusion arrived at in this cause is Mead v. Case, 33 Barb. 202. The court in that case recognized the distinction herein upheld. The only doubt about the case is whether the court correctly applied the rule to the facts. These were that several pieces of marble put together in the form of a monument were standing in the yard of a marble-cutter. That person agreed with a buyer to polish, letter and finish the article as a monument, and to dispose of it for an entire price—$200. The court held that there was no monument in existence at the time of the bargain. There were pieces of stone in the similitude of a monument, and that was all.

It is unnecessary to quarrel with this case. If unsound, it is only a case of a misapplication of an established rule. If sound, it is a so-called "border case," showing the refinements which are likely to arise in applying to various transactions the rule adopted in Sewall v. Fitch, and kindred cases. It is proper however to say that the notion that such an arrangement of marble placed in a cemetery over a grave cannot be regarded as a monument, in the absence of an inscription, seems highly strained. Then there could not be a memorial church without an inscription. Then it could not have been said of Sir Christopher Wren, in his relation to one of his great architectural productions, "Si quæris monumentum, circumspice." It would seem to be enough if the monument reminds the passer-by of him whom it is intended to commemorate, and this might be by tradition, inscriptions on adjoining or neighboring objects, or otherwise.

In the view of these principles, the defendants had the right to set up the statute of frauds. I think that this was so even as to the clapboards. Although not strictly in existence as clapboards, they fall within the rule in Smith v. Central R. Co. They were no more new products than was the wood in that case. There was simply to be gone through with a process of dividing and adapting existing materials to the plaintiffs' use. It would be difficult to distinguish between splitting planks into clapboards, and trees into wood. No especial skill is required, as all the work is done by machinery in general use, and readily managed by any producers of ordinary intelligence. The case bears no resemblance to that of Parsons v. Loucks, where the product was to be created from materials in no respect existing in the form of paper. The cases would have been more analogous had the contract in that case been to divide large sheets of paper into small ones, or to make packages of envelopes from existing paper. In Gilman v. Hill, 36 N. H. 311, it was held that a contract for sheep pelts to be taken from sheep was a contract for things in existence, and a sale.

The next inquiry is, whether there have been sufficient acts done on the part of the buyers to comply with the statute. In order to properly solve this question, it is necessary to look more closely into the nature of the contract. As has been already suggested, the contract was in its origin executory. It called for selection on the part of the sellers from a mass of materials. At the time

of the bargain there was no sale. There was at most only an agreement to sell. The plaintiffs however lay much stress on the fact that after the oral bargain and after the defendants had inspected the lumber, they gave directions, also oral, to the plaintiffs to place the lumber after it had been made ready for delivery upon the dock and to give notice to Percival. They urge that the subsequent compliance with these directions by the plaintiffs satisfy the terms of the statute.

It will be observed that all of these directions were given while the contract was still wholly executory, and before any act of selection had been performed by the plaintiffs. It will thus be necessary to consider whether these directions are sufficient to turn the executory contract of sale into an executed one, independent of the statute of frauds, and afterward to inquire whether there was any sufficient evidence of "acceptance and receipt" of the goods to take the case out of the statute. These questions are quite distinct in their nature and governed by different considerations: (1) If the contract had been for goods less than $50 in value, or for more than that amount, and ordered by the defendants in writing, it would still have been executory in its nature, and would have passed no specific goods. It would have been an agreement to sell and not a sale. The case would not have fallen within such authorities as Crofoot v. Bennett, 2 N. Y. 258, and Kimberly v. Patchin, 19 N. Y. 330. Since the goods could not have been identified at all, except by the act of the seller in selecting such as would comply with the order, nor could the purposes of the contract have been performed except by the labor of the plaintiffs in adapting the goods to the defendants' use, the case falls within a rule laid down by Mr. Blackburn in his work on Sales (pages 151, 152): "Where, by the agreement, the vendor is to do any thing to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or as it is some times worded, into a deliverable state, the performance of these things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property." Acraman v. Morrice, 8 C. B. 449; Gillett v. Hill, 2 C. & M. 530; Campbell v. Mersey Docks, 14 C. B. (N. S.) 412.

Proceeding on the view that this was an executory contract, it might still pass into the class of executed sales by acts "of subsequent appropriation." In other words, if the subsequent acts of the seller, combined with evidence of intention on the part of the buyer, show that specific articles have been set apart in performance of the contract, there may be an executed sale and the property in the goods may pass to the purchaser. Blackburn, Sales, 128; Benj. Sales, c. 5; Fragano v. Long, 4 B. & C. 219; Rohde v. Thwaites, 6 B. & C. 388; Aldridge v. Johnson, 7 E. & B. 885; Calcutta, etc., Company v. De Mattos, 33 L. J. (Q. B.) 214, in Exch. Cham. This doctrine requires the assent of both parties, though it is held that it is not necessary that such assent should be given by the buyer subsequently to the appropriation by the vendor. It is enough that the minds of both parties acted upon the subject and assented to the selection. The vendor may be vested with an implied authority by the vendee to make the selection and thus to vest the title in him. Browne v. Hare, 3 H. & N. 484; s. c., 4 H. & N. 822. This doctrine would be applicable to existing chattels where a mere selection from a mass of the same kind was requisite. On the other hand, if the goods are to be manufactured according to an order, it would seem that the mind of the purchaser after the manufacture was complete, should act upon the question whether the goods had complied with the contract. See Mucklow v. Mangles, 1 Taunt. 318; Bishop v. Crawshay, 3 B. & C. 415; Atkinson v. Bell, 8 B. & C. 277. This point may be illustrated by the case of a sale by sample, where the seller agrees to select from a mass of products certain items corresponding with the sample, and forward them to a purchaser. The act of selection by the vendor will not pass the title, for the plain and satisfactory reason, that the purchaser has still remaining a right to determine whether the selected goods correspond with the sample. Jenner v. Smith, L. R. 4 C. P. 270. In this case the plaintiff at a fair orally contracted to sell to the defendant two pockets of hops, and also two other pockets to correspond with a sample, which were lying in a warehouse in London, and which he was to forward. On his return to London, he selected two out of three pockets which he had there, and directed them to be marked to "wait the buyer's order." The buyer did no act to show his acceptance of the goods. The court held that the appropriation was neither originally authorized nor subsequently assented to by the buyer, and that the property did not pass by the contract. Brett, J., put in a strong form the objection to the view that the buyer could have impliedly assented to the appropriation by the seller. It was urged, he said, "that there was evidence that by agreement between the parties, the purchaser gave authority to the seller to select two pockets for him. If he did so, he gave up his power to object to the weighing and to the goods not corresponding with the sample; for he could not give such authority and reserve his right to object, and indeed it has not been contended that he gave up those rights. That seems to me to be conclusive to show that the defendant never gave the plaintiff authority to make the selection so as to bind him. Under the circumstances therefore it is impossible to say that the property passed." Page 278. The same general principle was main-

tained in Kein v. Tupper, 52 N. Y. 550, where it was held that the act of the vendor putting the goods in a state to be delivered did not pass the title, so long as the acceptance of the vendee, provided for under the terms of the contract, had not been obtained.

The result is, that if this sale, executory as it was in its nature, had not fallen within the statute of frauds, there would have been no sufficient appropriation by the vendor to pass the title. The transaction, so far as it went, was even at common law an agreement to sell and not an actual sale.

(2) But even if it be assumed that this would have been an executed contract of sale in its own nature, without reference to the statute of frauds, was there "an acceptance and a receipt" of the goods, or a part of them, by the buyer, so as to satisfy the statute?

The acceptance and receipt are both necessary. The contract is not valid unless the buyer does both. These are two distinct things. There may be an actual receipt without an acceptance, and an acceptance without a receipt. The receipt of the goods is the act of taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often an evidence of an acceptance, but it is not the same thing. Indeed the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. Blackb. Sales, 106; see Brand v. Focht, 3 Keyes, 409; Stone v. Browning, 51 N. Y. 211.

There are some dicta, of various judges, cited by the plaintiffs to the effect that acceptance and receipt are equivalent. Per Crompton, J., and Cockburn, Ch. B., in Castle v. Sworder, 6 H. & N. 832; per Erle, C. J., in Marvin v. Wallis, 6 E. & B. 726. These remarks cannot be regarded as of any weight, being contrary to the decided current of authority. Indeed a late and approved writer says: "It may be confidently assumed however that the construction which attributes distinct meanings to the two expressions, 'acceptance' and 'actual receipt,' is now too firmly settled to be treated as an open question, and this is plainly to be inferred from the opinions delivered in Smith v. Hudson." 6 B. & S. 436; Benj. Sales.

It cannot be conceded that there was any acceptance in the present case by reason of the acts and words occurring between the parties after the parol contract and before the goods were prepared for delivery. There could be no acceptance without the assent of the buyers to the articles in their changed condition, and as adapted to their use. If the case had been one of specific goods to be selected from a mass without any preparation to be made, and nothing to be done by the vendor but merely to select, the matter would have presented a very different aspect. This distinction is well pointed out by Willes, J., in Bog Lead Min. Co. v. Montague, 10 C. B. (N. S.) 481. In this case the question turned upon the meaning of the word "acceptance," in another statute, but the court proceeded on the analogies supposed to be derived from the construction of the same word in the statute of frauds. The question was as to what was necessary to constitute an "acceptance" of shares in a mining company, under 19 & 20 Vict. c. 47. The court having likened the case to that of a sale of chattels, said: "It may be that in the case of a contract for the purchase of unascertained property to answer a particular description, no acceptance can be properly said to take place before the purchaser has had an opportunity of rejection. In such a case, the offer to purchase is subject not only to the assent or dissent of the seller, but also to the condition that the property to be delivered by him shall answer the stipulated description. A right of inspection to ascertain whether such condition has been complied with is in the contemplation of both parties to such a contract; and no complete and final acceptance, so as irrevocably to vest the property in the buyer, can take place before he has exercised or waived that right. In order to constitute such a final and complete acceptance, the assent of the buyer should follow, not precede, that of the seller. But where the contract is for a specific, ascertained chattel, the reasoning is altogether different. Equally, where the offer to sell and deliver has been first made by the seller and afterwards assented to by the buyer, and where the offer to buy and accept has been first made by the buyer and afterwards assented to by the seller, the contract is complete by the assent of both parties, and it is a contract the expression of which testifies that the seller has agreed to sell and deliver, and the buyer to buy and accept the chattel." Pages 489, 490.

This view is confirmed by Maberley v. Sheppard, 10 Bing. 99. That was an action for goods sold and delivered, and it was proven that the defendant ordered a wagon to be made for him by the plaintiff, and, during the progress of the work, furnished the iron work and sent it to the plaintiff, and sent a man to help the plaintiff in fitting the iron to the wagon, and bought a tilt and sent it to the plaintiff to be put on the wagon. It was insisted, on these facts, that the defendant had exercised such a dominion over the goods sold as amounted to an acceptance. The court, per Tindal, C. J., held that the plaintiff had been rightly nonsuited, because the acts of the defendant had not been done after the wagon was finished and capable of delivery, but merely while it was in progress, so that it still remained in the plaintiff's yard for further work until it was finished. The court added: "If the wagon had been completed and ready for delivery and the defendant had then sent a workman of his own to perform any additional work upon it, such

conduct on the part of the defendant might have amounted to an acceptance." See also Benj. Sales, c. 4, and cases cited.

The plaintiffs, in the case at bar, rely much upon the decision in Morton v. Tibbett, 15 Ad. & El. (N. S.) 428. They maintain that this case clearly establishes that there may be an acceptance and receipt of goods by a purchaser, within the statute of frauds, although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract.

The expressions in Morton v. Tibbett are not to be pressed any further than the facts of the case require. The buyer of wheat by sample had sent a carrier to a place named in a verbal contract between him and the seller on August 25. The wheat was received on board of one of the carrier's lighters for conveyance by canal to Wisbeach, where it arrived on the 28th. In the mean time it had been resold by the buyer, by the same sample, and was returned by the second purchaser because found to be of short weight. The defendant then wrote to the plaintiff on the 30th, also rejecting it for short weight. An action was brought for goods bargained and sold. There was a verdict for plaintiff, with leave to move for a nonsuit. The question for the appellate court was, whether there was any evidence that the defendant had accepted and received the goods so as to render him liable as buyer. The court held that the acceptance under the statute was not an act subsequent to the receipt of the goods, but must precede, or at least be contemporaneous with it; and that there might be an acceptance to satisfy the statute, though the purchaser might on other grounds disaffirm the contract.

Morton v. Tibbett decides no more than this, viz., that there may be a conditional acceptance. It is as if the purchaser had said: "I take these goods on the supposition that they comply with the contract. I am not bound to decide that point at this moment. If, on examination, they do not correspond with the sample, I shall still return them under my common-law right, growing out of the very nature of the contract, to declare it void, because our minds never met on its subject-matter—non in haec foedera veni." It is not necessary to decide whether this distinction is sound. It is enough to say that it is intelligible. The case, in no respect, decides that there can be an acceptance under the statute of frauds without a clear and distinct intent, or that unfinished articles can be presumed to be accepted before they are finished. The act of acceptance was clear and unequivocal. There was a distinct case of intermeddling with the goods in the exercise of an act of ownership—a fact entirely wanting in the case at bar. The proof of acceptance was the act of resale before examination. The point of the decision is, that this was such an exercise of dominion over the goods as is inconsistent with a continuance of the rights of property in the vendor, and therefore evidence to justify a jury in finding acceptance as well as actual receipt by the buyer. Hunt v. Hecht, 8 Exch. 814.

Even when interpreted in this way, Morton v. Tibbett cannot be regarded as absolutely settled law in England. See Coombs v. Bristol & Exeter Ry. Co., 3 H. & N. 510; Castle v. Sworder, 6 H. & N. 828. The court of queen's bench recognizes it, while the court of exchequer has not received it with favor. Later cases distinctly hold that the acceptance must take place after an opportunity by the vendee to exercise an option, or after the doing of some act waiving it. Bramwell, B., said in Coombs v. Bristol & Exeter Ry. Co.: "The cases establish that there can be no acceptance where there can be no opportunity for rejecting." All the cases were reviewed in Smith v. Hudson, 6 Best & Smith, 431 (A. D. 1865), where Hunt v. Hecht was approved. The two last cited cases disclose a principle applicable to the case at bar.

In Hunt v. Hecht the defendant went to the plaintiff's warehouse and there inspected a heap of ox bones, mixed with others inferior in quality. The defendant verbally agreed to purchase those of the better quality, which were to be separated from the rest, and ordered them to be sent to his wharfinger. The bags were received on the 9th, and examined next day by the defendant, and he at once refused to accept them. There was held to be no acceptance. The case was put upon the ground that no acceptance was possible till after separation, and there was no pretense of an acceptance after that time. Martin, B., said that an acceptance, to satisfy the statute, must be something more than a mere receipt. It means some act done after the vendee has exercised or had the means of exercising his right of rejection.

In Smith v. Hudson, supra, barley was sold on November 3, 1863, by sample, by an oral contract. On the 7th it was taken by the seller to a railway station, where he had delivered grain to the purchaser on several prior dealings, and where it was his custom to receive it from other sellers. The barley was left at the freight-house of the railway, consigned to the order of the purchaser. It was the custom of the trade for the buyer to compare the sample with the bulk as delivered, and if the examination was not satisfactory, to reject it. This right continued in the present case, notwithstanding the delivery of the grain to the railway company. On the 9th the purchaser became bankrupt, and on the 11th the seller notified the station-master not to deliver the barley to the purchaser or his assignees. The court held that there was no acceptance sufficient to satisfy the statute. The most that could be said was, that the delivery to the com-

pany, considered as an agent of the buyer, was a receipt. It could not be claimed that it was an acceptance, the carrier having no implied authority to accept. The buyer had a right to see whether the bulk was according to the sample, and until he had exercised that right there was no acceptance. Opinion of Cockburn, Ch. J., 446; see, also, Caulkins v. Hellman, 47 N. Y. 449; Halterline v. Rice, 62 Barb. 593; Edwards v. Grand Trunk Ry. Co., 48 Me. 379, 54 Me. 111.

The case at bar only differs from these cases in the immaterial fact that the defendants, after the verbal contract was made, gave verbal directions as to the disposition which should be made of the goods after they were put into a condition ready for delivery. All that subsequently passed between them was mere words, and had not the slightest tendency to show a waiver of the right to examine the goods to see if they corresponded with the contract. Whatever effect these words might have had in indicating an acceptance, if the goods had been specific and ascertained at the time of the directions (see Cusack v. Robinson, 1 Best & S. 299), they were without significance under the circumstances, as the meeting of the minds of the parties upon the subject to be settled was necessary. Shepherd v. Pressey, 32 N. H. 57. In this case the effect of subsequent engagements by the buyer was passed upon as to their tendency to show a receipt of the goods by him. The court said: "As mere words constituting a part of the original contract do not constitute an acceptance, so we are of opinion that mere words after words used, looking to the future, to acts afterward done by the buyer toward carrying out the contract, do not constitute an acceptance or prove the actual receipt required by the statute." The case was stronger than that under discussion, as the goods were specific and fully set apart for the purchaser at the time of the subsequent conversations. No distinction is perceived between future acts to be done by the buyer and by the seller, as both equally derive their force from the buyer's assent.

I see no reason in the case at bar to hold that the defendants received the goods, independent of the matter of acceptance. There was no evidence that Percival became their agent for this purpose. The most that can be said is that they promised the plaintiffs that they would make Percival their agent. This promise being oral and connected with the sale, is not binding. They did not in fact communicate with him, nor did he assume any dominion or control over the property. The promissory representations of the plaintiffs are clearly within the rule in Shepherd v. Pressey, supra.

The whole case falls within the doctrine in Shindler v. Houston, 1 N. Y. 261, there being no sufficient act of the parties amounting to transfer of the possession of the lumber to the buyer and acceptance by him.

The judgment of the court below should be affirmed.

All concur.

Judgment affirmed.

PRATT et al. v. MILLER et al.

(18 S. W. 965, 109 Mo. 78.)

Supreme Court of Missouri, Division No. 1. March 14, 1892.

Appeal from circuit court, Johnson county; CHARLES W. SLOAN, Judge.

Action by Pratt, Warren & Co. against Miller & Heberling to recover the price of a bill of goods ordered by defendants, but not accepted. From a judgment of the Kansas City court of appeals affirming a judgment for plaintiffs, defendants appeal. Reversed.

S. P. Sparks, for appellants. *S. T. Allen*, for respondents.

BRACE, J. This is an appeal from the Johnson circuit court to the Kansas City court of appeals, certified here from the latter court on the ground that the conclusion reached by that court is in conflict with the decision of the St. Louis court of appeals in Burrell v. Highleyman, 33 Mo. App. 183. Plaintiffs' cause of action, set out in the petition, is that the defendants ordered and requested plaintiffs to manufacture for and furnish to them divers goods, wares, and merchandise, being boots and shoes, of which an itemized account, the price amounting to $265.45, is filed; that plaintiffs accepted said order, manufactured said goods, and shipped and tendered them to defendants, who refused to pay for them. The defendants' answer was a denial of the material allegations of the petition, a plea of the statute of frauds, a warranty of quality and breach thereof. The evidence tended to show that the plaintiffs are wholesale dealers in boots and shoes in the city of Boston, Mass., and that they are either themselves manufacturers, or have manufactured for them their stock in trade; that the defendants were retail merchants in Holden, Mo.; that on the 31st of May, 1877, the defendants, at Holden, gave the commercial traveler and solicitor of plaintiffs a verbal order for the bill of goods sued for; that the solicitor made a memorandum of the order in writing, signed it himself, gave a copy to the defendants, and forwarded it to the plaintiffs, who thereafter proceeded to have the goods made; that on the 8th of July the defendants wrote the plaintiffs, countermanding the order, and again on the 28th to the same purport. On the 29th of July, plaintiffs replied to defendants' letter of the 8th, refusing to accept the countermand, and advising the defendants that the goods would be shipped at the time named in the order; and, on the 13th of August, they shipped the goods, addressed to the defendants at Holden, Mo., where they arrived, and defendants refused to receive or pay for them. There was no evidence tending to show that the goods were not of the quality contracted for; and the defendants refused to receive the goods, not on account of defect in quantity or quality, but for the reasons assigned in their letters, which was a dissolution of their partnership, in the first letter, and the excessive drought prevailing in the country, curtailing trade, in their second. The court refused an instruction asked for by the defendants in the nature of a demurrer to the evidence, and submitted the case to the jury on the following instruction for the plaintiffs: "The court instructs the jury that if they believe from the evidence that the defendants ordered plaintiffs to make and furnish to them the goods set out in the petition, and that plaintiffs did commence to manufacture said goods on or about the time the order was received, and had a large portion of said goods manufactured on the 8th day of July, 1887, when defendants countermanded said order, and that plaintiffs did manufacture said goods and deliver them to a common carrier, directed to defendants at their place of business, then the plaintiffs must recover for the price sued for." The jury found the issues for the plaintiffs, and from the judgment of the circuit court thereon, for the price of the goods and interest, the defendants appealed to the Kansas City court of appeals, where the judgment of the circuit court was affirmed, but the case certified here, for the reason stated.

1. Section 2514, Rev. St. 1879, provides that "no contract for the sale of goods, wares, and merchandise for the price of thirty dollars or upwards shall be allowed to be good unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or unless some note or memorandum in writing be made of the bargain, and signed by the parties to be charged with such contract, or their agents lawfully authorized." This statute was first enacted in this state in 1825, (Laws Mo. 1825, p. 214,) and, except as to the amount, is almost a literal transcript of the English statute, (29 Car. II., c. 3, § 17.) The question to be determined in this case is whether the contract in question is a contract for the sale of goods, wares, and merchandise, or a contract for work and labor to be done and materials to be furnished. If the former, it is within the statute, and the plaintiffs cannot recover. If the latter, it is not within the statute, and they may. The Kansas City court of appeals, in effect, held that the contract belonged to the latter class, and was not within the statute, without discussing the question, but simply citing Brown on the Statute of Frauds (section 368*a*) in support of its conclusion. The whole question as to when a contract is to be held to belong to one or the other of these classes was maturely considered and ably discussed in Burrell v. Highleyman, supra, by the St. Louis court of appeals; the majority of the court, in an opinion delivered by ROMBAUER, P. J., holding, in consonance with the ruling in Lee v. Griffin, 1 Best & S. 272, that "when the subject-matter of a contract is a chattel to be afterwards delivered, then, although work and labor are to be done on such chattel before delivery, the cause of action is goods sold and delivered, and the contract is within the statute of frauds." THOMPSON, J., in a dissenting opinion, after reviewing the English cases from the passage of the act in England until the

date of its adoption in this state, adhered to the construction placed upon the statute by the English courts prior to the latter date, and by the supreme court of New York in Crookshank v. Burrell, 18 Johns. 58, (decided in 1820,) *i. e*, "that a contract to deliver at a future day a thing not then existing, and yet to be made, is not within the statute;" or, as stated in the syllabus, "where work, labor, or materials are to be applied to the chattel in order to put it in condition for delivery to the purchaser, the contract is not within the statute." Mr. Benjamin, in his excellent treatise on Sales, in entering on a review of the English cases, says: "There have been numerous decisions, and much diversity and conflict of opinion, in relation to the proper principle by which to test whether certain contracts are 'contracts for the sale,' etc., under the seventeenth section, or contracts for work and labor done and materials furnished," (1 Benj. Sales, § 108,) —and concludes by saying, (section 117:) "In reviewing these decisions, it is surprising to find that a rule so satisfactory and apparently so obvious as that laid down in Lee v. Griffin, in 1861, should not have been earlier suggested by some of the eminent judges who had been called on to consider the subject, beginning with Lord ELLENBOROUGH in 1814, and closing with POLLOCK, C. B., in 1856. From the very definition of a sale, the rule would seem to be deducible that if the contract is intended to result in transferring for a price, from B. to A., a chattel in which A. had no previous property, it is a contract for the sale of a chattel, and unless that be the case there can be no sale. In several of the opinions this idea was evidently in the minds of the judges. Especially was this manifest in the decision of BAYLEY, J., in Atkinson v. Bell, 8 Barn. & C. 277, and TINDALL, C. J., in Grafton v. Armitage, 2 C. B. 336; but it was not clearly brought into view before the decision in Lee v. Griffin. The same tentative process for arriving at the proper distinctive test between these two contracts has been gone through in America, but without a satisfactory result." The result of that process in America, briefly stated in a general way, may be found in 8 Amer. & Eng. Enc. Law, p. 707 et seq.

In New York the rule is that, if the subject-matter of the transfer does not exist *in solido* at the time of making, the contract is for work and labor, but if it does then exist the contract is none the less a contract of sale; that work and labor of the vendor is to be expended upon it before its delivery. This rule is founded upon the decision in Burrell v. Johnson, supra, afterwards followed in Parsons v. Loucks, 48 N. Y. 17; Cooke v. Millard, 65 N. Y. 352, and other cases based on old English decisions, such as Towers v. Osborne, 1 Strange, 506, and Clayton v. Andrews, 4 Burrow, 2101. In Cooke v. Millard, supra, (decided in 1875,) DWIGHT, J., remarks: "Were this subject now open to full discussion on principle, no more convenient and easily-understood rule could be adopted than that enunciated in Lee v. Griffin. It is at once so philosophical and so readily comprehensible that it is a matter of surprise that it should have been first announced at so late a stage in the discussion of the statute. It is too late to adopt it in full in this state. So far as authoritative decisions have gone, they must be respected, even at the expense of sound principles."

In Maryland, in Eichelberger v. McCauley, 5 Har. & J. 213, (decided in 1821,) the rule of the earlier English decisions was maintained; EARLE, J., in delivering the opinion of the court, saying: "Whatever opinion may be entertained of the true meaning of the seventeenth section of the statute, the court thinks the distinction between mere contracts of sale of goods and those contracts for the sale of goods where work and labor is to be bestowed on them previous to delivery, and subjects are blended together, some of which are not in contemplation of the statute, has too long prevailed to be at this day questioned." Citing the English cases of Clayton v. Andrews, (decided in 1767,) and Rondeau v. Wyatt, (in 1792,) in support of the conclusion. In the later case of Rentch v. Long, 27 Md. 188, the ruling in Eichelberger v. McCauley was affirmed; BARTOL, J., speaking for the court, saying: "Whatever opinion we might entertain on this question if it were presented for our consideration for the first time, we are not willing to disturb the rule established by that case." It will be observed that the rule of construction established in these states is not maintained in the later case upon the ground of sound principle, nor yet upon the ground that the courts were concluded by the early English rulings made before the statute was enacted in those states, but upon the ground that, those rulings having received a particular construction by their own courts in their early rulings, they felt constrained to maintain them, to the extent stated, on the principle of *stare decisis*.

In most of the other states where the courts were not thus fettered, while the rulings cannot be said to go the length of that in Lee v. Griffin, which is now the settled rule in England, they trend in that direction. As illustrative of this fact the following cases may be cited: Mixer v. Howarth, 21 Pick. 205; Spencer v. Cone, 1 Metc. (Mass.) 283; Gardner v. Joy, 9 Metc. (Mass.) 177; Lamb v. Crafts, 12 Metc. (Mass.) 353; Goddard v. Binney, 115 Mass. 450; Pitkin v. Noyes, 48 N. H. 294; Prescott v. Locke, 51 N. H. 94; Atwater v. Hough, 29 Conn. 508; Finney v. Apgar, 31 N. J. Law, 266; Cason v. Cheely, 6 Ga. 554; Edwards v. Railway Co., 48 Me. 379; Sawyer v. Ware, 36 Ala. 675; Mencke v. Falk, 55 Wis. 427, 13 N. W. Rep. 545; Brown v. Sanborn, 21 Minn. 402. In many of these cases, rules are laid down for distinguishing a contract of sale from one for work and labor and materials, not always harmonious or entirely consistent with each other, but from which a general rule may be drawn, broadly stated as well in Brown on Frauds as elsewhere: "That if the contract is essentially a contract for the article manufactured or to be manufactured the statute

applies to it. If it is for the work, labor, and skill to be bestowed in producing the article, the statute does not apply; * * * the true question being whether the essential consideration of the purchase is the work and labor of the seller, to be applied upon his material, or the product itself, as an article of trade." Sections 308, 308a. And, within the general scope of the American authorities, this rule may be formulated, determinative of the case in hand: That where the contract is for articles coming under the general denomination of goods, wares, and merchandise, the vendor being at the same time a manufacturer and a dealer in them, as a merchant, or, so dealing, has them manufactured for his trade by others, and the vendee being also a merchant dealing in and purchasing the same line of goods for his trade, of which fact the vendor is aware, the quantity required and the price being agreed upon, and the goods contracted for being of the same general line which the vendor manufactures or has manufactured for his general trade as a merchant, requiring the bestowal of no peculiar care or personal skill, or the use of material or a plan of construction different from that obtaining in the ordinary production of such manufactured goods for the vendor's general stock in trade, the contract is one of sale, and within the statute of frauds, although the goods are not *in solido* at the time of the contract, but are to be thereafter made and delivered. This rule, predicated upon the undisputed facts of this case, is within the ruling in Burrell v. Highleyman, by the St. Louis court of appeals, and in conflict with the conclusion reached by the Kansas City court of appeals. And, while sufficient for the disposition of this case, it is proper to add generally, this being the first time this court has been called upon to pass upon this question directly, that while we adhere to the rulings heretofore made in Skouton v. Woods, 57 Mo. 380; Skrainka v. Allen, 76 Mo. 384; and Snyder v. Railroad, 86 Mo. 613,—in adopting the statute of another state or of a foreign country, it is to be presumed that the legislature adopted such statute as construed by the courts of the state or country from which such statute is taken. Yet it is to be remembered that the force of this presumption must always depend upon the extent to which the terms of the statute have acquired a known and settled meaning and a definite application at the time of its adoption in the courts of the jurisdiction from which the statute is taken; and, while such construction has more weight than a construction of the same statute by the courts of the same country subsequent to its adoption in this state, yet it can never amount to more than persuasive authority as to the true intent and meaning of the statute and the proper application of its terms, or be permitted to prevail against a plain and obvious interpretation of the statute, or countervail the general policy of our laws and practice. Endl. Interp. St. § 371. "The uniform inclination of the courts of this state is to give the words of this statute full effect, and to refuse to sanction such a latitudinous construction of those words as would give rise to all the evils that the statute was enacted to prevent." Delventhal v. Jones, 53 Mo. 460. The construction by the English courts of this statute prior to 1825 was not so well known, definite, and settled, nor its application so uniform, that we ought to be concluded by the decisions of those courts prior to that date from adopting a rule brought to light by further judicial research, and which gives true force and effect to the terms of this statute, as does the rule laid down in Lee v. Griffin, supra, and approved by the St. Louis court of appeals in Burrell v. Highleyman. The undisputed facts in this case show that this contract was a sale of goods, wares, and merchandise, within the meaning of the statute; and, not being in writing, the demurrer to the evidence ought to have been sustained. The judgment of the Kansas City court of appeals will therefore be reversed, and the cause remanded to that court, where judgment will be entered, reversing the judgment of the Johnson circuit court.

CAULKINS v. HELLMAN.

(47 N. Y. 449.)

Court of Appeals of New York. 1872.

Action to recover for wines and casks sold.

Stephen K. Williams, for appellant. E. G. Latham, for respondents.

RAPALLO, J. The instructions to the jury as to the legal effect of the delivery of the wine at Blood's Station in conformity with the terms of the verbal contract of sale were clearly erroneous. No act of the vendor alone, in performance of a contract of sale void by the statute of frauds, can give validity to such a contract.

Where a valid contract of sale is made in writing a delivery pursuant to such contract at the place agreed upon for delivery, or a shipment of the goods in conformity with the terms of the contract, will pass the title to the vendee without any receipt or acceptance of the goods by him. But if the contract is oral, and no part of the price is paid by the vendee, there must be not only a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee to pass the title or make the vendee liable for the price; and this acceptance must be voluntary and unconditional. Even the receipt of the goods, without an acceptance, is not sufficient. Some act or conduct on the part of the vendee, or his authorized agent, manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required to supply the place of a written contract. This distinction seems to have been overlooked in the charge. The learned judge instructed the jury, as a matter of law, that if they were satisfied that the wine or any portion of it was actually delivered in pursuance of the verbal contract, that circumstance was sufficient to take the contract out of the statute of frauds, and the contract was a valid one, and might be enforced notwithstanding it was not in writing. The attention of the jury was directed to the inquiry whether the plaintiffs had faithfully performed their part of the contract rather than to the action of the defendant, and the judge proceeded to state that if the wine was delivered to the express company at Blood's Station in good order, in merchantable condition, and corresponded in quality and all substantial and material respects with the samples, then he instructed the jury as a matter of law, that if they found the contract as Gordon testified with respect to the place of delivery, that was a complete delivery under the contract, and passed the title from the plaintiffs to the defendant, and the plaintiffs were entitled to recover the contract price of the wines.

The plaintiff's counsel suggests in the statement of facts appended to his points, that Gordon was the agent of the defendant, to accept the goods at Blood's Station. But this statement is not borne out by the evidence; Gordon was the agent of the plaintiffs for the sale of the goods; it was incumbent upon them to make the shipment. All that Gordon testifies to is that the defendant requested him to make the best bargain he could for the freight. He does not claim that he had any authority to accept the goods for the defendant.

According to the defendant's testimony Gordon clearly had no such authority, nor did the defendant designate any conveyance, and the judge submitted no question to the jury as to the authority either of Gordon or the express company to accept the goods. On the contrary, he repeated that if when the wine was delivered at Blood's Station it was in good order and corresponded with the samples, the plaintiffs would be entitled to a verdict for the contract price, upon the ground that the parties by the contract (assuming it to be as claimed by the plaintiffs), fixed upon that station as the place of delivery; "that it was true that the defendant was not there to receive it, and had no agent at Blood's Station to receive it, and had no opportunity to inspect it there; but that that was a contingency he had not seen, and which he might have guarded against in the contract."

It is evident that the learned judge applied to this case the rule as to delivery, which would be applicable to a valid, written contract of sale, but which is inapplicable when the contract is void by the statute of frauds.

The effect of the delivery of goods at a railway station, to be forwarded to the vendee in pursuance of the terms of a verbal contract of sale, was very fully discussed in the case of Norman v. Phillips, 14 Mees. & W. 277, and a verdict for the plaintiff founded upon such a delivery, and upon the additional fact that the vendor sent an invoice to the vendee, which he retained for several weeks, was set aside. The English authorities on the subject are reviewed in that case, and the American and English authorities bearing upon the same question are also referred to in the late cases of Rodgers v. Phillips, 40 N. Y. 519, and Cross v. O'Donnell, 44 N. Y. 661. The latter case is cited by the counsel for the plaintiffs as an authority for the proposition that a delivery to a designated carrier is sufficient to take the case out of the statute; but it does not so decide. It holds only that the receipt and acceptance need not be simultaneous, but that they may take place at different times, and that after the purchaser had himself inspected and accepted the goods purchased, the delivery of them by his direction to a designated carrier was a good delivery, and the carrier was the agent of the purchaser

to receive them. No question however arises in the present case as to a delivery to a designated carrier, as the evidence in respect to the agreed mode of delivery is conflicting, and no question of acceptance by the carrier as agent for the defendant was submitted to the jury.

The judge submitted to the jury two questions, to which he required specific answers.

1st. Was the wine delivered at the railroad station at the time agreed upon by the parties, and was it then in all respects in good order, and like the samples exhibited by the plaintiff to the defendant? and,

2d. Was the wine accepted by the defendant after it reached his place of business in New York?

The jury answered both of these questions in the affirmative, and it is now claimed that the answer to the second question renders immaterial any error the judge may have committed in respect to the effect of the delivery at the station.

It is difficult to find any evidence justifying the submission to the jury of the second question; but no exception was taken to such submission. The motion for a nonsuit would have raised that point, were it not for the fact that there was evidence to go to the jury on the claim of $52 for barrels, and this precluded a nonsuit. We think however that the error in the charge may have misled the jury in passing upon the second question; at all events, it is not impossible that it should have done so. Having been instructed that upon the fact as they found it in respect to the agreement for a delivery at Blood's Station, the title to the goods had passed to the defendant before the receipt of them at New York, and that their verdict must be for the plaintiffs, they may have examined the question of his acceptance of them at New York with less scrutiny than they would have exercised had they been informed that the result of the case depended upon their finding on that question. And the construction of the defendant's acts and language may, in some degree, have been influenced by the consideration that when the wine arrived in New York the title had, according to the theory on which the case was submitted to them, passed to the defendant, and he had no right to reject the wines. Furthermore, we think the judge erred in excluding the evidence of the contents of the telegram which the defendant attempted to send to the plaintiffs immediately upon the receipt of the wine. If, as was offered to be shown, it stated that he declined to accept the wine, it was material as part of the res gestæ. A bona fide attempt, immediately on the receipt and examination of the wine, to communicate such a message, was an act on his part explaining and qualifying his conduct in receiving the wine into his store and allowing it to remain there. And even though the message never reached the plaintiffs, it bore upon the question of acceptance by the defendant. The objection to the evidence of the contents of the telegram was not placed on the ground of omission to produce the original, and the judge in his charge instructed the jury that the attempt to send this telegram did not affect the plaintiffs' rights, for the reason that it was not shown to have been received by them, and this was excepted to. In Norman v. Phillips, 14 Mees. & W. 277, the defendant was allowed to prove that on being informed by the railway clerk that the goods were lying for him at the station, he said he would not take them, and stress was laid upon the fact. Yet this statement to the clerk was not communicated to the plaintiffs. Evidence of an attempt to send a message to them to the same effect, though unsuccessful, would have been no more objectionable than the declaration to the clerk. The acts of the defendant at the time of the receipt of the goods, and his bona fide attempt to communicate to the plaintiffs his rejection of them were I think material and competent to rebut any presumption of an acceptance arising from their retention by him.

The judge was requested to instruct the jury that the true meaning of the defendant's letter of March 31 was a refusal to accept the wine under the contract. A careful examination of that letter satisfies us that the defendant was entitled to have the jury thus instructed. The letter clearly shows that the defendant did not accept or appropriate the wines. After complaining in strong language of their quality and condition, and of the time and manner of their shipment, he says to the plaintiffs, "What can be done now with the wine after it suffered so much, and shows itself of such a poor quality? I don't know myself and am awaiting your advice and opinion." He concludes by expressing his regret that their first direct transaction should have turned out so unsatisfactory, and by stating that he cannot be the sufferer by it, and he awaits their disposition.

This language clearly indicates an intention to throw upon the plaintiffs the responsibility of directing what should be done with the wine, and is inconsistent with any acceptance or appropriation of it by the writer.

For these reasons the judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

GARFIELD v. PARIS.

(96 U. S. 557.)

Supreme Court of the United States. Oct., 1877.

Error to the circuit court of the United States for the Eastern district of Michigan.

This was an action by Paris, Allen, & Co., of New York, against Garfield & Wheeler, of Detroit, Mich., to recover for certain spirituous liquors sold to the defendants by the plaintiffs, in the city of New York.

The facts are stated in the opinion of the court.

Verdict and judgment for the plaintiffs; whereupon the defendants sued out this writ of error.

Mr. Henry M. Duffield, for plaintiffs in error.

Mr. Justice CLIFFORD, delivered the opinion of the court. Neither the manufacture nor the sale of spirituous or intoxicating liquors is allowed by the law of the state where the present controversy arose. Instead of that, the state law provides that all payments made for such liquors so sold may be recovered back, and that all contracts and agreements in relation to such sales shall be utterly null and void against all persons and in all cases; with an exception in favor of the bona fide holders of negotiable securities and the purchasers of property without notice. 1 Comp. Laws Mich. p. 690.

Two bills of goods, consisting of spirituous liquors, were purchased of the plaintiffs by the defendants, which, including exchange, amounted to $4,143.69. Payment being refused, the plaintiffs brought suit in the court below to recover the amount, and the verdict and judgment were for the plaintiffs. Exceptions were taken by the defendants, and they sued out the present writ of error.

Sufficient appears to show that the plaintiffs are citizens of New York, and that the defendants are citizens of Michigan; that the liquors were purchased of the plaintiffs, as alleged; and that the same were received and sold by the defendants: but they set up the prohibitory liquor law of the latter state, providing that all such contracts are utterly null and void.

Evidence was introduced by the plaintiffs, showing that the liquors were ordered by one of the defendants at a time when he was temporarily in the city of New York; and that the plaintiffs, by his request, sent certain labels to be attached to the same, to the defendant, at the hotel in that city where he was stopping. By the agreement at the time the sale was made, the plaintiffs were to furnish these labels to the purchasers; and the evidence showed that the value of the labels entered into the price charged for the liquors, and that the labels, by the terms of the contract, were to be furnished to the buyers, by the sellers, without any other charge than the price to be paid for the liquors. Labels of the kind were something more than ordinary labels affixed to bottles, as they indicated not only the kind of liquor which the bottle contained, but also embraced an affidavit that the distillation was genuine, and of the particular brand manufactured and distilled by the plaintiffs; support to which is derived from the fact that the label was copyrighted, so that no other person than the plaintiffs had any right to make, use, or vend it.

Certain questions were submitted to the jury, among which were the following: "Were there any receipt and acceptance in New York of part of the goods sold; and, if so, what was so received?" to which the jury answered, "There was, to wit, certain labels." "Was any thing added to the price of the liquors on account of the labels, and, if so, what amount or price?" Answer: "There was nothing added; but the labels added to the value of the liquors, and formed part or parcel of the price."

Testimony was offered by the plaintiffs in respect to the delivery of the labels to the defendant while he was at the hotel in New York, to which the defendants objected; but the court overruled the objection, and the testimony was admitted, subject to the defendant's objection.

Errors assigned are in substance and effect as follows: (1) That the court erred in refusing to charge the jury that the delivery of the labels, as proved, was not a receipt and acceptance of part of the goods sold within the meaning of the state statute of frauds. (2) That the court erred in refusing to charge the jury that the evidence was not sufficient to take the case out of the statute of frauds. (3) That the court erred in refusing to charge the jury that the sale was not consummated until the defendants received and accepted the goods in the state where they resided. (4) That the court erred in instructing the jury that the defence set up is one not to be favored, and that the proof to support it must be clear and satisfactory, before the jury can consistently enforce it. (5) That the statute is a penal statute, in derogation of the rights of property; and that for that reason, if for no other, it must receive a strict construction. (6) That the court erred in instructing the jury that if the labels were included in the contract, and the liquors were worth more to the defendants on account of the labels, then the receipt and acceptance of the same by the acting defendant took the case out of the New York statute of frauds, and their verdict should be for the plaintiffs.

Due exception was also made to the ruling of the court in admitting the evidence reported in respect to the delivery and acceptance of the labels furnished to the purchasers at the time the order for the liquors was filled, the objection being that the labels are not mentioned in the plaintiff's bill of particulars filed in the case.

Matters of evidence are never required to be stated in such a paper. Courts usually re-

quire such a notice where the declaration is general, in order that the defendant may know what the cause of action is to which he is required to respond. Nothing is wanted in this case to meet that requirement, as all the items of the demand are distinctly and specifically stated in the bill filed in compliance with the order of the court.

Merchants selling spirituous liquors in bottles usually label the bottles, to indicate the kind, character, age, quality, or proof of the liquor, or to specify the name of the manufacturer, or the place where it was manufactured or distilled. Such are somewhat in the nature of trade-marks, and are useful to the seller of the liquors, to enable him to distinguish one kind of liquor from another without opening the bottle, and to commend the article to his customers without oral explanation.

Coming to the errors formally assigned, it is manifest that the first and second may be considered together, as they depend entirely upon the same considerations.

Both parties concede that the bargain for the sale of the liquors in this case was made in New York; and, by the laws of that state, contracts for the sale of any goods, chattels, or things in action, for the price of $50 or more, shall be void, unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase-money. 3 Rev. St. N. Y. (6th Ed.) 142, § 3.

Four answers are made by the plaintiffs to that proposition, each of which will receive a brief consideration:

1. That the defendants received and accepted the labels which the plaintiffs contracted to furnish at the time they filled the order for the liquors. 2. That the case is not within the statute of frauds, inasmuch as the defendants received the liquors, and sold the same for their own benefit. 3. That the statute of Michigan, prohibiting the sale of such liquors, and declaring such contracts null and void, has been repealed. 4. That the subsequent letter written by the defendants to the plaintiffs takes the case out of the operation of the statute requiring such a contract to be in writing.

Authorities almost numberless hold that there is a broad distinction between the principles applicable to the formation of the contract and those applicable to its performance, which appears with sufficient clearness from the language of the statute,—such a contract must be in writing, or there must be some note or memorandum of the same to be subscribed by the party to be charged: but the same statute concedes that the party becomes liable for the whole amount of the goods, if he accepts and receives part of the same, or the evidences, or some of them, of such things in action; and the authorities agree, that, where the question is whether the contract has been fulfilled, it is sufficient to show an acceptance and actual receipt of a part, however small, of the thing sold, in order that the contract may be held to be good, even though it does not preclude the purchaser from refusing to accept the residue of the goods, if it clearly appears that they do not conform to the contract. Benj. Sales (2d Ed.) 117; Hinde v. Whitehouse, 7 East, 558; Morton v. Tibbett, 15 Adol. & E. (N. S.) 427.

Hence, said Lord Campbell, in the case last cited, the payment of any sum in earnest to bind the bargain, or in part payment, is sufficient; the rule being, that such an act on the part of the buyer, if acceded to on the part of the vendee, is an answer to the defence.

"Accept and receive" are the words of the statute in question; but the law is well settled, that an acceptance sufficient to satisfy the statute may be constructive, the rule being that the question is for the jury whether the circumstances proved, of acting or forbearing to act, do or do not amount to an acceptance within the statute. Bushel v. Wheeler, 15 Adol. & E. (N. S.) 445; Chit. Cont. (10th Ed.) 367; Parker v. Wallis, 5 El. & Bl. 21; Lillywhite v. Devereux, 15 Mees. & W. 285; Simmonds v. Humble, 13 C. B. (N. S.) 261; Add. Cont. (6th Ed.) 169.

Questions of the kind are undoubtedly for the jury; and it is well settled that any acts of the parties indicative of ownership by the vendee may be given in evidence to show the receipt and acceptance of the goods to take the case out of the statute of frauds. Conduct, acts, and declarations of the purchaser may be given in evidence for that purpose; and it was held, in the case of Currie v. Anderson, 2 El. & El. 591, that the vendee of goods may so deal with a bill of lading as to afford evidence of the receipt and acceptance of the goods therein described. Gray v. Davis, 10 N. Y. 285.

Throughout, it should be borne in mind that one of the defendants in person visited the plaintiffs' place of business, and while there ordered the liquors, and that the liquors were all received by the defendants at their place of business, and were sold by them for their own benefit; that the contract between the sellers and purchasers was that the former should furnish the labels as part of the contract; and the evidence shows that they fulfilled that part of the contract, and that they delivered the same to the contracting party at his hotel, before he left the state where the purchase was made.

Satisfactory evidence was also introduced by the plaintiffs, showing that they drew a draft on the defendants for the payment of the price, and that the defendants answered the letter of the plaintiffs declining to accept the same, as more fully set forth in the record, in which they state that the pur-

chase was on four months, with the further privilege of extending the time two months longer by allowing seven per cent. interest, adding, that if the plaintiffs doubted their word, they had "a written contract to that effect." What they claim in the letter is that the arrangement was made with the salesman; and they state that they would not have given him the order, if he had not given them "those conditions." They make no complaint that the liquors were not of the agreed quantity and quality, and certainly leave it to be implied that they had been duly received, and that they were satisfactory.

It was contended by the plaintiffs that the case was taken out of the statute of frauds: (1) Because the labels were a part of what was purchased, and that the defendants accepted and received the same at the time and place of the purchase. (2) That the subsequent letter, as exhibited in the record, is sufficient for that purpose.

Enough appeared at the trial to show that the labels were copyrighted, and that the plaintiffs agreed to furnish the same without any additional charge; and the bill of exceptions also shows that it was conceded that the defendants accepted and received the labels at the hotel, as claimed by the plaintiffs. Still, the defendants denied that the labels were of any value, or that they entered into or constituted any part of the things purchased; both of which questions the circuit judge submitted to the jury, remarking, at the same time, that by the furnishing the labels with the liquors the defendants acquired the right to use the copyright to that extent, without which, or some equivalent permission or license, they would have had no such lawful authority.

Pursuant to these suggestions, the jury were directed to ascertain whether the liquors were worth more to the defendants on account of the labels, and whether the labels were included in the contract; and they were instructed, that, if they found affirmatively in respect to both of these inquiries, then the receipt and acceptance of the labels as alleged took the case out of the statute of frauds, because then there was a receipt and acceptance by the defendants of a portion of the things purchased.

Appropriate instruction was also given to the jury in respect to the subsequent letter sent by the defendants to the plaintiffs; and the jury were told by the presiding judge, that if they found, under the instructions given, that the defendants received and accepted a part of the things purchased, then the contract was made valid as a New York contract, and that their verdict should be in favor of the plaintiffs. Currie v. Anderson, supra. That if the contract was not made valid by the acceptance and receipt of the labels, nor by the letter exhibited in the record, then it was a Michigan contract, and their verdict should be for the defendants. Meredith v. Meigh, 2 El. & Bl. 364; Castle v. Sworder, 6 Hurl. & N. 828, L. R. 1 C. P. 5.

Controlling authorities already referred to show that the question whether the goods or any part of the same were received and accepted by the purchaser is one for the jury, to which list of citations many more may be given of equal weight and directness. Just exception cannot be taken to the form in which the question was submitted to the jury; and the record shows that the verdict was for the plaintiffs, and that the jury found, in response to the fifth question, that the labels added to the value of the liquors, and that they formed part or parcel of the price. Jackson v. Lowe, 7 Moore, 219.

Where goods are purchased in several parcels, to be paid for at a future day, the whole, within the meaning of the statute of frauds, constitutes but one contract, and the delivery of part to the purchaser is sufficient to take the case out of the operation of the statute of frauds. Mills v. Hunt, 20 Wend. 431.

Apply the finding of the jury in this case to the conceded facts, and it shows that the defendants were in the situation of a purchaser who goes to a store and buys different articles, at separate prices for each article, under an agreement for a credit, as in this case, accepting a part but leaving the bulk to be forwarded by public conveyance. Frequent cases of the kind occur; and it is well settled law that the delivery of a part of the articles so purchased, without any objection at the time as to the delivery, is sufficient to take the case out of the statute of frauds as to the whole amount of the goods. Mills v. Hunt, 20 Wend. 431.

The delivery in such a case, in order that it may have that effect, must be made in pursuance of the contract, the question whether it was so made or not being one for the jury; but if they find that question in the affirmative, then it follows that the case is taken out of the statute of frauds. Van Woert v. Railroad Co., 67 N. Y. 539.

Parol evidence is admissible to show what the circumstances were attending the contract, and to show the receipt and acceptance, in whole or in part, of the goods purchased. Tomkinson v. Staight, 17 C. B. 695; Kershaw v. Ogden, 3 Hurl. & C. 715.

Due acceptance and receipt of a substantial part of the goods will be as operative as an acceptance and receipt of the whole; and the acceptance may either precede the reception of the article, or may accompany their reception. 2 Whart. Ev. § 875.

Differences of opinion have existed upon some of these matters; but all the authorities, or nearly all, concur that the question is for the jury, to be determined by the circumstances of the particular case. Id.

Viewed in the light of these suggestions, it is clear that the question whether the evidence showed that the case was taken out of the statute of frauds by the acceptance

and receipt by the defendants of a part of what was purchased by them, in connection with the letter of the defendants exhibited in the record, was fairly submitted to the jury, and that their finding in the premises is final and conclusive.

Attempt was also made by the plaintiffs to support the judgment, upon the ground that the defendants were estopped to set up the statute of frauds as a defence, in view of the fact that they had received the liquors and sold the same for their own benefit; but it is not necessary to examine that proposition in view of the conclusion that the case is taken out of the operation of the statute by the other evidence and the finding of the jury. Nor is it necessary to give any consideration to the proposition that the act of the state of Michigan to prevent the manufacture and sale of spirituous and intoxicating liquors as a beverage is repealed, for the same reason, and also for the additional reason, that the repealing clause saves "all actions pending, and all causes of action which had accrued at the time" the repealing act took effect. Sess. Acts 1875, p. 279.

Having come to the conclusion that the case is taken out of the statute of frauds, it is not deemed necessary to give the other assignments of error a separate examination. Suffice it to say, that the court is of the opinion that there is no error in the record.

Judgment affirmed.

EDGERTON v. HODGE.

(41 Vt. 676.)

Supreme Court of Vermont. Rutland. Jan. Term, 1869.

Assumpsit, which was referred to a referee, who reported: "That on the 30th day of June, 1864, the parties made an agreement by parol, by which the defendant agreed to sell to the plaintiff what new milk cheese he then had on hand, and unsold, amounting to 975 lbs., and the new milk cheese he should make thereafter during the season, and the plaintiff agreed to pay the defendant therefor at the rate of fifteen and a half cents per pound, and every twenty days thereafter agreed to call at the defendant's house in Dorset, select such cheese as would be fit for market, attend its weight there, and pay the defendant for the cheese so selected and weighed, and then the defendant was to deliver the same to the plaintiff at the railroad depot in Manchester. The day after the above agreement was made, the defendant, by his son, Albert Hodge, wrote and sent by mail a letter to the plaintiff (a copy of which is annexed, dated July 1, 1864,) depositing the same at the post office in East Rupert, and directed to the plaintiff at Pawlet, and received by him by mail on the same day. The next day, after the return mail from Pawlet to East Rupert had gone out, it being on Saturday, the plaintiff enclosed in a letter, directed to the defendant, at East Rupert, and left it in the post office at Pawlet, to be carried by mail to the defendant, the sum of fifty dollars. (A copy of plaintiff's letter is hereunto annexed, and the envelope enclosing the fifty dollars is postmarked 'Pawlet, July 4.') This letter of the plaintiff was, on the 8th day of July, 1864, handed to the said Albert Hodge, by the postmaster of East Rupert, and it was on the same day carried by him to the defendant, opened by the said Albert, the fifty dollars refused to be received by the defendant, and the letter of the plaintiff, with the fifty dollars, and the envelope enclosing them, were, by mail, returned to the plaintiff, with no communication accompanying them *677 *from the defendant. The plaintiff received the so enclosed wrapper, money and letter, on the 9th of July, 1864, and kept the same fifty dollars for six months thereafter. A daily mail is carried between the postoffices of Pawlet and East Rupert, a distance of six miles. On the 20th day of July, 1864, the plaintiff sent word to the defendant to deliver what cheese he had fit for market to the depot in Manchester. The defendant replied to the messenger that he had no cheese for the plaintiff. No other communication ever took place between the parties in regard to the cheese after the return of the money as above stated until this suit was brought. The defendant sold all his cheese to other parties, making his first sale on the 26th day of July, 1864. If the court shall be of opinion that from the foregoing facts the plaintiff is entitled to recover, and that the rule of damages should be the New York market price for cheese for the season of 1864, deducting freight and commission, then I find due the plaintiff $411.01. If the current price in the country, paid by purchasers and sent by them to market, is to be the rule, then I find due the plaintiff the sum of $306.32."

"Dorset, July 1st, 1864. Mr. Edgerton: Sir:—According to our talk yesterday you bought my cheese for the season. I shall stand to it, but shall want you to pay me fifty dollars to bind it. I spose there is nothing holding unless there is money paid. I do not wish you to think I wish to fly from letting you have it so that it is sure. I will pay you interest on the money until the last cheese is delivered. Yours in haste. J. H. C. HODGE, per A. H."

"Pawlet, July 2, 1864. Mr. Hodge: Dear Sir:—I enclose you fifty dollars to apply on your dairy of cheese as you proposed. Yours, truly, S. EDGERTON."

The court at the March term, 1868, PIERPOINT, C. J., presiding, rendered judgment on the report that the plaintiff recover of the defendant the smaller sum reported by the referee, and for his costs, to which the defendant excepted.

*678 **Edgerton & Nicholson*, and *J. B. Bromley*, for the defendant.

Fayette Potter, for the plaintiff.

The opinion of the court was delivered by

WILSON, J. The parol agreement, entered into by the parties, June 30th, being for the sale of goods, wares and merchandise for the price of forty dollars and more, is within the statute of frauds, and inoperative, unless taken out of the statute by the subsequent acts of the parties. It is claimed by the plaintiff that the defendant's letter under date of July 1st, and the depositing of the plaintiff's letter with the fifty dollars in the postoffice on the 2d of that month, constitute a payment of part of the purchase money within the meaning of the statute. It will be observed that when those letters were written, no binding agreement had been concluded. The defendant, in his letter of July 1st, says: "According to our talk yesterday, you bought my cheese for the season. I shall stand to it, but shall want fifty dollars to bind it." By that letter the plaintiff was notified that he could make the bargain binding upon himself as well as the defendant, by paying to the defendant the sum demanded for that purpose. The plaintiff on the 2d day of July enclosed fifty dollars in a letter, directed to the defendant and deposited it in the postoffice, which letter was delivered to the defendant on the 8th of that month. He did not accept the money, but returned it to the plaintiff. It is clear that the act of depositing the letter and the money in the postoffice was not a payment to the defendant. His letter did not direct the money to be sent by mail; it contains nothing that would indicate that the defendant expected the plaintiff would reply by letter, or accept the proposition by depositing the money in the postoffice; and the fact that the defendant by letter offered to allow the plaintiff to perfect the agreement, by paying part of the purchase money, did not authorize or invite the plaintiff to send the money by mail, or make the mail the defendant's carrier of the money. The language of the defendant's letter is: "I shall want you to pay me fifty dollars to bind it," that is, to make it a valid contract.

The money, when deposited in the postoffice, belonged to the plaintiff; it belonged to the plaintiff while being carried by mail *679 *to the defendant, and it would continue the property of the plaintiff unless accepted by the defendant. The plaintiff took the risk not only of the safe conveyance of the money to the defendant, but also as to the willingness of the defendant to accept it. The defendant's letter, not constituting such a note or memorandum of the agreement as the statute required, left it optional with the defendant to accept or refuse part payment when offered to him, the same as if the defendant had sent to the plaintiff a verbal communica-

tion of the same import as the defendant's letter. A point is made by counsel as to whether the money was conveyed and delivered or offered to the defendant, within a reasonable time after his letter was received by the plaintiff, but it seems to us that the time the money was offered is not material. We think, even if the plaintiff had gone immediately after receiving the defendant's letter, and offered and tendered to him the fifty dollars, the defendant would have been under no legal obligation to accept it. The mere offer of the defendant to receive the money would not estop him from refusing to accept it; but in order to take the case out of the operation of the statute, it required the agreement or consent of both parties, as to payment by the plaintiff and acceptance of it by the defendant. Upon the facts of this case, we think the rights of the parties rest upon and are to be determined by the verbal agreement entered into by them on the 30th of June, and that their subsequent attempts to make that agreement a valid contract can not aid the plaintiff. The statute provides that "no contract for the sale of any goods, wares or merchandize, for the price of forty dollars or more, shall be valid, unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum of the bargain be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

The very language of the statute above quoted implies that in whichever way the parties verbally agree or propose that a contract for the sale of goods, wares or merchandise, for the price of $40 or more, shall be made exempt from the statute of frauds, *680 *whether it be by the purchaser accepting and receiving part of the goods so sold, by giving something in earnest to bind the bargain, or in part payment, or by making a note or memorandum of the bargain, it must be done, if done at all, by the consent of both parties. It is obvious that it would require the consent of the purchaser to accept and receive part of the goods, and he could not receive them unless by consent of the seller; the purchaser could not give something in earnest to bind the bargain, or in part payment, unless the seller accept and receive it; nor could a note or memorandum of the bargain be made and signed unless by the consent of the party to be charged thereby. A valid contract is an agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act; and each acquires a right to what the other promises; but if the parties, in making a contract like the present one, omit to do what the statute requires to be done to make a valid contract, it would require the consent of both parties to supply the thing omitted. Suppose it had been one stipulation of the verbal agreement on the 30th of June that the plaintiff should give and the defendant receive something in earnest to bind the bargain, and in pursuance of such stipulation the plaintiff had then offered to give or pay the amount so stipulated, and the defendant had refused to receive it, saying that he preferred not to receive any money until he had delivered the whole or part of the property, or had refused to accept the money so offered, or do any other act to bind the bargain, without giving any reason for such refusal, it would be evident that he did not intend to make a binding contract. But the fact that he had made such verbal agreement to receive something or to do some other act to bind the bargain, and that the plaintiff was ready and offered to comply on his part, would not take the agreement out of the statute. A verbal stipulation to give and to receive something in earnest to bind the bargain or in part payment, or a verbal promise to make a note or memorandum in writing necessary to exempt the agreement from the operation of the statute, is as much within the statute of frauds as is the agreement or contract taken as a whole; and a note or *memorandum *681 in relation to giving something in earnest to bind the bargain, or in part payment, which is insufficient of itself to take the contract out of the statute, is also insufficient to make the contract binding upon either party.

The judgment of the county court is reversed and judgment for the defendant for his costs.

HUNTER v. WETSELL.[1]

(84 N. Y. 549.)

Court of Appeals of New York. March 22, 1881.

This action was brought to recover the purchase price of a quantity of hops alleged to have been sold by Richard Hunter, plaintiffs' testator, to defendants.

The proof on the part of plaintiffs was to the effect that one of the defendants, who were partners, in September, 1877, looked at the hops in the hop-house and agreed to give Hunter 50 cents a pound for the lot and $10 additional, which Hunter agreed to take. It was agreed that Hunter should shovel the hops through, bale them in a few weeks when they were dry enough, and notify defendants, who were then to direct where they were to be delivered. Hunter baled and weighed the hops and notified one of the defendants, who promised to come out and take them. Afterward Hunter went to defendants' place of business, where the contract was restated, the weight of the hops was given, to wit, 2,370 pounds, the price was figured up at 50 cents a pound and $10 added, thus showing the whole purchase-price. Plaintiff then received defendants' check for $200 to apply on the purchase-price, and defendants agreed to go on the next week, take the hops, and pay the balance. The check was paid on presentation. Defendants did not come for the hops or notify Hunter where to deliver them. He was ready and offered to deliver. At the close of plaintiffs' evidence, defendants' counsel moved for a nonsult on the ground that the contract was void under the statute of frauds and that the check was no payment, within the meaning of that statute. The motion was denied, and said counsel duly excepted.

The further material facts appear in the opinion.

J. H. Clute, for appellants. E. W. Paige, for respondents.

FINCH, J. We are to assume as facts in this case, from the verdict of the jury, that an absolute contract for the sale of the hops, after they were weighed and baled, was entered into verbally by the parties, by the terms of which the hops were to be delivered where the defendants determined and requested, and were to be paid for within a few weeks upon such delivery, at the rate of 50 cents per pound, with $10 additional on the whole lot. Since the quantity of the hops, as baled and weighed, carried the price beyond $50, we held upon a previous appeal that the contract was void within the statute of frauds, because no memorandum in writing was made, no part of the property delivered and no portion of the purchase-money paid at the time of the transaction. The after-payments of $300 we decided to be insufficient to validate the contract, because when made there was no re-statement or recognition of the essential terms of the contract. 57 N. Y. 375. In the case as now presented the difficulty, fatal before, is claimed to have been obviated. There is proof of a re-statement of the essential terms of the contract at the time of the delivery of the check for $200. There is proof also contradicting such alleged fact. The question was left to the jury under a charge from the court which does not seem to be the subject of complaint, and they, in rendering a verdict for the plaintiffs, necessarily found the fact of such re-statement. That finding is conclusive upon us.

But it is now objected that conceding the fact of such re-statement, there was no payment of any part of the purchase-money at that time. It is admitted that the check was then given, and it cannot be successfully denied that it was both delivered and received as a payment upon the contract-price of the hops, but it is claimed that the check was not, in and of itself, payment, and having been drawn upon a bank, could not have been in fact paid until afterward, and so there was no payment "at the time" to satisfy the requirements of the statute. It is quite true that a check, in and of itself, is not payment, but it may become so when accepted as such and in due course actually paid. While not money, it is a thing of value, and is money's worth when drawn against an existing deposit which remains until the check is presented. We must assume that the check of the vendee in this case was good when drawn and was duly paid upon presentation in the usual and regular way, for it appears in the possession of the drawers, and they practically assert the fact of its payment by their counter-claim in the action, by which they seek to recover back the money so paid. There was therefore an actual and real payment made by the vendees to the vendor upon the purchase-price of the hops. It is said however that the actual payment of the money, as distinguished from the delivery of the check, was not "at the time" of the contract, but at some later period. We do not know accurately when the check was paid. It may have been the same day. It may have been within a very few moments. It may not have been till the next day. We are not to presume, for the purpose of making the contract invalid, that it was held beyond the natural and ordinary time. In such event it is a very narrow construction to say that the payment was not made at the time of the contract. The purpose and object of the statute should not be forgotten. Its aim is to substitute some act for mere words, to compel the verbal contract to be accompanied by some fact not likely to be mistaken, and so avoid the dangers of treacherous memory or downright perjury. The delivery of the check was such an act. Indeed it would be an entirely reasonable and just construction

[1] Irrelevant parts omitted.

to say that the delivery of the check and its presentment and payment constituted one continuous transaction, and should be taken as such without reference to the ordinary delay attendant upon turning the check into money. The statute does not mean rigorously, eo instanti. It does contemplate that the contract and the payment shall be at the same time, in the sense that they constitute parts of one and the same continuous transaction. We think therefore there was a payment "at the time," within the meaning of the statute, and that the contract of sale was valid. Artcher v. Zeh, 5 Hill, 200; Hawley v. Keeler, 53 N. Y. 114; Bissell v. Balcom, 39 N. Y. 275.

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PEABODY v. SPEYERS.

(56 N. Y. 230.)

Court of Appeals of New York. March 24, 1874.

Action for damages for breach of a contract for the sale of $40,000 of gold coin. The opinion shows the facts.

William A. Beach, for appellant. S. B. Brownell, for respondent.

GROVER, J. The appellant sustained no injury from the parol proof of the contract. The answer does not deny the making of the contract as alleged in the complaint, but sets up facts avoiding it, under the statute of frauds. The exception to this proof is not therefore available. The constitution and by-laws of the New York Gold Exchange were competent evidence. The parties were both members of the association, and had both subscribed the constitution. By this, and the by-laws made by the members in pursuance thereof, the mode of performing contracts of the kind in question between members is prescribed, and for this purpose, these become a part of the contract.

The finding, by the trial judge, of the fact that the contract was for the sale by the plaintiff to the defendant of $40,000 of gold, to be paid for by the latter in currency at the stipulated price, if correct, entirely obviates the objection of the counsel for the appellant, that the contract is made void by the statute prohibiting betting and gaming. 1 Rev. St. 662. The testimony supported this finding, and this court cannot consider that, if any, in conflict therewith.

A contract for the sale of gold to an amount exceeding $50 is equally within section 3 (2 Rev. St. 136) as that for the sale of any other personal property. When the subject of such a contract, it is regarded, not as money, but as a commodity; and the contract must be made in compliance with the statute of frauds, or it will be void. None of the gold was delivered to and accepted by the defendant, nor did the latter pay any part of the purchase-money. The inquiry is therefore, whether there was a note or memorandum of the contract signed, as required by the first subdivision of section 3. The verbal contract was made on the 23d of September, 1869. By the constitution and by-laws of the association, it was to be performed by the delivery of the gold, by the vendor, for the purchaser, at the Gold Exchange Bank of New York, and the purchaser was then to receive it, and pay to the bank the purchase-price for the vendor. This was to be done under the present contract, if valid, at a specified hour on the 24th. The bank, by the constitution and by-laws, was made the agent of both parties for the consummation of the contracts of members. Before eleven o'clock on the 24th of September the plaintiff delivered to the defendant the following instrument:

"New York, September 24, 1869. To the cashier of the New York Gold Exchange Bank: You are advised that we shall settle through the clearing department to-day, with Albert Speyers, $57,500 currency, for $40,000 of gold."

This was properly subscribed; and in the left margin were the words "deliver gold." At the same time the defendant delivered to the plaintiff the following instrument, duly subscribed by his authorized agent:

"No. 106. New York, September 24, 1869. New York Gold Exchange Bank. To the cashier: You are advised that I shall settle through the clearing department, to-day, with Peabody, for W. B. Sancton, $57,500 currency for $40,000 gold."

On the left margin were the words "receive gold." All the previous acts of the parties rested entirely in parol, without any writing except the entries that each had made of the contract, in a book kept by him; and there was nothing in these entries taking the case out of the statute of frauds. The inquiry is, whether it is so taken by the above instruments. These relating to the same subject and delivered at the same time must be construed together; and also in the light of the constitution and by-laws of the association, showing the manner of performing contracts for the sale and purchase of gold by the members. By the latter we have seen that officers of the bank were constituted agents of both parties for the performance of their contracts. Now what is the fair meaning of these instruments, so construed? I think as to this there can be little doubt after reading the constitution and by-laws. They can only mean that the plaintiff agreed to sell and deliver to the defendant that day $40,000 of gold, for which the latter agreed to pay the plaintiff $57,500 in currency, at the time of delivery; the gold to be delivered by the plaintiff, for the defendant, to the clearing department of the bank, and the currency paid in there for the plaintiff, as provided by the constitution and by-laws of the association. It is said by the counsel for the defendant that the instruments would have been in the same form had the transaction been a loan instead of a sale of gold by the plaintiff to the defendant. If this be so, and the defect be not otherwise supplied, the contract is not valid, for the reason that the instrument subscribed must show, either by itself or by reference to some other writing, what the contract really was, and its terms, unaided by parol proof, further than what is requisite to give a knowledge of the meaning of terms, phrases and abbreviations found in the writing. But the papers show that the plaintiff was to deliver and the defendant to receive the gold on the day in question, and that the defendant was at the same time to deliver and the plaintiff to receive the stipulated amount of currency therefor. This, in the absence of any thing showing the contrary, is a sale of the gold, all the

terms of which are specified in the writings. If a loan of gold secured by the currency was intended, the papers entirely fail to show it. The writing therefore proves a contract valid within the statute of frauds. But if it be conceded that the two instruments which have been thus far considered are indeterminate in their terms, and leave it in doubt whether the real transaction between the parties was a sale, a loan or a deposit, it does not follow that the contract to which they relate must be deemed invalid if, by any other writing signed by the proper party, the defect can be supplied. The thing requisite to the validity of the contract is that it shall be manifested by writing, signed by the party to be charged. It matters not in how many papers the contract is contained, so that the substance of the statute is complied with. The defect, if any, in the two papers first considered is that while they disclose all the other particulars of the contract, they do not determine whether it is a contract of sale, or loan, or deposit. This defect, we think, is entirely supplied by the letter signed by the defendant and addressed to Messrs. Belden & Co., on the day of the making of the contract. This shows the contract to have been in fact one of purchase and sale, and that by it the defendant bought the gold of Peabody, at the price mentioned. It is true that this paper also discloses that the purchase was on account of Wm. Belden & Co., as between that firm and the defendant. But that fact was not disclosed to the plaintiff; and where a purchase is made on behalf of an undisclosed principal the agent is personally bound.

It is argued that inasmuch as resort is necessary to the writing to prove the contract, it discharges the agent, by the disclosure of the principal, as effectually as it fixes the character of the transaction to have been a purchase. But this does not follow. The writings are, together, only the evidence of the contract; and the non-disclosure, in fact, to the plaintiff that the defendant was dealing on account of others, will leave him personally liable to the plaintiff. This seems to be a necessary consequence of the proposition that a writing signed by the proper party to be charged and addressed to a stranger, though it did not at the time come to the knowledge of the other party to the contract, may be deemed a part of the sufficient memorandum required by the statute. The nominal party was the apparent and actual party so far as the other contractor was concerned, and was shown to be such by the written memoranda, of which both parties at the time had knowledge. That he is compelled to resort to a further writing to fix and determine the character of the transaction, and thus to complete the written evidence of the contract, ought not to affect his rights in a particular in which the writings known to both parties were sufficient and definite when there is no absolute irreconcilability between them. Such is the case before us. By the two instruments first considered the defendant was the purchaser, and is to be deemed so in respect to the plaintiff, with whom he dealt as purchaser. That the other paper shows him to have bought for a principal, as between him and the principal, is entirely consistent with his being deemed himself the principal and purchaser, in so far as the plaintiff is concerned. That the paper in question, though addressed to third parties, may be used as evidence of the contract, under the statute, is decided in Gibson v. Holland, L. R. 1 C. P. 1, where the subject is fully considered, and where many analogous decisions under other sections of the statute of frauds are stated, and shown to support the conclusions announced. We are therefore of the opinion that in either view of the case, the contract in suit appeared to be sustained by sufficient written evidence under the statute.

The judgment must therefore be affirmed.

All concur, except **RAPALLO, J.**, not sitting.

Judgment affirmed.

LOUISVILLE ASPHALT VARNISH CO. v. LORICK et al.

(8 S. E. 8, 29 S. C. 533.)

Supreme Court of South Carolina. Nov. 27, 1888.

Appeal from common pleas circuit court of Richland county; Pressly, Judge.

Action by the Louisville Asphalt Varnish Company against Preston C. Lorick and William B. Lowrance, partners, trading as Lorick & Lowrance, to recover for goods sold them. At the trial, a nonsuit was granted, and judgment rendered for defendants. Plaintiff appeals. Reversed.

Bachman & Youmans, for appellant. S. W. Melton, for respondents.

McIVER, J. This was an action to recover the sum of $83.05, the price of certain varnish and paint alleged to have been sold by plaintiff to defendants. The defense was a general denial. At the trial the plaintiff offered testimony tending to show that on the 16th October, 1885, one of its traveling salesmen, Hutchinson by name, took from Moore, a clerk of defendants, who, it was admitted, had authority to give the order, a verbal order for the articles specified in the account sued on, which Hutchinson immediately entered in his memorandum book as follows:

"No. 65. Columbia, S. C., Oct. 16, 1885.
"Louisville Asphalt Varnish Co., Louisville, Ky.
Ship Lorick & Lowrance, Columbia, S. C.:
1. Bbl. No. 1 Turpt. Asphalt Black Varnish 55c.
1. " D. Roof Paint C................ 50c.
12. 5 gall. Pails D. Roof, do............ 55c.
"Cr. by 2c gal., on acct. freight.
"60 days. H. L. Hutchinson, Salesman."

On the same day, a copy of this order was sent by mail, by said salesman, to the plaintiff, who received it on the 19th October, 1885, and on the next day shipped the goods, by rail, to defendants. On the 17th October, 1885, the defendants wrote to plaintiff as follows: "Louisville Asphalt Varnish Co., Louisville—Gents: Don't ship paint ordered through your salesman. We have concluded not to handle it." This letter, however, was not received by plaintiff until after the goods had been shipped; and upon its receipt plaintiff wrote defendants, saying "that the shipment had gone before the request to cancel was received." When the goods arrived in Columbia, the defendants declined to receive them, but what became of them the testimony does not show. At the close of plaintiff's testimony, defendants moved for a nonsuit, which was granted, upon the ground that section 2020, Gen. St., (statute of frauds,) was fatal to a recovery. Plaintiff appeals, upon the several grounds set out in the record which make these two questions: First, whether there was such a note or memorandum in writing of the bargain as would satisfy the requirements of section 2020 of the General Statutes; second, if not, whether there was such an acceptance and actual receipt of the goods as would take the case out of the operation of that section.

It is quite certain that there was no formal agreement in writing, signed by the parties to be charged, for the sale of the goods in question, and we think it equally certain that there was no single instrument or memorandum in writing sufficient to satisfy the requirements of the statute; for the letter of the defendants, copied above, did not specify the necessary particulars as to quantity, nature, and price of the goods which were the subjects of the alleged contract of sale, and the copy of the order sent by the salesman to the plaintiff, which did contain all the necessary particulars, was not signed by the defendants. It is plain, therefore, that neither one of these papers, standing alone, would be sufficient. But as it is well settled that the whole agreement need not appear in a single writing, but may be made out from several instruments or written memoranda referring one to the other, and which, when connected together, are found to contain all the necessary elements, the precise, practical question in this case is whether the letter of defendants can be connected with the written order sent by the salesman, so that the two together may constitute a sufficient note or memorandum in writing to satisfy the requirements of the statute. In Saunderson v. Jackson, 2 Bos. & P. 238, the action was for not delivering certain articles alleged to have been sold by defendant to plaintiff, and the question was whether there was a sufficient note or memorandum in writing of the bargain, under the statute of frauds. It seems that when the plaintiff gave the verbal order for the goods, he was furnished by the defendant with a bill of parcels, not signed, but written on a piece of paper, with a printed heading containing the name and place of business of defendant. Shortly after this, defendant wrote a letter to plaintiff, saying: "We wish to know what time we shall send you a part of your order," etc. The court held that the requirements of the statute were complied with, saying: "This bill of parcels, though not the contract itself, may amount to a note or memorandum of the contract, within the meaning of the statute. * * * At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the statute of frauds; for, although it be admitted that the letter, which does not state the terms of the agreement, would not alone have been sufficient, yet, as the jury have connected it with something which does, and the letter is signed by the defendants, there is then a written note or memorandum of the order which was originally given by the plaintiff, signed by the defendants." This case has been expressly recognized and followed in this state, in Toomer v. Dawson, Cheves, 68. The same doctrine was applied in Western v. Russell, 3 Ves. & B. 188. See, also, to the same effect, Drury v. Young, 58 Md. 546, where, as in the case now under consideration, the letter of defendant was written for the purpose of withdrawing from the contract; but as it referred to the

previous order, the two, taken together, were held to satisfy the terms of the statute. In a note to that case, at page 347 of the volume of American Reports above cited, we find the following: "In Cave v. Hastings, 7 Q. B. Div. 125, an action for breach of a contract for the hire of a carriage for more than a year from the date of the agreement, at a specified sum per month, it was proved that the plaintiff agreed to let the carriage to the defendant. A memorandum of the terms of the agreement was signed by the plaintiff, but not by the defendant. The defendant subsequently wrote a letter to the plaintiff, desiring to terminate the agreement, in which he referred to "our arrangement for the hire of your carriage," and "my monthly payment." There was no other arrangement between the parties, to which the expressions of the defendant could have any reference, except the agreement contained in the memorandum signed by the plaintiff. Held, that the letter of the defendant was so connected, by reference, to the document containing the terms of the arrangement, as to constitute it a note and memorandum of the contract, signed by him, within the fourth section of the statute of frauds. The court said: "There is abundant evidence that there was an agreement which was not rescinded; but the defendant now contends that he is not liable, because he signed no memorandum in writing of the contract." It has, however, been long settled that the whole agreement need not appear in one document, but the agreement may be made out from several documents. The only document signed in this case by the defendant was the letter of the 11th February, which does not, in itself, contain the terms of the contract. In Dobell v. Hutchinson, 3 Adol. & E. 355, Lord Denman states the law on this subject to be as follows: "The cases on the subject are not, at first sight, uniform; but on examination it will be found that they establish this principle: that when a contract or note exists which binds one party, any subsequent note in writing, signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them." This letter in question refers to "our arrangement." Mr. Gully, in his argument, contended that that might refer to some other and different parol arrangement; but it seems to us that this reference to the former document is sufficient, in accordance with the principle laid down in Ridgway v. Wharton, 6 H. L. Cas. 237, where "instructions" were referred to, and it was held that parol evidence might be given to identify the instructions referred to with certain instructions in writing. This principle was applied in Baumann v. James, 16 Law T. (N. S.) 165, and carried still further in Long v. Millar, 41 Law T. (N. S.) 306, in which Bramwell, L. J., says: "The first question to be considered is whether there is a contract, valid according to the provisions of the statute of frauds, section 4. I think that there is a sufficient memorandum. The plaintiff has signed a document containing all the terms necessary to constitute a binding agreement, so that, if he committed a breach of it, he would be liable to an action for damages or to a suit for specific performance. But the point to be established by the plaintiff is that the defendant has bound himself, and a receipt was put in evidence signed by him, and containing the name of the plaintiff, the amount of the deposit, and some description of the land sold. The receipt also uses the word 'purchase,' which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, so soon as the two documents are placed side by side. The agreement referred to may be identified by parol evidence." He then goes on to add: "I may further illustrate my view by putting the following cases: Suppose that A. writes to B., saying that he will give £1,000 for B.'s estate, and at the same time states the terms in detail, and suppose that B. simply writes back in return, 'I accept your offer.' In that case, there may be an identification of the documents by parol evidence, and it may be shown that the offer alluded to by B. is that made by A. without infringing the statute of frauds, section 4, which requires a note or memorandum in writing." These observations, coming as they do from high authority, seem so appropriate to the present case that we have felt justified in inserting them at length. In Beckwith v. Talbot, 95 U. S. 289, it was held that, while the general rule is "that collateral papers adduced to supply the defect of signature of a written agreement, under the statute of frauds, should on their face sufficiently demonstrate their reference to such agreement, without the aid of parol proof," yet such rule is not absolute, as "there may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof." Accordingly, it was held in that case that "the defendant, unless he could show the existence of some other agreement, was estopped from denying that the agreement referred to by him in his letters was that which he induced the plaintiff to sign." Even in the case of Johnson v. Buck, 35 N. J. Law, 338, which seems to be much relied on by the counsel for respondents, it is conceded that parol evidence may be received "to identify papers which, by a reference in the signed memorandum, are made parts of it." While it is true that some of the cases which we have cited arose under the fourth section of the statute of frauds, and not under the seventeenth section, which controls the present case, yet it is admitted by Kent, C. J., in Bailey v. Ogdens, 3 Johns. 412, that the words of the two sections are in this respect similar, and require the same construction, and it was so held in Townsend v. Hargraves, 118 Mass. 325. It seems to us, there-

fore, that the letter of defendants, taken, as it must be, in connection with the order sent to plaintiff by the salesman, to which it expressly referred, and which was in writing, and specified all the necessary particulars as to price, quantity, quality, and time of payment, constituted a sufficient note or memorandum in writing of the bargain to take the case out of the statute of frauds. In the absence of any evidence that any other order was given, the language of the letter—"Don't ship paint ordered through your salesman"—must necessarily be regarded as referring to the order of which a memorandum in writing was taken at the time by the salesman, and a copy thereof immediately forwarded to the plaintiff, who at once filled the order, and shipped the goods to the defendants. This is a stronger case than that of Beckwith v. Talbot, supra, for there the letter of the defendant simply referred to the agreement, without indicating when or how it had been made, while here the letter refers to a particular article "ordered through your salesman," and we hear of no other order through the salesman or in any other way. The only necessity for any parol evidence at all, if, indeed, there was any, was to identify the order sent by the salesman, and for this purpose, as we have seen, such evidence would be competent. Suppose the plaintiff had, on the 16th October, 1885, written a letter to defendants, proposing to sell them the articles mentioned in the salesman's order, in the quantities there stated, and at the prices and on the time there mentioned, and that defendants had replied by letter, simply saying, "I accept your offer," without repeating the particulars as to quantity, price, etc., it could not be doubted that, although defendants' letter—the only paper which they signed—did not contain in itself the necessary particulars of the bargain, yet the two letters, taken together, would be held a sufficient compliance with the statute. It seems to us that the transaction here in question was in principle practically the same as that in the supposed case, and we think there was error in holding that the contract sued on was void under the statute of frauds.

We do not see how it is possible to regard the letter of the defendants as a denial of the order given to the salesman by their clerk, Moore, who, it was conceded, had authority to give the order, for the only testimony upon the subject is that of the salesman, who says distinctly that Moore gave him the order, and he entered it in his memorandum book, and there is no evidence to the contrary. Moore was not examined as a witness. It is true that, after the controversy between these parties had arisen, the defendants, in a letter as late as 31st December, 1885, addressed to the attorney who had been consulted by the plaintiff, do repudiate the purchase; but that is not the letter relied upon by plaintiff to establish the contract. On the contrary, the one relied on is that of the 17th October, 1885, which has been copied above, and the question is whether the last-mentioned letter can be regarded as a denial of having given the order. The manifest purpose of that letter was to countermand the order, and this necessarily presupposed that the order had been given. The terms used clearly show this: "Don't ship the paint ordered through your salesman. We have concluded not to handle it." This clearly means that the paint had been ordered, but that defendants had subsequently changed their minds and "concluded not to handle it;" and we don't see how it can be construed to mean anything else. We have then an admission in writing that an order for the goods in question through the salesman had been given, and we have the order referred to, likewise in writing; and the two together fully satisfy the requirements of the statute. Under the view which we have taken of the first question raised by this appeal, the second question becomes immaterial, and need not, therefore, be considered. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

McGOWAN, J., concurs.

SIMPSON, C. J. (dissenting.) The plaintiff brought the action below to recover the sum of $83.95, alleged to be due for certain paints claimed to have been sold defendants by the plaintiff. The defendants denied the purchase of said paints. At the trial, the plaintiff offered testimony showing that a traveling salesman of plaintiff called at the place of business of defendants in Columbia, and, after an interview with one Moore, a clerk of defendants, who had power to make purchases of the kind mentioned, entered an order in his memorandum book as follows:

"No. 65. Columbia, S. C., Oct. 16, 1885.
"Louisville Asphalt Varnish Company, Louisville, Ky: Ship Lorick & Lowrance, Columbia, S. C.:
1. Bbl. 1 Turpt. Asphalt Black Varnish.. 55c.
1. " D. Roof Paint C................ 50c.
12. 5 gall. Pails D. roof, do.............. 55c.
"Cr. by 2c. gal., on acct. freight.
"60 days. H. L. Hutchinson, Salesman."

—Embracing the goods which Hutchinson swore he sold to defendants through their agent, Moore. A copy of this order was immediately sent to plaintiff at Louisville, Ky., who on the 19th of October put said goods up for shipment, and on the 20th of October received from the Cincinnati Southern Railway a bill of lading executed in duplicate. After this shipment, the plaintiff received a letter from Lorick & Lowrance, dated 17th of October, of which the following is a copy: "Louisville Asphalt Varnish Company, Louisville—Gents: Don't ship paint ordered through your salesman. We have concluded not to handle it. Resp't'y. Lorick & Lowrance. M." To this the plain-

tiff replied, 22d October, 1885, that the goods had gone forward before receipt of defendants' letter above. The defendants then answered, denying that they had ever purchased from plaintiff, stating that one of its salesmen had visited Columbia and had offered to sell, but that their Mr. Moore had declined to purchase, and that the goods on arrival had been promptly reshipped to plaintiff. Upon testimony of plaintiff, substantially as above, on motion of defendants a nonsuit was granted, on the ground that section 2020, Gen. St., was fatal to a recovery. The plaintiff has appealed, both from the order granting the nonsuit and from the judgment entered, upon the following grounds: (1) That there was sufficient evidence to go to the jury, and his honor erred in holding otherwise. (2) That the evidence produced by plaintiff clearly took the case out of the statute of frauds, and out of section 2020, Gen. St., of this state. (3) That the evidence clearly showed the acceptance of the goods sold, and the actual receipt thereof by the defendants. (4) That the evidence clearly showed the note and memorandum in writing of the bargain, signed by the agent lawfully authorized. It is conceded that plaintiff's action was subject to the application of the statute of frauds, (section 2020, Gen. St.,) and the plaintiff based its right to a recovery upon a compliance with that statute in two of its requirements, to wit: First, that the goods, after being ordered, were accepted and actually received; and, second, that a sufficient memorandum in writing had been made to bind the defendants.

Now, the question before us is not as to the merits of the case, but simply whether enough testimony had been introduced, as to one or both of the grounds above, to carry the case to the jury, and prevent a nonsuit. The rule as to nonsuits is well understood, and we need only state here, what has often been said before, that a nonsuit is proper, and in fact demandable, where there is an absence of all relevant testimony as to one or more of the material disputed issues in the case. If, however, there is testimony upon said issues the truth, force, and effect of which is to be weighed and determined, the case must go to the jury, because, under our system, the jury is alone invested with power to determine disputed facts in cases at law. As to what amounts to an acceptance and an actual receipt under the statute, see 1 Chit. Cont. (11th Ed.) 555 et seq. We have found no pertinent testimony upon this point. His honor, in the absence of such evidence, was, therefore, right in holding that there was no ground upon which the case could go to the jury, in so far as this question was involved. Was there evidence of a note or memorandum in writing, signed by the defendants or their agent thereunto lawfully authorized, sufficient to carry the case to the jury? There is no pretense that the order sent by plaintiff's salesman was signed by the defendants or their agent. On the contrary, the order was prepared and sent by the plaintiff's agent, and no doubt was sufficient to bind the plaintiff if it was the party sought to be charged, although the defendants might not be bound. It is not necessary that both parties should sign the contract. It is sufficient that the defendant, whether he be vendor or vendee, has signed the contract, and it is no objection that he has no remedy thereon against the plaintiff, inasmuch as the latter has not signed it. Id. 568. It may be urged, however, that it is not necessary that the whole of the terms of the contract should be confined in one memorandum, it being sufficient if they can be collected from several distinct writings having reference to the same subject-matter. This is true, and it has been held that if, after the transaction has taken place, it be recognized in a letter written by the party to be charged, which refers to the specific contract, and not merely to the subject-matter, this will satisfy the statute. Id. 546. Under this principle, plaintiff contends that defendants' letter, in which they wrote: "Don't ship paint ordered through your salesman. We have concluded not to handle it,"—was sufficient to carry the case to the jury, on the question whether a note or memorandum in writing of the contract sufficient to comply with the statute has been executed by the defendants. The rule upon this subject, as will be seen from its discussion by Mr. Chitty (11th Ed.) 544 et seq., and the cases there cited in notes, seems to be this: The letter relied on must in itself contain the terms of the contract, quantity, quality, and price of the goods, etc., or it must refer to some other paper containing them in such way as by its own terms to connect itself with said paper. Now, the letter here might possibly be construed as an admission by the defendants that they had ordered certain paints from the plaintiff, and that since said order they had concluded not to take said goods. But there is nothing in this letter which points distinctly to the contract sued on. It could as well apply to any other contract as this, and therefore a most important link is wanting, which could be supplied only by verbal testimony. If the case had gone to the jury, there was no testimony by which the memorandum made by plaintiff's salesman could have been connected with defendants' letter. It was said in Waterman v. Meigs, 4 Cush. 497, "that a letter from the purchaser to the vendor, alluding to a parol agreement for the sale of goods, and inquiring whether they will be ready at the time agreed upon, but not mentioning the quantity, quality, or price of the goods, or the time of payment, is not a sufficient memorandum to take the agreement out of the statute of frauds." See, also, Manufacturing Co. v. Gaddard, 14 How. 446; Bailey v. Ogden, 3 Johns. 399. We think there was an absence

of all testimony connecting defendants' letter distinctly and clearly with the memorandum made by plaintiff's agent, and sent by him as an order for the goods, so that the two could constitute one memorandum in writing, signed by the defendants; and, the letter itself failing to embody the contract as to the quantity, quality, and price of the goods, the nonsuit was inevitable. Thus far it has been admitted that the letter of defendants, impliedly, at least, acknowledged an order for paints, but there is great doubt whether such is a proper construction of said letter. It may well be construed as a denial of the order. This view strengthens the conclusion we have reached.

McGOVERN v. HERN.

(26 N. E. 861, 153 Mass. 308.)

Supreme Judicial Court of Massachusetts. Suffolk. Feb. 26, 1891.

Exceptions from superior court, Suffolk county; Robert R. Bishop, Judge.

Thomas McGovern sued Denis J. Hern to recover the price of a house and lot alleged to have been purchased by Hern. The memorandum of sale was as follows:

"By SULLIVAN BROS.,
"Auctioneers.
"No. 9 School Street.

"Substantial 3½-story brick house, with store and lot, (about 1620 sq. ft.,) 87 and 89 Cove st., next the corner of Kneeland st.

"Thursday, Oct. 18, at 1 p. m., on the premises will be sold by auction, to the highest bidder, to settle the estate of John Higgins, deceased, this well-located and desirable property. The house contains a store and 14 rooms, arranged for families; water on each floor; in fair repair. The sale of this property, so centrally located, should command the attention of those seeking investments in business property. Terms at sale. $500 deposit at sale.

"Sale on the premises. Boston, Oct. 18, 1888. Terms and conditions of sale: Cash on delivery of the deed. Conveyance to be made in ten days from date, at the office of Sullivan Bros., No. 9 School street, by a good and sufficient deed, or the seller may take thirty (30) days, if necessary, in order to give title. Taxes for 1888 to be paid by the purchaser. $500 to be paid into our hands, to bind the sale, and form part of the purchase money in settlement for the estate; but will be forfeited to the seller if the purchaser fails to comply with the terms of sale. Forfeiture of the deposit money will not release the purchaser from his obligations to take the property, but if the title to the estate shall not be good this agreement shall be void.

"Boston, Oct. 18, 1888. I am the purchaser of the estate described in the printed advertisement hereto affixed, for the sum of twenty thousand six hundred and fifty ($20,650) dollars, and hereby assent to the terms of sale, and agree to abide by the same. D. J. HERN, Agent for the Estate of M. Doherty & Co."

Judgment for defendant, and plaintiff excepted.

C. F. Donnelley, for plaintiff. *D. E. Ware* and *J. Hewins*, for defendant.

ALLEN, J. The memorandum of the sale is insufficient to satisfy the statute of frauds. It is essential that it should show who are the vendors. It is true that they need not be named. It is enough if they are described, and in that case parol evidence is admissible to apply the description and to identify the persons meant. Jones v. Dow, 142 Mass. 130, 140, 7 N. E. Rep. 839; Catling v. King, 5 Ch. Div. 660; Rossiter v. Miller, L. R. 3 App. Cas. 1124, 1141, 5 Ch. Div. 648. Merely to refer to the persons selling as the vendors is no description. Catling v. King, 5 Ch. Div. 665, per MELLISH, L. J. In Gowen v. Klous, 101 Mass. 449, the sellers were described as "Eveline Gowen, guardian, and the heirs of Thomas Gowen;" and it was held that one of the heirs, who owned the lot in question, might maintain the action. The court said: "It is no objection to the sufficiency of the memorandum that the seller therein named is but an agent of the real owner, and on proof of the agency the latter may sue or be sued on the contract made by the agent in his behalf." The trouble with the memorandum in the case before us is that the seller is neither named nor described. Sullivan Bros. were indicated in one corner of the paper as the auctioneers, and it cannot fairly be considered that they were anything else. Their function as auctioneers was recognized in the memorandum as something distinct from that of parties contracting for unmentioned principals. Grafton v. Cummings, 99 U. S. 100, 107, 108. There is another objection which is fatal to the action in the present form, though it might perhaps be cured by an amendment, substituting the proper plaintiffs for the present plaintiff. At the time of the sale it appears that the estate was owned by devisees of John Higgins, and by grantees of certain of the devisees. The plaintiff was not at that time interested in the estate, but acquired it afterwards for the purpose of conveying it. If anybody had contracted as vendor, then it would be sufficient if such person was able to give a good title at the time specified. Dresel v. Jordan, 104 Mass. 407. In that case it was held that the person who contracted to sell, and who was described in the memorandum, might maintain an action. But such a contract is not negotiable, and it could not be said that the purchaser is liable to a suit in the name of a person who subsequently acquires the title of those who were the owners at the time of the sale. Grafton v. Cummings, ubi supra. Exceptions overruled.

DRAKE v. SEAMAN et al.

(97 N. Y. 230.)

Court of Appeals of New York. Nov. 25, 1884.

Action to recover damages for an alleged breach of a contract of employment. The facts are sufficiently stated in the opinion.

M. M. Waters, for appellant. Samuel Hand, for respondents.

FINCH, J. The court below has defeated the plaintiff upon the ground that his cause of action rested upon a contract which, by its terms, was not to be performed within one year, and which was rendered void by the statute of frauds for the want of a sufficient note or memorandum. That determination is challenged upon this appeal; and it is contended on behalf of the appellant that the memorandum was sufficient, for the double reason that no integral or material part of the agreement was omitted, but if it was, the omission was only of the consideration, which, under the statute, no longer needs to be expressed. It will be convenient to consider the last proposition first, since, if it is sound, it determines this appeal.

Before the Revised Statutes went into effect the consideration of an agreement within the statute of frauds was required to be stated in the memorandum. In the early case of Wain v. Walters, 5 East, 10, this was put upon the ground of a distinction between the word "agreement" and the word "promise" as used in the statute; but later, upon the proposition that the memorandum should contain within itself all the elements of a complete cause of action without need of resort to parol evidence. Saunders v. Wakefield, 4 Barn. & Ald. 595. Thereafter the courts in this state admitted and enforced that rule (Sears v. Brink, 3 Johns. 210; Kerr v. Shaw, 13 Johns. 236), but held the memorandum sufficient if its language so indicated the consideration that it could be argued out or inferred, and very much of nice criticism and narrow distinction followed as a result (Rogers v. Kneeland, 10 Wend. 251, 13 Wend. 114). The Revised Statutes sought to remedy the difficulty by an amendment requiring the consideration to be expressed, but the question whether in each case it was expressed, or what was a sufficient expression, led to renewed and continual litigation. It was soon held that the words "for value received" were enough to satisfy the requirement (Miller v. Cook, 23 N. Y. 495), and in 1863 the legislature struck out the clause, and restored the section to its old form.

But in all the current of authority in this state, previous to that final amendment, it was steadily ruled that the memorandum must contain the whole agreement, and all its material terms and conditions, not indeed in detail and with absolute precision, but substantially, and so that one reading the memorandum could understand from that what the agreement really was. In Wright v. Weeks, 25 N. Y. 159, which preceded the amendment of 1863 but a few years, that doctrine was declared in very strong terms and as entirely settled. But the change of 1863 has given rise to a new question, and bred in the courts a wide difference of opinion. In Speyers v. Lambert, 6 Abb. Prac. [N. S.] 309, the general term of the superior court held that the effect of striking out the clause requiring the consideration to be expressed was not merely to restore the law as it was before the words were inserted,—that is to say, that the consideration must appear in the agreement, but might be argued out or inferred from its terms,—but to go further than that, and make wholly and entirely unnecessary any statement of the consideration at all. That was said, however, in a case where the consideration was rendered at the moment in which the contract took effect, so that such contract was executory upon one side only, and not upon both. The exact contrary of this construction was held in Castle v. Beardsley, 10 Hun, 343, and the remark of Bingham, in his work on Contracts for the Sale of Real Property (363), was cited with approval, that "it is certainly a singular way of construing a statute that has been once amended and then again amended by striking out the amendment, to mean something different from what it did before it was amended at all." What was said in Evansville National Bank v. Kaufmann, 93 N. Y. 273, was not at all intended to decide the question upon which the courts have thus differed. The guaranty there was special and without consideration in fact, and the question now under discussion was not before the court. Very early it was doubted whether the amendment of 1830 at all changed the law (Church v. Brown, 21 N. Y. 331, per Comstock, J.), and it is extremely difficult to answer the logic of the doubt. In that view of the subject, neither amendment changed the law, and the presence or absence of the omitted clause was alike immaterial. But if the amendment of 1830 worked any change, it was no more than this: that the consideration should no longer be implied from the language of the instrument, but should be expressed in it. Brewster v. Silence, 8 N. Y. 207. And the subsequent omission of the inserted clause would seem only to indicate a legislative intent not to require a definite expression of consideration, and leave the contract good if one could be implied or inferred from its terms. Reed, St. Frauds, § 423. But whatever else may be said of the amendment of 1863, we are quite sure that it cannot be understood to destroy and annul the requirement that the note or memorandum must contain all the

substantial and material terms of the contract between the parties. It must show on its face what the whole agreement is so far as the same is executory, and remains to be performed, and rests upon unfulfilled promise.

Down to the amendment of 1863 no case wandered from that rule, so far as we have been able to discover; and since that date it has been re-stated and enforced in this court. In Newberry v. Wall, 65 N. Y. 484, a letter admitting the purchase of goods by the writer from the person to whom it was written was held to be an insufficient note or memorandum, because it did not "express any consideration or terms of the purchase," "and it is impossible to say from the contents of the letter what the contract in fact was." And again in Stone v. Browning, 68 N. Y. 604, Rapallo, J., said of a similar letter admitting the agreement to purchase: "It does not state the price or any of the terms of the contract. These deficiencies cannot be supplied by oral evidence. All the essential parts of the contract must be evidenced by the writing." Now those essential parts cannot be omitted, because, in addition to constituting such material elements, they constitute also a consideration of the contract. The agreement of the defendants in this case was not merely to pay so much money to plaintiff. It was to pay him that money for his services as salesman to be thereafter rendered. For what the payment was to be made constituted a material and essential element of the agreement on the part of the defendants; an important condition of the contract on their side. Their agreement was not absolute to pay the money. It was conditioned upon the rendition of the stipulated services. Any memorandum which omits the condition falsifies the agreement which they actually made, and represents them as agreeing to pay the money absolutely when they did not so contract. It is no answer that the omitted condition, coupled with the other party's promise of performance, constituted a consideration for his own agreement, and so need not be expressed. If we were to grant that, and follow Speyers v. Lambert to its full extent, it would only justify an omission from the memorandum of plaintiff's promise to perform the services, and not of defendants' condition modifying and limiting and measuring their own promise. As in the cases last cited in our own reports, the agreement was not an absolute agreement to purchase irrespective of price, but to buy at an agreed and specified price, so here the agreement was not an absolute agreement to pay so much money, but to pay it upon condition that certain specific services were rendered. And if we conceded that the consideration might be wholly omitted from the memorandum, it would still be requisite that all the essential and material elements of defendants' own agreement should be stated, and they are not stated where the very condition upon which they were to pay at all is omitted, and the subject-matter of their agreement is absent.

And that brings us to the question whether the memorandum on its face stated the actual contract which the defendants made; or whether from the memorandum we can determine what the real contract between the parties was. The actual agreement was that the defendants would pay yearly the sums specified in the memorandum for the services of the plaintiff as a salesman, to be rendered for three years, and the inquiry is whether that contract is stated in the memorandum. The writing begins with the words "preserve this," and continues thus: "The understanding with Mr. Drake is as follows: 2,000 dollars for the first year; 2,500 dollars for the second year sure, and provided the increase sales shall warrant it, he is to have $3,000. 3 year in proportion to business as above." On the face of this writing the contract of the defendants with its essential terms and conditions does not at all appear, unless we yield to the construction very ingeniously suggested and forcibly argued on behalf of the appellant, that the words "for the first year" mean, for the first year's time of the plaintiff, and so on through the other stipulations. It is said the word "year" means a period of time, and must be held to refer to the plaintiff's time, using that word in the sense of services, and the construction is sought to be strengthened by parol evidence, showing that plaintiff was a salesman, and defendants manufacturers. There are no technical or ambiguous words in the memorandum requiring explanation, and we cannot resort to parol evidence to insert in the writing what is not there. Wright v. Weeks, supra. Confining our attention to what the memorandum says, we observe that its language is equally applicable to many contracts entirely different from that actually made. Although plaintiff is a salesman, he may have invented or purchased a patent valuable for the use of the defendants, and bargained to give them that use for three years, in return for which plaintiff was to have $2,000 for the first year, $2,500 for the second year, sure, and provided the increase sales shall warrant it he is to have $3,000. Third year in proportion to business as above. Or the plaintiff may have rented to the defendants a store or factory for three years, and the memorandum recite the rental. And so the illustrations might be multiplied. Nothing in the writing indicates which of all the possible contracts was intended, or identifies the one really made. To a person depending wholly upon the writing, the real contract made is impossible to be ascertained. And here comes in the difficulty against which the statute was aimed. If the memorandum be held sufficient, any false-

hood or perjury on the part of the plaintiff might apply it to an agreement never made or thought of, and against that the memorandum would not furnish the least protection. And there is a further difficulty as to the third year, which is the only one here in controversy. Precisely what the final clause means it is not easy to say. It does not provide in terms for any fixed salary, but makes the payment dependent upon the business in proportion to the rates above stated. No evidence was given showing the amount of business. We cannot hold this memorandum sufficient without a dependence upon parol evidence which would practically nullify the statute, and since we have held that one party may be bound by his signature while the other party, not signing, is not bound at all (Mason v. Decker, 72 N. Y. 595), it becomes very important for the party who does sign and is bound, that the rule should be firmly adhered to which requires the real contract to be stated with its substantial terms and conditions. We, therefore, agree with the conclusion of the general term.

The order of the general term should be affirmed and judgment absolute rendered for the defendants, with costs.

All concur.

Order affirmed, and judgment accordingly.

JUSTICE v. LANG et al.

(42 N. Y. 493.)

Court of Appeals of New York. March 28, 1870.

Action for breach of contract. The opinion states the case. Defendants had judgment below.

Edmund Terry, for appellant. Samuel E. Lyon, for respondent.

LOTT, J. The plaintiff brought this action for the recovery of damages from the defendants (composing the firm of W. Bailey Lang & Co.), for the non-performance of their promise, contained in the following memorandum or instrument in writing, signed by them, viz.:

"New York, 13th May, 1861.

"We agree to deliver P. S. Justice one thousand Enfield pattern rifles, with bayonets, no other extras, in New York, at eighteen dollars each, cash upon such delivery. Said rifles to be shipped from Liverpool not later than 1st July, and before if possible.
"W. Bailey Lang & Co."

After proof of the negotiation of the parties, the execution of the instrument by the defendants, its acceptance by the plaintiff, and the introduction by him of other evidence to sustain his action, but without showing that a counterpart of the memorandum, or any instrument in writing whatever, was ever signed by him to accept the rifles, or pay for them, he rested his case. Then the counsel of the defendants, after the denial of a motion to dismiss the complaint, proceeded to examine witnesses on their part; and after some testimony had been given (but which was afterward considered as stricken out), the judge stated that he much inclined to think that the memorandum was a nudum pactum, and after referring to its contents, said: "It expresses no consideration, and there is no evidence tending to show that the proposed purchaser ever agreed to take the rifles or to pay for them;" and remarked that the admission of testimony offered to prove that the contract was obtained fraudulently, or by false representations, would be in the face of his impressions in regard to the contract itself; that if it was a mere nudum pactum, without consideration, it would be useless to prove any conversation in regard to it. He thereupon, on the grounds above stated by him, and on motion of the defendants' counsel, dismissed the complaint, and an exception to that decision was duly taken. The ground assigned by the learned judge for the dismissal of the complaint renders it necessary to examine into the validity of the contract at common law, as well as under the requirement of the statute of frauds.

Blackstone, in his Commentaries (volume 2, p. 422), defines a contract to be "an agreement upon sufficient consideration to do, or not to do a particular thing;" and he says the price, or motive of the contract, we call the consideration (page 444). Kent's definition of an executory contract is an agreement of two or more persons, upon sufficient consideration, to do or not to do a particular thing. 2 Kent, Comm. 449, etc. Comyn, in his work on Contracts (page 2), says: A simple contract, or contract by parol, is defined in our law books to be "a bargain or agreement voluntarily made upon good consideration, between two or more persons capable of contracting to do, or forbear to do, some lawful act." * * * And "six things appear necessary to concur: (1) A person able to contract; (2) a person able to be contracted with; (3) a thing to be contracted for; (4) a good and sufficient consideration, or quid pro quo; (5) clear and explicit words to express the contract or agreement; (6) the assent of both the contracting parties." He adds: "So, every contract should be obligatory on both the contracting parties, or both should be at liberty to recede therefrom: but to an agreement or contract there is no prescribed form of words, but any words which show the assent of the parties are sufficient." He also, in this connection, states that a voluntary promise, without any other consideration than mere good-will, or natural affection, to give to another a sum of money, as for instance £20, and that he will be a debtor for such sum, is no contract, but a mere nudum pactum, and that the law will not compel the execution by a person of what he had no visible inducement to engage for, but any degree of reciprocity will prevent the agreement or promise from being classed under this rule; and he illustrates the distinction by saying, that in the instance or case put, if any thing, however trifling, were done or to be done, or given for the £20, it would be a valid contract, and binding upon the parties.

Chitty says: "A contract or agreement not under seal, may be thus defined or described: A mutual assent of two or more persons competent to contract, founded on a sufficient and legal motive, inducement or consideration, to perform some legal act, or to omit to do any thing, the performance of which is not enjoined by law." Chit. Cont. 3. All of these definitions are substantially the same; and upon the application of that given by Comyn, which embraces the others, and appears to me to be a precise and explicit exposition of the necessary ingredients of a contract, to the memorandum in question, with his illustrations, it will be seen that it constitutes a sufficient and perfect agreement.

It shows that the plaintiff and the defendants were the contracting parties, the first as seller, and the last as purchaser; that the thing contracted for was Enfield pattern rifles; that a good and sufficient consideration, or quid pro quo, was expressed, being the delivery of such rifles to the defendant, at New York, on the payment by him to the plaintiff of $18 each, cash, upon such delivery. Clear and explicit words were used to ex-

press the terms of the contract and agreement, leaving no doubt as to the subject-matter thereof, the time and place for the delivery of the goods to be delivered, and the price or sum to be paid, and when such payment was to be made; and the assent of both the contracting parties also appears. that of the sellers, by subscribing their firm name at the end of the contract, and that of the buyer by the acceptance thereof. Although there is no distinct and express promise in terms by the plaintiff, to pay the price specified, the terms "cash on delivery," imply a promise, and create an obligation to make such payment when the rifles are delivered.

I shall therefore assume that the contract was valid and binding on the defendants at common law, and, as I understand the prevailing opinion of the general term, its validity as a common-law agreement was conceded; and the affirmance of the judgment at the trial term was placed on the sole ground that it was void under the statute of frauds. 2 Rev. St. 136, etc.

It will now be considered with reference to the requirements of that statute, which so far as it applies to the sale of goods and chattels, declares that "every contract for the sale of any goods, chattels or things in action for the price of $50 or more, shall be void, unless, 1st. A note or memorandum of such contract be made in writing and be subscribed by the parties to be charged thereby; or 2d. Unless the buyer shall accept and receive part of such goods or the evidences, or some of them, of such things in action; or 3d. Unless the buyer shall at the time pay some part of the purchase-money." 2 Rev. St. 136, § 3. And a subsequent section (section 8) declares that every instrument, by any of the provisions of the title to be subscribed by any party, may be subscribed by the lawful agent of such party.

This is substantially, so far as it affects this case, the same as the fifteenth section of the former statute of frauds in this state, entitled "An act for the prevention of frauds," passed 26th February, 1787. 1 Greenl. Ed. Laws, p. 391, etc., and 1 R. L. 1813, p. 75. That section enacts "that no contract for the sale of any goods, wares and merchandise, for the price of £10 or upward, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized," and is in its terms a transcript of the seventeenth clause of the English statute of frauds (29 Car. II. c. 3) which Chancellor Kent says "is assumed to be the basis of the several statute laws of the several states on this subject." 2 Kent, Comm. 510.

In this connection it may be useful to advert to the fact that subdivision 1 of section 3 of the Revised Statutes as above set forth is materially different from its provisions as reported to the legislature by the revisers. Those were in the following terms, viz.: "A note or memorandum of such contract, containing the names of the parties, a description of the things sold and the price thereof, be reduced to writing at the time the contract is made, and be subscribed by all the parties thereto." See 3 Revisers' Notes N. Y. St. at Large (Edmonds' Ed.) vol. 5, p. 395. The effect of the statute is to make additional requirements to what was required at common law to make a valid contract. They are specifically stated; and so far as it relates to or affects the contract in question, are "that a note or memorandum of such contract be made in writing and be subscribed by the parties to be charged thereby."

It is claimed by the defendants, and it was so held by the general term, that the omission of the plaintiff to subscribe the contract rendered it void, even as to the defendants, by whom it was subscribed, and consequently that it was wholly inoperative and ineffectual for any purpose or to any extent whatever. Is this the proper construction of the statutory provision?

In deciding this question it is important to consider the object of the statute. That is declared in the act of 26th February, 1787. It is entitled "An act for the prevention of frauds;" and after making several enactments it enacts (as is stated in the beginning of section 9) "for the prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury," several provisions, and among others, the fifteenth section, above cited.

The present statute on the subject is confessedly for the same purpose. The enactment that every contract for the sale of any goods for the price of $50 or more, where the buyer neither accepts nor receives a part of them, nor at the time pays some part of the purchase-money, shall be void "unless a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby," does not make such a contract unlawful, but its object is to declare that it shall be of no binding force to charge any party who has not subscribed a note or memorandum thereof in writing, with any liability thereon. It evidently contemplates legal proceedings against one of the parties to it, and its design is to prevent perjury and subornation of perjury by refusing the aid of the law in the enforcement of any rights claimed under it against him, without such written evidence.

The end and object of the statute are attained by written proof of the obligation of the defendant; he is the party to be charged with a liability, dependent on, and resulting from the evidence, and he is intended to be protected against the dangers of false oral

testimony. To say that the plaintiff or the party seeking to enforce a contract is himself a party to be charged therewith is a perversion of language.

The term "parties" in the section quoted is used in connection with the words "to be charged thereby," and does not necessarily include, nor can it be construed to include, all the parties to the contract. It is on the contrary limited and restricted by the qualifying words, to such only of those parties as are to be bound or held chargeable and legally responsible on the contract, or on account of a liability created by or resulting from it.

If it had been intended to extend to, and include all of the parties, those words "to be charged thereby" would have been unnecessary and superfluous. The appropriate language to express such intention would have been, that the note or memorandum should be subscribed "by all the parties thereto," or "by the parties thereto," or some general terms, without any limitation or restriction to any particular class or designation of parties.

The action of the legislature, moreover, when considered in connection with the recommendation of the revisers, is in harmony with and strongly confirmatory of this construction. That recommendation was, that the note or memorandum should be subscribed by all the parties thereto; and if it had been adopted there would have been no room for doubting as to the intent of the requirement. So on the other hand the omission to make the change recommended, and the enactment of the provision by the continuance of the phraseology and terms, "the parties to be charged thereby," clearly indicate that the construction that had been given thereto in numerous cases, declaring that it was enough that the note or memorandum of the contract be signed or subscribed by the party to be charged, was expressive of the true meaning of those terms.

The counsel for the respondent however in arguing that the memorandum must be subscribed by both parties, claims and insists that "an examination of the history of the question will show that no decisions to the contrary have been made in the court of last resort in this state, and that those which had been made to the contrary in other courts have not been well considered;" and in support of that proposition he refers to several reported cases where the question has been the subject of consideration, and it will be proper to examine them with the view of ascertaining whether he is sustained in the construction he has given to them, or as to the effect to which they are entitled as authority. The first is that of Roget v. Merritt, 2 Caine, 117, decided in 1804. It was an action for not delivering two hundred and twenty barrels of flour, according to agreement. It appeared that the defendant agreed to sell the flour, and a memorandum of the sale, made and signed by him, was delivered to the plaintiff's broker, who negotiated the sale for him. A note of one Lyon was to be given for the flour, but before it was tendered he failed. One of the objections taken to the recovery was, that the contract was void under the statute of frauds, because the memorandum or agreement was signed only by one party, and therefore, though obligatory on him, it could not be enforced against the plaintiff, and that this rendered the whole a mere nudum pactum. Judge Spencer held the objection to be untenable, and said: "The statute of frauds requires in certain contracts a memorandum to be signed by the parties to be charged. If there are acts to be done by both parties, and the one who is to perform a principal part (as here, the delivery of the flour) sign, and it is accepted by the other party, there can exist no doubt but that such contract would be mutually obligatory. In this case I hold that there was a valid contract executory in its nature; but before the period of its execution arrived, the consideration agreed to be given by the plaintiff wholly failed by the insolvency of Lyon."

The question of the necessity of the execution or signing of the agreement by both parties thereto was involved in the case, and although it is true that the judge said before he made those remarks, that as the opinion he was about to give in deciding it was not founded on either of the objections taken (the other being as to a variance between the contract set forth in the declarations and the proof) it would be unnecessary to enter into a minute examination of them, yet what he did say in reference thereto was nevertheless an authority on the question.

The next case was that of Bailey v. Ogden, 3 Johns. 399 (decided in 1808), which was an action of assumpsit by the plaintiffs for the price of a quantity of sugar alleged to have been sold by them to the defendants through the agency of one Huguet, acting as a broker for them. An entry of the sale and the terms was made by one of the plaintiffs and kept by them, commencing "sold Huguet for J. Ogden & Co. notes, with approved indorser," and then stating some other terms, but not specifying the quantity of the sugar sold. It was read to Huguet, and there was evidence tending to prove that he said it was correct. He himself had on the previous day made an entry of the transaction in pencil in his own memorandum book, commencing "J. Ogden & Co.—Bailey v. Bogert," stating some other particulars, but saying nothing about an indorsement; and he testified that he did not assent to that. The extent of Huguet's authority and some other matters were the subject of dispute on the trial. The judge among other things charged: "That a note or memorandum to satisfy the statute of frauds, must contain the names of the parties and the terms of the contract; and that if the names of the parties be inserted at the top, in the middle, or at the bottom, by their authority, it is sufficient;" and then

after adverting to the fact that there was but one special count on the contract which averred a delivery, and that averment must be proved, even if there had been a note or memorandum within the statute, submitted it to the jury to find whether there had been an absolute delivery to the defendants and acceptance by them of the goods. They found a verdict for the defendants.

A motion was made in the supreme court to set aside that verdict and for a new trial. The counsel for the plaintiffs among other points, insisted that it was not necessary that both parties should sign the note or memorandum of the contract, citing Roget v. Merritt, supra, and Saunderson v. Jackson, 2 Bos. & P. 238, and that if there was a sufficient memorandum in writing, proof of a delivery of the goods was not required.

The counsel for the defendants in reference to the sufficiency of the note or memorandum, after referring to the language of the statute, said that none of the authorities cited by the plaintiffs' counsel applied to the case; that "when the memorandum is signed by one party only it must be by the party to be charged;" and argued that the "bare assent" of the party to be charged was not equivalent to a signing.

Kent, C. J., in delivering the opinion of the court, stated that the case depended on the decision of two general questions; one of which and the first of them was whether there was a note or memorandum in writing, binding upon the defendants, within the meaning of the statute of frauds; and after referring to the memorandum made relative to the transaction as above stated, he said: "The entry of the plaintiffs made and retained by them was not binding upon the defendants, because the statute requires the note or memorandum to be signed by the party to be charged. The numerous cases admitting an agreement to be valid within the statute if signed by one party only, are all of them cases in which the agreement was signed by the party against whom the performance was sought. Some of the cases arose under the fourth and others under the seventeenth section of the English statute, but the words are in this respect similar and require the same construction." He then, after remarking that it had been said "that there would be a want of mutuality, if the plaintiffs in the case were bound by the entry and the defendants would not be," says: "Whether the plaintiffs in the present case would be bound at law by their memorandum, or if bound, whether they might have relief in equity, are questions not before us, and concerning which we are not now to inquire," and after an examination of the facts disclosed in the case, he came to the conclusion that there was no note or memorandum in writing which took the contract there relied on out of the statute of frauds, so far at least as it respected the defendants, nor a delivery or acceptance of the sugars, and that therefore the motion for a new trial should be denied.

This case, while it cannot be considered as an actual authority in support of the present action, is nevertheless important as recognizing the fact that there were numerous cases holding an agreement to be valid within the statute if signed by one party only, when such party was the one against whom the performance was sought, and the remark of the learned chief justice, "whether the plaintiffs in that case were bound at law by their memorandum, or if bound, whether they might have relief in equity, were questions not then before the court, and concerning which they were not then bound to inquire;" was as consistent with a doubt or question as to the sufficiency of the memorandum to bind the plaintiffs, conceding it to have been signed by them, as it was in reference to their liability, if it had been so signed and was in other respects sufficient.

What was thus said can on no ground be considered as questioning the force or effect of the "numerous cases" referred to by him as authority.

The next case was that of Merritt v. Clason, 12 Johns. 102 (decided in 1815). There it appears that John Townsend, a broker, was employed by the defendant to purchase rye; that he, on application to Isaac Wright & Son, in New York, the agents of the plaintiffs, agreed to purchase of them ten thousand bushels at $1 per bushel, and they authorized him to sell the same to the defendant on the terms agreed on; he then informed the defendant of the terms of sale and was directed by him to make the purchase accordingly. Thereupon he went to Wright & Son and closed the bargain with them, as agents of the plaintiffs, and in their presence wrote in his memorandum book with a pencil as follows: "February 18th, bought of Daniel & Isaac Merritt by Isaac Wright & Son, 10,000 bushels of good merchantable rye, at one dollar per bushel, deliverable in the last ten or twelve days of April next, alongside of any vessel or wharf the purchaser may direct, for Isaac Clason, of New York, payable on delivery." All the other memoranda in the same book were written with a lead pencil. Soon after the purchase was thus completed, the broker informed the defendant of it, but did not give him a copy of the memorandum. The plaintiffs repeatedly tendered the rye to the defendant, according to the terms of the agreement, and he refused to accept and pay for it. They then gave him notice that unless he received and paid for the rye, they would, on a day and place specified, sell the same at public auction and hold him accountable for the deficiency, in case it should sell for less than the price mentioned in the contract and the expenses. On his

refusal to complete the purchase, the property was sold by the plaintiffs at public auction, pursuant to the notice; and the suit was brought by them to recover the difference between the net proceeds of such sale and the contract price. A verdict was taken, subject to the opinion of the court, on a case containing the facts above stated, and which either party was to be at liberty to turn into a special verdict.

On the argument of the case in the supreme court, Mr. Baldwin, one of the counsel of the defendants, among other questions, raised the point, on the authority of Champion v. Plummer, 4 Bos. & P. 252, that a memorandum signed by the seller only was not sufficient; that the plaintiffs were not bound thereby, and if they were not, neither could the defendant be bound.

Platt, J., in delivering the opinion of the court, stated that the only point was whether the memorandum made by John Townsend was a sufficient memorandum of the contract, within the statute of frauds, to bind the defendant; and after expressing an opinion on other questions presented by the case than that raised by Mr. Baldwin as above stated, as to which he said nothing, he came to the conclusion that the memorandum stated with reasonable certainty, every essential part of the agreement, and that the plaintiffs were entitled to judgment.

The case was carried to the court for the correction of errors on a special verdict finding the facts above stated (with two other causes in which the facts, so far as affected the questions involved, were substantially the same), and is reported in 14 Johns. 484, under the title of Executors of Clason v. Merritt; and one of the other cases is by same plaintiffs in error against Baily, and that case is the one particularly referred to in the opinion of the court. In that court the point was raised on the part of Clason's executors, that the agreement was not signed by both parties; and Chancellor Kent, in giving the opinion of the court, said: "Clason's name (that of the purchaser) was inserted in the contract by his authorized agent; and if it were admitted that the name of the other party was not there by their direction, yet the better opinion is that Clason, the party who is sought to be charged, is estopped by his name from saying that the contract was not duly signed within the purview of the statute of frauds, and that it was sufficient if the agreement was signed by the party to be charged," adding: "It appears to me that this is the result of the weight of authority, both in the courts of law and equity;" and after reviewing several cases in both courts sustaining that result, he said: "There was nothing to disturb the strong and united current of authority of those cases, but the observations of Lord Chancellor Redesdale, in Lawrenson v. Butler, 1 Schoales & L. 13, who thought that the contract ought to be mutual to be binding, and that if one party could not enforce it, the other ought not; and said that to decree performance when one party only was bound, would "make the statute really a statute of frauds, for it would enable any person who had procured another to sign an agreement to make it depend on his own will and pleasure whether it should be an agreement or not." He then after remarking that the intrinsic force of the argument, the boldness with which it was applied, and the commanding weight of the very respectable character who used it, caused the courts for a time to pause, but that they had on further consideration resumed their former track, and citing authorities on both sides of the question, added: "I have thought and have often intimated, that the weight of argument was in favor of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding, and that the one party ought not to be at liberty to enforce at his pleasure, an agreement which the other was not entitled to claim. It appears to be settled (Hawkins v. Holmes, 1 P. Wms. 770), that though the plaintiff has signed the agreement, he never can enforce it against the party who has not signed it. The remedy therefore in such case is not mutual. But notwithstanding this objection, it appears from the review of the cases, that the point is too well settled to be now questioned." He then says: "There is a slight variation in the statute respecting agreements concerning the sale of lands, and agreements concerning the sale of chattels, inasmuch as the one section (being the fourth section of the English and the eleventh section of our statute) speaks of the party, and the other section (being the seventeenth of the English and the fifteenth of ours) speaks of the 'parties' to be charged; but I do not find from the cases that this variation has produced any difference in the decisions. The construction as to the point under consideration has been uniformly the same in both cases;" and after the full discussion and consideration of this question he comes to the conclusion that "Clason who signed the agreement, and is the party sought to be charged, is then, according to the authorities, bound by the agreement, and he cannot set up the statute in bar;" adding, "but I do not deem it absolutely necessary to place the cause on this ground, though as the question was raised and discussed, I thought it would be useful to advert to the most material cases, and to trace the doctrine through the course of authority."

He then says that in his opinion "the objection itself is not well founded in point of fact;" and after a reference to the memorandum and its contents, and the facts found by the special verdict, he concludes that the contract was, in judgment of law, reduced to writing and signed by both parties.

Another objection taken by Clason in the

supreme court and by the executors in the court for the correction of errors, to the validity of the contract (not material to the case now under review), was then considered by the learned chancellor, and held to be untenable; and thereupon the judgment of the supreme court was affirmed (two senators dissenting).

It may be important in this connection to advert to the fact that this opinion was delivered in 1817, nearly nine years after what was said by him as chief justice in Bailey v. Ogden, supra, and about three years after the intimations made by him in Parkhurst v. Van Cortlandt, 1 Johns. Ch. 282, and Benedict v. Lynch, Id. 370, to the effect that an agreement concerning lands, to be enforced in equity, should be mutually binding, and to which he probably had reference in that opinion, and as to which he said therein, that it appeared from the view of the cases that the point was too well settled to be then questioned.

Although, in view of the conclusion arrived at by the learned chancellor on the other point (that the contract was, in judgment of law, reduced to writing and signed by both parties), it was not, as he himself stated, absolutely necessary to place the cause on the ground first discussed and considered by him as above mentioned; yet as it was raised by the facts found by the special verdict, on which the supreme court had given judgment, and on the argument in the court for the correction of errors, it was material that it should be considered by him. He remarked, in the commencement of that opinion, that the case struck him on the argument as being plain; but as it may have appeared to other members of the court in a different, or at least in a more serious light, he deemed it proper and necessary to state the reasons for his opinion on both the questions subsequently examined and discussed by him. It, as it appears to me, is a perversion of terms and an entire misconception of the effect and force of the able and elaborate opinion of that learned and distinguished jurist, to characterize or treat it as a mere obiter dictum.

Gardiner, J., in James v. Patten, 6 N. Y. 9, in which it had been claimed by counsel that a case cited on the argument in support of, and indeed decisive of, the question then under review and consideration, might have been decided on other grounds than those stated in the prevailing opinion on that point, said: "We are now gravely informed that it was possible to reverse the judgment upon other grounds. The effect of any decision in a court composed of more than a single judge might in this way be avoided. But when two questions are presented to the appellate court, upon which their decision is asked, both of which are discussed by counsel, and each is considered and determined in the only opinions read in the hearing of the members, the majority must be deemed to acquiesce in the conclusions upon those questions reached in those opinions, unless some one dissents. With a different rule there could be no such thing as the establishment of a principle by the court of last resort, when more than a single point was presented." And Paige, J., said in the same case: "Where several questions arise in a cause and the opinions delivered agree in regard to all of them, and the other members give a silent vote of concurrence, then all the questions will be deemed to have been determined by a majority of the court, and the case will be regarded and respected as an authoritative adjudication of all such questions."

In the case of Executors of Clason v. Baily, supra, the opinion of the chancellor was the only one delivered, and must be held to be an authority of the court of last resort on the very question now presented for our decision and adjudication.

The question again arose in the supreme court in 1829, in Russell v. Nicoll, 3 Wend. 112, 20 Am. Dec. 670, which was an action by the plaintiffs claiming damage for the non-delivery of a quantity of cotton alleged to have been purchased by them of the defendants.

The contract was substantially in all essential particulars like the one in the present case. It was in these words:

"Sold by Daniel Rapalye, for our account, to R. M. and J. Russell five hundred bales of cotton, at sixteen and a half cents per pound. Said cotton was purchased for our account at Huntsville, and is to be delivered, on its arrival at this port from New Orleans, at any time between the present date and the first day of June next, and the amount to be cash on delivery, to be reweighed, and two per cent tare allowed.

"New York, February 9, 1825.

"Francis H. Nicoll & Co."

The plaintiffs were nonsuited on the trial at the circuit, on grounds other than that now under consideration. But on the review of the case by the supreme court, the counsel for the defendants stated that the plaintiffs, if an action had been brought against them on the contract, might have interposed the statute of frauds as a defense, they not having signed any note or memorandum in writing of the bargain; and, the agreement produced being signed only by the defendants, that the plaintiff could not have been holden, and the defendants were not bound, and that, though this objection was not taken at the circuit, the court would not grant a new trial if they perceived that the plaintiffs must be nonsuited on that ground; as to which point the court, by Marcy, J., said, in the commencement of his opinion: "It was insisted on the argument that the contract declared on was within the statute of frauds, and void for

not being reduced to writing and signed as the statute directs. This objection is not sustainable. If the contract be within the statute, it is very clear that the signing by the defendants is a compliance with its requirements. Egerton v. Mathews, 6 East, 307; Saunderson v. Jackson, 2 Bos. & P. 238."

The question was thus distinctly raised and decided in the supreme court, and the decision is a distinct and positive authority thereon. If the objection had been well founded, it would have been decisive against the plaintiffs' right of recovery, and there would have been no necessity to consider the questions raised at the circuit, and which were afterward elaborately discussed in the opinion. Those questions were based on the assumption that the contract was valid and obligatory on the defendants. The circumstance that the question arising on the statute of frauds was not raised at the circuit does not impair, or in the least weaken, the effect of the decision thereon by the supreme court. On the contrary, it shows that the eminent counsel for the defendants did not at that time deem it available and effectual, and they probably presented it in opposing the motion to set aside the nonsuit, on the principle that they would not then fail to present and urge any point on which the nonsuit might be sustained or supported

The next case referred to by the counsel was that of Dykers v. Townsend, 24 N. Y. 57, etc. That was an action to recover damages for the failure of the defendant to receive any pay for one thousand one hundred shares of the capital stock of the New York and Erie Railroad Company, purchased under three several contracts, one of which is set forth in the case, and is in the following form:

"New York, May 2d, 1854.

"I have purchased of Dykers, Alstyne & Co. 500 shares of the New York and Erie Railroad Company at seventy (70) per cent, and deliverable in sixty days, buyer's option, with interest at the rate of six per cent per annum. W. S. Hoyt."

The other two were in the same form, except that one of them was signed by one Brown. It was alleged and proved on the trial that Hoyt and Brown were brokers, and acted as the agents of the defendant in making the contract.

When the plaintiff rested, the defendant moved to dismiss the complaint, on the grounds that the contracts were signed by Brown and Hoyt in their own names, and that the name of the defendant nowhere appeared upon them; that parol evidence could not be introduced to show that the defendant was the person for whose benefit the contracts were made, and that the plaintiffs had not shown any valid contract between themselves; and the defendant took an exception. Proof was then offered of certain facts for the purpose of showing the contract void under the stock-jobbing act, in force at the time of the sale, which was rejected, and the defendant took an exception. The plaintiff recovered a verdict, and judgment thereon was rendered at general term, in the First district, which, on an appeal to this court, was affirmed without any dissent to such affirmance. One of the judges, Selden, J., was absent, and another, James, J., expressed no opinion. That decision, so far as it affects the present question, gives no color for sustaining the judgment in the case now under review. It is true that Judge Hoyt, in giving his opinion for its affirmance, remarked that as an original question, he should have had no hesitation in saying, in a case where the contract was entirely executory on both sides, and no part of the consideration had been paid, that it was necessary that it should be in writing, under the statute, and be signed by both parties thereto, or their agents, in order to be binding upon either; or, in other words, there being no consideration paid, the promise of one party would be the consideration for the promise of the other, and that both must be in writing to charge either; and after referring to the distinction between the section of the statute applicable to that case and section 8, relating to a contract for the sale of land, which he concedes, on the authority of this court, in Worrall v. Munn, 5 N. Y. 244, is only required to be signed by the party by whom the sale is to be made, and after adding that in the case of a contract for the sale of goods, he should say the party to be charged means the vendor upon his contract to sell, and the vendee upon his contract to accept and pay for the goods, he added that this question did not appear to have been directly raised on the trial; if it had been, it might, perhaps, have been obviated by the production of a counterpart of the contract, signed by the plaintiffs, and then said: "As there are several authorities which seemingly, at least, give a different construction to this and similar provisions in the former statute of frauds, I do not propose further to discuss the question at this time." And after a more particular reference to the requirements of the statute, he concludes with the remark: "In this case, a note or memorandum of the contract was made in writing, and signed by the lawful agent of the defendant, and we think that this was sufficient compliance with the statute, according to the settled construction that has been given to it."

The only other case referred to by the respondent's counsel, on this question, was that of Brabin v. Hyde, 32 N. Y. 519, which he says decided that the memorandum must be signed by both parties. This is clearly a mistake.

The action was brought by the plaintiff to recover the possession of a mare and colt, which he claimed as owner, by purchase

from one Milton Blackmer in August, 1857; and which, on the third day of September next thereafter, the defendant took from his possession, under a claim that he owned them under a purchase from the same vendor in the month of July preceding. The plaintiff recovered a verdict, on which judgment was entered. That judgment was reversed by the general term on appeal, and the plaintiff thereupon appealed to this court. The judge on the trial in his charge to the jury, after stating that the defendant had given evidence of a prior bargain, and that it was objected by the plaintiff that the contract under which he claimed ownership was void by the statute of frauds, read and explained the statute, and then charged, "that according to the defendant's narrative of facts, the contract rested solely in words. There was no other evidence of it; there was no delivery of the property or memorandum made, as the contract was narrated by him, nor any payment, nor was the property present at any time, or any thing to save it from the statute of frauds. I advise you that the contract for the purchase of the horse by the defendant, as narrated by himself, is invalid." To which there was an exception. When the case was reviewed by this court, Brown, J., in giving the opinion on the reversal of the order of the general term granting a new trial, referred to the facts detailed in the narrative of the defendant; and from the learned judge's statement of them, it appeared that a part of the price, agreed to be paid by the defendant for the mare and colt, was to be credited on his books when he got to his house, on account of a debt owing and due to him from Blackmer; that he went home and made the entry in his book, giving him credit on the day of the purchase for the amount that was to be so credited. It was an original entry. On his cross-examination, it further appeared that he kept a day-book and a ledger, for the purposes of his business; that the entries to Blackmer's credit were not upon those books, or in any account of his daily transactions; and that all that appeared upon any book was an entry made of the mare and colt upon a blank leaf, on which there were no other entries. It was not claimed that he gave Blackmer any receipt, or discharge for the money for the mare and colt, or that he communicated to him what he had done. There were some additional facts stated, for the purpose of showing a delivery of the mare and colt, which are immaterial to be noticed here, and the learned judge, after the conclusion of his statement of the facts, said: "These are the facts upon which the defendant relied to take the case out of the statute of frauds. There was no delivery of the property to the purchaser, and no memorandum of the sale signed by the parties;" and then, after stating the charge to the jury as above set forth, and making some general remarks on the insufficiency of words merely, and the necessity of acts as evidence of a purpose to part with, or to accept, the ownership of personal property, he said: "There must have occurred one of the three acts mentioned in the statute, or the sale will not be affected. These acts are not to be performed by one party only, they are to be concurred in by both parties to the contract. If the memorandum in writing is relied upon, it must be signed by the parties, not the party, to be charged thereby." He then, after giving his views of what is necessary, when either a delivery of the goods, or a part of them, or the payment of some part of the purchase-money is depended upon as the consummation of the contract, and after the application of his construction of the requirements of that statute to the facts of the case, closes the opinion with this remark: "I think the judge at the circuit, in his charge to the jury, was entirely right;" and thereupon the order of the general term granting a new trial was reversed, and the judgment on the verdict was affirmed.

No other opinion appears to have been given in the case.

It is evident from the opinion and the conclusion arrived at by the learned judge, that there was no question involving the construction of the section of the statute now under consideration. On the contrary, he declares that the judge at the circuit, who had charged the jury, "that according to the defendant's narrative of the facts, the contract rested solely in words," was entirely right. The remark, that it was necessary that a written memorandum in writing of a contract should be signed by both parties to it, was gratuitous; and certainly there is not the least color for saying that this court in that case "decided that the memorandum must be signed by both parties."

I have now examined, with much and perhaps unnecessary particularity, the cases referred to by the counsel to sustain his position that there has been no decision in the court of last resort, and no well-considered one in the other courts, holding it to be unnecessary that the note or memorandum of the contract for the sale of goods should be signed by both parties. That examination shows not only that all of them, except the case of Bailey v. Ogden, 3 Johns. 399, involve the question, and hold that the statute is complied with when the note or memorandum of the contract is signed or subscribed by the party to be charged thereby, but also that the question has been decided after a careful consideration thereof; and in the case of Bailey v. Ogden, supra, the same principle is distinctly and fully recognized by Kent, C. J., as appears by his statements above referred to.

I will add another case, that of Davis v. Shields, 26 Wend. 341, in the court for the correction of errors, decided in 1841, where the question was again raised and considered by Chancellor Walworth and Senator

Verplank. The chancellor, at page 350, said that "the former statute of frauds required the note or memorandum of the agreement to be signed by the parties to be charged thereby, and the courts had not only decided that it was not necessary that it should be signed by both parties, so as to make it legally binding on both, or upon neither, but they had in many cases held that a literal signing of the memorandum by the party who was sought to be charged thereby was not necessary." Senator Verplank, at page 362, said: "A doubt naturally arises whether, under our Revised Statutes, the words to 'be subscribed by the parties to be charged' do not require that the agreement should be from the first binding, by means of an authorized signing, upon all the parties to the bargain;" and, after referring to the case of Clason v. Merritt, which he considered as having settled the question in that court, and stating that the decision was in conformity with numerous prior decisions, as was shown in the opinion of Chancellor Kent in that case, he said: "It seems to me these words must be taken in their fixed and adjudicated sense, according to which it is enough that the agreement be signed, or be authorized to be signed by the party to be charged in the suit;" and adds, "nor is this interpretation without the support of reasons of equity independent of authority. It is within the literal sense of the words used;" and then, after some remarks in support of those views, he concludes: "I adhere then to the old adjudicated meaning of the words retained from the original statute, and consider it sufficient if the memorandum was authorized by the vendors who are now to be charged, although it might not have been originally binding on the vendee."

In that case the question was also presented whether the contract was "subscribed" within the requirements of the Revised Statutes, without being actually signed below or at the end of the memorandum, and it was decided that it was not; and the decision of the supreme court holding to the contrary, as the case is reported in 24 Wend. 324, was reversed.

In addition to the above cases I will cite, as authority sustaining the sufficiency of the signature by the party to be charged, the following: West v. Newton, 1 Duer, 277–283; Woodward v. Harris, 3 Sandf. 272–277; Fenley v. Stewart, 5 Sandf. 101–105. These authorities are in conformity to the decisions on the English statute, which were recognized as authority by Chancellor Kent in Clason v. Baily, 14 Johns. 484, etc. Among those were Saunderson v. Jackson, 2 Bos. & P. 238; Champion v. Plummer, 4 Bos. & P. 252; Egerton v. Matthews, 6 East, 307; Allen v. Bennett, 3 Taunt. 169. In Egerton v. Matthews, the action was brought by the seller against the buyers for not accepting and paying for certain goods, which the defendants had contracted to purchase by the following memorandum in writing: "We agree to give Mr. Egerton nineteen cents per pound for thirty bales of Smyrna cotton, customary allowance cash, three per cent as soon as our certificate is complete." It was dated 2d September, 1803, and was signed by the defendants, the buyers, only. They had before that time become bankrupts, and their certificate was waiting for the lord chancellor's allowance, and after it was allowed, they signed the memorandum again. On the opening of the case upon the trial it was objected that the contract was altogether executory, that no consideration appeared on the face of the writing for the promise, and that there was not any mutuality in the engagement, and therefore that it was void by the statute of frauds. 29 Car. II. c. 3.

The objection prevailed, and the plaintiff was nonsuited; but on a motion to set aside the nonsuit, Lord Ellenborough, C. J., observed that the seventeenth clause of that statute required "some note or memorandum in writing of the bargain signed by the parties to be charged by the contract;" and that this memorandum above quoted was a memorandum of the bargain, or at least so much of it as was sufficient to bind the parties to be charged therewith, and whose signature to it was all that the statute required.

The question again arose in Allen v. Bennett, 3 Taunt. 169. The action was brought by the buyer against the seller for the non-delivery of goods, and was based on certain entries of the sale made by defendant's agent in a book of the plaintiff. The sale was subsequently recognized in a correspondence by the plaintiff with the defendant, but there was no evidence that the plaintiff had signed any contract to bind himself. It was objected on the trial that there was not a sufficient note in writing within the statute of frauds for the sale of the goods, inasmuch as it did not at all appear by the contract who was the buyer; that all that could be gathered from the entries was, that they were contracts entered into by Bennett, to sell goods to persons not named, and who the persons were could not be supplied by oral evidence. There was a verdict for the plaintiff. On a motion to set it aside, the correspondence was held sufficient to connect the parties. It was then objected that the party who had not signed was not bound, as to which Mansfield, C. J., said that the cases of Egerton v. Matthews, Saunderson v. Jackson, and Champion v. Plummer, supra, "suppose a signature by the seller to be sufficient, and every one knows it is the daily practice of the court of chancery to establish contracts signed by one person only; and yet a court of equity can no more dispense with the statute of frauds than a court of law can," and he held that the verdict should be sustained. Heath, J., was of the same opinion, and said there was a case in Strange by which it appeared that a voidable promise was sufficient to sustain a promise.

Lawrence, J., after showing that it was evident that the contract was entered into by the authority of the defendants, said that the objection would quite overturn the cases of Egerton v. Matthews, Saunderson v. Jackson, and Champion v. Plummer, and the statute of frauds clearly supposes the probability of there being a signature by one person only.

Without multiplying cases, I will content myself with quoting the remark of Earl, C. J., in the case of Parton v. Crofts, 16 C. B. (N. S.) 111, E. C. L. 11, where he, after discussing and considering the effect of bought-and-sold notes, in reference to the requirement of the statute of frauds, says: "To satisfy the seventeenth section of the statute, it is enough to produce a memorandum of the contract signed by the party to be charged thereby, or by an agent thereunto duly authorized."

This is recognized as the rule by the elementary writers. Chancellor Kent, in his Commentaries (volume 2, p. 510), says: "The signing of the agreement by one party only is sufficient, provided it be the party sought to be charged. He is estopped by his signature from denying that the contract was validly executed, though the paper be not signed by the other party, who sues for the performance."

Starkie, in his work on Evidence (volume 2, p. 614), says: "It is sufficient if there be a memorandum signed by the defendant, the vendor, although it be not signed by the plaintiff, the vendee, and although it could not have been enforced by the latter." See, also, Comyn, Cont. 123. In view of the numerous decisions, both in this state and in England, it appears to me to be impossible now to hold a different rule by giving a different construction to the statute of frauds.

Assuming then that the memorandum, on which the present action is based, is valid and binding on both parties at common law, and that the statute only requires it to be signed by the party to be charged, it appears to me to follow as a necessary consequence, that the defendants, the vendors, in this case having by their signature in writing given the written evidence to charge them, are liable thereon; and that the nonsuit in the court below was improperly granted.

As however a majority of this court was unable to concur in a judgment on the first argument, it may be proper to refer briefly to the opinion then read in affirmance of the nonsuit, and which has been presented to us on the present argument. It concedes that it is not necessary, under the requirements of the statute of frauds, that the contract should be signed by both parties; and that prior to the statute, it would have been valid and binding upon both of them without being reduced to writing and signed by either. But the learned justice, by whom it was delivered, adds that: "The statute makes the contract void, although reduced to writing, as to the party not subscribing it; and it follows that the void promise of the latter furnished no consideration for the agreement of the party who subscribes it."

This appears to me to be a misconstruction of the statute. That does not define or prescribe what shall be necessary to constitute a contract. On the contrary, it assumes the existence of one that is valid and binding in all respects, and on that assumption declares that it shall be "void," not unlawful but ineffectual, of no binding force to charge any of the parties with a liability thereon who does not subscribe a note or memorandum thereof in writing. It did not affect nor was it intended to affect an oral agreement, otherwise, or to a greater extent, than by the requirement of written evidence of its terms by the signature or subscription of the party who was to be charged with a legal liability thereon. It is true that the party who does not sign or subscribe it may not be liable thereon in an action, as to which I deem it unnecessary to express an opinion; but that fact does not destroy or annul the consideration and terms which form the inducement of the other party to make it obligatory on himself by compliance with all the requirements of the law to make it so. On the contrary, the same consideration continued without being impaired or annulled, and no new or further evidence of it was requisite.

It is too late for him, after executing an agreement conformable in all respects with the requirements of the law, and with the avowed intention to bind and charge himself, for the purpose of avoiding the liability thus voluntarily assumed, to say that the other party thereto cannot be charged thereon, on the sole ground that he himself did not take the precautionary means required by the law to charge such other party, either through neglect or in reliance on his promise to fulfill his part of it without being legally bound thereto.

The object of the statute is attained by protecting a vendor against a liability, founded on oral evidence only of his contract, without relieving him from an obligation clearly assumed and created by a written evidence thereof, the evidence of which under such circumstances, would make the statute the means of perpetrating fraud, as well as a protection against it, and against perjury or subornation of perjury. A construction that leads to such a result is not necessary and is, in my opinion, unwarranted.

The substance of these views is tersely expressed by Parsons in his work on Mercantile Law (page 78), where he, after considering the several clauses of the statute of frauds, says: "The operation of the statute in the clauses we have considered is not to avoid the contract, but only to inhibit and prevent actions from being brought upon it. In other respects it is valid."

Conceding it to be true that the consideration for a promise, as well as the promise itself, must be in writing to give any right of action thereon against a party who has signed it, as was decided in Waine v. Wailters, 5 East, 10, and in Sears v. Brink, 3 Johns. 210, it does by no means follow that when those and the other requisite elements to constitute a valid contract appear, it is also necessary that there should be a mutuality of obligation to give a right of action against either party.

Chancellor Kent, in Executors of Clason v. Baily, 14 Johns. 488, supra, says that although Lord Chancellor Redesdale, in Lawrenson v. Butler, 1 Schoales & L. 13, had expressed the opinion that the contract ought to be mutual to be binding, and that if one party could not enforce it the other ought not, and that he himself had thought, and had often intimated, that the remedy ought to be mutual, yet it appeared from a review of the cases that it had been too well settled to the contrary to be now questioned.

It was subsequently (in 1836) said by Tindal, J., in Laythoarp v. Bryant, 2 Bing. N. C. 735, speaking of the clause of the English statute requiring an agreement for the sale of lands or any interest therein, or a note or memorandum thereof in writing, to be signed by the party to be charged therewith, or some other person thereunto lawfully authorized by him, that the party who has signed the agreement is the party to be charged, and he cannot be subject to any fraud; that there had been some confusion in the argument of the case between the consideration of the agreement and the mutuality of claim; and although it was true that the consideration must appear on the face of the agreement, yet he had found no case nor any reason for saying that it is the signature of both parties that makes the agreement. Vaughn, J., in the same case, said that the argument had proceeded on a fallacy arising out of a misconception of the case of Waine v. Wailters; that the decision therein never turned on the ground that the mutuality of the contract must appear, but only that the note or memorandum must show the consideration, as well as the promise.

An objection of the same nature as that now under consideration was raised in Ballard v. Walker, 3 Johns. Cas. 60, which was an action by the vendee on a written agreement for the sale of land to him, which was signed by the vendor alone, in which the name of the parties and all the terms of sale were stated, as to which Radcliff, J., said: "The first objection, so far as it rests on the want of consideration, appears to me inapplicable to the case. If the contract would be valid, as a contract by parol merely, there would certainly be an ample consideration. The defendant agreed to convey lands to the plaintiff for a stipulated price, and the plaintiff, in consideration of such conveyance, agreed to pay the price to the defendant. Here were mutual and valid considerations. If the agreement was not sufficiently reduced to writing, or signed by the parties, agreeably to the statute of frauds, it is void by force of that statute, but not for want of consideration." He then proceeded to show that the plaintiff could not be deprived of a recovery because it was not signed by the plaintiffs. And Kent, J., said: "This contract is valid so far as a consideration is in question. One agrees to sell, and the other to convey. It is sufficient if the writing be signed by one party only, and accepted by the other. This takes the case out of the statute of frauds."

The objection based on a want of mutuality, was also urged in Re Hunter, 1 Edw. Ch. 1, and overruled by Vice-Chancellor McCown. That decision was recognized and approved in McCrea v. Purmort, 16 Wend. 460; decided in the court for the correction of errors, in 1836, where Cowan, J., said, that the objection that the agreement there in question was void, as being signed by one party only, and thus wanting mutuality, and that it must therefore go for nothing, was fully answered by the learned vice-chancellor in Hunter's Case, supra, and Paige, J., in the case of Worrall v. Munn, 5 N. Y. 229 (decided in this court), said: "A contract, valid within the statute, even if not binding on the party who has not subscribed it, can nevertheless be enforced, either at law or in equity, against the party (if the contract is for the sale of land) by whom the sale is to be made, or (if for the sale of goods) who is to be charged thereby, if subscribed by him. Want of mutuality is no defense to the suit. The vendor, a party to be charged, who has subscribed the contract, is estopped by his signature from denying that the contract was validly executed, although not signed by the other party who sues for the performance;" and added, "it is the constant practice of the court of chancery to compel a specific performance, by a vendor, of a contract for the sale of lands subscribed by him, although the vendee has not bound himself by subscribing the contract. These cases show a clear distinction between a consideration and the mutuality of obligation, and that the former is necessary while the latter is not. See, also, Fenley v. Stewart, 5 Sandf. 101, supra.

The views above expressed show that the defendants had bound themselves by the contract in question to deliver the rifles therein agreed to be delivered, and that there was a good and sufficient consideration for their obligation.

It follows that the judgment of the court below should be reversed, and a new trial ordered, costs to abide the event.

All concur, except INGALLS, J., dissenting.

INGALLS, J. (dissenting). The defendants executed and delivered to the plaintiff

an instrument in writing, of which the following is a copy:

"New York, May 13, 1861.

"We agree to deliver P. S. Justice, one thousand Enfield pattern rifles (with bayonets, no other extras), in New York, at eighteen dollars each, cash upon such delivery; said rifles to be shipped from Liverpool not later than 1st July, and before if possible.

"W. Bailey Lang & Co."

The plaintiff subscribed no agreement or memorandum, paid no money, parted with nothing of value, and assumed no obligation on account of the defendants' promise. The contract remains wholly executory, no part of the rifles having been delivered. The plaintiff instituted this action to recover damages for the failure of the defendants to deliver the rifles. The only question of any importance is, whether the mere subscribing and delivery of the above instrument by the defendants created a legal obligation on their part, which entitles the plaintiff to damages for a failure to deliver the rifles. The counsel for the appellant insists that the mere subscribing and delivery of the said instrument by the defendants constituted a valid and binding obligation on their part, within the provisions of the statute of frauds, and consequently the defendants were liable to respond in damages for a violation of their agreement. The provision of the statute of frauds, which has any application to this case, is as follows: "Every contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, shall be void; unless: 1st. A note or memorandum of such contract be made in writing and be subscribed by the parties to be charged thereby." The instrument in question was subscribed by the defendants; and so far the statute was complied with. But something further was required to constitute it a valid and binding contract; the agreement being wholly executory, it was indispensable that there should be some consideration for the agreement of the defendants, without which it was void. If the defendants had offered the rifles, the plaintiff was at liberty to refuse to receive them, and the defendants would have been wholly without remedy. The statute of frauds, while it declares that a contract for the sale of personal property for the price of $50 or more shall be void, unless there is a note or memorandum subscribed by the party to be charged, does not declare that such note or memorandum so subscribed, is all that is essential to constitute a valid contract. The statute may be complied with in the above particular, and yet the contract be wholly void because there is no consideration to support it. It was not the intention of the legislature, in adopting that statute, to dispense with the necessity of having a consideration to support an agreement, but to require such note or memorandum in addition to such consideration. If there had been a consideration, however slight, for the defendants' promise, they would have been bound, because they complied with the statute so far as the writing was concerned. If the instrument in question had been subscribed by the plaintiff, and had contained a promise on his part to receive the rifles and pay for them, such promise would have been a good consideration for the defendants' undertaking. We are not called upon to examine the numerous cases cited by the counsel, touching the statute of frauds, because most of them have little or no bearing upon the question involved in the disposition of this appeal. In my judgment the case is reduced to one question; whether an executory contract can be enforced when subscribed by one party only, and there is no consideration whatever for such contract. I cannot bring my mind to doubt but that such agreement is wholly void. The judgment of the general term should be affirmed, with costs.

WILKINSON v. HEAVENRICH et al.

(26 N. W. 139, 58 Mich. 574.)

Supreme Court of Michigan. Jan. 6, 1886.

Error to Saginaw.

Wheeler & McKnight, for plaintiff and appellant. Wisner & Draper, for defendants.

CHAMPLIN, J. But one question is involved in this case, and that is as to plaintiff's right to maintain the action. The declaration alleges that on or about the fourteenth day of October, 1882, the defendants entered into a written contract with plaintiff as follows:

"We promise and agree to pay Thomas Wilkinson wages or salary at the rate of $3,500 a year, for three years, from the second day of October, 1882, in consideration of his working for us for that length of time as cutter in our merchant tailoring department in the city of East Saginaw, Michigan. Payments to be made, as earned, in such sums and at such times as he may desire.

"Dated October 14, 1882.

"[Signed] Heavenrich Bros. & Co."

—That he worked for defendants under this contract, and in the business and employment aforesaid, and was always ready and willing to so work and be employed for defendants for the term of three years in said contract mentioned, and so worked until on or about the fifth day of July, 1884, when, without cause and against the wishes and contrary to the will and against the consent of the plaintiff, the defendants wrongfully dismissed and discharged the plaintiff from their employment, and refused to allow the plaintiff to work for them in the employment mentioned in said contract, whereby plaintiff lost the wages and profits and advantages which he would have derived from being continued in said employ, was thrown out of work, and was unable to get any employment for a long space of time, to-wit, for four months. A second count alleges that on the fourteenth day of October, 1882, defendants entered into another contract with plaintiff, and in consideration that plaintiff would work for them promised and agreed to employ the plaintiff for three years as cutter in defendants' merchant tailoring department, and pay him, as such cutter, at the rate of $3,500 each year, as earned, in sums and at times desired by plaintiff; that plaintiff entered upon such employment as cutter and worked until about the fifth day of July, 1884, when he was wrongfully and against his will discharged, etc. The plea was the general issue, with notice that plaintiff did not perform the contract on his part, and for that reason they discharged him.

On the trial, after the introduction of the agreement in evidence, it was admitted that the defendants constituted the firm of Heavenrich Bros. & Co. at the time of the making of the contract that is offered in evidence; that plaintiff was discharged on the seventh day of July, 1884; that the defendants paid the plaintiff in full for his services up to the time of his discharge; that upon the eighth day of July the plaintiff served upon the defendants the following notice:

"Heavenrich Bros. & Co., East Saginaw, Michigan — Gentlemen: I hereby protest against your attempt to cancel our contract. I hold your written agreement for a three-years term of service, from October 2, 1882, That contract I am ready and willing to perform on my part, and I hereby offer to continue, and request you to furnish me employment, under the terms of that arrangement.

"Dated East Saginaw, July 8, 1884.

"[Signed] Thomas Wilkinson."

The plaintiff was sworn in his own behalf, and was cross-examined relating to his performance of the contract on his part; but the scope of his evidence was unimportant, in view of the charge given by the court, which was that there was no mutuality in the agreement, for Mr. Wilkinson was not bound to stay three years, and Heavenrich Bros. & Co. could not be bound to keep him three years, and, for want of such mutuality, the plaintiff could not recover; and he directed a verdict for the defendants.

The conflict of authority upon questions of the kind raised upon this record is truly bewildering, and the cases are incapable of being reconciled with each other; a large and respectable class holding that a contract which the statute of frauds declares shall not be valid unless in writing, and signed by the party to be charged therewith, need only be signed by the party defendant in the suit, and that it is no objection to maintaining such suit, and recovering upon such contract, that the other party did not also sign, and was not bound by its terms. 2 Kent, Comm. 510; 2 Starkie, Ev. 614; Smith's Appeal, 69 Pa. St. 481; Tripp v. Bishop, 56 Pa. St. 428; Perkins v. Hadsell, 50 Ill. 217; Old Colony R. Corp. v. Evans, 72 Mass. 31; Williams v. Robinson, 73 Me. 186. Another and equally respectable class of jurists hold that, unless the party bringing the action is bound by the contract, neither is bound, because of the want of mutuality. Lees v. Whitcomb, 14 E. C. L. 572; Sykes v. Dixon, 36 E. C. L. 366, 9 Adol. & E. 693; Krohn v. Bantz, 68 Ind. 277; Stiles v. McClellan, 6 Colo. 89. And see, also, as bearing upon the question, Hall v. Soule, 11 Mich. 496; Scott v. Bush, 26 Mich. 418; Liddle v. Needham, 39 Mich. 147; McDonald v. Bewick, 51 Mich. 79, 16 N. W. 240. The cases above cited are not intended to be exhaustive on either side of the proposition.

I shall not attempt a reconciliation when reconciliation is impossible; but as the question is new in this state, the court is left to adopt such view as appears to rest upon principle. It is a general principle in the law of contracts, but not without exception, that an agreement entered into between parties competent to contract, in order to be binding, must be mutual; and this is especially

so when the consideration consists of mutual promises. In such cases, if it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality. Hopkins v. Logan, 5 Mees. & W. 241; Dorsey v. Packwood, 12 How. 126; Ewins v. Gordon, 49 N. H. 444; Hoddesdon Gas Co. v. Haselwood, 6 C. B. (N. S.) 239; Souch v. Strawbridge, 2 C. B. 808; Callis v. Bothamly, 7 Wkly. R. 87; Sykes v. Dixon, 9 Adol. & E. 693; Add. Cont. § 18; Pars. Cont. § 449; Railroad Co. v. Brinckerhoff, 21 Wend. 139; Lester v. Jewett, 12 Barb. 502.

Such was the case here. The consideration consisted of mutual promises of the parties, not to be performed within a year from the making thereof. The defendants' promise was in writing, and signed by them; but the plaintiff's promise does not appear in the writing signed by the defendant, nor was any note or memorandum made and signed by him promising to labor for defendants three years or any length of time. Plaintiff was never bound by the agreement. There never was, then, any consderation to support defendants' promises. The agreement was void for want of mutuality. The plaintiff was under no legal obligation to work for defendants a moment longer than he chose, and the defendants were under none to keep him in their employment. The plaintiff could neither revive nor make a contract with defendants after he was discharged by them without their consent and concurrence. The letter written after he was discharged was of no avail.

The judgment is affirmed.

The other justices concurred.

CLASON v. BAILEY et al. SAME v. DENTON et al. SAME v. MERRIT et al.

(14 Johns. 484.)

Court of Errors of New York. March, 1817.

These causes came before this court on writs of error, to the supreme court. The facts in all were, substantially, the same. See Merrit v. Clason, 12 Johns. 102.

Townsend, a broker, was employed by Clason, a merchant, in the city of New York, in February, 1812, to purchase a quantity of rye for him. Townsend applied to Bailey & Voorhees, to know if they had rye for sale; and they agreed to sell him, for Clason, 3,000 bushels of rye, at one dollar per bushel, payable on delivery, and authorized him to make sale thereof to Clason, accordingly. Townsend informed Clason of the quantity of rye he could purchase of Bailey & Voorhees, and the terms of sale, and he was directed by Clason to purchase it. Townsend then went to Bailey & Voorhees and closed the bargain; and thereupon wrote the following memorandum in his memorandum book, in the presence of Bailey & Voorhees: "February 29th, bought for Isaac Clason, of Bailey & Voorhees, three thousand bushels of good merchantable rye, deliverable from the 5th to the 15th of April next, at one dollar per bushel, and payable on delivery." The memorandum was made the 29th of February, 1812, and was written, as well as the other memoranda, in the same book, with a lead pencil. The day after making the bargain, Townsend informed Clason of it; and he gave him a copy of the memorandum, in the latter part of the month of April, but not before. On the 14th of April, 1812, Bailey & Voorhees tendered 3,000 bushels of good merchantable rye to Clason, requesting him to take the same away, and pay for it, according to the terms of the bargain; but Clason refused to accept and pay for it. On the 16th of April, Bailey & Voorhees addressed a letter to Clason, giving him notice, that unless he took the rye and paid for it, in the mean time, it would be sold on the Tuesday following, at public auction, etc., and that they should hold him accountable for whatever deficiency there might be, after charging the original price, charges, &c. Clason neglected to receive and pay for the rye, which was sold pursuant to the notice, at the best price that could be got for it; and the deficiency, after deducting the nett proceeds from the price at which it was purchased by Clason, was $1,150.50 to recover which sum, the suit was brought by Bailey & Voorhees against Clason. There was a special verdict, on which the court below gave judgment for the plaintiffs below, on which the defendant brought a writ of error.

The reasons of the judgment below, were assigned by the chief justice; being the same as delivered by the supreme court, in Merrit v. Clason, 12 Johns. 100.

Mr. Van Beuren, Atty. Gen., for plaintiff in error. S. Jones, Jr., and Mr. Henry, for defendants in error.

THE CHANCELLOR. The case struck me upon the argument as being very plain. But as it may have appeared to other members of the court in a different, or, at least, in a more serious light, I will very briefly state the reasons why I am of opinion, that the judgment of the supreme court ought to be affirmed.

The contract on which the controversy arises, was made in the following manner:

Isaac Clason employed John Townsend to purchase a quantity of rye for him. He, in pursuance of this authority, purchased of Bailey & Voorhees 3,000 bushels, at one dollar per bushel, and at the time of closing the bargain, he wrote a memorandum in his memorandum book, in the presence of Bailey & Voorhees, in these words: "February 29th, bought for Isaac Clason, of Bailey & Voorhees, 3,000 bushels of good merchantable rye, deliverable from the 5th to the 15th of April next, at one dollar per bushel, and payable on delivery."

The terms of the sale and purchase had been previously communicated to Clason, and approved of by him, and yet at the time of delivery, he refused to accept and pay for the rye.

The objection to the contract, on the part of Clason, is that it was not a valid contract within the statute of frauds:

(1) Because the contract was not signed by Bailey & Voorhees.

(2) Because it was written with a lead pencil, instead of pen and ink.

I will examine each of these objections.

It is admitted that Clason signed this contract, by the insertion of his name by his authorized agent, in the body of the memorandum. The counsel for the plaintiff in error do not contend against the position, that this was a sufficient subscription on his part. It is a point settled, that if the name of a party appears in the memorandum, and is applicable to the whole substance of the writing, and is put there by him or by his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom. Saunderson v. Jackson, 2 Bos. & P. 238; Welford v. Beazely, 3 Atk. 503; Stokes v. Moor, cited by Mr. Coxe in a note to 1 P. Wms. 771. Forms are not regarded, and the statute is satisfied if the terms of the contract are in writing, and the names of the contracting parties appear. Clason's name was inserted in the contract, by his authorized agent, and if it were admitted that the name of the other party was not there by their direction, yet the better opinion is, that Clason, the party who is sought to be charged, is estopped, by his name, from saying that the contract was not duly signed within the purview of the statute of frauds;

and that it is sufficient, if the agreement be signed by the party to be charged.

It appears to me, that this is the result of the weight of authority both in the courts of law and equity.

In Ballard v. Walker, 3 Johns. Cas. 60, decided in the supreme court, in 1802, it was held, that a contract to sell land, signed by the vendor only, and accepted by the other party, was binding on the vendor, who was the party there sought to be charged. So in Roget v. Merritt, 2 Caines, 117, an agreement concerning goods, signed by the seller, and accepted by the buyer, was considered a valid agreement, and binding on the party who signed it.

These were decisions here, under both branches of the statute, and the cases in the English courts are to the same effect.

In Saunderson v. Jackson, 2 Bos. & P. 238, the suit was against the seller, for not delivering goods according to a memorandum signed by him only, and judgment was given for the plaintiff, notwithstanding the objection that this was not a sufficient note within the statute. In Champion v. Plumer, 4 Bos. & P. 252, the suit was against the seller, who alone had signed the agreement. No objection was made that it was not signed by both parties, but the memorandum was held defective, because the name of the buyer was not mentioned at all, and consequently there was no certainty in the writing. Again, in Egerton v. Matthews, 6 East, 307, the suit was on a memorandum for the purchase of goods, signed only by the defendant, who was the buyer, and it was held a good agreement within the statute. Lastly, in Allen v. Bennet, 3 Taunt. 169, the seller was sued for the non-delivery of goods, in pursuance of an agreement signed by him only, and judgment was rendered for the plaintiff. In that case, Chief Justice Mansfield made the observation, that "the cases of Egerton v. Matthews, Saunderson v. Jackson, and Champion v. Plumer, suppose a signature by the seller to be sufficient; and every one knows it is the daily practice of the court of chancery, to establish contracts signed by one person only, and yet a court of equity can no more dispense with the statute of frauds than a court of law can." So Lawrence, J., observed, that "the statute clearly supposes the probability of there being a signature by one person only."

If we pass from the decisions at law to the courts of equity, we meet with the same uniform construction. Indeed, Lord Eldon has said (18 Ves. 183) that chancery professes to follow courts of law, in the construction of the statute of frauds.

In Hatton v. Gray, 2 Ch. Cas. 164, 1 Eq. Cas. Abr. 21, pl. 10, the purchaser of land signed the agreement, and not the other party, and yet the agreement was held by Lord Keeper North to be binding on him, and this too, on a bill for a specific performance. So in Coleman v. Upcol, 5 Vin. Abr. 527, pl. 17, the Lord Keeper Wright held, that an agreement concerning lands was within the statute, if signed by the party to be charged, and that there was no need of its being signed by both parties, as the plaintiff, by his bill for a specific performance, had submitted to perform what was required on his part to be performed.

Lord Hardwicke repeatedly adopted the same language. In Buckhouse v. Crosby, 2 Eq. Cas. Abr. 32, pl. 44, he said, he had often known the objection taken, that a mutual contract in writing, signed by both parties, ought to appear, but that the objection had as often been overruled; and in Welford v. Beazely, 3 Atk. 503, he said, there were cases where writing a letter, setting forth the terms of an agreement, was held a signing within the statute; and in Owen v. Davies, 1 Ves. Sr. 82, an agreement to sell land, signed by the defendant only, was held binding.

The modern cases are equally explicit. In Cotton v. Lee, before the lords commissioners, in 1770, which is cited in 2 Brown, Ch. 564, it was deemed sufficient, that the party to be charged had signed the agreement. So in Seton v. Slade, 7 Ves. 275, Lord Eldon, on a bill for a specific performance, against the buyer of land, said, that the agreement being signed by the defendant only, made him, within the statute, a party to be charged. The case of Fowle v. Freeman, 9 Ves. 351, was an express decision of the master of the rolls, on the very point, that an agreement to sell lands, signed by the vendor only, was binding.

There is nothing to disturb this strong and united current of authority, but the observations of Lord Chancellor Redesdale, in Lawrenson v. Butler, 1 Schoales & L. 13, who thought that the contract ought to be mutual, to be binding, and that if one party could not enforce it, the other ought not. To decree performance, when one party only was bound, would "make the statute really a statute of frauds, for it would enable any person who had procured another to sign an agreement, to make it depend on his own will and pleasure whether it should be an agreement or not." The intrinsic force of this argument, the boldness with which it was applied, and the commanding weight of the very respectable character who used it, caused the courts, for a time, to pause. Lord Eldon, in 11 Ves. 592, out of respect to this opinion, waived, in that case, the discussion of the point; but the courts have, on further consideration, resumed their former tract. In Western v. Russell, 3 Ves. & B. 192, the master of the rolls declared he was hardly at liberty, notwithstanding the considerable doubt thrown upon the point by Lord Redesdale, to refuse a specific performance of a contract to sell land, upon the ground that there was no agreement signed by the party seeking a performance: and in Ormond v. Anderson, 2 Ball & B. 370, the present lord chancellor of Ireland (and whose authority, if we may judge from the ability

of his decisions, is not far short of that of his predecessor), has not felt himself authorized to follow the opinion of Lord Redesdale. "I am well aware," he observes, "that a doubt has been entertained, by a judge of this court, of very high authority, whether courts of equity would specifically execute an agreement where one party only was bound; but there exists no provision in the statute of frauds to prevent the execution of such an agreement." He then cites, with approbation, what was said by Sir J. Mansfield, in Allen v. Bennet.

I have thought, and have often intimated, that the weight of argument was in favour of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding, and that the one party ought not to be at liberty to enforce, at his pleasure, an agreement which the other was not entitled to claim. It appears to be settled (Hawkins v. Holmes, 1 P. Wms. 770), that though the plaintiff has signed the agreement, he never can enforce it against the party who has not signed it. The remedy, therefore, in such case, is not mutual. But, notwithstanding this objection, it appears from the review of the cases, that the point is too well settled to be now questioned.

There is a slight variation in the statute respecting agreements concerning the sale of lands, and agreements concerning the sale of chattels, in as much as the one section (being the fourth section of the English, and the eleventh section of our statute,) speaks of the party, and the other section (being the seventeenth of the English, and the fifteenth of ours,) speaks of the parties to be charged. But I do not find from the cases that this variation has produced any difference in the decisions. The construction, as to the point under consideration, has been uniformly the same in both cases.

Clason, who signed the agreement, and is the party sought to be charged, is then, according to the authorities, bound by the agreement, and he cannot set up the statute in bar. But I do not deem it absolutely necessary to place the cause on this ground, though as the question was raised and discussed, I thought it would be useful to advert to the most material cases, and to trace the doctrine through the course of authority. In my opinion, the objection itself is not well founded in point of fact.

The names of Bailey & Voorhees are as much in the memorandum as that of Clason. The words are, "Bought for Isaac Clason, of Bailey & Voorhees, 3,000 bushels," &c.; and how came their names to be inserted? Most undoubtedly they were inserted by their direction and consent, and so it appears by the special verdict. The jury find, that when the bargain was closed, Townsend, the agent of Clason, did, at the time, and in their presence, write the memorandum; and if so, were not their names inserted by their consent? Was not Townsend their agent for that purpose? If they had not assented to the memorandum, they should have spoken. But they did assent, for the memorandum was made to reduce the bargain to writing in their presence, at the time it was closed. It was, therefore, as much their memorandum as if they had written it themselves. Townsend was, so far, the acknowledged agent of both parties. The auctioneer who takes down the name of the buyer, when he bids, is quoad hoc his agent. Emmerson v. Heelis, 2 Taunt. 38. The contract was, then, in judgment of law, reduced to writing, and signed by both parties, and it appears to me to be as unjust as it is illegal, for Clason, or his representatives, to get rid of so fair a bargain, on so groundless a pretext.

2. The remaining objection is, that the memorandum was made with a lead pencil.

The statute requires a writing. It does not undertake to define with what instrument, or with what material the contract shall be written. It only requires it to be in writing, and signed, &c.; the verdict here finds that the memorandum was written, but it proceeds further, and tells us with what instrument it was written, viz. with a lead pencil. But what have we to do with the kind of instrument which the parties employed, when we find all that the statute required, viz. a memorandum of the contract in writing, together with the names of the parties?

To write is to express our ideas by letters visible to the eye. The mode or manner of impressing those letters is no part of the substance or definition of writing. A pencil is an instrument with which we write without ink. The ancients understood alphabetic writing as well as we do, but it is certain that the use of paper, pen, and ink, was, for a long time, unknown to them. In the days of Job they wrote upon lead with an iron pen. The ancients used to write upon hard substances, as stones, metals, ivory, wood, &c. with a style or iron instrument. The next improvement was writing upon waxed tables; until, at last, paper and parchment were adopted; when the use of the calamus or reed was introduced. The common law has gone so far to regulate writings, as to make it necessary that a deed should be written on paper or parchment, and not on wood or stone. This was for the sake of durability and safety; and this is all the regulation that the law has prescribed. The instrument, or the material by which letters were to be impressed on paper or parchment, has never yet been defined. This has been left to be governed by public convenience and usage; and as far as questions have arisen on this subject, the courts have, with great latitude and liberality, left the parties to their own discretion. It has, accordingly, been admitted (2 Bl. Comm. 297; 2 Bos. & P. 238; 3 Esp. 180), that printing was writing, within the statute, and (2 Brown, Ch. 585) that stamping was equivalent to signing, and (8 Ves. 175) that making a mark

was subscribing within the act. I do not find any case in the courts of common law in which the very point now before us has been decided, viz. whether writing with a lead pencil was sufficient; but there are several cases in which such writings were produced, and no objection taken. The courts have impliedly admitted that writing with such an instrument, without the use of any liquid, was valid. Thus in a case in Comyn (page 451), the counsel cited the case of Loveday v. Claridge, in 1730, where Loveday, intending to make his will, pulled a paper out of his pocket, wrote some things down with ink, and some with a pencil, and it was held a good will. But we have a more full and authentic authority in a late case decided at doctors commons (Rymes v. Clarkson, 1 Phillim. Ecc. Judgm. 22), where the very question arose on the validity of a codicil written with a pencil. It was a point over which the prerogative court had complete jurisdiction, and one objection taken to the codicil was the material with which it was written, but it was contended, on the other side, that a man might write his will with any material he pleased, quocunque modo velit, quocunque modo possit, and it was ruled by Sir John Nicholl, that a will or codicil written in pencil was valid in law.

The statute of frauds, in respect to such contracts as the one before us, did not require any formal and solemn instrument. It only required a note or memorandum, which imports an informal writing done on the spot, in the moment and hurry and tumult of commercial business. A lead pencil is generally the most accessible and convenient instrument of writing, on such occasions, and I see no good reason why we should wish to put an interdict on all memoranda written with a pencil. I am persuaded it would be attended with much inconvenience, and afford more opportunities and temptation to parties to break faith with each other, than by allowing the writing with a pencil to stand. It is no doubt very much in use. The courts have frequently seen such papers before them, and have always assumed them to be valid. This is a sanction not to be disregarded.

I am, accordingly, of opinion that the judgment of the supreme court ought to be affirmed.

This was the opinion of the court, ELMENDORF and LIVINGSTON, Senators, dissenting.

It was thereupon ordered, adjudged, and decreed, that the judgment of the supreme court be, in all things, affirmed, and that the defendants recover from the plaintiffs their double costs, to be taxed, and that the record be remitted, etc. Judgment affirmed.

TOWNSEND v. HARGRAVES.

(118 Mass. 325.)

Supreme Judicial Court of Massachusetts. Suffolk. Sept. 17, 1875.

M. Storey, for plaintiff. F. A. Brooks, for defendant.

COLT, J. The plaintiff relied on an oral contract of sale to the defendant of a quantity of wool in bales then in Boston, and held in store by one Williams. The sale was by sample at the invoice weight for a given price per pound, and the bales were specifically designated and appropriated by the terms of the contract.

At the time of the great fire of November 9, 1872, a part of the wool had been sent to the railroad station in Boston, and was either there or at the defendant's mill in Maine, or in transit to the mill, and a part remained and was burned in the storehouse of Williams. The defendant denies his liability for the wool burned.

He contends, first, that the contract was not a completed contract of sale, because something connected with the shipment or delivery of the wool remained to be done by the plaintiff. But the instructions upon this point were sufficiently favorable to the defendant, and upon evidence which, though conflicting, was sufficient to warrant the finding. The jury must have found that nothing remained to be done on the part of the seller in the way of ascertaining, appropriating or delivering the property. It is well settled that by such a contract, independently of the statute of frauds, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. Morse v. Sherman, 106 Mass. 430; Foster v. Ropes, 111 Mass. 10; Haskins v. Warren, 115 Mass. 514; Goddard v. Binney, Id. 450.

The defendant next relies upon the statute of frauds set up in his answer, and contends that there was no acceptance or receipt of any part of the wool sufficient to take the case out of its provisions as to the part burned.

There was, however, evidence which justified the jury in finding that the storekeeper, Williams, after being notified of the sale by both parties, and of the fact that the property belonged to the defendant, undertook at his request to deal with and hold it for him. Such an arrangement the jury may have found constituted a sufficient acceptance and receipt to make the contract "good and valid." It is well settled that the warehouseman in such case becomes the agent of the buyer and holds possession for his principal. Cushing v. Breed, 14 Allen, 376; Boardman v. Spooner, 13 Allen, 353; Hatch v. Bayley, 12 Cush. 27; Browne, St. Frauds, § 318. But the evidence upon this point was conflicting, and some of it tended to prove that there was no acceptance of the wool or any part of it through the agency of Williams, or until after the fire. It cannot be certainly known that the verdict was not founded upon an acceptance by the defendant at his mill in Maine, after the fire, of a part of the wool which had been sent on by railroad.

The instructions given by the court applicable to this aspect of the case were not excepted to, and are not reported. It is to be presumed that they were apt and sufficient, unless the specific instructions requested by the defendant should have been given in whole or in part; and that is the remaining question.

The first two instructions requested were designed to support the statute defence, by avoiding the legal effect of the alleged acceptance, at the mill, of part of the wool. The acceptance referred to is that which the statute requires to give validity to the contract. It must be with intention to perform the whole contract and assert the buyer's ownership under it, but it is sufficient if it be of part of the goods only. Such an acceptance implies the existence of a completed contract, sufficient to pass the title, which is not to be confounded with that actual transfer of possession necessary to defeat the vendor's lien or his right of stoppage in transitu, or to show an actual receipt under the statute. Morse v. Sherman, supra; Browne, St. Frauds, § 317.

The first request in all its parts is to be taken together and treated as one; the proposition that delivery of part to the Eastern Railroad Company would not satisfy the statute of frauds, even as to that part, being preliminary only, and for the purpose of leading up to the main proposition in regard to the subsequent acceptance of such part.

The judge properly declined to rule that an acceptance, as thus defined, of part of the wool would not operate to take the contract out of the statute, as to the part which the plaintiff had not sent, although by the terms of the contract the seller was to ship it all by railroad at the defendant's expense.

In the second request the judge was asked distinctly to rule that an acceptance of part of the wool would not operate upon the contract to render it valid retrospectively, or make the defendant liable to pay for that which had been destroyed by fire. This presents the question whether the date of the acceptance or the date of the agreement will be treated, as between the parties, as the time when the contract was made, and the risk of loss of the goods was cast on the buyer. No direct adjudication of this precise point is cited, if we accept a New York case in which it seems to be held, in a per curiam opinion, that a loss which happens after the original agreement and before the acceptance required by the statute, must fall on the purchaser. Vincent v. Germond, 11 Johns. 283.

The decision of it depends upon the construction to be given to that part of the statute applicable to sales of personal property,

which is incorporated in Gen. St. c. 105, § 5, and follows, with slight variation, the words of the seventeenth section of the English statute.

The purpose of this celebrated enactment, as declared in the preamble and gathered from all its provisions, is to prevent fraud and falsehood, by requiring a party, who seeks to enforce an oral contract in court, to produce, as additional evidence, some written memorandum signed by the party sought to be charged, or proof of some act confirmatory of the contract relied on. It does not prohibit such contract. It does not declare that it shall be void or illegal, unless certain formalities are observed. If executed, the effect of its performance on the rights of the parties is not changed, and the consideration may be recovered. Stone v. Dennison, 13 Pick. 1; Basford v. Pearson, 9 Allen, 387; Nutting v. Dickinson, 8 Allen, 540. The memorandum required is the memorandum of only one of the parties. The alternative acts of the seventeenth section proceed from one only. They presuppose a contract, and are in affirmance or partial execution of it. They are not essential to its existence, need not be contemporaneous, and are not prescribed elements in its formation. It is declared in the fourth section that no action shall be brought upon the promises therein named, unless some memorandum of the agreement shall be in writing; and in the seventeenth that no contract for the sale of goods "shall be allowed to be good," or, as in our statute, "shall be good and valid," unless the buyer accepts and receives part or gives earnest, or there is some memorandum signed by the parties to be charged, or, as in our statute, by the party to be charged. It is true there is difference in phraseology in these sections; but in view of the policy of the enactment, and the necessity of giving consistency to all its parts, this difference cannot be held to change the force and effect of the two sections. "Allowed to be good" means good for the purpose of a recovery under it; and the clause in the last part of the latter section, which requires the memorandum to be signed by the party or parties to be charged, implies that the validity intended is that which will support an action on the contract. We find no case in which it is distinctly and authoritatively held otherwise. See Leroux v. Brown, 12 C. B. 801; Carrington v. Roots, 2 Mees. & W. 248; Reade v. Lamb, 6 Exch. 130; Browne, St. Frauds. §§ 115, 136. With reference to the change in our statute by the use of the words "good and valid," which first appears in Rev. St. c. 74, § 4, it is enough to say that the provincial statute of 1692, c. 15, § 7, and St. 1788, c. 16, § 2, follow the precise words of the English statute; and the commissioners on the Revised Statutes, in their report (page 107) declare that they intend to retain the well-known and familiar phraseology of the old statute, which has received judicial construction. Tisdale v. Harris, 20 Pick. 9, 12. It is apparent that the legislature of this state did not intend to change the meaning of the original provision.

In carrying out its purpose, the statute only affects the modes of proof as to all contracts within it. If a memorandum or proof of any of the alternative requirements peculiar to the seventeenth section be furnished, if acceptance and actual receipt of part be shown, then the oral contract, as proved by the other evidence, is established with all the consequences which the common law attaches to it. If it be a completed contract according to common-law rules, then, as between the parties at least, the property vests in the purchaser, and a right to the price in the seller, as soon as it is made, subject only to the seller's lien and right of stoppage in transitu.

Many points decided in the modern cases support by the strongest implication the construction here given. Thus, if one party has signed the memorandum, the contract can be enforced against him, though not against the other,—showing that the promise of the other is not wholly void, because it affords a good and valid consideration to support the promise which by reason of the memorandum may be enforced. Reuss v. Picksley, L. R. 1 Exch. 342.

The memorandum is sufficient if it be only a letter written by the party to his own agent, or an entry or record in his own books, or even if it contain an express repudiation of the contract. And this because it is evidence of, but does not go to make, the contract. Gibson v. Holland, L. R. 1 C. P. 1; Buxton v. Rust, L. R. 7 Exch. 1, 279; Allen v. Bennet, 3 Taunt. 169; Tufts v. Mining Co., 14 Allen, 407; Argus Co. v. Albany, 55 N. Y. 495.

A creditor, receiving payment from his debtor, without any direction as to its application, may apply it to a debt upon which no action can be maintained under the statute. Haynes v. Nice, 100 Mass. 327.

The contract is treated as a subsisting valid contract when it comes in question between other parties for purposes other than a recovery upon it. Hence the statute cannot be used to charge a trustee, who may set up against his debt to the principal defendant a verbal promise within the statute to pay the defendant's debt to another for a greater amount. Cahill v. Bigelow, 18 Pick. 369. And a guarantor may recover of his principal a debt paid upon an unwritten guaranty. Beal v. Brown, 13 Allen, 114.

On the ground that the statute affects the remedy and not the validity of the contract, it has been held that an oral contract, good by the law of the place where made, will not be enforced in the courts of a country where the statute prevails. Leroux v. Brown, 12 C. B. 801. The defendant may always waive its protection, and the court will not interpose the defence. Middlesex Co. v. Osgood, 4 Gray, 447. And, except that the statute provides that no action shall be brought, there would

be no good reason to hold that a memorandum signed, or an act of acceptance proved, at any time before the trial would not be sufficient. Bill v. Bament, 9 Mees. & W. 36; Tisdale v. Harris, 20 Pick. 9.

In a recent case in the queen's bench, a memorandum in writing made by the defendant, after the goods had been delivered to a carrier and been totally lost at sea while in his hands, was held sufficient to take the case out of the statute, and no notice is taken of the fact that the goods were not in existence when the memorandum was furnished. Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140.

In the case of Marsh v. Hyde, 3 Gray, 331, relied on by the defendant, although there are some inconsistent expressions in the opinion, the general course of reasoning supports this result. The facts in that case showed a completed sale by oral agreement, with an acceptance and receipt of part, which was held, although subsequent in point of time to the original contract, to take the case out of the statute. The point decided is not in conflict with the law here stated.

The case of Stockdale v. Dunlop, 6 Mees. & W. 224, also fails to sustain the defendant's case. That was a sale of goods "to arrive," and it was expressly found that by the use of this mercantile term, if the property or the vessel named did not arrive, the buyer would have no right to the goods, and so no present insurable interest in them.

It follows that it would have been erroneous to have given the instructions requested. Upon the point closely allied, namely, what effect, if any, the defendant's mistake or ignorance of a material fact, such as the destruction ofthe rest of the wool, would have on the alleged act of acceptance, we are not required by the terms of the request to pass.

The third and last request was also properly refused for the reasons above given. If the property in the wool passed by the terms of the original agreement, and the contract was taken out of the statute by the subsequent acceptance and receipt, then, as we have seen, as between the parties, the risk of loss was on the defendant at the time of the fire, and the plaintiff may recover the agreed price of the whole.

Exceptions overruled.

WHEELER v. REYNOLDS.

(66 N. Y. 227.)

Court of Appeals of New York. May 23, 1876.

Action for specific performance of a parol agreement in reference to lands. The facts appear in the opinion. Judgment for plaintiff.

John Van Voorhis, for appellant.

The agreement claimed by plaintiff was void by the statute of frauds. 2 Rev. St. (Edm. Ed.) 139, § 6; Lathrop v. Hoyt, 7 Barb. 59; Levy v. Brush, 45 N. Y. 589; Sturtevant v. Sturtevant, 20 N. Y. 39; 2 Story Eq. Jur. 61, § 1201; Getman v. Getman, 1 Barb. Ch. 499.

Geo. H. Humphrey, for respondent.

Equity will not allow defendant to retain the property obtained on the faith of the oral contract without performing the same on his part. Ryan v. Dox, 34 N. Y. 307; Church v. Kidd, 3 Hun, 254. This case was not within the statute of frauds. 2 Rev. St. (Edm. Ed.) 139; 2 Story, Eq. § 759; 34 N. Y. 311; Stoddard v. Whiting, 46 N. Y. 627; Dodge v. Wellman, 43 How. Prac. 427.

EARL, J. In 1855 the plaintiff was the owner in fee of the lands described in the complaint, and then executed to the defendant a mortgage upon the lands, which is also described in the complaint. In April, 1865, the plaintiff had become insolvent, and the mortgage remained unpaid, and he was unable to pay it. At that time the plaintiff claims a parol agreement was made as to the foreclosure of the mortgage, which he seeks to enforce in this action. No one was present when the agreement was made except the parties, and they are the only witnesses thereto. The defendant, as a witness, denied the agreement. The plaintiff, as a witness, stated the agreement as follows: That he went to the defendant and stated to him that he would like to have him foreclose the mortgage and bid in the land at the sale, and then sell the land or hold it to such time until they could sell it for what it was worth; that he would do what he could toward selling the land and that defendant should do the same; and that when the land was sold he should take out the amount due upon his mortgage, and his costs and expenses, and pay the balance to the plaintiff. This was the whole agreement as proved by the plaintiff. It was not agreed that plaintiff should not attend the sale, or that he should prevent others from attending. The judge who tried the cause found that this agreement was made, and also found that it was made by the defendant upon the consideration that the plaintiff would not attend the sale or procure others to bid against the defendant at the sale. There was no proof whatever of such a consideration. The learned judge probably inferred it from all the facts of the case. It would doubtless have defeated the agreement if plaintiff had attended at the sale and bid, or if he had procured others to bid; and yet it could not be said that in either event he would have violated his agreement. The alleged agreement was wholly for his benefit, and if he had before the day of sale obtained the money to bid in the land, and thus enabled the defendant to realize all that was due him, there would have been no ground of complaint on the part of the defendant, and no breach of faith on the part of the plaintiff; so if the plaintiff had procured other parties to bid sufficiently, the substantial purpose of the agreement would have been accomplished. The plaintiff therefore gave up no right which he possessed, and the defendant, by virtue of the agreement, could receive no more than his due, and obtained no right which he did not before have. The judge found that in pursuance of this agreement the defendant proceeded to foreclose his mortgage. There was however no proof that he foreclosed it in pursuance of the agreement. The defendant testified that he did not. Nothing was said at the sale about the agreement; and there was no act of either party indicating that the foreclosure was in pursuance of the agreement. Nothing was done at the sale by the defendant to prevent competition; and one or more other parties did bid. There was no proof or finding that plaintiff omitted to attend the sale, or to procure others to attend, in reliance upon the agreement, or that the plaintiff, but for the agreement, could or would have bid off the property, or procured some one else to do so for him. The defendant bid off the property for $800, but the amount due him upon his judgment in foreclosure, including costs and expenses of sale, was about $1,800, which was substantially all the land was worth. There was no allegation in the complaint, nor proof upon the trial of any fraud practiced by the defendant upon the plaintiff in making the agreement, or in the foreclosure of the mortgage and the sale of the land. The defendant, after the sale, took possession of the land under his deed, and retained it, and paid the taxes and received the rents, and this suit was not commenced until nearly nine years after the sale, when the land had greatly increased in value. If under such circumstances this alleged parol agreement can be enforced, our statute in reference to fraudulent conveyances and contracts, relative to lands will, in large part, be nullified.

It must be conceded that the parol agreement was of itself absolutely void and conferred no rights and imposed no obligations upon any one. But one ground upon which it is sought to maintain this action is that the agreement was partly performed so as to take it out of the statute of frauds. 2 Rev. St. 135, §§ 6, 10. To have such effect the part performance must be substantial, and nothing will be considered as part performance which

does not put the party into a situation which is a fraud upon him unless the agreement be fully performed; and the acts of part performance should clearly appear to be done solely with a view to the agreement being performed. Generally if they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance of the agreement. The acts should be so clear, certain and definite in their object and design as to refer exclusively to a complete and perfect agreement, of which they are a part execution. 2 Story, Eq. Jur. §§ 761, 762; Phillips v. Thompson, 1 Johns. Ch. 131; Byrne v. Romaine, 2 Edw. Ch. 445; Jervis v. Smith, Hoff. Ch. 470; Wolfe v. Frost, 4 Sandf. Ch. 77. The object of the statute is to prevent frauds and perjuries, and hence courts of equity will take no notice of agreements depending upon parol evidence and otherwise within the statute, unless there are acts of part performance which go along with, relate to, and confirm the agreement, and which were clearly done in part execution thereof, and thus with the parol evidence established the existence of the agreement. Now, what have we in this case? Every act done by the defendant was such as he had a perfect right to do by virtue of his mortgage and his deed upon the foreclosure sale, and apparently had no reference whatever to any agreement with the plaintiff. There was no act of the plaintiff which could be referred exclusively to the agreement. The only act of part performance pretended is that the plaintiff did not attend the sale and bid. But his absence from the sale was just as consistent with other circumstances. He was insolvent and unable to pay the mortgage; and the amount due thereon, with the costs and expenses of sale, was equal to the value of the land. Hence he could have had little motive to attend the sale, of which public notice was given, as required by the statute. To hold that his mere omission to attend the sale under such circumstances was a part performance would be an application of the equity rule upon the subject wholly unauthorized by the best authorities.

The court at general term affirmed the judgment upon the authority of the case of Ryan v. Dox, 34 N. Y. 307. That case is quite unlike this in its essential features. There there was a sale under a foreclosure judgment, and the plaintiffs, the owners of the land, procured the defendant to bid off the same under a parol agreement that he would attend the sale and bid off the land for their benefit and advantage, and take the deed as his security for the amount paid by him, they agreeing that they would not find any other person to attend the sale and bid for them. He was to hold the deed as his security, and whenever the plaintiffs repaid him the amount paid at the sale, together with interest and a reasonable compensation for his services, he was to convey the land to them. In pursuance of the agreement he attended the sale and bid off the land for $100, which was then worth $4,000. The others present at the sale were informed of the agreement, and therefore abstained from bidding. If plaintiffs had not relied upon the agreement, they would not have allowed the land to have been struck off for the sum of $100, but could have found other persons to have purchased the land, and thus would have saved the same from sacrifice. They relied upon the agreement, and made no other effort to procure the money or the assistance of friends to save and buy the land. They continued in the possession of the land after the sale for six years, and during all that time had the use of the land with the knowledge and consent of the defendants, and they paid the taxes thereon and made payments on account of incumbrances thereon. After the plaintiffs had been in possession of the land for six years the defendant obtained the possession, and then repudiated the agreement and denied plaintiffs' rights. The plaintiffs brought the action to enforce the agreement, and they were defeated in the supreme court; but this court reversed the judgment on the ground that there was sufficient part performance of the contract to take it out of the statute. Levy v. Brush, 45 N. Y. 589, 596. There the acts of part performance were clearly referable to the agreement, and were done in reliance thereon, and in part execution thereof, and the equity rule as to part performance, as above laid down, was fully satisfied.

But it is uncertain from the complaint and the findings of the judge upon what ground relief was granted to the plaintiff in this action, whether upon the ground of specific performance of a parol contract partly performed, or upon the ground that a trust had been created by the agreement of the parties and the circumstances of the case which the defendant was bound to execute. We must therefore further inquire whether there was any trust which could properly be enforced. Parol trusts in lands are condemned by the statute (2 Rev. St. 135, § 6), and no mere parol agreement creating them will ever be enforced in equity. Sturtevant v. Sturtevant, 20 N. Y. 39. They are sometimes enforced where there is an element of fraud in the case, as where the parol agreement is obtained as part of a scheme of fraud, or when by a parol agreement, a person is fraudulently deprived of his valuable rights or his property; and in such case a court of equity does not intervene to uphold or enforce the parol trust, but to relieve against the fraud which has been perpetrated by raising an implied trust; and it will treat the person who perpetrated the fraud as a trustee, not by virtue of the parol agreement, but as a trustee ex maleficio on account of the fraud. The mere refusal to perform a parol agreement void under the statute may be a moral wrong, but it is in no sense a fraud in law or equity. Levy v. Brush, supra. Here

there was no allegation or finding of any fraud, and hence if this agreement should be treated as an attempt to create a parol trust, it could not be upheld or enforced. In Brown v. Lynch, 1 Paige, 147; Cox v. Cox, 5 Rich. Eq. 365; Keith v. Purvis, 4 Dess. 114; Peebles v. Reading, 8 Serg. & R. 492; Trapnall v. Brown, 19 Ark. 49,—there was fraud which enabled the courts to enforce parol trusts. In Levy v. Brush, a verbal agreement was entered into between the plaintiff and defendant by which the latter agreed to bid off in his own name and enter into a contract for the purchase of land, and pay from his own funds the necessary amount for that purpose, for the joint benefit of both; the plaintiff was to re-imburse one-half of the money so paid, the deed to be taken in the name of both; and it was held, the defendant having bid off the land in his name and taken a contract thereof, but having refused to convey one-half of the contract to the plaintiff, that no action would lie to compel the execution of the agreement. There was much ground for saying there as here that the plaintiff relied upon the agreement, so far that he did not himself bid or make arrangements with other parties for bidding, and yet it was held that it was not a case for the enforcement of the agreement either upon the ground of part performance or of a parol trust repudiated by the trustee in wrong of the plaintiff. If one employs another by parol to buy land for him with his own money, and the latter buys the land and takes the deed to himself and refuses the former any right therein, the former cannot compel a conveyance to him, even by showing that but for his reliance upon the fidelity of his agent he would have purchased in person or through some other agent. Smith v. Burnham, 3 Sumn. 435, Fed. Cas. No. 13,019; 2 Story, Eq. Jur. 1201a. In Kellum v. Smith, 33 Pa. St. 158, it was held that a promise to purchase real estate at a sheriff's sale and to convey it to the defendant in the execution whenever he should repay to the purchaserers their advances to him, does not raise a resulting trust in favor of the defendant. Strong, J., says: "A resulting trust cannot be created in such a way. Such a trust can arise only from the payment of the purchase-money or from fraud in the purchase; fraud perpetrated by the grantee. Here the purchase-money of the sheriff's sale was paid Bell & Co. and consequently the beneficial interest as well as the legal estate went to them. Had there been fraud in the purchase they might have been held trustees ex maleficio. But the fraud which will convert the purchaser at a sheriff's sale into a trustee, ex maleficio, of the debtor, must have been fraud at the time of the sale. Subsequent crime will not answer any more than subsequent payment of the purchase-money will convert an absolute purchase into a naked trust. Where the purchaser at a sheriff's sale promises to hold for the debtor and afterward refuses to comply with his engagement, the fraud, if any, is not at the sale, not in the promise, but in its subsequent breach. That is too late. It is abundantly settled that equity will not decree such a purchaser to be a trustee, unless there is something more in the transaction than the mere violation of a parol agreement." The learned judge further says: "It may in all cases be assumed that where a promise is made to buy or to hold for another, confidence is invited and more or less reposed. So it is in every parol contract for the purchase of lands; but the statute of frauds would be worse than waste paper if a breach of the promise created a trust in the promisor which the contract itself was insufficient to raise. It may be that if at the instance of the promisor, the promisee is induced to incur some expense or perform some act which he otherwise would not have done, the former shall be estopped from denying the trust. But however this may be, mere acquiescence or omission to take other steps to obtain the property, though induced by faith in the promisor, is not available for such a purpose." If in the case under consideration, the defendant at the sale had declared that he was bidding in the property for the plaintiff, and had thus induced other persons to refrain from bidding and purchased the property for less than its value, a case would probably have been made for holding him as trustee ex maleficio of the plaintiff. Brown v. Dysinger, 1 Rawle, 408; Ryan v. Dox, supra; 2 Washb. Real Prop. 444.

The case nearest like this which I have been able to find in the reports of this state is that of Lathrop v. Hoyt, 7 Barb. 59. In that case the defendant, at plaintiff's request, agreed, by parol, that he would go and attend a sale of the plaintiff's farm under a decree of foreclosure; that he would bid off the premises and take a deed in his own name, but he would give the plaintiff an opportunity to repay him the amount of his bid and have a re-conveyance of the premises, and that the plaintiff should have two weeks' notice to pay the amount. The defendant accordingly bid off the farm and took a deed in his own name, and it was held that the agreement was void as being within the statute of frauds and would not support an action, and that there was no trust which could be enforced. That case was decided by a learned court and contains a correct exposition of the law. Although it was decided nearly thirty years ago our attention has not been called to any reported case in this state in conflict with it.

It is a mistake to suppose that parol agreements relating to lands are any more valid in equity than at law. They are always and everywhere invalid. But courts of equity have general jurisdiction to relieve against frauds, and where a parol agreement relating to lands has been so far partly performed that it would be a fraud upon the party doing the

acts, unless the agreement should be performed by the other party, the court will relieve against this fraud and apply the remedy by enforcing the agreement. It is not the parol agreement which lies at the foundation of the jurisdiction in such a case, but the fraud. So in reference to parol trusts in lands. They are invalid in equity as well as in law. But in cases of fraud courts of equity will sometimes imply a trust and will treat the perpetrator of the fraud as a trustee, ex maleficio, for the purpose of administering a remedy against the fraud. For the same purpose it will take the trust which the parties have attempted to create and enforce it; and in such a case the fraud, not the parol agreement, gives the jurisdiction.

It follows from these views that the order must be reversed and new trial granted, costs to abide event.

All concur.

Order reversed and ordered accordingly.

NALLY v. READING.

(17 S. W. 978, 107 Mo. 350.)

Supreme Court of Missouri, Division No. 1. Dec. 7, 1891.

Case certified from St. Louis court of appeals.

Action by Charles W. D. Nally, as administrator, etc., of James W. Johnson, deceased, to recover on a contract of assignment of an interest in a lease. Defendant appealed to the St. Louis court of appeals from a judgment for plaintiff, rendered in the circuit court of Pike county, where the judgment was reversed, and the cause certified to this court. Affirmed.

Robinson & Farrell, for appellant. *Reynolds & Lewis*, for respondent.

SHERWOOD, J. This cause has been transferred to this court from the St. Louis court of appeals under the constitutional provision. The only point presented—the turning point in the case—for consideration is whether such a contract as the pleadings and evidence present is capable of being sold, transferred, or assigned by parol; that is, whether one of five parties, lessees of a large tract of land for the term of ten years, can make a valid verbal contract with an outsider, whereby the interest of such party in the lease can be transferred to such outsider for four years,—the residue of the term, —the latter agreeing to stand in the stead of the one party to the lease, and to pay the same amount he would have had to do to his lessor, to-wit, $100 per year. Under such a contract, and as contemplated therein, the defendant received and took possession from the party from whom he purchased of a portion of the land, pastured his cattle there for one season, and paid to the original lessor the agreed sum for the year of his occupancy; but, having done so, abandoned that occupancy, and refused longer to occupy the premises, or to pay the residue of the sum agreed upon. On being sued for the residue of such money by the plaintiff, who had to pay such residue of the rent money himself, the defendant, after pleading several matters of defense, interposed as a further defense that the contract was not in writing, and pleaded the provisions of chapter 35, Rev. St. 1879, in support of this plea. Section 2 of the chapter referred to—it being section 2510, Rev. St. 1879—provides: "No leases, estates, interests, either of freehold or term of years, or any uncertain interest of, in, to, or out of, any messuages, lands, tenements, or hereditaments, shall at any time hereafter be assigned, granted, or surrendered, unless it be by deed or note, in writing, signed by the parties so assigning, granting, or surrendering the same, or their agents, lawfully authorized by writing, or by operation of law." Section 5 of the same chapter—it being section 2513—declares: "No action shall be brought * * * to charge any person upon any contract for the sale of any lands, * * * or any lease thereof for any longer time than one year, or any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized." It seems, at first blush, that the contract in suit plainly infracts both of the sections above quoted, in that it attempts by parol to assign a lease for a term of years under section 2510, and to make a sale of a lease by parol under section 2513. And said contract also infracts the latter section, inasmuch as the contract is not to be performed, and cannot be performed, according to its terms, within one year from the time of its making. These views are readily seen to be supported by an examination of the following authorities: Browne, St. Frauds, §§ 230, 231, 272, 281, 290; Tayl. Landl. & Ten. § 427; Durand v. Curtis, 57 N. Y. 7; Pierce v. Paine, 28 Vt. 34. And the fact that defendant took possession under the verbal contract, and made one payment, cuts no figure in this case. Whatever may be the rule in equity as to the doctrine of part performance, that rule has no place in an action at law, as is the present instance. 3 Pars. Cont. (7th Ed.) 60; Sharp v. Rhiel, 55 Mo. 97. It is unnecessary to review the authorities in this state. That has been well done by ROMBAUER, P. J., in 36 Mo. App. 306. If there are any authorities in conflict with the views here announced we overrule them. We hold, as did the court of appeals, that the demurrer to the evidence of plaintiff should have been granted. We therefore affirm the judgment of the court of appeals, and remand this cause to that court for further proceedings. All concur.

BRITAIN v. ROSSITER.

(11 Q. B. Div. 123.)

Court of Appeal. March 4, 1879.

Action for wrongful dismissal.

At the trial it appeared that the plaintiff entered into the defendant's service as clerk and accountant for one year.

The plaintiff and the defendant had interviews upon the 17th, 19th, and 21st of April, 1877. The 21st was a Saturday, and the plaintiff entered upon the defendant's service upon Monday, the 23d. The final arrangement between the parties was arrived at upon the Saturday.

The plaintiff remained some months in the defendant's service and was then dismissed without a three months' notice. The defendant relied upon the statute of frauds (section 4). At the trial before Hawkins, J., the verdict was entered for the defendant upon the grounds: First, that the contract was made finally upon Saturday, the 21st of April, and being made upon that day was within the statute of frauds (section 4); secondly, that there was no evidence of a new contract on Monday, April the 23d, it not being proved that the contract made on the previous Saturday was altered or rescinded. The exchequer division having refused a new trial on the ground of misdirection:

1878, May 29. Mr. Firth moved in this court, by way of appeal. He contended: First, that the contract of service for one year was to begin from Monday, the 23d of April, and therefore that it was a contract to be performed within a year; secondly, that the plaintiff could not be dismissed without notice, a verbal contract being in existence; thirdly, that the contract having been partly performed, was taken out of the statute of frauds (section 4). As to the first point he cited Cawthorne v. Cordrey, 13 C. B. (N. S.) 406, 32 Law J. C. P. 152.

BRETT, L. J. It seems to me that this contract is within the statute of frauds (section 4). I take the evidence to be clear in this case. The contract was made on the Saturday, and the terms of the contract were that the plaintiff was to commence his service on the Monday, and to serve for a year from the Monday, and to be paid for a year from the Monday; therefore the contract was not to be performed within a year, and falls within the statute of frauds (section 4). It was contended that Cawthorne v. Cordrey, 13 C. B. (N. S.) 406, 32 Law J. C. P. 152, was contrary to our decision. It seems to me that that case contains two things,—one a decision, and the other a dictum. The decision is not against our judgment; for it was that, although the parties spoke to each other on a Sunday, there was evidence upon which the jury might find that the contract was made on the Monday, and that that contract was for service for a year from that Monday, and that the service was to be performed within a year from that time. That decision was in accordance with all the other cases. If the contract was made on the Monday, and if the service was to commence on the Monday, it is obvious that the service was to be performed within one year from the making of the contract. There was, however, a dictum of Willes, J., which seems to be supported by the opinion of Byles, J. These are great authorities, and that dictum seems to have been that if a contract is made on a day, say Monday, for a service for a year, to commence on the following day, say a Tuesday, the service is to be performed within 365 days from the making of the contract, but that inasmuch as the law takes no notice of part of a day, and the contract was made in the middle of the Monday, the service to be performed within 365 days after that, the law did not count that half day of the Monday, and therefore the contract was to be performed within 365 days after it was made, and that was within a year. This view was founded upon a fiction, namely, that the law does not take notice of part of a day. I am not prepared to say that under like circumstances one might not follow that dictum and carry it to the length of a decision. It is not necessary to say so here, because the case has not arisen. This contract was made on the Saturday, and the service was not to begin until the Monday; that is, not the next day to Saturday, but the day save one after. The dictum does not apply. To say that the Sunday is not to be counted in the year's service would not do, because if one Sunday is not to be counted, no Sunday is to be counted. As to Cawthorne v. Cordrey, 13 C. B. (N. S.) 406, 32 Law J. C. P. 152, the decision is not different from other cases. As to the dictum, we can say nothing about it in this case, because the point does not arise. Therefore we have not to overrule Cawthorne v. Cordrey, 13 C. B. (N. S.) 406, 32 Law J. C. P. 152, either as to its decision or its dictum. I think that the contract falls clearly within the statute and within the principle of Bracegirdle v. Heald, 1 Barn. & Ald. 722. Therefore no rule will be granted as to the point whether the contract is within the statute; but the plaintiff may take a rule upon the questions whether the operation of the statute of frauds (section 4) may be defeated by part performance, and also whether the plaintiff was entitled to any notice of dismissal, a verbal contract being in existence.

COTTON and THESIGER, L. JJ., concurred.

1879, March 4. J. C. Lawrence, Q. C., and P. B. Hutchins, shewed cause. The plaintiff cannot recover in this action. Snelling v. Lord Huntingfield, 1 Cromp., M. & R. 20, shews that the express verbal contract of Saturday, the 21st of April, was still in existence, and that no fresh contract can be implied from acts done in pursuance of it. That contract was for a year's service to commence at a future day, and was therefore a contract not to be performed within a year. Bracegirdle

v. Heald, 1 Barn. & Ald. 722; Banks v. Crossland, L. R. 10 Q. B. 97. Nevertheless, whilst it remained unrescinded no other contract between the parties can be implied. The words of the statute of frauds (section 4) are express, and no action can be brought upon a contract falling within its prohibition. Leroux v. Brown, 12 C. B. 801. The fact that the contract has been partly performed, does not affect the position of the parties. Giraud v. Richmond, 2 C. B. 835. The equitable doctrine of part performance, whereby the operation of the statute of frauds has been defeated, has always been confined to contracts for the sale and purchase of lands, and has not been extended to contracts of other kinds.

Mr. Firth, in support of the rule. A contract falling within the prohibition of the statute of frauds (section 4) is void to all intents and purposes. Carrington v. Roots, 2 Mees. & W. 248; Reade v. Lamb, 6 Exch. 130; Inman v. Stamp, 1 Starkie, 12. A contract that is void in part is void altogether. Thomas v. Williams, 10 Barn. & C. 664. Therefore the contract of Saturday, the 21st of April, may be treated as no contract, and a fresh contract of service may be implied from the acts of the parties.

As to the doctrine of part performance it is true that the court of chancery formerly applied it only to contracts for the sale of land, and there may have been a difficulty in decreeing specific performance of a contract for personal services. Pickering v. Bishop of Ely, 2 Younge & C. 249; Johnson v. Railway Co., 3 De Gex, M. & G. 914. But the court of chancery would not allow the provisions of a statute to defeat a claim which good conscience required to be carried out. Bond v. Hopkins, 1 Schoales & L. 413; Morphett v. Jones, 1 Swanst. 172. The defence set up by the defendant is wholly against good conscience. And now by Judicature Act 1873 (36 & 37 Vict. c. 66) § 25, subsec. 7, the doctrines of equity may be applied to cases decided in the common law divisions.

BRETT, L. J. Upon the best consideration which I can give to this case, it seems to me that this rule should be discharged. I think that Hawkins, J., was right, and that the exchequer division was also right. It was clearly established that on Saturday, the 21st of April, a contract of service was in express terms entered into between the plaintiff and the defendant that the plaintiff should serve the defendant for one year, the contract to commence the Monday following. It cannot be disputed that a contract of that kind is within the 4th section of the statute of frauds,—that is to say, it is a promise founded upon a sufficient consideration,—but, it being only verbal, neither party can bring an action upon it so as to charge the other. It is, however, contended that as the plaintiff did on Monday, the 23d of April, enter into the defendant's service and continue in it for some months, another contract to serve for a year ought to be implied, attended with the same consequences as the original contract, but outside the statute of frauds. It is alleged that this contract can be implied, because the contract originally entered into is void. But, according to the true construction of the statute, it is not correct to say that the contract is void; and, in my opinion, no distinction exists between the 4th and the 17th sections of the statute. At all events, the contract is not void under the 4th section. The contract exists, but no one is liable upon it. It seems to me impossible that a new contract can be implied from the doing of acts which were clearly done in performance of the first contract only, and to infer from them a fresh contract would be to draw an inference contrary to the fact. It is a proposition which cannot be disputed that no new contract can be implied from acts done under an express contract, which is still subsisting. All that can be said is that no one can be charged upon the original contract because it is not in writing. At the bar reliance was placed upon Carrington v. Roots, 2 Mees. & W. 248, and Reade v. Lamb, 6 Exch. 130. In the former case Parke, B., said: "I think the right interpretation of" the 4th section of the statute of frauds "is this: that an agreement which cannot be enforced on either side is as a contract void altogether." In the latter, Pollock, C. B., said: "Carrington v. Roots, 2 Mees. & W. 248, is in effect a decision that, for the purposes of the present question, there is no distinction between the 4th and 17th sections of the statute of frauds, and that not only no action can be brought upon an agreement within the 4th section of that statute if it be not reduced into writing, but that the contract is also void." With regard to these dicta it is enough to say that the doctrine thereby laid down was unnecessary for the decisions in those cases; for it being clear that no action can be brought on the verbal contract itself, it is also clear that neither party can be held liable upon it indirectly in any action which necessitates the admission of the existence of the contract. The two cases which I have mentioned were considered in Leroux v. Brown, 12 C. B. 801; and Jervis, C. J., undoubtedly took the same view of them as I do, and gave the interpretation necessary for that case, namely, that the contract is not void, but only incapable of being enforced, and that any claim which depends upon the contract as such cannot be maintained. If the contrary view had prevailed, it would have been decided in that case that the statute of frauds (section 4), had a territorial operation; whereas if it applies merely to the enforcement of the contract, then it is a statute with respect to the procedure of the English courts, and it is applicable to contracts made abroad as well as in England. Moreover, the case of Snelling v. Lord Huntingfield, 1 Cromp., M. & R. 20, has not been overruled by subsequent cases, but the doctrine there laid down has been

strongly supported by subsequent cases, and in my opinion it certainly ought not to be overruled now. In my view the contract entered into on the 21st of April was not void, but existing, and from a part performance of it a fresh contract ought not to be implied. The plaintiff, therefore, is driven to rely upon the original contract, but he cannot maintain an action upon that, inasmuch as it is not in writing.

It has been further contended that, as the contract of the 21st of April has been partly performed, it may be enforced, notwithstanding the statute of frauds, and that the equitable doctrine as to part performance may be applied to it. It is well known that where a contract for the sale of land had been partly performed, courts of equity did in certain cases recognize and enforce it; but this doctrine was exercised only as to cases concerning land, and was never extended to contracts like that before us, because they could not be brought within the jurisdiction of courts of equity. Those courts could not entertain suits for specific performance of contracts of service, and therefore a case like the present could not come before them. As to the application of the doctrine of part performance to suits concerning land, I will merely say that the cases in the court of chancery were bold decisions on the words of the statute. The doctrine was not extended to any other kind of contract before the judicature acts. Can we so extend it now? I think that the true construction of the judicature acts is that they confer no new rights; they only confirm the rights which previously were to be found existing in the courts either of law or of equity. If they did more, they would alter the rights of parties, whereas in truth they only change the procedure. Before the passing of the judicature acts no one could be charged on this contract either at law or in equity; and if the plaintiff could now enforce this contract, it would be an alteration of the law. I am of opinion that the law remains as it was, and that the plaintiff cannot maintain this action for breach of contract.

COTTON, L. J. We refused to grant a rule on the ground that the contract entered into on Saturday, the 21st of April, was to be performed within a year, and therefore not within the operation of the 4th section of the statute of frauds. The contract clearly was within that enactment. On the other points we granted a rule, but after having heard the arguments on behalf of the plaintiff, I think that the rule for a new trial must be discharged. It has been contended that although the express contract cannot be enforced, nevertheless a contract which can be enforced may be implied from conduct of the parties, and it has been argued that the rule does not apply which forbids a contract to be implied where an express contract has been concluded, because the contract was void under the provisions of the statute of frauds (section 4); but in my opinion that is not the true construction of the enactment, which provides that no action shall be brought to charge any person upon the verbal contract.

In the first place, I may observe that to hold that this enactment makes void verbal contracts falling within its provisions, would be inconsistent with the doctrine of the courts of equity with regard to part performance in suits concerning land. If such contracts had been rendered void by the legislature, courts of equity would not have enforced them; but their doctrine was that the statute did not render the contracts void, but required written evidence to be given of them; and courts of equity were accustomed to dispense with that evidence in certain instances. During the argument some decisions were relied upon as shewing that the contract in the present case was void. In Carrington v. Roots, 2 Mees. & W. 248, certain expressions were used by the judges which indicated that in their opinion a verbal contract falling within section 4 was void; but I think that their language, when carefully analyzed, merely means that the contract was not enforceable, either directly or indirectly by action at law. I think it unnecessary to go into the case of Reade v. Lamb, 6 Exch. 130. It was a case decided upon special demurrer, and the question to which the attention of the judges was directed, was whether the pleadings were correct in point of form.

It has been further argued that the contract may be enforced, because it has been in part performed. Let me consider what is the nature of the doctrine as to part performance. It has been said that the principle of that doctrine is that the court will not allow one party to a contract to take advantage of part performance of the contract, and to permit the other party to change his position or incur expense or risk under the contract, and then to allege that the contract does not exist; for this would be contrary to conscience. It is true that some dicta of judges may be found to support this view, but it is not the real explanation of the doctrine, for if it were, part payment of the purchase money would defeat the operation of the statute. But it is well established and cannot be denied that the receipt of any sum, however large, by one party under the contract, will not entitle the other to enforce a contract which comes within the 4th section. What can be more contrary to conscience than that after a man has received a large sum of money in pursuance of a contract, he should allege that it was never entered into? The true ground of the doctrine in equity is that if the court found a man in occupation of land, or doing such acts with regard to it as would, prima facie, make him liable at law to an action of trespass, the court would hold that there was strong

evidence from the nature of the user of the land that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken. Does this doctrine, when so explained, apply to the present case? I will first mention the provisions of Judicature Act 1873, § 24, subsecs. 4, 7. These provisions enable the courts of common law to deal with equitable rights and to give relief upon equitable grounds; but they do not confer new rights. The different divisions of the high court may dispose of matters within the jurisdiction of the chancery and the common law courts; but they cannot proceed upon novel principles. Could the present plaintiff have obtained any relief in equity before the passing of the judicature acts? I think that he could not. The doctrine as to part performance has always been confined to questions relating to land; it has never been applied to contracts of service, and it ought not now to be extended to cases in which the court of chancery never interfered.

THESIGER, L. J. Two questions must be considered in this case: First, whether the plaintiff could maintain an action at law; secondly, whether, if he could not maintain an action at law, he could maintain a suit in equity. I am compelled to subscribe to the opinion that the plaintiff had no remedy either at law or in equity. I have been unwilling to come to this conclusion, because it is manifestly unjust that where a contract of hiring has been acted on for a certain time, one party who has had the advantage of it should be able to put an end to it; and I should have been glad to decide that the plaintiff was entitled to a reasonable notice of dismissal. First, has the plaintiff a right of action at law? It is clear that a contract was made on Saturday, the 21st of April, and it cannot be contended that a contract made at that date to commence from the 23d of April is not within the 4th section of the statute of frauds. It is necessary to consider what is the effect of the statute upon such a contract. Is it that the contract is wholly null so that it does not prevent the proof of any other contract, or is it that the contract exists but cannot be enforced? Certain dicta are to be found in the books from which it might appear that some of the judges have considered the verbal contract as absolutely void. But if those dicta are carefully examined, it will be found that they are not necessary for the decision of the cases in which they appear, and upon referring to subsequent cases it will be found that it has been decided in clear terms that the verbal contract is not actually void. It is impossible to say that the words of the statute make the verbal contract void. That a verbal contract is not void, is proved by the circumstance that where one party has signed the contract and the other has not, the party who has signed may be charged upon it, but that the party who has not signed cannot be charged. It may also be urged with some show of reason that though there is a difference in language between the 4th and 17th sections of the statute of frauds, they are substantially identical in construction, and Carrington v. Roots, 2 Mees. & W. 248, and Reade v. Lamb, 6 Exch. 130, may perhaps be cited in support of that argument. And it is plain that verbal contracts under the 17th section are not absolutely void for all purposes, for the section provides that part performance by payment or acceptance and receipt of goods shall authorize the court to look at the terms of the contract, although it is not in writing. But I need not discuss this question further, for in Snelling v. Huntingfield, 1 Cromp., M. & R. 20, which has never been overruled, but, on the contrary, has been often followed, it was held that a contract not enforceable by reason of the statute of frauds (section 4) nevertheless existed, and no contract can be implied where an express contract exists. I think that we are bound by the authority of that case. There was, therefore, in existence a contract made in express terms on Saturday, the 21st of April, and the plaintiff cannot sue upon it, as it is not in writing. It appears to have been held that, though there may be no right to recover on an executory contract, nevertheless, if it has been executed to the extent of the contractee entering upon the service, that is enough to entitle him to be paid for his services, and if we were not bound by authority it would be difficult to understand why, if the plaintiff can sue for services rendered, he should not equally be entitled to allege that he shall not be dismissed without notice or without such notice as was stipulated for in the contract. But in Snelling v. Huntingfield, 1 Cromp., M. & R. 20, the court of exchequer appears to have thought that the contractee can recover for services rendered but not for dismissal without notice. This seems to have been the construction at common law. If we turn to equity, we find that it has been held, as regards a sale of land, that when there has been an entry by one party to the contract, that is an overt act apparently done under a contract which entitles the court to look at the contract to see to what contract the overt act is really referable. I confess that on principle I do not see why a similar doctrine should not be applied to the case of a contract of service, and as the doctrine of equity is based upon the theory that the court will not allow a fraud on the part of one party to a contract on faith of which the other party has altered his position, I do not see why a similar doctrine should not comprehend a contract of service. At the same time I feel that doctrines of this nature are not to be unwarrantably extended, and that we ought not to go further than the decisions of courts of equity as to the principles of re-

lief, and as to the instances to which the doctrine of part performance is to be applied. Therefore, as we cannot clearly see that the equitable doctrine of part performance ought to be extended to contracts of service, I think that we ought to keep within the limits observed by the court of chancery before the passing of the judicature acts of 1873 and 1875.

Rule discharged.

BAKER et al. v. LAUTERBACK.

(11 Atl. 703, 68 Md. 64.)

Court of Appeals of Maryland. Dec. 13, 1887.

Appeal from circuit court, Howard county.

Catherine Lauterback, administratrix of John Lauterback, plaintiff, sued Baker Bros. & Co., defendants, to recover balance due for services of deceased. Judgment was rendered for plaintiff for $160, and defendants appealed.

John T. Mason, W. A. Hammond, and E. C. Williams, for appellants. T. C. Weeks, R. D. Johnson, and W. Reynolds, for appellee.

BRYAN, J. John Lauterback entered the service of Baker Bros. & Co. on the first day of March, 1880, and remained in their employment until August, 1883, when he was killed by an accident. He was 20 years of age on the twenty-ninth of March, 1880. His father died some years previously to his entering this service. But it appears that his mother signed a written contract with Baker Bros. & Co., by which she undertook to bind him to them as an apprentice for five years to learn the art and trade of glass-blowing. The contract stipulated that, if the boy was considered competent to learn and be instructed, he was to receive for his services one-half of the rate of wages paid journeymen for similar work for the first four years, and two-thirds of such wages for the fifth year; and it was further stipulated that $200 should be held by the employers out of his wages as security, to be paid at the expiration of the term of the apprenticeship, or forfeited if he should leave their employment for any cause whatever before the expiration of the term of five years. All the wages were paid with the exception of $200, and the present suit was brought by the administratrix of the deceased apprentice against Baker Bros. & Co. to recover this amount. The verdict was for $160.

The contract was not signed by the employers, but only by the mother of the boy. In the view which we have taken of the case, this circumstance is immaterial. A father may bind out his son as an apprentice until he reaches the age of 21 years, provided he pursues the mode authorized by the twentieth section of article 6 of the Code; but a contract of apprenticeship executed by the mother is simply void. The boy would not be obliged to serve according to the terms of such an instrument; nor would the employer, by force of it, acquire any control over him. He did, however, serve for three years and five months, with a full knowledge of the terms of this contract. He knew, therefore, the rate of compensation which his employers expected to pay for his work; it would not then be just that he should receive more. The law would imply a contract on the part of his employers to pay him what his services were reasonably worth. It would not, however, imply a contract on the part of the boy to serve for five years, nor to pay a forfeiture in case he should leave the service before the expiration of that time. A contract of this kind is required, by the fourth section of the statute of frauds, to be in writing. The terms of the statute are that no action shall be brought "upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." If, therefore, the boy had in express terms made a verbal contract to serve for five years, it could not have been enforced against him by the other party. And if, after serving a portion of the time, he should refuse to carry out his contract, and bring suit to recover the value of the services rendered, the verbal contract would not avail the employer as a defense. It could not be set up as a contract at all; the breach of it would impose no liability which the law could enforce; the obligation to perform it could not be maintained in an action at law. In Browne on the Statute of Frauds the law is thus stated: "As a general proposition, however, we shall hereafter see that a verbal contract within the statute cannot be enforced in any way, directly or indirectly, whether by action or in defense." Section 122. "The supreme court of Connecticut, in a case where the plaintiff, by oral agreement, bound himself to serve the defendant for a term longer than one year, for a consideration to be paid at the end of that time, and having repudiated the contract, and quitted his employer at the end of six months, brought his action to recover the value of the services so rendered, held that he could recover, and that the defendant could not set up the existing verbal agreement to defeat his claim." Section 122a. "The clear rule of law is that such a contract cannot be made the ground of defense any more than of a demand. The obligation of the plaintiff to perform it is no more available to the defendant in the former case than the obligation of the defendant to perform it would be to the plaintiff in the latter case." Section 131. It appears to us, therefore, upon the uncontested facts in the case, that the plaintiff is entitled to recover the full value of the boy's services, less such sums as have been paid. It seems to be unnecessary to notice in detail the rulings of the court below. It is sufficient to say that they accord with the views which we have expressed.

It must be observed that, although contracts within the statute of frauds are void unless they are in writing, yet the voluntary performance of them is in no respect unlawful. If services be rendered in pursuance of a contract of this kind by one party, and be accepted by the other, they must be compensated. Ellicott v. Peterson's Ex'rs, 4 Md. 491.

And if an action be brought against a defendant for acts done, which were in performance of such a contract, or authorized by its terms, no recovery can be had against him. Cane v. Gough, 4 Md. 333; Browne, St. Frauds, § 133. It is said that the contract operates as a license to do these acts, although it cannot be set up as conferring any right of action. As said by Lord Abinger in Carrington v. Roots, 2 Mees. & W. 248, in speaking of a case within the statute: "I think the contract cannot be available as a contract at all, unless an action can be brought upon it. What is done under the contract may admit of apology or excuse, diverso intuitu, if I may so speak; as where, under a contract by parol, the party is put in possession, that possession may be set up as an excuse for a trespass alleged to have been committed by him. * * *" The agreement might have been available in answer to a trespass by setting up a license; not setting up the contract itself as a contract, but only showing matter of excuse for the trespass. Judgment affirmed.

HAMER v. SIDWAY.

(27 N. E. 256, 124 N. Y. 538.)

Court of Appeals of New York, Second Division. April 14, 1891.

Appeal from an order of the general term of the supreme court in the fourth judicial department, reversing a judgment entered on the decision of the court at special term in the county clerk's office of Chemung county on the 1st day of October, 1889. The plaintiff presented a claim to the executor of William E. Story, Sr., for $5,000 and interest from the 6th day of February, 1875. She acquired it through several mesne assignments from William E. Story, 2d. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, 2d; that at the celebration of the golden wedding of Samuel Story and wife, father and mother of William E. Story, Sr., on the 20th day of March, 1869, in the presence of the family and invited guests, he promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became 21 years of age, he would pay him the sum of $5,000. The nephew assented thereto, and fully performed the conditions inducing the promise. When the nephew arrived at the age of 21 years, and on the 31st day of January, 1875, he wrote to his uncle, informing him that he had performed his part of the agreement, and had thereby become entitled to the sum of $5,000. The uncle received the letter, and a few days later, and on the 6th day of February, he wrote and mailed to his nephew the following letter: "Buffalo, Feb. 6, 1875. W. E. Story, Jr.—Dear Nephew: Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars, as I promised you. I had the money in the bank the day you was twenty-one years old that I intend for you, and you shall have the money certain. Now, Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of hard work. You would hardly believe me when I tell you that to obtain this I shoved a jack-plane many a day, butchered three or four years, then came to this city, and, after three months' perseverance, I obtained a situation in a grocery store. I opened this store early, closed late, slept in the fourth story of the building in a room 30 by 40 feet, and not a human being in the building but myself. All this I done to live as cheap as I could to save something. I don't want you to take up with this kind of fare. I was here in the cholera season of '49 and '52, and the deaths averaged 80 to 125 daily, and plenty of small-pox. I wanted to go home, but Mr. Fisk, the gentleman I was working for, told me, if I left them, after it got healthy he probably would not want me. I stayed. All the money I have saved I know just how I got it. It did not come to me in any mysterious way, and the reason I speak of this is that money got in this way stops longer with a fellow that gets it with hard knocks than it does when he finds it. Willie, you are twenty-one, and you have many a thing to learn yet. This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. I was ten long years getting this together after I was your age. Now, hoping this will be satisfactory, I stop. One thing more. Twenty-one years ago I bought you 15 sheep. These sheep were put out to double every four years. I kept track of them the first eight years. I have not heard much about them since. Your father and grandfather promised me that they would look after them till you were of age. Have they done so? I hope they have. By this time you have between five and six hundred sheep, worth a nice little income this spring. Willie, I have said much more than I expected to. Hope you can make out what I have written. To-day is the seventeenth day that I have not been out of my room, and have had the doctor as many days. Am a little better to day. Think I will get out next week. You need not mention to father, as he always worries about small matters. Truly yours, W. E. STORY. P. S. You can consider this money on interest." The nephew received the letter, and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letter. The uncle died on the 29th day of January, 1887, without having paid over to his nephew any portion of the said $5,000 and interest.

H. J. Swift, for appellant. *Adelbert Moot*, for respondent.

PARKER, J., (after stating the facts as above.) The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator, William E. Story, became indebted to his nephew, William E. Story, 2d, on his twenty-first birthday in the sum of $5,000. The trial court found as a fact that "on the 20th day of March, 1869, * * * William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor using tobacco, swearing, and playing cards or billiards for money until should become twenty-one years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement." The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the prom-

isee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise,—and insists that it follows that, unless the promisor was benefited, the contract was without consideration,—a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The exchequer chamber in 1875 defined "consideration" as follows: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson, Cont. 63. "In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Pars. Cont. *444. "Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." 2 Kent, Comm. (12th Ed.) *465. Pollock in his work on Contracts, (page 166,) after citing the definition given by the exchequer chamber, already quoted, says: "The second branch of this judicial description is really the most important one. 'Consideration' means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first." Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been, support the position we have taken. In Shadwell v. Shadwell, 9 C. B. (N. S.) 159, an uncle wrote to his nephew as follows: "My dear Lancey: I am so glad to hear of your intended marriage with Ellen Nicholl, and, as I promised to assist you at starting, I am happy to tell you that I will pay you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require. Your affectionate uncle, CHARLES SHADWELL." It was held that the promise was binding, and made upon good consideration. In Lakota v. Newton, (an unreported case in the superior court of Worcester, Mass.,) the complaint averred defendant's promise that "if you [meaning the plaintiff] will leave off drinking for a year I will give you $100," plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred, on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled. In Talbott v. Stemmons, 12 S. W. Rep. 297, (a Kentucky case, not yet officially reported,) the step-grandmother of the plaintiff made with him the following agreement: "I do promise and bind myself to give my grandson Albert R. Talbott $500 at my death if he will never take another chew of tobacco or smoke another cigar during my life, from this date up to my death; and if he breaks this pledge he is to refund double the amount to his mother." The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained, and an appeal taken therefrom to the court of appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money, or contributed to his health; nevertheless, the surrender of that right caused the promise, and, having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the promise." Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in Lindell v. Rokes, 60 Mo. 249. The cases cited by the defendant on this question are not in point. In Mallory v. Gillett, 21 N. Y. 412; Belknap v. Bender, 75 N. Y. 446; and Berry v Brown, 107 N. Y. 659, 14 N. E. Rep. 289,—the promise was in contravention of that provision of the statute of frauds which declares void all promises to answer for the debts of third persons unless reduced to writing. In Beaumont v. Reeve, Shir. Lead. Cas. 7, and Porterfield v. Butler, 47 Miss. 165, the question was whether a moral obligation furnishes sufficient consideration to uphold a subsequent express promise. In Duvoll v. Wilson, 9 Barb. 487, and Wilbur v. Warren, 104 N. Y. 192, 10 N. E. Rep. 263, the proposition involved was whether an executory covenant against incumbrances in a deed given in consideration of natural love and

affection could be enforced. In Vanderbilt v. Schreyer, 91 N. Y. 392, the plaintiff contracted with defendant to build a house, agreeing to accept in part payment therefor a specific bond and mortgage. Afterwards he refused to finish his contract unless the defendant would guaranty its payment, which was done. It was held that the guaranty could not be enforced for want of consideration; for in building the house the plaintiff only did that which he had contracted to do. And in Robinson v. Jewett, 116 N. Y. 40, 22 N. E. Rep. 224, the court simply held that "the performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract." It will be observed that the agreement which we have been considering was within the condemnation of the statute of frauds, because not to be performed within a year, and not in writing. But this defense the promisor could waive, and his letter and oral statements subsequent to the date of final performance on the part of the promisee must be held to amount to a waiver. Were it otherwise, the statute could not now be invoked in aid of the defendant. It does not appear on the face of the complaint that the agreement is one prohibited by the statute of frauds, and therefore such defense could not be made available unless set up in the answer. Porter v. Wormser, 94 N. Y. 431, 450. This was not done.

In further consideration of the questions presented, then, it must be deemed established for the purposes of this appeal that on the 31st day of January, 1875, defendant's testator was indebted to William E. Story, 2d, in the sum of $5,000; and, if this action were founded on that contract, it would be barred by the statute of limitations, which has been pleaded, but on that date the nephew wrote to his uncle as follows: "Dear Uncle: I am 21 years old to-day, and I am now my own boss; and I believe, according to agreement, that there is due me $5,000. I have lived up to the contract to the letter in every sense of the word." A few days later, and on February 6th, the uncle replied, and, so far as it is material to this controversy, the reply is as follows: "Dear Nephew: Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have $5,000, as I promised you. I had the money in the bank the day you was 21 years old that I intend for you, and you shall have the money certain. Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right, and lose this money in one year. * * * This money you have earned much easier than I did, besides acquiring good habits at the same time; and you are quite welcome to the money. Hope you will make good use of it. * * * W. E. STORY. P. S. You can consider this money on interest." The trial court found as a fact that "said letter was received by said William E. Story, 2d, who thereafter consented that said money should remain with the said William E. Story in accordance with the terms and conditions of said letter." And further, "that afterwards, on the 1st day of March, 1877, with the knowledge and consent of his said uncle, he duly sold, transferred, and assigned all his right, title, and interest in and to said sum of $5,000 to his wife, Libbie H. Story, who thereafter duly sold, transferred, and assigned the same to the plaintiff in this action." We must now consider the effect of the letter and the nephew's assent thereto. Were the relations of the parties thereafter that of debtor and creditor simply, or that of trustee and *cestui que trust?* If the former, then this action is not maintainable, because barred by lapse of time. If the latter, the result must be otherwise. No particular expressions are necessary to create a trust. Any language clearly showing the settler's intention is sufficient if the property and disposition of it are definitely stated. Lewin, Trusts, 55. A person in the legal possession of money or property acknowledging a trust with the assent of the *cestui que trust* becomes from that time a trustee if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever it may have been, no longer controls. 2 Story, Eq. Jur., § 972. If before a declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands, and stipulating for its investment on the creditor's account, will have the effect to create a trust. Day v. Roth, 18 N. Y. 448. It is essential that the letter, interpreted in the light of surrounding circumstances, must show an intention on the part of the uncle to become a trustee before he will be held to have become such; but in an effort to ascertain the construction which should be given to it we are also to observe the rule that the language of the promisor is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. White v. Hoyt, 73 N. Y. 505, 511. At the time the uncle wrote the letter he was indebted to his nephew in the sum of $5,000, and payment had been requested. The uncle, recognizing the indebtedness, wrote the nephew that he would keep the money until he deemed him capable of taking care of it. He did not say, "I will pay you at some other time," or use language that would indicate that the relation of debtor and creditor would continue. On the contrary, his language indicated that he had set apart the money the nephew had "earned," for him, so that when he should be capable of taking care of it he should receive it with interest. He said: "I had the money in the bank the day you were 21 years old that I intend for you, and you shall have the money certain." That he had set apart the money is further evidenced by the next sentence: "Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it." Certainly the uncle must have intended that his nephew should understand that the prom-

ise not "to interfere with this money" referred to the money in the bank, which he declared was not only there when the nephew became 21 years old, but was intended for him. True, he did not use the word "trust," or state that the money was deposited in the name of William E. Story, 2d, or in his own name in trust for him, but the language used must have been intended to assure the nephew that his money had been set apart for him, to be kept without interference until he should be capable of taking care of it, for the uncle said in substance and in effect: "This money you have earned much easier than I did. * * * You are quite welcome to. I had it in the bank the day you were 21 years old, and don't intend to interfere with it in any way until I think you are capable of taking care of it; and the sooner that time comes the better it will please me." In this declaration there is not lacking a single element necessary for the creation of a valid trust, and to that declaration the nephew assented. The learned judge who wrote the opinion of the general term seems to have taken the view that the trust was executed during the life-time of defendant's testator by payment to the nephew, but, as it does not appear from the order that the judgment was reversed on the facts, we must assume the facts to be as found by the trial court, and those facts support its judgment. The order appealed from should be reversed, and the judgment of the special term affirmed, with costs payable out of the estate. All concur.

RANN et al. v. HUGHES.

(7 Term R. 350, note.)

The declaration stated that on the 11th of June, 1764, divers disputes had arisen between the plaintiffs' testator and the defendant's intestate, which they referred to arbitration; that the arbitrator awarded that the defendant's intestate should pay to the plaintiffs' testator £983. That the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that Mary Hughes died, having appointed the plaintiffs her executors; that at the time of her death the said sum of £983 was unpaid, "by reason of which premises the defendant as administratrix became liable to pay to the plaintiffs as executors the said sum, and being so liable she in consideration thereof undertook and promised to pay &c." The defendant pleaded non assumpsit; plené administravit; and plené administravit, except as to certain goods &c. which were not sufficient to pay an outstanding bond debt of the intestate's therein set forth &c. The replication took issue on all these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the two last; and on the first a general judgment was entered in B. R. against the defendant de bonis propriis. This judgment was reversed in the exchequer-chamber; and a writ of error was afterwards brought in the house of lords, where after argument the following question was proposed to the judges by the lord chancellor, "Whether sufficient matter appeared upon the declaration to warrant after verdict the judgment against the defendant in error in her personal capacity;" upon which the Lord Chief Baron Skynner delivered the opinion of the judges to this effect.—It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is nudum pactum ex quo non oritur actio, and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant being indebted as administratrix promised to pay when requested, and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise, but the promise must be coextensive with the consideration unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right in consideration of forbearance for a particular time promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right: but here no sufficient consideration occurs to support this demand against her in her personal capacity; for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing that takes away the necessity of a consideration and obviates the objection of nudum pactum, for that cannot be where the promise is put in writing; and that after verdict, if it were necessary to support the promise that it should be in writing, it will after verdict be presumed that it was in writing: and this last is certainly true; but that there cannot be nudum pactum in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. His lordship observed upon the doctrine of nudum pactum delivered by Mr. J. Wilmot in the case of Pillans v. Van Mierop and Hopkins, 3 Burrows, 1663, that he contradicted himself, and was also contradicted by Vinnius in his Comment on Justinian.

All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the statute of frauds has taken away the necessity of any consideration in this case; the statute of frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His lordship here read those sections of that statute which relate to the present subject. He observed that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought or some memorandum thereof was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition that when in writing the party must be at all events liable. He here observed upon the case of Pillans v. Van Mierop in Burrows, and the case of Losh v. Williamson, Mich. 16 Geo. III. in B. R.; and so far as these cases went on the doctrine of nudum pactum, he seemed to intimate that they were erroneous. He said that all his brothers concurred with him that in this case there was not a sufficient consideration to

support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference. The consequence of which is that the question put to us must be answered in the negative.

And the judgment in the exchequer-chamber was affirmed.

HAIGH et al. v. BROOKS.[1]

(10 Adol. & E. 309.)

Trinity Term. June 6, 1839.

W. W. Follett, for plaintiff. J. Campbell, Atty. Gen., contra.

LORD DENMAN, C. J. This action was brought upon an assumpsit to see certain acceptances paid, in consideration of the plaintiffs giving up a guarantee of £10,000, due from the acceptor to the plaintiffs. Plea, that the guarantee was for the debt of another, and that there was no writing wherein the consideration appeared, signed by the defendant, and so the giving it up was no good consideration for the promise. Demurrer, stating for cause that the plea is bad, because the consideration was executed, whether the guarantee were binding in law or not. The form of the guarantee was set out in the plea. "In consideration of your being in advance to Messrs. John Lees and Sons, in the sum of £10,000, for the purchase of cotton, I do hereby give you my guarantee for that amount, (say £10,000,) on their behalf. John Brooks."

It was argued for the defendant, that this guarantee is of no force, because the fact of the plaintiffs being already in advance to Lees could form no consideration for the defendant's promise to guarantee to the plaintiffs the payment of Lees' acceptances. In the first place, this is by no means clear. That "being in advance" must necessarily mean to assert that he was in advance at the time of giving the guarantee, is an assertion open to argument. It may, possibly, have been intended as prospective. If the phrase had been "in consideration of your becoming in advance," or, "on condition of your being in advance," such would have been the clear import. As it is, nobody can doubt that the defendant took a great interest in the affairs of Messrs. Lees, or believe that the plaintiffs had not come under the advance mentioned at the defendant's request. Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guarantee; and, if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it.

But we are by no means prepared to say that any circumstances short of the imputation of fraud in fact, could entitle us to hold that a party was not bound by a promise made upon any consideration which could be valuable; while of its being so the promise by which it was obtained from the holder of it must always afford some proof.

Here, whether or not the guarantee could have been available within the doctrine of Wain v. Warlters, 5 East, 10, the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge. We, therefore, think the plea bad: and the demurrer must prevail.

Judgment for the plaintiffs.

[1] Irrelevant parts omitted.

JUDY v. LOUDERMAN.

(29 N. E. 181, 48 Ohio St. 562.)

Supreme Court of Ohio. Nov. 17, 1891.

Error to circuit court, Fayette county.

Action by Henry Judy against Nathan Louderman, executor of Henry Louderman, deceased. to recover on a written agreement made by deceased. Plaintiff's demurrer to the answer being overruled, he brings error. Reversed.

The other facts fully appear in the following statement by DICKMAN, J.:

The original action was commenced by Henry Judy, the plaintiff in error, against the defendant in error, Nathan Louderman, executor of the last will and testament of Henry Louderman, deceased. The following is a copy of the petition filed in the court of common pleas of Fayette county. "Plaintiff says: On the 5th day of October, 1882, he was the owner and holder of a certain promissory note, signed by one Jesse Louderman, for the sum of $269.52, dated January 18, 1873, due six months after date, with eight per cent. interest from date. On said 5th day of October, 1882, he turned over and surrendered to said Henry Louderman, then in full life, said promissory note; and in consideration therefor said Henry Louderman executed and delivered to plaintiff an agreement of which the following is a copy, viz.: 'New Holland, O., Oct. 5, 1882. In consideration of the following described note of my son Jesse Louderman, being turned over to me by Henry Judy, the owner and holder thereof, this day, I agree to pay to the said Henry Judy, from my personal estate at my decease, the sum of $269.52, to be paid by my executor or administrator, as the case may be; and I hereby make this a charge and advancement to the heirs of my son, the said Jesse Louderman. The following is a copy of said note: "$269.52. Six months after date I promise to pay to Henry Judy or order the just and full sum of two hundred and sixty-nine dollars and fifty-two cents, for value received this 18th day of January, A. D. 1873, bearing eight per cent. interest from date. JESSE LOUDERMAN." In witness whereof I have hereunto set my hand and seal this 5th day of October, A. D. 1882. HENRY LOUDERMAN. [Seal.] Signed and sealed in our presence this 5th day of October, 1882. Witness: JOHN LOUDERMAN. NATHAN LOUDERMAN.' Plaintiff further says that the said Henry Louderman died on the ——— day of ———, 188—, and that the said Nathan Louderman is his duly appointed and qualified executor. That on the ——— day of ———, 1885, he presented to the said Nathan Louderman, as such executor, the said claim of this plaintiff, on said agreement of Henry Louderman duly certified as required by law, and asked to have the same allowed as a valid claim against the estate of said Henry Louderman, deceased; but the said Nathan Louderman, as executor, refused to allow the same, and on the 4th day of April, A. D. 1885, indorsed thereon his rejection thereof. There is due to plaintiff by reason of the premises, from the estate of said Henry Louderman, deceased, the sum of $269.52, with interest at six per cent. from April 4, 1885. Plaintiff therefore asks judgment against said defendant that his said claim be allowed and paid out of the estate of said Henry Louderman, deceased." To this petition there was a general demurrer, which was overruled.

The defendant thereupon filed the following answer: "And now comes the defendant, and, answering the plaintiff's petition, says: That for many years prior to the date of said pretended written obligation set forth in the petition the said Jesse Louderman had been dead. That his estate was insolvent, and had, long before the making of said pretended agreement, been fully settled; and said note of said Jesse Louderman was on said 5th of October, 1882, and for years before had been, wholly worthless, all of which was then fully known to said plaintiff. That there was no person who was liable to be or could have been sued thereon or against whom a judgment could have been rendered thereon, which plaintiff then well knew. That said pretended written obligation was not an instrument required by the laws of Ohio to be sealed. That the alleged and pretended seal attached thereto was simply a pen scrawl, which the defendant denies was a seal, or that the said pretended written obligation was a sealed instrument. That said Henry Louderman was in no way connected with or liable in any way on said promissory note of said Jesse Londerman, either morally, legally, or equitably. That said pretended written obligation was and is wholly without consideration, and created no obligation or liability on said Henry Louderman or his estate. The defendant denies any indebtedness or liability of said estate to pay the same. The defendant, further answering, says: That there is no personal property of said estate which can be applied to the payment of said written obligation. That the just and legal debts of said estate are more than all the personal property. That all the real estate of deceased was specifically devised, and there is no estate or property belonging to said estate with which to pay said written obligation, if it should be held to be a valid instrument. Wherefore defendant asks to go hence and recover his costs."

There was a general demurrer to this answer, which was sustained, and the defendant excepted. The defendant having failed to make any amendment to his answer, it was adjudged that the plaintiff, Henry Judy, recover of the defendant the sum of $278 and costs, to be levied upon the property of the estate coming into his hands as such executor. The circuit court, on petition in error, held that the court of common pleas erred in sustaining the demurrer to the defendant's answer, reversed the judgment of that court, and remanded the cause for further proceedings. To reverse the judgment of the circuit court the present petition in error is filed.

Hidy & Patton, for plaintiff in error. *Mills Gardner*, for defendant in error.

DICKMAN, J., (after stating the facts.) If there was no actual consideration for the obligation executed and delivered to the

plaintiff in error, it was competent to prove the want or failure of such consideration, notwithstanding a "scrawl seal" was attached to the instrument. By the act of February 24, 1834, (1 Curw. Rev. St. 124,) it was provided "that, in any action founded upon any specialty or written contract for the payment of money or delivery of property, the defendant by special plea, or by notice attached to and filed with the general issue, may allege the want or failure of consideration in the whole or any part thereof." This act was repealed by the act establishing a Code of Civil Procedure, but section 93 of the Code, which is continued in section 5071 of the Revised Statutes, provided that "the defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off as he may have, whether they be such as have been heretofore denominated 'legal' or 'equitable,' or both." As against a strictly legal cause of action, a defendant, therefore, may now set up an equitable defense, and thereby not only bar the plaintiff's action, but obtain the proper affirmative equitable relief connected with the subject-matter. And although the common law, in requiring a valuable consideration in order to render an agreement valid and binding, declared, in its strictness, that a seal was conclusive evidence of such a consideration, yet, in determining the rights of parties upon equitable principles, a seal has been divested of the apparent sacredness with which it was clothed by the common law; and equity, looking rather to reality than form, does not permit a seal to supply the place of a real consideration, and, notwithstanding the seal, will allow the want or failure of such consideration to be shown in the enforcement of executory contracts of every description. In Richardson v. Bates, 8 Ohio St. 264, it was said by SUTLIFF, J.: "Under the statute of February 24, 1834, allowing the failure, or part failure, of consideration to be given in evidence, in a suit upon a specialty, the facts stated in the answer would have constituted a perfect defense. And the provision of the Code, allowing a defendant to set forth in his answer equitable as well as legal grounds of defense, permitted the same defense to be made in this case; and therefore the failure of consideration, stated in the answer, constituted a good defense."

Conceding, then, that it was competent to set up a want or failure of consideration as a defense to the original action, the decisive question in the case before us is whether the written obligation entered into by Henry Louderman was wholly without consideration, or was not founded upon sufficient consideration to support the plaintiff's action. It is alleged in the answer that for many years prior to the date of the written obligation described in the petition Jesse Louderman had been dead; that his estate was insolvent, and long before the making of the obligation had been fully settled; and that the note of Jesse Louderman was, on the 5th day of October, 1882, and for years before had been, wholly worthless,—all of which, it is alleged, was then fully known to the plaintiff. It is evident, however, that the father did not treat the note of his son as without value, for he stipulated for the payment to the plaintiff, out of his personal estate at his decease, of a sum equal to the full amount called for by the note. The motive or inducement operating upon the father seems to have been so controlling that he was determined upon paying his son's outstanding note, though postponing payment until his decease, when it was to be paid out of his personal estate, and the sum paid to be a charge and advancement to the son's heirs. For aught that appears, there may have been circumstances, best known to the father, which in his estimation rendered his possession of the note a valuable acquisition. And the manifest wish and design of the father to acquire the ownership and possession of the note obviously tended to enhance the value of the instrument while in the hands of the plaintiff. It cannot well be said, we think, that the chose in action surrendered by the plaintiff was valueless, or was inadequate as a consideration for the execution and delivery of the written obligation, the adequacy or inadequacy of consideration having been left to the free exercise of the judgment of the contracting parties.

It is an elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration, but will leave the parties to judge of that for themselves. The reason of the rule is succinctly expressed by ALDERSON, B., in Pilkington v. Scott, 15 Mees. & W. 657. "Before the decision in Hitchcock v. Coker," 6 Adol. & E. 440, he says, "a notion prevailed that the consideration must be adequate to the restraint. That was, in truth, the law making the bargain, instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain." It is considered unwise to interfere with the facility of contracting, and the free exercise of the judgment and will of the parties, by not allowing them to be sole judges of the benefits to be derived from their bargains. "It is, indeed, necessary that the consideration should be of some value; but it is sufficient if it be of slight value only, or even if it be such as could be valuable to the party promising." 1 Chit. Cont. (11th Amer. Ed.) 29, and cases cited. When a contract is founded on a transfer of an article of property, the authorities are numerous in illustration of the doctrine that, in determining adequacy of consideration, the extent of benefit derivable from it is not considered. A value, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on the contract or promise. "Thus, the mere surrender and delivery of a letter or other written document which the promisee has a right to keep and retain in his possession is a sufficient consideration for the promise, although the possession of it may turn out eventually to be of no value in a pecuniary point of view, or no benefit may have resulted to the one party, nor prejudice to the other, from the surrender and delivery of the document." 1

Add. Cont. (8th Ed.) 6. In Haigh v. Brooks, 10 Adol. & E. 309, 320, the declaration in *assumpsit* stated that the defendant promised to see certain bills accepted by L. paid at maturity, in consideration that the plaintiffs, at his request, would give up to him a certain guaranty on behalf of L., then held by plaintiffs. It was averred that the plaintiffs gave up the guaranty, but that the defendant did not perform his promise. There was a plea that the guaranty was a promise to answer for the debt of another, and that there was no agreement in writing wherein any sufficient consideration was stated, according to St. 29 Car. II. It was held that it appeared on the pleadings that the plaintiffs had delivered something to the defendant, on the faith of his promise, which he at the time considered valuable; and this being so, and no fraud imputed, he could not afterwards excuse a breach of the promise, by alleging that the thing given up was not of the value he had supposed. Lord DENMAN, C. J., in delivering the judgment of the court, said: "We are by no means prepared to say that any circumstances short of the imputation of fraud in fact could entitle us to hold that a party was not bound by a promise made upon any consideration which could be valuable; while of its being so, the promise by which it was obtained from the holder of it must always afford some proof. Here, whether or not the guaranty could have been available within the doctrine of Wain v. Warlters, 5 East, 10, the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, on discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives, and of their weight he was the only judge."

As alleged in the original petition, and as stated in the written obligation upon which the action is founded, the consideration of Henry Louderman's executing and delivering the obligation was the surrendering and turning over to him of the note of his son. The facts constituting the cause of action were admitted by the demurrer to the petition; and in the answer thereto subsequently filed there was no denial of the allegations in the petition as to the consideration of the written obligation. The answer, in the nature of a confession and avoidance, avers, substantially, that the note of Jesse Louderman was, at the time it was surrendered, and for years before had been, uncollectible; and that therefore the written obligation was wholly without consideration, and created no valid claim against Henry Louderman or his estate. If, before and at the time the note was surrendered, it was not collectible out of Jesse Louderman's estate, it would not follow—for reasons before assigned—that the written obligation was necessarily without consideration. Henry Louderman received from the plaintiff that for which he contracted, and obtained that which, by the terms of the contract, was evidently deemed by the contracting parties an object of value. In contemplation of law, there was, in our view, no want or failure of consideration for the written obligation of Henry Louderman. It is alleged in the answer of the defendant "that the just and legal debts of said estate of Henry Louderman are more than all the personal property," and "that all the real estate of deceased was specifically devised." Henry Louderman, by his written obligation, made the claim of Henry Judy a debt against his estate. It was to be paid out of his personal estate at his decease, by his executor or administrator, as the case might be. What was his personal estate? Not, as contended, that which would remain after the payment of his debts, and out of which a distributive share would go to the heirs of Jesse Louderman, but the body of his personal property existing at the time of his death. The personal estate is the regular and primary fund for the payment of debts, and this will be first applied until exhausted. And, "as soon as the executor or administrator shall ascertain that the personal estate in his hands will be insufficient to pay all the debts of the deceased," it is made his duty, by statute, to apply to the probate court or the court of common pleas for authority to sell the real estate of the deceased. Section 6136, Rev. St. Where, for a valuable consideration, one promises to pay a debt out of his personal estate at his decease, without a specific limitation to that estate alone, if, at his decease, the personal estate is insufficient to pay the debt, the creditor will not be precluded from resorting to the real estate of the debtor, if any there be. Otherwise it might be in the power of the debtor, in his life-time, to convert his personal into real estate, and thus evade his obligations by simply changing the form of his property. Under his written obligation, the personal property of Henry Louderman was made the primary fund for the payment of the plaintiff's claim; but if, at his death, his just and legal debts exceeded all his personal property, the residue of his estate, if any, was not thereby discharged from the payment of his debt to the plaintiff. The demurrer to the answer was rightly sustained, and the judgment of the circuit court should be reversed, and that of the court of common pleas affirmed. Judgment accordingly.

SCHNELL v. NELL.

(17 Ind. 29.)

Supreme Court of Indiana. Nov. 25, 1861.

Appeal from court of common pleas, Marion county.

James Morrison and C. A. Ray, for appellant. N. B. Taylor and A. Seidensticker, for appellee.

PERKINS, J. Action by J. B. Nell against Zacharias Schnell, upon the following instrument:

"This agreement, entered into this 13th day of February, 1856, between Zach. Schnell, of Indianapolis, Marion county, state of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Hendricks county, state of Indiana, and Donata Lorenz, of Frickinger, Grand Duchy of Baden, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: Whereas his wife, Theresa Schnell, now deceased, has made a last will and testament in which, among other provisions, it was ordained that every one of the above-named second parties, should receive the sum of $200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said Theresa Schnell, deceased, in her own name, at the time of her death, and all property held by Zacharias and Theresa Schnell jointly, therefore reverts to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this, and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said Zach. Schnell, agrees to pay the above named sums of money to the parties of the second part, to wit: $200 to the said J. B. Nell; $200 to the said Wendelin Lorenz; and $200 to the said Donata Lorenz, in the following installments, viz., $200 in one year from the date of these presents; $200 in two years; and $200 in three years; to be divided between the parties in equal portions of $66⅔ each year, or as they may agree, till each one has received his full sum of $200. And the said parties of the second part, for, and in consideration of this, agree to pay the above named sum of money (one cent), and to deliver up to said Schnell, and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said Theresa Schnell, deceased. In witness whereof, the said parties have, on this 13th day of February, 1856, set hereunto their hands and seals. Zacharias Schnell. [Seal.] J. B. Nell. [Seal.] Wen. Lorenz. [Seal.]"

The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did not aver that the one cent agreed to be paid, had been paid or tendered.

A demurrer to the complaint was overruled.

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, etc.

The will is copied into the record, but need not be into this opinion.

The court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point. See Ind. Dig. p. 110.

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay $600:

(1) A promise, on the part of the plaintiffs, to pay him one cent.

(2) The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of the property.

(3) The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of Schnell. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. Baker v. Roberts, 14 Ind. 552. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or, perhaps, for other thing of indeterminate value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one. Hardesty

v. Smith, 3 Ind. 39. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. A moral consideration, only, will not support a promise. Ind. Dig. p. 13. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding. Spahr v. Hollingshead, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise, on two grounds: (1) They are past considerations. Ind. Dig. p. 13. (2) The fact that Schnell loved his wife, and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell and the Lorenzes a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell, that, in consideration of his promising to pay, after her death, to the person named, a sum of money, she would be industrious, and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife, a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See Stevenson v. Druley, 4 Ind. 519.

PER CURIAM. The judgment is reversed, with costs. Cause remanded, etc.

COLEMAN v. EYRE.

(45 N. Y. 38.)

Court of Appeals of New York. Feb. 21, 1871.

W. M. Macfarland, for appellants. John H. Reynolds, for respondents.

RAPALLO, J. The plaintiff was interested to the extent of one-fourth in the profits or losses of a shipment of coffee undertaken by him jointly with other parties. After the adventure had been begun, and before the coffee had reached its port of destination, it was mutually agreed between the plaintiff and the defendant that the latter should have one-half interest in the plaintiff's one-fourth interest in the adventure. The speculation resulted in a loss, and this action was brought to recover one-half of the plaintiff's proportion of such loss. It is now claimed on the part of the defendant that no valid contract was made between him and the plaintiff; that inasmuch as the plaintiff had embarked in the speculation before and without reference to any arrangement with the defendant, and the defendant had not done or contributed any thing to aid in the joint enterprise, there was no partnership, and no consideration for the undertaking of the plaintiff to give him one-half of the profits; that therefore the defendant could not have enforced payment of half the profits, if the adventure had been successful, and consequently no agreement on his part to contribute to the loss can be implied.

This argument assumes that the agreement was simply that the defendant should have one-half of the profits, which the plaintiff might make out of the adventure, in case it should prove successful. But such was not the agreement proved. The agreement was that the defendant should share with the plaintiff in the adventure, and it seems to have been clearly understood that he should participate in the result, whether it should prove a profit or a loss. That it might result in a loss was contemplated by the parties. There is evidence in the case that the possibility of that event was the subject of conversation between them at the time of making the contract; that the hope was then expressed that the plaintiff would not be compelled to call upon the defendant to contribute to a loss; and that afterwards, when they did call upon him to contribute, he did not dispute his liability, but sought to reduce the amount by claiming a portion of the plaintiff's commissions.

The evidence fully justified a finding that in consideration of the agreement by the plaintiffs to account to the defendant for half the profits in case of success, the defendant undertook to bear half the loss in the contrary event; and the intendment is that the referee did so find. Indeed, such is a proper construction of the actual finding. It is a clear case of mutual promises; and the obligation of each party was a good consideration for that of the other. Briggs v. Tillotson, 8 Johns. 304.

The evidence was conflicting as to whether the defendant was to share in the commissions. The referee found in the plaintiffs' favor on that point, and the court below, at general term, refused to interfere with that finding. We cannot disturb it.

The agreement was not within the statute of frauds. It was not an agreement for the sale of any personal property or chose in action, but an executory agreement, whereby one party undertook to bear one part of a possible loss in consideration of a share of an expected profit.

The judgment of reversal and order granting a new trial should be reversed, and the judgment for the plaintiffs entered on the report of the referee should be affirmed, with costs.

All concur.

Order of general term reversed, and judgment for the plaintiffs affirmed.

SEWARD et al. v. MITCHELL.

(1 Cold. 87.)

Supreme Court of Tennessee. Nov. Term, 1859.

T. J. Freeman, for plaintiffs in error. M. R. Hill, for defendant in error.

CARUTHERS, J. On the 16th Oct. 1856, Mitchell sold to Seward & Scales, for the consideration of $8,596.50, a tract of land in the county of Gibson, described in a deed of that date, by metes and bounds, "containing 521 acres, being a part of a 5000-acre tract granted to George Dougherty, and bounded as follows," etc.

The title is warranted with the usual covenants, but nothing more said about the grants than what is above recited.

Some time after the deed was made, the parties, differing as to the quantity of land embraced in the tract, made an agreement, that it should be surveyed by Gillespie, and if there were more than five hundred and twenty-one acres, the vendee should pay for the excess at the rate of $16.50 per acre, that being the price at which the sale was made, and if less, then the vendor should pay for the deficiency, at the same rate. It turned out that there was an excess of fifty-seven acres, and the tract embraced in the deed was five hundred and seventy-eight acres, instead of five hundred and twenty-one, as estimated in the sale. For this excess, the present suit was brought, and recovery had, for $1,079.

It is objected here, that the court below erred in refusing to charge, as requested, that the agreement sued upon was void for want of a writing, and because there was no consideration for the promise.

1. The contract, or promise sued upon, is not for the sale of land, so as to require a writing, under the statute of frauds.

The sale had already been reduced to writing. This was a subsequent collateral agreement in relation to the price, which was binding by parol, and to which the statute can have no application whatever. This is too plain for argument.

2. There is more plausibility in the second objection, that there was no sufficient consideration for the promise. But this is also untenable. The argument is that the deed embraced the whole tract, and passed a perfect title to the extent of the boundaries, and consequently there was nothing passing as a consideration for the new promise that the party did not own before by a perfect legal right.

It is true that if the sale was by the tract and not by the acre, as appears from the deed, and no stipulations as to quantity, that the title was good for the whole and covered the excess. But, if the sale was not in gross, but by the acre, and the recitation in the deed would not be conclusive in a court of equity on that point, if the fact could be shown to be otherwise, then there would be mutual remedies for an excess or deficiency in proper cases, as we held in Miller v. Bents, 4 Sneed, and a more recent case; but, independent of that, and taking it to have been purely a sale in gross, and both parties desiring to act justly, and being of different opinions as to the quantity, mutually agreed to abide by an accurate survey to ascertain which was bound to pay, and recover from the other, and what amount. We see no good reason in law or morals, why such an agreement should not be binding upon them. The case of Howe v. O'Malley, 1 Murph. L. & Eq. R. 287, is precisely in point. The court there held that a promise to refund in case of deficiency, is a good consideration for a promise to pay for any excess over what is called for in the deed. That such mutual promises are sufficient considerations for each other.

The case of Smith v. Ware, 13 Johns. 259, which is supposed to conflict with this, is entirely different; "there was no mutuality," because the promise sued upon was to pay for the deficiency, without any obligation on the other party to pay for an excess, if any there had been.

The principle of the North Carolina case, commends itself to our approbation, because of its equity and justice.

Without further citation of authorities, we are satisfied to hold that the promise in this case was binding upon the defendant, as his honor charged, and therefore affirm the judgment.

PRESBYTERIAN CHURCH v. COOPER et al.

(20 N. E. 352, 112 N. Y. 517.)

Court of Appeals of New York. March 5, 1889

Appeal from supreme court, general term Third department.

Action by the Presbyterian Church of Albany against Thomas C. Cooper and another, administrators of Thomas P. Crook, deceased, on a subscription made by the decedent towards paying off a mortgage debt owing by the plaintiff. Judgment was given for defendants, and plaintiff appeals.

Matthew Hale, for appellant. Walter E. Ward, for respondents.

ANDREWS, J. It is, we think, an insuperable objection to the maintenance of this action that there was no valid consideration to uphold the subscription of the defendants' intestate. It is of course unquestionable that no action can be maintained to enforce a gratuitous promise, however worthy the object intended to be promoted. The performance of such a promise rests wholly on the will of the person making it. He can refuse to perform, and his legal right to do so cannot be disputed, although his refusal may disappoint reasonable expectations, or may not be justified in the forum of conscience.

By the terms of the subscription paper the subscribers promise and agree to and with the trustees of the First Presbyterian Church of Albany to pay to said trustees within three years from its date the sums severally subscribed by them, for the purpose of paying off "the mortgage debt of $45,000 on the church edifice," upon the condition that the whole sum shall be subscribed or paid in within one year. It recites a consideration, viz.: "In consideration of one dollar to each of us (subscribers) in hand paid, and the agreement of each other in this contract contained." It was shown that the one dollar recited to have been paid was not in fact paid, and the fact that the promise of each subscriber was made by reason of and in reliance upon similar promises by the others, constitutes no consideration as between the corporation for whose benefit the promise was made and the promisors. The recital of a consideration paid does not preclude the promisor from disputing the fact in a case like this, nor does the statement of a particular consideration, which on its face is insufficient to support a promise, give it any validity, although the fact recited may be true. It has sometimes been supposed that when several persons promise to contribute to a common object desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise would not in a legal sense be beneficial to the promisors entering into the engagement. This seems to have been the view of the chancellor, as expressed in the Hamilton College Case, when it was before the court of errors, (2 Denio, 417;) and dicta of the judges will be found to the same effect in other cases. Trustees v. Stetson, 5 Pick. 508; Watkins v. Eames, 9 Cush. 537. But the doctrine of the chancellor, as we understand, was repudiated when the Hamilton College Case came before this court, (1 N. Y. 581,) as have been also the dicta in the Massachusetts cases, by the court in that state, in the recent case of Church v. Kendall, 121 Mass. 528. The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors, and a failure to carry out, as between themselves, their mutual engagement. It is in no proper sense a case of mutual promises as between the plaintiff and defendant. If any action would lie at all, it would be one between the promisors for breach of contract.

In the disposition, therefore, of this case, we must reject the consideration recited in the subscription paper as ground for supporting the promise of the defendants' intestate, —the money consideration,—because it had no basis in fact, and the mutual promise between the subscribers, because, as to their promises there is no privity of contract between the plaintiff and the promisors. Some consideration must therefore be found other than that expressly stated in the subscription paper in order to sustain the action. It is urged that a consideration may be found in the efforts of the trustees of the plaintiff during the year, and the time and labor expended by them during that time, to secure subscriptions in order to fulfill the condition upon which the liability of the subscribers depended. There is no doubt that labor and services rendered by one party at the request of another would constitute a good consideration for a promise made by the latter to the former, based on the rendition of the service. But the plaintiff encounters the difficulty that there is no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation or its trustees did, or undertook to do, anything upon the invitation or request of the subscribers. Nor is there any evidence that the trustees of the plaintiff, as representatives of the corporation, in fact did anything in their corporate capacity, or otherwise than as individuals interested in promoting the general object in view. Leaving out of the subscription paper the affirmative statement of the consideration, (which for reasons stated may be rejected,) it stands as a naked promise of the subscribers to pay the several amounts subscribed by them for the purpose of paying the mortgage on the church property, upon a condition precedent limiting their

liability. Neither the church nor the trustees promise to do anything, nor are they requested to do anything, nor can such a request be implied. It was held in the Hamilton College Case, 1 N. Y. 581, that no such request could be implied from the terms of the subscription in that case, in which the ground for such an implication was, to say the least, as strong as in this case. It may be assumed from the fact that the subscriptions were to be paid to the trustees of the church for the purpose of paying the mortgage that it was understood that the trustees were to make the payment out of the moneys received. But the duty to make such payment in case they accepted the money, would arise out of their duty as trustees. This duty would arise upon the receipt of the money, although they had no antecedent knowledge of the subscription. They did not assume even this obligation by the terms of the subscription, and the fact that the trustees applied money paid on subscriptions upon the mortgage debt did not constitute a consideration for the promise of the defendants' intestate. We are unable to distinguish this case in principle from the Hamilton College Case, 1 N. Y. 581. There is nothing that can be urged to sustain this subscription that could not with equal force have been urged to sustain the subscription in that case. In both the promise was to the trustees of the respective corporations. In each case the defendant had paid part of his subscription, and resisted the balance. In both part of the subscription had been collected and applied by the trustees to the purpose specified. In the Hamilton College Case, (which in that respect is unlike the present one,) it appeared that the trustees had incurred expense in employing agents to procure subscriptions to make up the required amount, and it was shown also that professors had been employed upon the strength of the fund subscribed. The Hamilton College Case is a controlling authority in this case. It has not been overruled, and has been frequently cited with approval in the courts of this and other states.

The cases of Barnes v. Perine, 12 N. Y. 18, and Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500, are not in conflict with the decision in the Hamilton College Case. There is, we suppose, no doubt that a subscription invalid at the time for want of consideration may be made valid and binding by a consideration arising subsequently between the subscribers and the church or corporation for whose benefit it is made. Both of the cases cited, as we understand them, were supported on this principle. There was, as was held by the court in each of these cases, a subsequent request by the subscriber to the promisee to go on and render service, or incur liabilities, on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request by the promisor. Judge Allen, in his opinion in Barnes v. Perine, said "the request and promise were to every legal effect simultaneous;" and he expressly disclaims any intention to interfere with the decision in the Hamilton College Case.

In the present case it was shown that individual trustees were active in procuring subscriptions. But, as has been said, they acted as individuals, and not in their official capacity. They were deeply interested, as was Mr. Crook, in the success of the effort to pay the debt on the church, and they acted in unison. But what the trustees did was not prompted by any request from Mr. Crook. They were all co-laborers in promoting a common object. We can but regret that the intention of the intestate in respect to a matter in which he was deeply interested, and whose interest was manifested up to the very time of his death, is to be thwarted by the conclusion we have reached; but we think there is no alternative, and that the judgment must be affirmed.

All concur.

KEEP et al. v. GOODRICH.

(12 Johns. 397.)

Supreme Court of New York. Oct., 1815.

This was an action of assumpsit. The declaration contained three counts. The first stated, that certain differences having arisen between the plaintiffs, as executors of Nathan Hale, deceased, and the defendant, concerning a promissory note, made by the defendant to their testator, dated the 7th day of February, 1797, by which the defendant promised to pay him, for value received, £69 3s. 8d. lawful money, on demand, with lawful interest, at six per cent., in certain liquidated securities given by the treasurer of Connecticut; and that to put an end to such differences, the parties, heretofore, to wit, &c., "respectively submitted themselves to the award of John Elmore, to be made between them, of and concerning the said differences; and in consideration thereof, and that the plaintiffs, at the special instance and request of the defendant, had, then and there, undertaken and promised the defendant to perform and fulfil the award of the said John Elmore, to be made, &c. of and concerning the said differences, in all things on their part to be performed and fulfilled, he, the defendant, undertook, &c. to perform and fulfil the said award, in all things," &c. The plaintiffs averred that Elmore, having taken upon himself the burthen of the arbitrament, did, on the 15th of May, 1814, at, &c., make his award in writing, &c., and thereby awarded, that the defendant should pay the said plaintiffs, as executors aforesaid, the sum of 391 dollars and 31 cents, in full satisfaction of their claim on the said note, of which said award, the said defendant, afterwards, to wit, &c., had notice; and although often requested, &c. to pay the said sum, &c., according to the tenor and effect of the said award, and of his promise, &c.; yet, not regarding, &c., he did not pay, &c. The second count was on an insimul computassent. The third count was also on an insimul computassent, with the plaintiffs, as executors, &c.

The defendant pleaded the general issue, with notice of set-off.

At the trial, the plaintiffs give in evidence a letter of the defendant, dated Albany, August 19th, 1811, addressed to John Elmore, in which, speaking of the claim of the plaintiffs, and alleging that he owed nothing, he says: "But I have agreed for you to say what I shall do in this case, and hold myself obligated accordingly," &c. On the 23d of November, 1811, the defendant again wrote to Elmore on the same subject, and promised to send him some papers relative to his payments, &c.

On the 8th of January, 1814, he again wrote to Elmore, and, after mentioning that he had been called on again by the plaintiffs, about the business, he says: "I still wish you to make up your mind on this business, as I am willing to agree to your decision, and abide your judgment."

The defendant, on the 8th of January, 1814, wrote to Elmore as follows: "I wrote you some time since, concerning Squire Hale and myself. I wish you to make up your mind according to what you have understood, as you have had more knowledge than any other person about my business. I think I made a kind of statement to you. I am called upon by Mr. Keep, and have renewed a line to you on the matter; and I wish you to look into the business, and give your opinion, for a full settlement of the business," &c. "N. B. I am willing to have the note matter settled on your opinion."

On the 28th of January, 1814, Elmore, who lived at Canaan, in the state of Connecticut, wrote to the defendant, at Albany, acknowledging the receipt of his letter of the 8th of January, saying he should have no objection to determine what was right in the matter, if they (the plaintiffs) would agree to it, after having the circumstances stated to him again, as they were somewhat out of his mind. "But they will not agree to abide my judgment; for J. Hale (one of the plaintiffs) told me, when he called on me, some time since, for my opinion in the matter, that you was bound to abide my judgment, but he was not, unless he liked it. I then told him, I would not determine it, unless he was bound also. If they will agree with you, to refer their claim to me, and give me a statement of the fact, I will determine the question between you."

Elmore testified, that he had not seen the defendant for some time previous to the 19th of August, 1811, nor since, until after he made his award; and that the defendant had never appeared before him, nor submitted the matter in controversy to him, otherwise than as is contained in the above letters. That after writing the letter to the defendant, of the 28th of January, 1814, one of the plaintiffs, who resided at Goshen, in Connecticut, called on him, and agreed that they would be bound, and abide by his award. No notice of the time and place where he would meet, to make up an award, was given by him to the defendant; nor did he inform the defendant, that he had taken upon himself to decide between the parties; nor that the plaintiffs had agreed to abide by his decision; nor was the defendant present when he undertook to make up his decision.

The plaintiffs produced an award in writing, dated Canaan, May 15th, 1814, which, after reciting that the plaintiffs, as executors, &c. and the defendant, had submitted the controversy subsisting between them, relative to a promissory note, &c., and that, "having heard the parties, and taken the case into consideration," he was of opinion that there was due to the plaintiffs, as executors, &c., on the said note, 391 dollars and 31 cents; and, therefore, he awarded, that the defendant should pay to the plain-

tiffs the said sum, in full satisfaction for their claim on the said note.

The judge charged the jury, that, in his opinion, there was sufficient evidence of a submission, on the part of the defendant, of the matter in difference between the plaintiffs and defendant; and that, without regarding the matter as a submission to Elmore, he might be considered as having been constituted the agent of the defendant, to adjust and ascertain the amount due on the note. The jury found a verdict for the plaintiffs, for 417 dollars and 50 cents.

A motion was made to set aside the verdict, and for a new trial.

Mr. Parker, for the motion. H. Bleecker, opposed.

SPENCER, J. It is very clear, that Elmore did not act as the private agent of the defendant, in adjusting the claim made on him by the plaintiffs. He made a formal award between the parties, and refused to act, unless the plaintiffs agreed to be bound also. The count on an insimul computassent cannot be maintained.

The real question is, whether the defendant is bound by the award, it appearing clearly in evidence, that the plaintiffs refused to be concluded by it, up to the 28th of January, 1814. Subsequent to that time, the plaintiffs agreed to be bound by the award; but the defendant's agreement to submit to Elmore, and to be bound by his decision, was on, or anterior to, the 8th of January, 1814; so that there was no point of time when both parties bound themselves, by agreement with each other, to submit their controversy to Elmore, and to be bound by his award.

In Livingston v. Rogers, 1 Caines, 583, it was decided, that in assumpsit on mutual promises, the declaration must allege that they were concurrent. In that case, the promise was stated, "and that in consideration the plaintiffs had, at the defendant's request, promised to perform his part; the defendant, afterwards, to wit, the same day, promised," &c. The court were of opinion that the judgment ought to be arrested; but there being a good count, and a motion to amend, leave was given for that purpose, on payment of all the costs.

The only consideration, in this case, for the defendant's promise, is the plaintiffs' promise; and it is alleged, in both counts on the award, that the defendant's promise was made in consideration of the plaintiffs' promise, and both promises are laid as concurrent acts; and we have seen, that if the promises were not alleged to have been made concurrently, it would have been good ground for arresting the judgment. It is a necessary consequence, that the proof should support this allegation in the declaration, and show that, in point of fact, the promises were considerations reciprocally for the parties. Here the proof negatives the fact, that the consideration of the defendant's promise to submit and abide by the award of Elmore, was, that the plaintiffs had, at the same time, made the like promise; for it clearly appears that the plaintiffs refused to submit and be bound by Elmore's award, long after the defendant professed a willingness to make the submission.

In Tucker v. Woods, 12 Johns. 190, we recognized the principle that, in contracts where the promise of one party is the consideration for the promise of the other, the promise must be concurrent and obligatory upon both at the same time; and, in addition to the case in Caines, 1 Chit. Pl. 297, and 3 Term R. 653, were cited, which fully warrant the position. The same doctrine is contained in Paine v. Cave, 3 Term R. 148, and in Kingston v. Phelps, Peake, N. P. 227. The plaintiff proved that the defendant consented to be bound by an award to be made on a submission by other underwriters on the same policy, but the witness proved no agreement on the part of the plaintiff to be bound by the award. Lord Kenyon held, that there was no mutuality, and, therefore, the defendant's agreement was a mere nudum pactum. It is correctly stated by Kent, J., in Livingston v. Rogers, that Hobart (88) observes, that the promises must be at one instant; for, else, they will be both nuda pacta.

There must be a new trial, with costs to abide the event of the suit.

New trial granted.

L'AMOREUX v. GOULD.

(7 N. Y. 349.)

Court of Appeals of New York. 1852.

The defendant in this action was an endorser upon five promissory notes made by J. W., amounting in the aggregate to $1,140. Two of them, amounting to $490, had become payable before May 26, 1841, and the remaining three were payable after that day. The defendant held as trustee a judgment against Woodward given to secure certain creditors, and among them the plaintiff as endorser of the notes. Upon that day an agreement in writing was entered into between the defendant and plaintiff of which the following is a copy:

"James L'Amoreux, Esq., being an endorser on several notes drawn by J. W., some of which have become due, and on some of them prosecutions have been commenced, and the subscriber having a judgment rendered in his favor against the said J. W. entered in the supreme court for securing certain creditors agreeably to a certain declaration of trust in writing in which the endorsers on the defendant's paper are included in the first class of creditors and in which it is declared that such creditors shall be first paid: Now in consideration of the premises and in consideration that the said James L'Amoreux shall advance and pay the sum of one thousand dollars towards satisfying or in part satisfying the notes on which he is holden as endorser as aforesaid, and shall exhibit to the said Charles D. Gould the evidence of such payment; the said Charles hereby agrees with the said James, that within one year from this date he will cause to be raised under the said judgment given as aforesaid the said sum of one thousand dollars with interest, and will pay the same over to the said James in satisfaction of the money so to be advanced towards satisfying said endorsements.

"Charles D. Gould.

"Dated August 26, 1841."

The plaintiff subsequently paid the five notes and exhibited them to the defendant, at the same time telling him that he did it in compliance with the agreement, and the defendant replied that it was all right. The defendant refusing to comply with the terms of the agreement an action of assumpsit was brought thereon in September, 1842. The cause was tried by a referee, who found for the plaintiff the amount due by the terms of the agreement, upon which a judgment was entered in November, 1848. The defendant appealed therefrom.

J. C. Spencer, for appellant. N. Hill, Jr., for respondent.

EDMONDS, J. (after disposing of some objections arising upon the pleadings which were cured by the finding by the referee). The only question to be determined, therefore, is, whether there was such a want of mutuality between the parties that there was in fact no cause of action.

The proposition is stated by Chitty as broadly as the defendant's counsel claims it, that if the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality (Chit. Cont. 15); but the proposition is too broadly stated. It is confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise. Arnold v. Mayor of Poole, 4 Man. & G. 860. For there are many valid contracts not mutually binding at the time when made; as where A. says to B., if you will furnish goods to C. I will pay for them, B. is not bound to furnish them, but if he does he may recover on the promise. 2 Saund. 137h; Morton v. Burn, 7 Adol. & E. 19; Kennaway v. Treleavan, 5 Mees. & W. 498. And the question in this case is not whether the plaintiff was bound to pay the $1,000, but whether, if he did pay it, the defendant was without any valid or available consideration for his promise. The agreement is, that if the plaintiff will pay $1,000 on notes on which he is holden as indorser, etc. Now I am not very clear whether this means on notes on which he was absolutely fixed and liable as indorser by means of due protest, or those on which he was merely liable to be, in case of non-payment by the drawer. The pleadings do not help us out of the difficulty at all, but the evidence shows that three of the five notes were not due at the time the agreement was made, and the agreement recites that he was indorser on several notes some of which had become due, etc. Those notes which had become due at that time and on which alone the plaintiff could then have become "holden" by due protest, did not amount to one-half of the $1,000 that he was to pay, while all of the five notes which he had indorsed amounted to more than $1,000. I should infer that the parties meant by this equivocal expression to refer to the fact of his indorsement only, and not to the fact of his being fixed as indorser. This is a material consideration, because if the plaintiff was to pay the $1,000 merely upon notes upon which he was finally fixed and "holden" by due protest, he would do nothing more by paying that sum than merely discharge an obligation which he was bound to perform, and that would form no consideration for the defendant's promise.

But if on the other hand he voluntarily paid the money, without reference to his being fixed as indorser, and in fact waived the various acts of demand and protest which were necessary to fix him as indorser, he thus assumed a liability and performed an act detrimental to himself, which would furnish a good consideration for the promise. And in-

ferring as I do from the facts proved on the trial and from the language of the agreement that the parties meant all the notes, as well those not due as those due and protested, I have no difficulty in finding a sufficient consideration to support the promise, in the fact of the plaintiff's having paid the $1,000 and thus enlarged his liability beyond what it was when the agreement was made.

This disposes of the only point not cured by the finding, and I am of opinion the judgment ought to be affirmed.

All the judges concurred.

Judgment affirmed.

DAVIE et al. v. LUMBERMAN'S MIN. CO.

(53 N. W. 625, 93 Mich. 491.)

Snpreme Court of Michigan. Nov. 18, 1892.

Error to circuit court, Menominee county; John W. Stone, Judge.

Action by Josiah Davie and another against the Lumberman's Mining Company for breach of contract. From a judgment for plaintiffs, defendant appeals. Reversed.

Ball & Hanscom, (B. J. Brown, of counsel,) for appellant. R. C. Flannigan, (F. O. Clark, of counsel,) for appellees.

DURAND, J. On October 7, 1889, the plaintiffs, who were practical miners, entered into a verbal agreement with the defendant company, through its mining captain, to go to work in what is called the "Cave Pit," and were to receive $1.50 per ton for all the ore they produced, as long as they could make it pay. The plaintiffs practically agree that the mining captain, with whom the contract was made, said to them that he would give $1.50 a ton for all the ore they could produce anywhere in the pit, to which they responded, "All right; we will take the contract, and work it as long as we can make it pay." The plaintiffs were to put in skip roads for hoisting the ore, and were to put it in position for hoisting, and the defendant was to furnish the hoisting machinery and do the hoisting. Acting under this contract, the plaintiffs went to work in the pit. They leveled off a place, and put down some plank platform to pile ore upon, and sorted out some ore from the loose rock, and took some ore also out of a seam in the foot wall of the pit, and placed it on these platforms. On the morning of the third day after they began to work, the captain of the defendant company went down, and found the plaintiffs digging into the foot wall of the pit, upon which he ordered them to quit mining at that point. A controversy then arose between him and the plaintiffs in reference to where they had a right to dig, and as to the extent of their right, which ended by the plaintiffs quitting the work. The plaintiffs contend that they had a right to mine at any point they chose, and that they had a right to dig into and through the foot wall, and that they had a right, under their contract, to mine all ore which might be newly discovered by them after digging through the walls of the pit, and that they were not confined to such ore as they might find within the pit, as it had already been opened and worked. The defendant contends that, even if the contract is a valid one, it merely had reference to such ore as might be found within the pit as it had been opened and worked, and that it gave them no right to dig or break through the walls of the pit, and mine ore found outside of the walls; that it was essentially what is known among miners as a "scramming contract," which is one that confers the right to mine and gather such ore as may be left within the limits of a mine or pit as it has been opened and mined before; that nothing beyond that was ever thought of, and that the act of the plaintiffs in breaking through the walls of the pit, and mining in a newly-discovered vein of ore, was never contemplated by the parties; and that it would greatly endanger the property of the defendant, as well as the lives of the miners, by rendering it likely to cave, as had happened before, and for which reason it is alleged this pit was named "Cave Pit;" and the defendant insists that the plaintiffs were stopped from digging in the foot walls for the reasons stated, while the plaintiffs contend that the real reason was that the defendant thought they would make too much money if allowed to mine in the rich vein of newly-discovered ore beyond the foot wall. The plaintiffs also contend that the term employed in the contract, "as long as we can make it pay," has a special signification among miners, and means as long as they could make "company account" wages, being such wages as the company was then paying by the day for such work; and they introduced some testimony, against the defendant's objection, tending to prove this to be so, while the defendant denies that this is so, and contends that the term has no special signification. The plaintiffs also contend that they had discovered a body of ore which amounted to at least 17,000 tons, and that if they had been allowed to mine it,—as they claim they had a right to do under the contract referred to,—they would have realized a profit of $22,000; while the defendant contends that this is not true, and that the dangers and contingencies were so great that no estimate of profits could be made which would be at all reliable, or upon which the jury could intelligently act in attempting to decide upon what the damages should be. The questions of fact were all fairly submitted to the jury, who found a verdict of $1,000 for the plaintiffs, and a judgment for that amount was thereupon rendered in their favor. The defendant claims error.

The questions we are called upon to consider all relate to and depend upon the two main propositions in the case, which are whether or not the contract is of such a character as to entitle the plaintiffs to damages for its breach, and, if it is, then whether or not the profits which the plaintiffs claim they would have made if they had been allowed to proceed to mine the ore, as long as they could make it pay, are not so speculative, uncertain, and contingent as to make it improper to permit the jury to pass upon them in deciding upon the damages to which the plaintiffs are entitled. We have sought in vain for a valid reason to sustain the plaintiffs in their contention in this case, but we cannot do so. We do not think the contract is of such a character as to be enforceable as an executory

contract. The agreement was simply that the plaintiffs would work at mining the ore in "Cave Pit" for $1.50 per ton as long as they could make it pay. No limitations were put upon their methods, or how or in what manner they should conduct the work in order to make it pay, nor does it give the defendant any voice in deciding upon whether or not the plaintiffs could make it pay, nor does it place the subject of the contract upon any certain basis upon which a jury can lawfully and justly arrive at a fair rule of damages in case of its violation. Under this contract, the plaintiffs must be presumed to be the sole judges of whether or not it would pay them to do the work, and of how long they should continue it. Neither do we think that the clause, "as long as they could make it pay," has any special signification in this case. It is not in any sense ambiguous, and can have no different meaning when applied to mining than it has in any mechanical or agricultural employment. It is a term used daily in all the different enterprises and occupations in which men are engaged, and its scope is so well understood that no evidence is necessary to show what it is, or that it means anything different in one case than in another. When a party agrees to sell articles of merchandise, or deliver the productions of his labor to another at a certain price as long as he can make it pay, every one must clearly understand that the term is dependent on conditions over which the promisee has no control, and, in so far as any one has the power to make the term effective, it is lodged solely in the promisor, who by judicious purchases or skillful manipulations of labor may be able to make a transaction pay when a more careless, negligent, or improvident person would be unable to do so. This serious element of uncertainty destroys all mutuality in the contract, and gives the promisor full power to say when a further execution of the contract will not be advantageous, because he cannot make it pay. Contracts cannot arise where there is no mutuality, nor can they arise from the action of one party alone where the other has no power to prevent his action. The uncertainty of the term, "as long as we can make it pay," employed in this contract, is illustrated in the case of Cummer v. Butts, 40 Mich. 322. In that case the contract stipulated that on 60 days' notice it might be canceled by either party for "good cause." One of the parties terminated the contract, whereupon the other party, who insisted that no "good cause" for his dismissal existed, brought suit to recover for the profits he would have made if the arrangement had not been interrupted. Mr. Justice Graves, in an opinion concurred in by the entire court, says: "The difficulty is inherent. It exists in the terms adopted by the parties. The requirement of 'good cause,' as something on which the right to revoke by one or the other should depend, is, as here introduced, too vague to be fairly intelligible. The phrase in such connection, as to parties and subject-matter, has no such distinct sense as to furnish a common and intelligible criterion for the parties, or any determinate sense whatever. It is impossible to say that the wills of the parties concurred, and that each meant exactly what the other did, or even to say what either meant. The case is one where the parties have failed to express themselves in terms capable of being reduced to lawful certainty by judicial effort." The same general rule is laid down in cases cited in Am. & Eng. Enc. Law, 844, 845, and notes; Blanchard v. Railroad Co., 31 Mich. 43; Caswell v. Gibbs, 33 Mich. 331; Wilkinson v. Heavenrich, 58 Mich. 574, 26 N. W. 139. Under this view of the law, we must hold that the plaintiffs cannot recover under this contract for any prospective profits which they might have made if they had been allowed to complete it, and the jury should have been so instructed. As this disposes of the case in favor of the defendant, it is unnecessary to discuss the question of damages, or any other question raised by the record. It follows that the judgment must be reversed, with costs of this court, and a new trial granted. The other justices concurred.

COOK et al. v. WRIGHT.

(1 Best & S. 559.)

Court of Queen's Bench. July 9, 1861.

Declaration by plaintiffs, as payees, against the defendant, as maker of two promissory notes, dated the 7th February, 1856. The first count was upon a note for £10 10s., payable twelve months after date; the second was upon a note for £11, payable twenty-four months after date. There was also a count upon an account stated. Claim, £50.

First plea to the whole declaration: That after the passing and coming into operation of the Whitechapel improvement act, 1853, and after the passing and coming into operation of the Metropolis local management act, 1855, the defendant made the several promissory notes in the said first and second counts mentioned at the request of the plaintiffs, and that, at the time of making the said promissory notes, the plaintiffs asserted and represented to the defendant, and the defendant believed such assertion and representation to be true, that there was then due and owing, and payable from him, the defendant, as the owner of certain lands and buildings in certain streets called "Finch Street," "John Street" and "Dawson's Place," situate within the parish of St. Mary, Whitechapel, to the trustees of the parish of St. Mary, Whitechapel, under the provisions of the Whitechapel improvement act, 1853, divers large sums of money in respect of paving the streets fronting, adjoining and abutting on such lands and buildings. And the defendant says that, at the time of making the said promissory notes no sum of money whatsoever was due or owing or payable from the defendant as such owner to the said trustees, nor was the defendant such owner as aforesaid, and that there never was any consideration or value for the defendant making the said promissory notes in the first and second counts mentioned, or either of them, or for his paying the same, or any part thereof; and the plaintiffs never were, nor was any person, ever a holder of the said notes, or either of them, for value or consideration; and that the account stated, in the declaration mentioned, was stated of and concerning the matters and things in this plea mentioned, and was not stated of or concerning any other matter or thing whatsoever.

Second plea, to the first and second counts: That the defendant was induced to make, and did make, the promissory notes in those counts mentioned, and each of them, by the fraud, covin, and misrepresentation of the plaintiffs and others in collusion with them.

On the trial, before Wightman, J., at the sittings in London, during Easter term, 1860, it appeared that the plaintiffs were four of the commissioners or trustees acting under and incorporated by section 27 of the Whitechapel improvement act, 1853 (16 & 17 Vict. c. cxli.); and the action was brought to recover the amount of the two notes mentioned in the declaration. The evidence as to what took place at the time of the giving of the notes was as follows: Mitchell, the clerk to the trustees, said that, certain parts of the district not being in repair in 1854, notices to do repairs were sent or left addressed to the owners; and in October, 1855, he wrote a letter to the defendant demanding £70 for expenses incurred by the trustees in doing paving works in front of houses, of which the defendant was the owner or occupier, situate in and abutting on public highways within the district of the Whitechapel improvement act. The defendant complained that the works done by the trustees had seriously injured the property, and that the tenants were dissatisfied, and requested him to get an abatement made. He informed the defendant that the trustees assented, and the balance to be paid by the defendant was agreed to at £30. The defendant then requested time, and time was given, upon condition that he paid interest; and three promissory notes were given by the defendant, the first of which was paid by him under protest. The defendant was called, and stated that Mrs. Bennett was owner of the three houses in question, and that he was tenant of one of them at a rack rent under her, and collected the rents of the others for her; that he paid the paving rate of the house which he occupied, and the paving rates of the other houses he paid for Mrs. Bennett and in her name; that, upon receiving the notice of October, 1855, he went before the board of trustees and told them that he was not the owner of the property, and shewed them Mrs. Bennett's receipts for the rent. They replied that, as he paid the rates, they considered he was the owner within the meaning of the Whitechapel improvement act, 1853, and, if he did not give notes, they would serve him as they had served Goble, which was by levying an execution on him; that there was another case in which the question of the liability of the inhabitants was to be tried, and, if decided against the trustees, he should not be called on to pay. When the first note became due he complained to Mitchell that the trustees had not carried out their promise to try one of the cases. Mitchell said that, as the defendant had signed the notes, he must pay them, and that the promised trial should take place. Thereupon the defendant paid the first note. The defendant was afterwards told by Mrs. Bennett that he was not the owner within the meaning of the act, and he thereupon went to a board meeting of the trustees and told them that he would not pay the other notes. It was contended for the defendant that the notes were given without consideration, the defendant not being an "owner" within section 7 of the Whitechapel improvement act. The jury, in answer to the questions put to them by the learned judge, found that the defendant told Mitchell or the board, before he gave the notes, that he was not the owner; that the defendant mentioned, before he

gave the notes, that Mrs. Bennett was the owner; and that Mitchell, or some member of the board, told the defendant, in the board-room, that, unless he gave the notes, he would be served as Goble had been. The verdict was thereupon entered for the defendant, leave being reserved to move to enter a verdict for the plaintiffs. In the same term (May 4).

Montagu Chambers obtained a rule to shew cause accordingly, on the ground that the evidence did not prove want of consideration for giving the notes, and that, upon the evidence, the plaintiffs were entitled to a verdict.

This rule was argued in this term, May 23d, before COCKBURN, C. J., and WIGHTMAN, CROMPTON, and BLACKBURN, JJ.

Mr. Shee, Serjt., and Mr. Barnard, shewed cause. There was no consideration for the notes. The defendant signed them upon the representation by the trustees that they considered him the owner of the houses because he collected the rents, and was liable to pay the rates. But the defendant was not the owner within section 7 of St. 16 & 17 Vict. c. cxli., by which "the word 'owner,' used with reference to any lands or buildings in respect of which any work is required to be done, or any rate to be paid under this act, shall mean the person for the time being entitled to receive, or who, if such lands or buildings were let to a tenant at rack rent, would be entitled to receive, the rack rent from the occupier thereof."

The existence of disputes and controversies between a plaintiff and defendant, as to whether the defendant is indebted to the plaintiff, is not a sufficient consideration for a promise; there must be a debt in existence. Edwards v. Baugh, 11 Mees. & W. 641. These notes were not given for the debt of another party: the trustees did not profess to take them in payment of the rates due from Mrs. Bennett. [CROMPTON, J. Suppose money had been paid by the defendant, could he have recovered it back? The maxim "Quod fieri non debet factum valet" seems to apply. WIGHTMAN, J., referred to Southall v. Rigg and Forman v. Wright, 11 C. B. 481.] In Addison on Contracts, p. 15 (4th Ed.), it is said: "So if the consideration prove to be a nullity, the promise founded upon it is void, as if the consideration be the forbearance of a suit when there is no cause of action * * * or a promise to pay a debt which never had an existence in point of law."

Mr. Hannen, in support of the rule. 1. The plea was not proved. The defendant did not believe the representation of the trustees that he was liable as owner of the houses under the provisions of the Whitechapel improvement act, 1853.

2. The plea is not good. In Edwards v. Baugh, 11 Mees. & W. 641, the defendant might have been imposed upon as to their being a debt due from him to the plaintiff, but in this case there is no statement that the defendant yielded to the assertion that he was owner of the houses; it amounts to no more than that he thought it doubtful whether he was liable. [CROMPTON, J. Did the trustees put themselves in a worse position by taking the notes? Might they not the next day have said, "We have mistaken our position," and have returned the notes?] No. In Baker v. Walker, 14 Mees. & W. 465, Parke, B., said (page 467), "If I give a promissory note for the debt of a third person, I am bound to pay it when due." [CROMPTON, J. The defendant gave the note in discharge of his own liability. He took the debt upon himself, whosesoever it was, if the trustees would give him time.] The defendant signed the notes because the trustees threatened to sue him, not because he believed himself to be liable; and he obtained time for payment of the debt of a third person, which is a sufficient consideration for giving the notes. Sowerby v. Butcher, 2 Cromp. & M. 368. Suppose the trustees had sued Mrs. Bennett for the rates, she might have pleaded that the trustees had taken notes for the amount from her agent. The notes were given for the debt claimed to be due in respect of a particular property. [COCKBURN, C. J. The difficulty which I feel is that I do not see in what character the defendant acted when he gave the notes. WIGHTMAN, J. By section 11 of St. 16 & 17 Vict. c. cxli., the provisions of the "Towns Improvement Clauses Act, 1847" (10 & 11 Vict. c. 34,) are incorporated with the first mentioned act, "with respect to the paving and maintaining the streets, except sections 54 and 55; and provided that section 53 shall extend to such streets only as shall be public highways at the time of the passing of this act, and that the expenses incurred under the last mentioned section shall be repaid by the owners of the lands therein mentioned, and shall be recoverable from the owners or occupiers in the same manner as is provided with respect to the recovery of expenses under the provisions for insuring the execution of works required to be done by the owners and occupiers of lands."]

Cur. adv. vult.

BLACKBURN, J. (July 9th) delivered the judgment of COCKBURN, C. J., WIGHTMAN, J., and himself; CROMPTON, J., having left the court before the argument was concluded.

In this case it appeared on the trial that the defendant was agent for a Mrs. Bennett, who was nonresident owner of houses in a district subject to a local act. Works had been done in the adjoining street by the commissioners for executing the act, the expenses of which, under the provisions of their act, they charged on the owners of the adjoining houses. Notice had been given to the defendant, as if he had himself been owner of the houses, calling on him to pay the proportion chargeable in respect of them. He attended at a board meeting of the commissioners, and objected both to the amount

and nature of the charge, and also stated that he was not the owner of the houses, and that Mrs. Bennett was. He was told that, if he did not pay, he would be treated as one Goble had been. It appeared that Goble had refused to pay a sum charged against him as owner of some houses, and the commissioners had taken legal proceedings against him, and he had then submitted and paid, with costs. In the result it was agreed between the commissioners and the defendant that the amount charged upon him should be reduced, and that time should be given to pay it in three instalments. He gave three promissory notes for the three instalments. The first was duly honoured; the others were not, and were the subject of the present action. At the trial it appeared that the defendant was not in fact owner of the houses. As agent for the owner he was not personally liable under the act. In point of law, therefore, the commissioners were not entitled to claim the money from him; but no case of deceit was alleged against them. It must be taken that the commissioners honestly believed that the defendant was personally liable, and really intended to take legal proceedings against him, as they had done against Goble. The defendant, according to his own evidence, never believed that he was liable in law, but signed the notes in order to avoid being sued as Goble was. Under these circumstances the substantial question reserved (irrespective of the form of the plea) was whether there was any consideration for the notes. We are of opinion that there was.

There is no doubt that a bill or note given in consideration of what is supposed to be a debt is without consideration if it appears that there was a mistake in fact as to the existence of the debt (Bell v. Gardiner, 4 Man. & G. 11), and, according to the cases of Southall v. Rigg and Forman v. Wright, 11 C. B. 481, the law is the same if the bill or note is given in consequence of a mistake of law as to the existence of the debt. But here there was no mistake on the part of the defendant, either of law or fact. What he did was not merely the making an erroneous account stated, or promising to pay a debt for which he mistakingly believed himself liable. It appeared on the evidence that he believed himself not to be liable; but he knew that the plaintiffs thought him liable, and would sue him if he did not pay, and in order to avoid the expense and trouble of legal proceedings against himself he agreed to a compromise; and the question is whether a person who has given a note as a compromise of a claim honestly made on him, and which but for that compromise would have been at once brought to a legal decision, can resist the payment of the note on the ground that the original claim thus compromised might have been successfully resisted.

If the suit had been actually commenced, the point would have been concluded by authority. In Longridge v. Darville, 5 Barn. & Ald. 117, it was held that the compromise of a suit instituted to try a doubtful question of law was a sufficient consideration for a promise. In Atlee v. Backhouse, 3 Mees. & W. 633, where the plaintiff's goods had been seized by the excise, and he had afterwards entered into an agreement with the commissioners of excise that all proceedings should be terminated, the goods delivered up to the plaintiff, and a sum of money paid by him to the commissioners, Parke, B., rests his judgment (page 650) on the ground that this agreement of compromise honestly made was for consideration, and binding. In Cooper v. Parker, 15 C. B. 822, the court of exchequer chamber held that the withdrawal of an untrue defence of infancy in a suit, with payment of costs, was a sufficient consideration for a promise to accept a smaller sum in satisfaction of a larger.

In these cases, however, litigation had been actually commenced; and it was argued before us that this made a difference in point of law, and that though, where a plaintiff has actually issued a writ against a defendant, a compromise honestly made is binding, yet the same compromise, if made before the writ actually issues, though the litigation is impending, is void. Edwards v. Baugh, 11 Mees. & W. 641, was relied upon as an authority for this proposition. But in that case Lord Abinger expressly bases his judgment (pages 645, 646) on the assumption that the declaration did not, either expressly or impliedly, shew that a reasonable doubt existed between the parties. It may be doubtful whether the declaration in that case ought not to have been construed as disclosing a compromise of a real bona fide claim, but it does not appear to have been so construed by the court. We agree that, unless there was a reasonable claim on the one side, which it was bona fide intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise. The position of the parties must necessarily be altered in every case of compromise, so that, if the question is afterwards opened up, they cannot be replaced as they were before the compromise. The plaintiff may be in a less favourable position for renewing his litigation; he must be at an additional trouble and expense in again getting up his case, and he may no longer be able to produce the evidence which would have proved it originally. Besides, though he may not in point of law be bound to refrain from enforcing his rights against third persons during the continuance of the compromise, to which they are not parties, yet practically the effect of the compromise must be to prevent his doing so. For instance, in the present case, there can be no doubt that the practical effect of the

compromise must have been to induce the commissioners to refrain from taking proceedings against Mrs. Bennett, the real owner of the houses, while the notes given by the defendant, her agent, were running; though the compromise might have afforded no ground of defence had such proceedings been resorted to. It is this detriment to the party consenting to a compromise arising from the necessary alteration in his position which, in my opinion, forms the real consideration for the promise, and not the technical and almost illusory consideration arising from the extra costs of litigation. The real consideration therefore depends, not on the actual commencement of a suit, but on the reality of the claim made and the bona fides of the compromise.

In the present case we think that there was sufficient consideration for the notes in the compromise made as it was.

The rule to enter a verdict for the plaintiff must be made absolute.

Rule absolute.

RECTOR, ETC., OF ST. MARK'S CHURCH v. TEED.

(24 N. E. 1014, 120 N. Y. 583.)

Court of Appeals of New York, Second Division. June 24, 1890.

Appeal from an order of the general term of the supreme court, in the second judicial department, reversing a judgment entered upon the decision of the court at special term.

Action on a written instrument whereby the defendant promised to pay to the plaintiff, a religious corporation, the sum of $500. The answer alleged that said promise to pay was made without any consideration,—good, valuable, or otherwise,—and that it is of no force or effect. Upon the trial it appeared that on February 1, 1875, one Lewis T. Wright died, leaving a last will and testament, which in due time was presented for probate to the surrogate of the proper county by the defendant, who was the executor named therein. Objections to the probate of the will were filed by Thomas Wright, the only brother, heir at law, and next of kin of the decedent. On the 14th of April, 1875, while the issue was on trial, the defendant, desiring that the contest should be withdrawn, made an arrangement with Thomas Wright, whereby the latter agreed to withdraw his opposition to the probate of the will, provided the former would pay the plaintiff the sum of $500 "in the manner, at the time, on the conditions, and for the purpose expressed in the undertaking or obligation hereinafter set forth." The defendant agreed to and accepted said terms of compromise, and thereupon, executed and delivered the following instrument, viz.: "For value received, I hereby promise to pay to Saint Mark's Church, New Castle, Westchester county, the sum of five hundred dollars. It is understood that said church will appropriate the interest of said money to the improvement, adornment, and care-taking of the church-yard of said church; but the payment thereof shall not be exacted till the decease of Thomas Wright. It is further understood that, upon the execution and delivery, by the residuary legatees named in the will of Lewis Wright, of a written agreement or a sufficient promise to bind them, instead of the undersigned, to the above, then this writing shall be destroyed, or delivered to the undersigned. CHAS. G. TEED. In presence of LEWIS C. PRATT. Dated April 14th, 1875." In consideration of the execution and delivery of this agreement by the defendant, said Thomas Wright withdrew his objections to the probate of the will, which was immediately admitted to probate; and letters testamentary were issued to the defendant thereon. Neither the plaintiff nor the defendant had any interest in the estate of said decedent, either through the will or otherwise, but one ground of objection to the probate was that the testator had agreed to leave $500 to the plaintiff. The legatees were relatives of the defendant, and on their account he desired that the contest should be abandoned. Said instrument was duly delivered to the plaintiff, and it has ever since been the lawful owner and holder thereof. Thomas Wright died September 20, 1882; and said agreement has never been complied with by the residuary legatees, nor performed by the defendant. The trial judge, after finding the foregoing facts, in substance, found as a conclusion of law that the complaint should be dismissed with costs.

William H. Robertson, for appellant. *Walter Edwards*, for respondent.

VANN, J. The question presented for decision by this appeal is whether the instrument upon which the action was brought is supported by a consideration that the law recognizes as sufficient. "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." 3 Amer. & Eng. Enc. Law, 831; Currie v. Misa, L. R. 10 Exch. 162; Chit. Cont. (9th Amer. Ed.) 29; 2 Kent, Comm. 465. It is not essential that the person to whom the consideration moves should be benefited, provided the person from whom it moves is, in a legal sense, injured. The injury may consist of a compromise of a disputed claim, or forbearance to exercise a legal right; the alteration in position being regarded as a detriment that forms a consideration, independent of the actual value of the right forborne. Thomas Wright, as the sole heir at law and next of kin of the decedent, would have inherited the entire estate if he had succeeded in his effort to defeat the probate of the will. He was, therefore, "particularly interested in setting aside the will," within the meaning of that phrase as used in the case of Seaman v. Seaman, 12 Wend. 381, which we regard as analogous to this, and which has been repeatedly followed. Palmer v. North, 35 Barb. 293; Bedell v. Bedell, 3 Hun, 583; Hall v. Richardson, 22 Hun, 447.

It will be presumed that the testator left assets of some value, as the evidence tended to show that there was property, although not enough to pay the legacies, and the trial court mentioned "the property" and "the estate" of Lewis T. Wright in the findings. Moreover, as the agreement recites a consideration, the burden of proof was on the defendant to show that there was none; and, if that depended upon the allegation that the testator left no property, the burden extended to proof of that proposition also. The withdrawal of the objections to the probate of the will, therefore, at the special request of the defendant, was the forbearance of a legal right, and constituted a consideration sufficient to support a promise by him, even if he was to receive no benefit whatever. "Whether he would have succeeded in the litigation," as was said in the Seaman Case, "is not the test. * * * It is enough that he yielded to his adversaries the right he possessed to contest the will. That he has done, and the compromise itself proves *prima facie* an acknowledgment by the defendants that there was color for his objections." Page 381. The

court will not ask "which party would have succeeded;" for that would involve the trial of the issue that was compromised, and the object of the law in encouraging compromises would thus be defeated. The consideration did not rest upon any advantage to the defendant, but upon the abandonment by Thomas Wright of his position as a contestant. By discontinuing his effort to overthrow the will, he relinquished a right secured to him by law, and lost his chance of inheriting the estate. He did this at the request of the defendant, who promised to pay for it. If the form of the promise had been to pay directly to Thomas Wright, no reason is perceived why it could not have been enforced. As the arrangement was made with him, and the consideration was furnished by him, the fact that the money was made payable by his direction to the plaintiff does not render the promise void. The plaintiff became his appointee, and upon receiving from him the written agreement, or evidence of the promise, it became his donee; and thus privity was established between the parties to the action. This is not the case of a mere stranger who attempts to intervene, and claim the benefit of a contract to which he is not a party, as in many of the authorities relied on by the appellant, because the promise was made directly to the plaintiff, and there was a clear intention on the part of the person furnishing the consideration to secure a benefit to the plaintiff. If the sum in question had been made payable to Thomas Wright, he could have given the claim to the plaintiff, whose title would thus have been perfect; and why could he not make the gift by causing the promise to be made directly to the plaintiff? The intention of the parties should not be defeated by releasing the defendant from his promise, after he had received the consideration therefor, simply on account of the form of the transaction, which violates no statute, nor any rule of public policy.

If A. sells a horse to B. for $100, and B. gives in payment therefor a note for that amount drawn payable to C. at A.'s request, and A. delivers the note to C., the latter can enforce it against the maker. The case supposed differs in no essential particular from that under consideration. As recently held by this court, after a careful review of the authorities, a party for whose benefit a promise is made may sue in *assumpsit* thereon even if the consideration therefor arose between the promisor and a third person. Todd v. Weber, 95 N. Y. 181, 194. Without elaborating our reasons, we think that the order appealed from should be affirmed, and that judgment absolute should be rendered against the defendant, with costs. All concur, except POTTER, J., dissenting, and HAIGHT, J., absent.

McKINLEY v. WATKINS.

(13 Ill. 140.)

Supreme Court of Illinois. Dec., 1851.

This action was commenced by Watkins against McKinley before a justice of the peace. Watkins failed to recover on the trial before the justice, and took an appeal to the circuit court. At the April term, 1851, of the Logan circuit court, the cause was tried before Davis, J., and a jury, and resulted in a verdict and judgment for Watkins, and McKinley brought the cause to this court by writ of error.

Watkins and McKinley had traded horses in 1845. Afterwards they had some dispute about the trade, and Watkins threatened to sue unless McKinley would give him a horse, or the worth of the horse which McKinley had got from Watkins, the horse which Watkins had received in exchange having died. McKinley promised that, if Watkins would not sue, he would give him fifty dollars, or a horse worth that sum. Upon this promise Watkins brought his action against McKinley.

W. H. Herndon, for plaintiff in error. T. L. Harris, for defendant in error.

TRUMBULL, J. This was an action originally commenced before a justice of the peace, and taken by appeal to the circuit court, where the plaintiff had judgment for fifty dollars and costs.

The evidence showed that the parties had traded horses; that, a month or two after the trade, the horse which plaintiff got, died, and that he was unsound when the trade took place. There was no evidence of any false representations, or warranty on the part of the defendant in making the trade. After the death of the horse the plaintiff informed the defendant of the fact, and alleged that he was diseased at the time of the trade, whereupon the defendant promised to pay the plaintiff fifty dollars, or let him have a fifty-dollar horse, if he would not sue.

This action was brought to recover the fifty dollars. On the trial the circuit court instructed the jury as follows:

"If the jury believe from the evidence that there was a horse trade between Watkins and McKinley, out of which a difficulty had grown, and that Watkins was threatening to sue McKinley, and not deceiving him by any misrepresentations, and that McKinley, rather than be sued, promised Watkins that he would pay him fifty dollars, then said promise is binding; and this regardless of the question as to whether McKinley would or would not have been liable in the suit which Watkins was threatening to bring against him." The only question in the case is as to the propriety of this instruction, and in one point of view it is clearly erroneous. It assumes that the defendant would be bound by his promise, whether assented to by the plaintiff or not. Unless the plaintiff were bound on his part not to do the act which formed the consideration of the promise of the defendant, the agreement was void for want of mutuality. The promise of defendant to pay fifty dollars if plaintiff would not sue him was incomplete till accepted by the plaintiff. Chit. Cont. 13.

A mere offer not assented to constitutes no contract, for there must be not only a proposal, but an acceptance thereof. Story, Cont. §§ 377, 378.

The instruction in other respects is very nearly, if not quite, correct. It assumes that, in order to support the promise, there must have been a horse trade between the parties, out of which a difficulty had arisen, and that the plaintiff was threatening to sue the defendant, and not deceiving him by any misrepresentations. If by this is to be understood that the plaintiff must in good faith have supposed that he had a good cause of action against the defendant, growing out of the horse trade, the instruction is strictly proper. It is immaterial whether the plaintiff could have recovered in such action or not. If he honestly supposed that he had a good cause of action, the compromise of such right was a sufficient consideration to uphold a contract fairly entered into between the parties, irrespective of the question as to who was in the right. It has often been decided that the compromise of a doubtful right is a sufficient consideration for a promise; and it is immaterial on whose side the right ultimately turns out to be, as it must always be on one side or the other, because there can be but one good right to the same thing. Taylor v. Patrick, 1 Bibb, 168; Russell v. Cook, 3 Hill, 504; Moore v. Fitzwater, 2 Rand. 442; O'Keson v. Barclay, 2 Penn. R. 531.

If the plaintiff was threatening to sue on a claim which he knew was wholly unfounded, and which he was setting up as a mere pretense to extort money from the defendant, a contract founded on a promise not to sue in such a case would be utterly void. In order to support the promise there must be such a claim as to lay a reasonable ground for the defendant's making the promise, and then it is immaterial on which side the right may ultimately prove to be. Edwards v. Baugh, 11 Mees. & W. 641; Perkins v. Gay, 3 Serg. & R. 331.

The judgment of the circuit court is reversed, and the cause remanded. Judgment reversed.

TREAT, C. J., dissented.

RUE v. MEIRS et al.

(12 Atl. 369, 43 N. J. Eq. 377.)

Court of Chancery of New Jersey. Feb. 7, 1888.

Bill to enforce performance of contract. On hearing on demurrer.

William H. Vredenburgh, for demurrant. Frank P. McDermott, for complainant.

VAN FLEET, V. C. The complainant sues in a dual capacity—in her own right, as well as in that which she holds as the administratrix of her deceased brother, Nathaniel S. Rue, Jr. The foundation of her action is a contract made by her father, Robert C. Rue, with the defendants, John G. Meirs and Sarah E. Davis, and which was reduced to writing and signed by her father and the defendants, and which reads as follows: "This agreement, made the twenty-seventh of September, 1875, by and between Sarah E. Davis and John G. Meirs, of Cream Ridge, county of Monmouth, state of New Jersey, of the first part, and Robert C. Rue, of the same place, as the representative of his children, L. M. Rue and N. S. Rue, Junior, of the second part; witnesseth, in consideration of the covenants on the part of the party of the first part hereinafter contained, doth covenant and agree with the party of the second part, Robert C. Rue, that we, Sarah E. Davis and John G. Meirs, of the first part, do agree to pay the sum of $4,000 to R. C. Rue, as the representative of his children, L. M. Rue and N. S. Rue, Junior, provided R. C. Rue makes no objection to the proof of the will and the settlement of the estate of Lucretia S. Meirs, deceased, so far as said will has reference to said children." The complainant's bill alleges that this contract grew out of a threatened contest over a paper purporting to be the will of Lucretia S. Meirs, deceased. Mrs. Meirs was the mother of the defendants, and the grandmother of the complainant and her brother, being the children of a deceased daughter of Mrs. Meirs. Mrs. Meirs died on the ninth of September, 1875. By her will she made an unequal distribution of her property, giving the defendants much more than two-thirds. The complainant and her brother were both infants at the time of their grandmother's death. Their father was present at the reading of her will, and immediately after he knew its contents expressed his dissatisfaction with its provisions, and protested against its admission to probate. The bill says that the defendants, recognizing the unequal distribution which the testatrix had made of her property, and the grounds which existed for contesting her will, they, to induce Robert C. Rue to forbear from contesting the will on behalf of his children, made the promise contained in the contract. The bill further says that the will of Mrs. Meirs was, three days after the contract was signed, admitted to probate, without contest, and that since then her estate has been settled, and her property distributed, in accordance with the terms of her will, without objection on the part of Robert C. Rue or his children, but with their acquiescence. But the $4,000 have not been paid, and this action is brought to compel payment.

The defendant Meirs demurs. He disputes the validity of the contract. He says that he and his sister got nothing for their promise to pay the $4,000. This contention attempts, as it seems to me, to deny what is manifestly undeniable. The right of Robert C. Rue to file a caveat, as the next friend of his children, against the probate of Mrs. Meirs' will, stands, I think, free from the least doubt. While an infant is incapable of maintaining a suit or other legal proceeding in his own name, for the protection of his rights, there can be no doubt that he is entitled to the benefit of every remedy recognized by our system of jurisprudence, and to which an adult of full capacity may resort, the only difference being that an infant must proceed in the name of an adult, as his next friend, while an adult may proceed in his own name. And this is so because an infant, by reason of the immaturity of his mind, is incapable of judging when and under what circumstances he should seek judicial protection or redress, and the courts have therefore adopted, as a rule of practice for the protection of infants as well as themselves, that no suit or proceeding in behalf of an infant shall be entertained, unless instituted by a person competent to judge whether such step is necessary or proper for the due protection of the infant's rights. While any person of full age and sound mind is competent to become the next friend of an infant, his nearest relative is usually preferred. A father, being the natural guardian of his infant child, has a vested right, as it has been called, to act as the next friend of his child in a litigation involving the child's rights, if the father's interests are not hostile to those of his child, and he has been guilty of no default or neglect. This right is regarded as so superior by the English courts that it has been declared that the father has a right, even where another person has instituted a suit in behalf of his infant child, and prosecuted it to decree, to have such other person displaced, after decree pronounced, and himself substituted as next friend. Woolf v. Pemberton, 6 Ch. Div. 19. It would seem, then, to be entirely clear that the defendants, by removing the opposition which Robert C. Rue intended to make on behalf of his children to the probate of the will, and which he had an unquestionable right to make, relieved themselves from the only substantial danger which existed, and that instead of its being true that they got nothing for their promise to pay $4,000, it is a fact standing free from all dispute that they have received everything which the contract stipulated that they should receive. The thing that the defend-

ants were bargaining for was that the paper which their mother left as the testamentary disposition of her property should be proved as her will, without objection, and that their mother's property should be divided and distributed as her will directed. The will was proved without objection, and the property has been divided and distributed as the will directed. The contract, therefore, so far as the defendants were entitled to anything under it, has been fully performed.

The question whether a promise to forbear suit to enforce a disputed claim or right, where the claim or right is honestly asserted, under a belief that it is substantial, although it is in fact wholly unfounded, is sufficient, as a consideration to support a promise to pay money, has recently been put at rest in this state by a decision of the supreme court. That court said in Grandin v. Grandin, 49 N. J. Law, 508, 9 Atl. 756: "The compromise of a disputed claim, made bona fide, is a good consideration for a promise, whether the claim be in suit or litigation has not been actually commenced, even though it should ultimately appear that the claim was wholly unfounded,—the detriment to the party consenting to a compromise, arising from the alteration in his position, forms the real consideration which gives validity to the promise. The only elements necessary to a valid agreement of compromise are the reality of the claim made, and the bona fides of the compromise." And what I understand is meant by the phrase, "the reality of the claim made," is that the claimant shall assert his claim in good faith, believing that it is real, or, in the language of Lord Justice Cotton, in Miles v. Estate Co., 32 Ch. Div. 266: "A claim is honest if the claimant does not know that his claim is unsubstantial, or if he does not know the facts which show that his claim is a bad one." The court, in deciding Grandin v. Grandin, adopted the principle established by the court of queen's bench in Cook v. Wright, 1 Best & S. 559. That case was heard by Cockburn, C. J., and Blackburn and Wightman, JJ. The material facts, as stated in the opinion of Mr. Justice Blackburn, were: "The defendant was agent for a Mrs. Bennett, who was a non-resident owner of houses in a district subject to a local act. Work had been done in the adjoining street by the commissioners for executing the act, the expenses for which, under the provisions of the act, they charged on the owners of the adjoining houses. Notice had been given to the defendant, as if he had himself been the owner of the houses, calling on him to pay the proportion chargeable in respect to them. He attended at a board meeting of the commissioners, and objected both to the amount and nature of the charge, and also stated that he was not the owner of the houses, and that Mrs. Bennett was. He was told that if he did not pay he would be treated as one Goble had been. It appeared that Goble had refused to pay a sum charged against him as the owner of some houses, and the commissioners had taken legal proceedings against him, and he had then submitted and paid with costs. In the result it was agreed between the commissioners and the defendant that the amount charged upon him should be reduced, and that time should be given to pay it in three installments. The defendant gave three promissory notes for the three installments; the first was duly honored, the others were not, and were the subject of the present action. At the trial it appeared that the defendant was not the owner of the houses. As agent for the owner he was not personally liable under the act. In point of law, therefore, the commissioners were not entitled to claim the money from him, but no case of deceit was alleged against them. It must be taken that the commissioners honestly believed that the defendant was personally liable, and really intended to take legal proceedings against him, as they had done against Goble. The defendant, according to his own evidence, never believed that he was liable in law, but signed the notes in order to avoid being sued as Goble was." The court decided that the notes sued on were supported by a good consideration, and this ruling was put distinctly on the ground that the defendant, by giving the notes, had induced the plaintiffs to alter their position, by refraining from doing what they might have done if the notes had not been given. The court say: "There can be no doubt that the practical effect of the compromise must have been to induce the commissioners to refrain from taking proceedings against Mrs. Bennett, the real owner of the houses, while the notes given by the defendant, her agent, were running; though the compromise might have afforded no ground of defense had such proceedings been resorted to. It is this detriment to the party consenting to a compromise, arising from the necessary alteration in his position, which, in our opinion, forms the real consideration for the promise, and not the technical and almost illusory consideration arising from the extra costs of the litigation. The real consideration, therefore, depends, not on the actual commencement of a suit, but on the reality of the claim made, and the bona fides of the compromise."

The same doctrine was subsequently declared in Callisher v. Bischoffheim, L. R. 5 Q. B. 449. The court, speaking by Cockburn, C. J., there said: "The authorities clearly establish that, if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. * * * Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, (in enforcing his claim or right by suit;) and if he bona fide believes he has a fair chance of success, he has reasonable

ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue, he gives up what he believes to be a right of action, and the other party gets an advantage, and instead of being annoyed with an action, he escapes from the vexation incident to it." Applying these principles to the contract on trial, its validity, in point of consideration, is put beyond dispute. In cases of this class, if the contract has been fairly made, no inquiry will be made as to the adequacy of its consideration. Grandin v. Grandin, supra. By the terms of this contract, it will be observed that the advantages were all with the defendants. They were not bound to pay until the other contracting party had performed his part of the contract, and they had received everything under the contract which they were entitled to receive. Stated in substance, the contract is this: The defendants agreed to pay Robert C. Rue $4,000, for his children, provided he make no objection, on behalf of his children, to the proof of Mrs. Meirs' will, and the division and distribution of her estate according to the terms of her will. The $4,000 are not payable until the will has been proved and fully executed,—until the opposing or hostile right, which the defendants feared, was actually extinguished. The defendants have now received everything which they were entitled to receive under the contract, and for which they agreed to pay the $4,000, and I think they are, therefore, bound in law and conscience to abide by their contract, and pay the $4,000.

The defendant also raises a question of jurisdiction. He denies the power of this court to give the complainant the relief she asks. This objection raises a question which, in view of the peculiar condition of facts which the case presents, seems to me to be one about which strong diversity of opinion may exist, and I must confess that the conclusion which I have reached concerning it is not one which I express without doubt. The draughtsman of the bill has attempted to lay a foundation for equity cognizance, by asking for a reformation of the contract. The contract, it will be observed, says that "in consideration of the covenants on the part of the party of the first part, hereinafter contained, doth covenant and agree with the party of the second part, Robert C. Rue, that we, Sarah E. Davis and John G. Meirs, do agree to pay the sum of $4,000 to R. C. R.," etc. The words "party of the first part" are used where it is manifest the words "party of the second part" were intended to be used. And it is also obvious that the words "party of the first part" should have been inserted between the words "hereinafter contained" and the words "doth covenant," in order to make the contract express, in formal words, the meaning of the parties. But these mistakes are palpable, and do not create the slightest obscurity as to the meaning of the contract, nor prevent it from being so construed as to give full effect to the real intention of the parties. It is a rule of construction, of universal application, that a contract, notwithstanding mistakes, shall, if the meaning of the parties can be clearly discerned, be construed as near the minds and apparent intents of the parties as it possibly may be, and the law will permit. Sisson v. Donnelly, 36 N. J. Law, 432. The subsequent parts of this contract express the intention of the parties in language so clear, simple, and explicit that it must, in its present form, be understood and construed just exactly as it would be after it was reformed. Where that is the case, reformation can accomplish nothing; indeed, there is nothing to reform, for the contract, with the mistake in it, is to be construed and carried into effect just as if it was entirely free from mistake. A mistake which is harmless, and does no injury, needs no correction. This court cannot take jurisdiction on the ground that the contract sued on needs reformation.

This suit is brought to enforce a money demand, founded on a simple contract. If that was all there was of it, there would not be the least pretense of jurisdiction in this court. And so, if the contract consisted of a promise by the defendants to pay money to the complainant and her brother, for a consideration moving from their father to the defendants, there can be no doubt that an action at law might be maintained on it; for it is settled that, in cases of simple contract, if one person makes a promise to another for the benefit of a third, the third may maintain an action at law on it, though the consideration does not move from him. It is otherwise when the contract is under seal. Joslin v. Car Spring Co., 36 N. J. Law, 141. But this contract was made by a person acting as trustee for the benefit of his cestuis que trust. A father, as the natural guardian of his two infant children, agrees to waive his right, as the person having the first and best right to act as the next friend of his children, to contest the validity of a will by legal proceedings, on condition that, if no contest is made and the will is admitted to probate, and the testatrix's property is distributed as the will directs, the persons taking the largest benefit under the will will pay a certain sum of money, not to the children, but to the father for his children. Now, in such a transaction, the father, from the beginning to the end, is acting in a capacity of pure trust. It is true, he is a self-constituted trustee, but he assumes that character under circumstances when the common instinct of our nature made it his duty to do so, and when, if he had not done so, he would have allowed what he believed to be an unconscientious advantage to be taken of his children. The fact that the contract was made by a person acting as a trustee, for the benefit of his infant cestuis que trust, may not be decisive on the question of jurisdiction, but it shows that the contract belongs to a class of transactions over which this court exercises a very extensive jurisdiction.

I think there is reason to doubt whether the children could maintain an action at law on this contract in their own names. No promise is made to them; on the contrary, the promise is to their father, the language of the contract being: "We do agree to pay the sum of $4,000 to R. C. Rue, as the representative of his two children." But if the children could have maintained an action at law in their own names, it would be necessary now, as one of them is dead, that two actions should be brought,—one in the name of the surviving child, and the other in the name of the administratrix of the deceased child. There may, perhaps, be less doubt about the right of the father to maintain an action at law in his name for the use of his children. I think such action would be maintainable. The cases at law, however, upon this subject are at variance. Judge Story, in his commentaries on Equity Jurisprudence, calls attention to the fact that the cases at law on this subject are not uniform, and that the law in consequence is somewhat uncertain, and then adds: "But, be this as it may, it is certain that a remedy would lie in equity, under like circumstances, as a matter of trust; for it is laid down in a work of very high authority. 'If a man gives goods or chattels to another, upon a trust to deliver them to a stranger, chancery will oblige him to it.'" 2 Story, Eq. Jur. § 1041. And I suppose it would necessarily follow that, where a promise was made to one as a trustee for another, upon a sufficient consideration, that chancery would oblige the promisor to perform his promise at the suit of the cestui que trust, especially in a case where the consideration for his promise consisted in the extinguishment of a right belonging to the cestui que trust.

But another fact, and the one which I think possesses the greatest force, remains to be mentioned. The bill alleges that, subsequent to the making of the contract sued on, the defendants, Meirs and Davis, made an agreement apportioning the $4,000 between themselves, by which it was agreed that Meirs should pay $3,000, and Mrs. Davis the remaining $1,000, and that, in pursuance of such apportionment, Mrs. Davis, on the twenty-third day of May, 1877, paid Robert C. Rue, who was then the duly-appointed guardian of the complainant and her brother, her quota of the $4,000. There can be no doubt, I think, that the making of this agreement, and its subsequent execution by Mrs. Davis, raised an equity in her favor as against her co-defendant, and also against the complainant, to be exonerated from all liability for the $3,000, provided the money could be collected of Meirs. He is the person who is unquestionably primarily liable as between Mrs. Davis and himself, and should, therefore, in justice, in the first instance, be compelled to bear it alone, together with all the legal expenses attending its enforcement. Mrs. Davis' right to exemption from primary liability was known to the complainant at the time she brought her suit. I think she was under a clear equitable obligation to respect that right, and the only way open to her to effectually protect Mrs. Davis' right in this regard, was to bring her suit in this court. Here a decree may be made which will give Mrs. Davis the full benefit of any equity arising to her out of the agreement of apportionment, and at the same time preserve to the complainant any rights which may exist in her favor against Mrs. Davis, in the event that the whole of the sum due cannot be collected of the person who is primarily liable. If the complainant had sued at law, her suit would have been an open declaration that she intended to violate Mrs. Davis' right to be exempt from primary liability, for, if she recovered at all in such suit, her recovery would have been against both defendants as principals, each being adjudged liable for the whole amount of the recovery. An attempt by the complainant, with full knowledge of Mrs. Davis' equity, to place Mrs. Davis in the situation in which she would stand by a judgment at law against her, under which the whole of this debt might be made out of her property, might, under some circumstances, be so strongly indicative of a fraudulent purpose on the part of the complainant as to justify this court in interfering by injunction. Equity will, in cases of this class, take jurisdiction whenever it is necessary to compel the person primarily liable to perform an obvious duty, and thus relieve another person standing in the position of his surety from a needless burden, and also to prevent circuity of action. Irich v. Black, 17 N. J. Eq. 189. For these reasons I think this court should retain jurisdiction of this cause.

This suit, in its present condition, is defective in parties. Robert C. Rue, the person with whom the contract on which the suit is founded was made, is not a party. His omission is made a ground of objection by the demurrant. He is a necessary party, and this ground of demurrer must be sustained. The others must be overruled.

FINK v. COX.

(18 Johns. 145.)

Supreme Court of New York. Aug., 1820.

This was an action of assumpsit brought to recover the amount of a promissory note, given by the testator, Alexander Fink, to his son, the plaintiff. The note, which was proved by the subscribing witness, was as follows: "New-York, 30th July, 1816. Sixty days after date, I promise to pay John L. Fink, or order, one thousand dollars, value received.

his
Alexander X Fink." The testator, at the
mark
time he gave the note to the plaintiff, declared that he gave it to him absolutely, and observed that the plaintiff was not so wealthy as his brother; and that the plaintiff and his brother had had a controversy about a stall, &c., which were the reasons for his giving the note to the plaintiff. There was no actual consideration for the note; and the witness understood it to be a gift from the testator to his son.

The defendant gave in evidence the will of the testator, by which he devised all his personal estate to his sons, including the plaintiff, in equal proportions; and after a devise to his daughter of a house and lot, the residue of his real estate was given to his executors in trust, to sell the same, and divide the proceeds equally among his children. The defendant also gave in evidence the plaintiff's answer to a bill in chancery, for a discovery filed by the executor, in which he stated that the note was freely given to him by the testator, and was founded on the consideration of natural love and affection.

The cause was tried at the New-York sittings, in June, 1818, when a verdict was found for the plaintiff, for $1,129 and 30 cents, subject to the opinion of the court, on a case containing the above facts.

Mr. Van Wyck, for plaintiff. Mr. Slosson, contra.

SPENCER, C. J. The question in this case is, whether there is a sufficient consideration for the note on which this suit is founded. It appears from the declaration of the testator when the note was given, that he intended it as an absolute gift to his son, the plaintiff; alleging that the plaintiff was not so wealthy as his brothers, that he had met with losses, and that he and his brothers had had a controversy about a stall. Such were the reasons assigned for his giving the note to the plaintiff.

There can be no donbt that a consideration is necessary to uphold the promise, and that it is competent for the defendant to show that there was no consideration. Schoonmaker v. Roosa, 17 Johns. 301. The only consideration pretended, is that of natural love and affection from a father to a child; and if that is a sufficient consideration, the plaintiff is entitled to recover, otherwise not.

It is conceded, that the gift, in this case, is not a donatio causa mortis, and cannot be supported on that ground. In Pearson v. Pearson, 7 Johns. 26, the question was, whether the gift of a note signed by the defendant to the plaintiff was such a vested gift, though without consideration, as to be valid in law; we held that it was not, and that a parol promise to pay money, as a gift, was no more a ground of action, than a promise to deliver a chattel as a gift; and we referred to the case of Noble v. Smith, 2 Johns. 52, where the question underwent a full discussion and consideration. The case of Grangiac v. Arden, 10 Johns. 293, was decided on the principle, that the gift of the ticket had been completed by delivery of possession, and is in perfect accordance with the former cases.

It has been strongly insisted, that the note in the present case, although intended as a gift, can be enforced on the consideration of blood. It is, undoubtedly, a fair presumption that the testator's inducement to give the note sprang from parental regard. The consideration of blood, or natural love and affection, is sufficient in a deed, against all persons but creditors and bona fide purchasers; and yet there is no case where a personal action has been founded on an executory contract, where a consideration was necessary, in which the consideration of blood, or natural love and affection, has been held sufficient. In such a case, the consideration must be a valuable one, for the benefit of the promisor, or to the trouble, loss, or prejudice of the promisee. The note here manifested a mere intention to give the one thousand dollars. It was executory, and the promisor had a locus pœnitentiæ. It was an engagement to give, and not a gift. None of the cases cited by the plaintiff's counsel maintain the position, that because a parent, from love and natural affection, engages to give his son money, or a chattel, that such a promise can be enforced at law.

Judgment for the defendant.

MILLS v. WYMAN.

(3 Pick. 207.)

Supreme Judicial Court of Massachusetts. Worcester. Oct. Term, 1825.

This was an action of assumpsit brought to recover a compensation for the board, nursing, &c., of Levi Wyman, son of the defendant, from the 5th to the 20th of February, 1821. The plaintiff then lived at Hartford, in Connecticut; the defendant, at Shrewsbury, in this county. Levi Wyman, at the time when the services were rendered, was about 25 years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and being suddenly taken sick at Hartford, and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On the 24th of February, after all the expenses had been incurred, the defendant wrote a letter to the plaintiff, promising to pay him such expenses. There was no consideration for this promise, except what grew out of the relation which subsisted between Levi Wyman and the defendant, and Howe, J., before whom the cause was tried in the court of common pleas, thinking this not sufficient to support the action, directed a nonsuit. To this direction the plaintiff filed exceptions.

J. Davis and Mr. Allen, in support of the exceptions. Mr. Brigham, for defendant.

PARKER, C. J. General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in foro conscientiæ to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some preëxisting obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such preëxisting equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a quid pro quo; and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells, to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well disposed son, to furnish him with the means of acquiring and maintaining a becoming rank

in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the statute of limitations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value: though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application, to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessaries, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation upon the father; and it seems to follow, that his promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law, which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Insteal of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 Bos. & P. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided, that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the nonsuit directed by the court of common pleas was right, and that judgment be entered thereon for costs for the defendant.

STEVENS v. COON.

(1 Pin. 356.)

Supreme Court of Wisconsin. July Term, 1843.

Error to district court, Jefferson county.

Coon brought an action of assumpsit against Stevens in the Jefferson county district court upon a written contract, by which Stevens bound himself that a certain eighth of a section of land which Coon was about to enter should sell by a given day for $200 or more, and Coon agreed to give Stevens one-half of all the land should sell for over $200.

On the trial in the court below, Coon, the plaintiff, proved the entry of the land, and introduced evidence to prove that the land, at the time specified in the contract, was worth about $1.25 per acre.

Upon this testimony, the defendant moved the court to instruct the jury as in case of a nonsuit, for the following reasons:

"(1) Because the said supposed contract was a nudum pactum, by which the defendant received no benefit, and the plaintiff no injury.

"(2) Because the supposed contract assumes to bind the defendant to perform an impossibility.

"(3) Because said writing discloses a gambling contract, if any."

The court overruled the motion and refused the instruction asked for, and the jury returned a verdict in favor of the plaintiff for $116.50, upon which the court rendered judgment.

David Brigham, for plaintiff in error. Edward V. Whiton, for defendant in error.

DUNN, C. J. Error is brought in this case to reverse a judgment of the district court of Jefferson county.

Coon, plaintiff below, brought his action of assumpsit against Stevens, defendant below, to recover damages on a liability growing out of a contract, which is in the words, etc., following, viz.:

"Astor, March 23, 1839. In consideration of C. J. Coon entering the west half of the north-west quarter of section 35, in town. 13, range 13, I bind myself that the said eighty acres of land shall sell, on or before the 1st October next, for two hundred dollars or more, and the said Coon agrees to give me one-half of the amount over two hundred dollars said land may sell for in consideration of my warranty. Hamilton Stevens."

"I agree to the above contract. C. J. Coon."

At the August term of the said Jefferson county district court, in the year 1840, the said defendant Stevens pleaded the general issue, which was joined by the said plaintiff Coon, and after several continuances the case was tried at the October term, 1842. On the trial, the above contract, and the receiver's receipt to said plaintiff Coon for the purchase-money for said tract of land described in said contract, were read in evidence to the jury; and Abraham Vanderpool, a witness, testified "that he had visited that part of the country where the land lies, specified in said writing, and was upon the same, as he has no doubt, and estimated the present value of the same at $1.50 per acre, and that in October, 1839, it might be worth $1.25 an acre." Upon this evidence and testimony the plaintiff rested his case.

Under the construction put on the contract read in evidence the jury found for the plaintiff $116.50 in damages, and judgment was entered thereon. There is manifest error in this decision of the court. From an inspection of the contract it is obvious that it is not such an one as is obligatory on either party. There is no reciprocity of benefit, and it binds the defendant below to the performance of a legal impossibility, so palpable to the contracting parties that it could not have been seriously intended by the parties as obligatory on either. The undertaking of the defendant below is "that plaintiff's tract of land shall sell for a certain sum by a given day." Is it not legally impossible for him to perform this undertaking? Certainly no man can in legal contemplation force the sale of another's property by a given day, or by any day, as of his own act. The plaintiff was well apprised of the deficiency of his contract on the trial, as the testimony of his witness was entirely apart from the contract sued on, and was directed in part to a different contract, and such an one as the law would have recognized. If the contract had been that the tract of land would be worth $200 by a given day, then it could have been recovered on, if it did not rise to that value in the time. 1 Comyn, Cont. 14, 16, 18; Comyn, Dig. Tit. "Agreement"; 1 Poth. Obl. 71; 6 Pet. Abr. 218; 2 Sand. 137. The district court should not have entered judgment on the finding of the jury in this case. The construction of the contract by the district court was erroneous.

Judgment reversed, with costs.

STILK v. MYRICK.

(2 Comp. 317.)

Michaelmas Term. 50 Geo. III.

This was an action for seaman's wages, on a voyage from London to the Baltic and back.

By the ship's articles, executed before the commencement of the voyage, the plaintiff was to be paid at the rate of £5 a month; and the principal question in the cause was, whether he was entitled to a higher rate of wages. In the course of the voyage, two of the seamen deserted, and the captain, having in vain attempted to supply their places at Cronstadt, there entered into an agreement with the rest of the crew, that they should have the wages of the two who had deserted equally divided among them, if he could not procure two other hands at Gottenburgh. This was found impossible; and the ship was worked back to London by the plaintiff and eight more of the original crew, with whom the agreement had been made at Cronstadt.

Mr. Garrow, for defendant, insisted, that this agreement was contrary to public policy, and utterly void. In West-India voyages, crews are often thinned greatly by death and desertion; and if a promise of advanced wages were valid, exorbitant claims would be set up on all such occasions. This ground was strongly taken by Lord Kenyon, in Harris v. Watson, Peak, 72, where that learned judge held, that no action would lie at the suit of a sailor on a promise of the captain to pay him extra wages, in consideration of his doing more than the ordinary share of duty in navigating the ship; and his lordship said, that if such a promise could be enforced, sailors would in many cases suffer a vessel to sink unless the captain would accede to any extravagant demand they might think proper to make.

The Attorney-General, contra, distinguished this case from Harris v. Watson, as the agreement here was made on shore, when there was no danger or pressing emergency, and when the captain could not be supposed to be under any constraint or apprehension. The mariners were not to be permitted on any sudden danger to force concessions from the captain; but why should they be deprived of the compensation he voluntarily offers them in perfect security for their extra labour during the remainder of the voyage?

LORD ELLENBOROUGH. I think Harris v. Watson (Peak, 72) was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compelled to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death, and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of £5 a month.

Verdict accordingly.

MUNROE v. PERKINS.

(9 Pick. 298.)

Supreme Judicial Court of Massachusetts. Suffolk and Nantucket. March, 1830.

Indebitatus assumpsit for work done, materials found, money paid, &c. brought against the defendant jointly with William Payne, who died after the action was commenced.

At the trial before the chief justice it appeared, that in 1821 the plaintiff was employed by Perkins and Payne to build a hotel at Nahant, which was begun in that year and finished in 1823.

The general defence was, that there was a special contract, and that the work had been paid for according to the terms of that contract.

For the purposes of this case it was admitted, that the amount of expenditures made and incurred by the plaintiff in and about the work, exceeded the amount of the payments made to him.

It appeared that in 1821, a number of persons associated themselves for the purpose of erecting a hotel at Nahant, and subscribed certain sums of money therefor; that Perkins and Payne were subscribers and were the agents of the association, which was to be incorporated as soon as possible, and which was incorporated accordingly in February, 1822.

The defendant offered in evidence an agreement under seal, dated October 24, 1821, wherein the plaintiff engages to build the hotel according to a certain drawing and description, and the defendant and Payne, in behalf of their associates, agree to pay the plaintiff therefor 14,500 dollars as the work advances.

T. W. Sumner, a witness called by the defendant, testified that the work was executed upon the basis of the drawing and description referred to in the sealed contract; that there were some deviations, consisting of additional work; that this was considered as extra work, not included in the contract, and was paid for separately according to its full cost and value.

To prove a waiver of the special contract, the plaintiff introduced several witnesses. J. Alley testified, that in 1825 he said to the defendant, it was a pity Munroe had undertaken to build the hotel; to which the defendant replied, that Munroe would not lose any thing by it, and that they had agreed to pay him for every minute's work and for all he had purchased. J. Mudge testified, that in the spring of 1823 the plaintiff was indebted to the Lynn bank on a note for 1100 dollars, which he wished to have renewed, but that the directors were not satisfied of his solvency; that in April of that year, the plaintiff came to the bank with Payne, who said he was the agent who attended to the business of the Nahant hotel in the absence of Perkins, who had gone to Europe; that he wanted to get from the bank some indulgence towards the plaintiff; that the corporation would leave the plaintiff as good as they found him; they would pay Munroe for all he should lay out; that Munroe should not stop for want of funds; that he (Payne) knew Perkins's mind upon the subject; that the bills would be paid, and the plaintiff should not suffer. W. Johnson testified, that on the strength of this representation of Payne, the bank renewed the plaintiff's paper. W. Babb testified, that in May, 1822, the defendant asked the plaintiff how he got on; that the plaintiff said poorly enough; that the defendant told him he must persevere; the plaintiff said he could not without means; and the defendant repeated, you must persevere, and added, you shall not suffer, we shall leave you as we found you.

The defendant objected to this evidence, that it was insufficient in law to set aside the special contract; that it did not amount to a waiver of the original contract, but so far as it proved any thing, it was evidence of a new express promise, which was without consideration and from which no implied assumpsit could be raised. Also, that the conversation with Perkins at one time and with Payne at another, were not joint promises and created no joint cause of action, but that the liability, if there was any, was several.

A verdict was taken by consent, subject to the opinion of the court.

S. Hubbard and F. Dexter, for defendant. Ward, contra.

PER CURIAM. The verdict of the jury has established the fact, if the evidence was legally sufficient, that the defendant, together with Payne, made the promise declared on. The defence set up was, that the work was done and the materials were furnished on a special contract under seal, made by the defendant and Payne on behalf of themselves and other subscribers to the hotel; and such a contract was produced in evidence. The main question is, whether, there being this contract under seal, for a stipulated sum, an action lies on a general assumpsit for the amount which the building actually cost; which is more than the sum specified in the contract. It is said on the part of the plaintiff, that having made a losing bargain and being unwilling and unable to go on with the work, Perkins and Payne assured him that he should not suffer; and that the work was carried on and finished upon their engagement and promise that he should have a reasonable compensation, without regard to the special contract. This engagement is to be considered as proved, if by law it was admissible to show a waiver of a special contract.

It is objected, that as the evidence was parol, it is insufficient in law to defeat or avoid the special contract; and many authorities have been cited, to show that a sealed contract cannot be avoided or waived but by an instrument of a like nature; or generally, that a contract under seal cannot be avoided

or altered or explained by parol evidence. That this is the general doctrine of the law cannot be disputed. It seems to have emanated from the common maxim, "Unumquodque dissolvitur eo ligamine quo ligatur." But like other maxims, this has received qualifications, and indeed was never true to the letter, for at all times, a bond, covenant or other sealed instrument might be defeated by parol evidence of payment, accord and satisfaction, &c.

It is a general principle, that where there is an agreement in writing, it merges all previous conversations and parol agreements; but there are many cases in which a new parol contract has been admitted to be proved. And though when the suit is upon the written contract itself, it has been held that parol evidence should not be received, yet when the suit has been brought on the ground of a new subsequent agreement not in writing, parol evidence has been admitted.

In Ratcliff v. Pemberton, 1 Esp. 35, Lord Kenyon decided, that to an action of covenant on a charter-party, for the demurrage which was stipulated in it, the defendant might plead that the covenantee, who was the master and owner of the ship, verbally permitted the delay, and agreed not to exact any demurrage, but waived all claim to it. He laid down a similar rule in Thresh v. Rake, Id. 53; where however the contract does not appear to have been under seal.

In 2 Term R. 483, there were articles of partnership, containing a covenant to account at certain times; and upon a balance being struck, the defendant promised to pay the amount of the balance; and it was held that assumpsit would lie upon this promise.

The case of Lattimore v. Harsen, 14 Johns. 330, comes nearer the case at bar. There the plaintiffs had agreed to perform certain work for a stipulated sum of money, under a penalty. After they had entered upon the performance of it, they determined to leave off, and the defendant, by parol, released them from their covenant, and promised them, if they would complete the work, that he would pay them by the day. The court held, that if the plaintiffs chose to incur the penalty, they had a right to do so, and that the new contract was binding on the defendant.

In Dearborn v. Cross, 7 Cow. 48, it is held, that a bond or other specialty may be discharged or released by a parol agreement between the parties, especially where the parol agreement is executed; and the case of Lattimore v. Harsen is there cited and relied on.

There are other decisions of like nature in the same court; as Fleming v. Gilbert, 3 Johns. 358; Keating v. Price, 1 Johns. Cas. 22; Edwin v. Saunders, 1 Cow. 250. In Ballard v. Walker, 3 Johns. Cas. 64, it was held that the lapse of time between the making of the contract and the attempt to enforce it, was a waiver; which is going further than is necessary in the case before us, for here there is an express waiver.

In Le Fevre v. Le Fevre, 4 Serg. & R. 241, parol evidence was admitted to prove an alteration of the course of an aqueduct established by deed. In regard to the objection, that this evidence was in direct contradiction to the deed, Duncan, J. remarks, that "the evidence was not offered for that purpose, but to show a substitution of another spot. If this had not been carried into effect, the evidence would not have been admissible; but where the situation of the parties is altered, by acting upon the new agreement, the evidence is proper; for a party may be admitted to prove by parol evidence, that after signing a written agreement, the parties made a verbal agreement, varying the former, provided their variations have been acted upon, and the original agreement can no longer be enforced without a fraud on one party."

The distinction taken in the argument, between contracts in writing merely and contracts under seal, appears by these authorities not to be important as it respects the point under consideration, and justice required in the present case, that the parol evidence should be received.

It was said that the promise of Payne cannot affect Perkins, and vice versa. But as they were joint actors, and as when one acted in the absence of the other, it was always with a joint view to the same object, they cannot be separated, but must be considered as joint promisors.

The parol promise, it is contended, was without consideration. This depends entirely on the question, whether the first contract was waived. The plaintiff having refused to perform that contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterward went on upon the faith of the new promise and finished the work. This was a sufficient consideration. If Payne and Perkins were willing to accept his relinquishment of the old contract and proceed on a new agreement, the law, we think, would not prevent it.

Motion for new trial overruled.

VANDERBILT v. SCHREYER.

(91 N. Y. 392.)

Court of Appeals of New York. March 6, 1883.

The material facts are stated in the opinion.

T. M. Tyng, for appellant. John L. Lindsay, for respondent.

RUGER, C. J. This was an action to foreclose a mortgage for $5,000 given September 5, 1873. by one James Dunseith and wife to John Schreyer, and by him assigned to the plaintiff on the 5th day of May, 1874.

Schreyer was made a party defendant, and it was sought to charge him with the payment of any deficiency that might arise upon a sale of the mortgaged premises, upon the ground that he had guaranteed the payment of the mortgage debt.

Schreyer answered, and after admitting the assignment and the guaranty of payment alleged by way of defense, that on the 2d day of February, 1874, the plaintiff entered into a contract with George Gebhardt and Matthew L. Ritchie for the erection by him of certain buildings for them upon certain lots in the city of New York, for which he was to receive $8,175, to be paid as follows: "When the said houses are topped out, a payment of $5,000 by assignment of a bond and mortgage held by John Schreyer on the property of Anna Maria Schreyer, No. 350 West Forty-Second street, New York City," and the balance, amounting to $3,175, when the houses should be fully completed. Vanderbilt commenced performance of his contract and continued until he became entitled to the assignment of the $5,000 mortgage. Schreyer thereupon offered to assign it to the plaintiff, but the latter refused to accept an assignment unless Schreyer would also guarantee payment. The defendant refused to do this, and Vanderbilt then suspended work upon the buildings for about two months. The defendant then under protest, and believing, as he alleges, that he was acting under compulsion, executed the assignment with the guaranty in question. The plaintiff then completed his contract and received the balance of the consideration. The answer further states "that it was neither under said contract or otherwise made a condition of the plaintiff's accepting the assignment of said mortgage that this defendant or any other person should guarantee the payment thereof," and further "that no consideration ever passed to him or his principals for such guaranty and the same was and is null and void."

Upon the trial of the action at special term the plaintiff produced and proved the mortgage in question, and also an assignment from defendant to plaintiff in the usual form, but containing the following clause: "And I hereby guarantee the payment of said bond and mortgage for $5,000 and interest from May 5, 1874, by due foreclosure and sale." The assignment and guaranty were sealed and executed in the presence of a subscribing witness. The plaintiff thereupon rested, and the defendant offered to prove in substance the facts alleged in his answer, which offer was objected to and excluded upon the ground that such answer did not set up facts constituting a defense. The defendant excepted to such ruling. The court thereupon held that said guaranty was absolute and ordered judgment against Schreyer for the deficiency which had previously been ascertained by a sale of the premises. An appeal was taken to the general term, which reversed the judgment and directed a dismissal of the complaint upon the ground that Schreyer was improperly made a defendant, because the guaranty in question was in effect a guaranty of collection only, and that no right of action arose thereon until after the amount of the deficiency had been ascertained by a judicial sale of the mortgaged premises.

We differ in our conclusion from that reached by both of the courts below.

The guaranty in question is not an absolute guaranty for the payment of the mortgage, but a guaranty that it shall be paid in a particular manner. In construing it we must give effect not only to the entire instrument, but also to all of its language. This requires us to give some effect to the words, "by due foreclosure and sale," and they can perform no other office in the connection in which they are used than to qualify and limit the operation of the preceding words, "I hereby guarantee the payment of said bond and mortgage." We must conclude that the parties put these words into their contract for some purpose; and the only purpose they can be made to serve is to make the guaranty a conditional instead of an absolute one. A covenant quite similar to this was held in the case of Mahaiwe Bank v. Culver, 30 N. Y. 313, to be a covenant to pay any deficiency existing after a foreclosure and sale.

But we suppose it to be immaterial whether this guaranty be called a guaranty of payment or of collection, for in either event the plaintiff was entitled to make Schreyer a party defendant in the foreclosure action and demand and recover a judgment against him therein for any deficiency which might arise on a sale of the mortgaged premises.

The principles applicable to the prosecution of actions against guarantors of the collection of promissory notes and other securities do not apply to actions for the foreclosure of mortgages. In the latter the persons who may be made parties therein are pointed out by statute, and include all who are under obligation to pay the mortgage debt, or any part thereof, whether such obligation be absolute or conditional.

This action was commenced, and tried, prior to the adoption of section 1627 of the Code

of Civil Procedure. It must therefore be governed by the provisions of the Revised Statutes. The sections applicable are the following: 2 Rev. St. (1st Ed.) 191, § 154, reads: "If the mortgage debt be secured by the obligation or other evidence of debt hereafter executed, of any other person beside the mortgagor, the complainant may make such person a party to the bill, and the court may decree payment of the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases." Section 153, Id., reads: "After such bill [bill for foreclosure] shall be filed while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage or any part thereof unless authorized by the court of chancery."

These provisions of the statute remained without material changes, so far as the question under discussion is concerned, until the adoption in 1880 of the last portion of the Code of Civil Procedure. The scheme of these provisions was stated by this court in Society v. Stevens, 63 N. Y. 341, to be to prevent oppressive litigation by the multiplication of actions against the several persons who might be liable for the same mortgage debt, and to require all of the parties interested in its payment to be brought into the same suit and thus settle their respective liabilities in one comprehensive action. Previous to the enactment of section 1627 of the Code of Civil Procedure it was the settled practice of courts of equity to bring all parties who were in any way liable for the payment of the mortgage debt, or any part thereof, and whether liable upon an absolute or conditional undertaking, into the same foreclosure action and decree payment of any deficiency arising on a sale of the mortgaged premises, against any of the parties appearing to be liable therefor, according to the nature and circumstances of such liability. The principle that such person, whether liable conditionally or absolutely, may be sued and made liable for any deficiency in an action to foreclose the mortgage is laid down in the works on chancery practice and sustained by numerous cases. See 2 Hoff. Ch. Prac. 141, 142; 2 Barb. Ch. Prac. 175, 176; Leonard v. Morris, 9 Paige, 90; Suydam v. Bartle, Id. 294; Curtis v. Tyler, Id. 432; Griffith v. Robertson, 15 Hun, 344; Scofield v. Doscher, 72 N. Y. 491. Other actions of a similar nature are provided for in our statute, as in the case of proceedings in equity against insolvent corporations to reach stockholders and trustees who may be contingently liable for the payment of the debts of such corporations. These trustees and stockholders are chargeable with a conditional liability in the action brought to dissolve the corporation. Of course, where the liability of a person to pay a mortgage debt depends upon some extrinsic event which cannot be determined in the prosecution of the foreclosure suit, he could not be made a party to such an action and charged with a deficiency, because by the terms of his contract, his liability would not commence until the happening of the event contracted for, and that might be wholly disconnected with the process of foreclosure.

Such was the case of Coal Co. v. Blake, 85 N. Y. 226, where the party guaranteed to pay the mortgage debt, provided another party upon demand did not do so. There a demand was held necessary before suit brought. The serious consequences of neglecting to include as parties all persons liable for the payment of the mortgage debt in a foreclosure thereof are illustrated in the case of Society v. Stevens, already cited. It was there held that upon an application for leave to prosecute an action at law against parties liable for the payment of the mortgage debt, the granting of the permission rested in the discretion of the court, whether the application was made during the pendency of the foreclosure suit or after it had terminated; and that in the exercise of a wise discretion the court had the power to deny such permission, even when the claim had not been prosecuted in the foreclosure suit. The order of the court below granting leave to prosecute such an action was reversed, upon the ground that it had declined to exercise its undoubted discretionary power.

That an action at law either during the pendency or after the termination of a foreclosure suit cannot be maintained by the holder of a mortgage against a person liable for the payment or collection of the mortgage debt, without leave of the court, duly obtained, has frequently been held in this state. Pattison v. Powers, 4 Paige, 549; Comstock v. Drohan, 71 N. Y. 9; Scofield v. Doscher, supra. It follows from these authorities that the plaintiff was not only justified in making Schreyer a defendant in this action, and asking judgment for a deficiency against him, even though his guaranty was one of collection merely, but that it would have been hazardous to his security if he had omitted to do so.

A more serious question however arises under the exception taken to the rulings of the special term excluding the evidence offered by the defendant to prove the facts stated in his answer, showing that the guaranty was without consideration.

In considering this question the allegations in the answer must be assumed to be true, and that the defendant would have proved them if he had not been precluded by the rulings of the court from doing so. The answer, while perhaps inartificially drawn, certainly alleged all of the facts necessary to show that neither Gebhardt and Ritchie, nor the plaintiff, had received any consideration for the guaranty in question. This he should have been allowed to prove. The production

of the assignment in evidence, purporting to be executed "for value received," and being under seal was prima facie evidence only of a valuable consideration. It was not conclusive and could be disproved if it was in the defendant's power to do so. 3 Rev. St. (6th Ed.) 672, § 124; Bookstaver v. Jayne, 60 N. Y. 146; Anthony v. Harrison, 14 Hun, 198, affirmed in this court, 74 N. Y. 613.

The incorporation of this guaranty into the assignment for which there was a consideration does not affect the question. It was not essential to the assignment and was, so far as its legal effect was concerned, a separate instrument, and must be supported upon a sufficient consideration or treated as nudum pactum.

It is quite clear that the plaintiff had no right to demand this guaranty by the terms of his original contract with Gebhardt and Ritchie. That was satisfied by a mere naked transfer of his interest in the mortgage.

It was held in Van Eps v. Schenectady, 12 Johns. 436, that an agreement to execute a deed of lands was satisfied by the execution of a deed, without warranty or covenants. So it has been held that a party has no right to impose any conditions to the performance of a contract, except those contained in the contract itself. Furnace Co. v. French, 34 How. Prac. 94. It being clear that Vanderbilt had no legal right to require, as a condition to the fulfillment of his contract, the performance of an act not required by the contract, it is difficult to see what benefit he has bestowed or what inconvenience he has suffered in return for the undertaking assumed by the defendant. He promises to do only that which he was before legally bound to perform. Even though it lay in his power to refuse to perform his contract, he could do this only upon paying the other party the damages occasioned by his nonperformance, and that in contemplation of law would be equivalent to performance. He had no legal or moral right to refuse to perform the obligation of the contract into which he had upon a good consideration voluntarily entered.

There is no evidence in support of a claim that this guaranty was given as a compromise of any dispute arising with reference to the obligations of the plaintiff under his contract with Gebhardt and Ritchie. The case is not, therefore, brought within the cases in which a promise has been upheld on the theory that it was made in settlement of a controversy over disputed claims. The authorities seem quite uniformly to show the inadequacy of the consideration alleged for the guaranty in question. In Geer v. Archer, 2 Barb. 420, the defendant visited the plaintiff to pay her an installment upon a mortgage given by him a few weeks before on a purchase of land. She complained that she had not received the fair value of her land upon such purchase. The defendant offered to give her his note for $200 to satisfy her complaints. She replied that she would be satisfied with that, whereupon the note in question was given. It was held that this note was void for want of consideration. So, where land was sold and described in the deed as containing a certain quantity, and a deficiency was afterward discovered, it was held that there was no obligation on the grantor to compensate the grantee for such deficiency, and a promise to pay the same was without consideration. Smith v. Ware, 13 Johns. 257; Ehle v. Judson, 24 Wend. 97.

Pollock states the rule as follows: That "neither the promise to do a thing, nor the actual doing of it, will be a good consideration if it is a thing which the party is bound to do by the general law, or by a subsisting contract with the other party." Pol. Cont. 161; Crosby v. Wood, 6 N. Y. 369; Deacon v. Gridley, 15 C. B. 295. "Nor is the performance of that which the party was under a previous valid, legal obligation to do a sufficient consideration for a new contract." 2 Pars. Cont. 437. When certain sailors had signed articles to complete a voyage, but at an intermediate port refused to go on, and the captain thereupon promised to pay them increased wages, it was held that the promise was without consideration. Bartlett v. Wyman, 14 Johns. 260. A firm having a contract to build a railroad found the contract unprofitable, whereupon the railroad company promised, if they would go on and complete the contract, they would repay to the contractors all of the obligations which they had or would incur in consequence of their completion of the work. Held no consideration. Ayres v. Railroad Co., 52 Iowa, 478, 3 N. W. 522.

When a mortgagor, as a condition to the payment of his mortgage, exacted from the mortgagee an obligation that he would procure the cancellation of a certain outstanding bond executed by the mortgagor, or pay him the sum of $100, said bond being given to indemnify against some apparent incumbrance, it was held, that it not being shown that there was any incumbrance existing against the land, the obligation was without consideration. Conover v. Stillwell, 34 N. J. Law, 54. When the plaintiff agreed to enter the military service of the United States to the credit of the town of Tobin for $100, and on arriving at the place of enlistment, being offered an advanced price by others, refused to perform unless they would pay him $250 additional, held, that an obligation to pay him the additional amount was void for want of consideration. Reynolds v. Nugent, 25 Ind. 328. A sailor signed articles for a voyage to Melbourne and home at three pounds per month; several of the crew deserted at Melbourne. The captain, to induce plaintiff to remain, signed fresh articles for six pounds per month; Held, no consideration for the promise. Harris v. Carter, 3 El. & Bl. 559; to same effect Stilk v. Myrick, 2 Camp. 317. When defendants

gave plaintiff's notes to provide funds to take up obligation, which plaintiff had previously contracted to pay, held no consideration. Mallalieu v. Hodgson, 16 Adol. & E. (N. S.) 689. A promise to pay an attorney additional compensation to attend as a witness, after he has been duly subpœnaed, is without consideration. The attorney did nothing except what he was legally bound to do. Smithett v. Blythe, 1 Barn. & Adol. 514.

It would doubtless be competent for parties to cancel an existing contract and make a new one to complete the same work at a different rate of compensation, but it seems that it would be essential to its validity that there should be a valid cancellation of the original contract. Such was the case of Lattimore v. Harsen, 14 Johns. 330.

It necessarily follows from these authorities that the plaintiff had no right to impose, as a condition to the performance of his contract, that the payment of said mortgage should be guaranteed. Although the defendant was not a party to the original contract and the consideration and contract between him, Gebhardt and Ritchie does not appear, yet we must assume that he acted at the request of Gebhardt and Ritchie, and was required only by such contract to execute such an assignment as Gebhardt and Ritchie had contracted to give. The answer, at all events, sets up that he received no consideration from any one for the guaranty sued upon.

The answer also alleges that the sole consideration received for this guaranty was the performance by the plaintiff of his contract with Gebhardt and Ritchie.

We think this answer sets forth a defense to the action, and inasmuch as the defendant has been erroneously deprived of the opportunity of proving it, if in his power to do so, that a new trial should be ordered.

The judgment therefore of the general term dismissing the complaint should be reversed, and its order reversing the judgment ordered against the defendant at circuit affirmed, and a new trial ordered, with costs to abide the event.

All concur, except ANDREWS and DANFORTH, JJ., not voting.

Judgment accordingly.

WHEELER v. WHEELER.

(11 Vt. 60.)

Supreme Court of Vermont. Chittenden. Jan. 1839.

This was an action of *assumpsit* on an *insimul computasset* for $557,05. The defendant filed the following plea, in bar: That before the 20th day of May, 1833, when the accounting, on which the plaintiff declared was had, sundry dealings had occurred between the plaintiff and this defendant, the charges of which, on the part of the said Reuben, came down to the year 1830 and no later, and remained unliquidated, and that after that time, in consequence of certain losses by fire, this defendant became insolvent and was unable to pay the full amount of his debts. and, by reason thereof, a negotiation was entered into between this defendant and his creditors, including the said Reuben, for a partial payment of their claims, and on the 30th May, 1831, it was agreed by and between this defendant and his said creditors, including said Reuben, that this defendant should pay them the one half of their claims, in the following manner: one fourth on or before the first day of June, 1833, and one fourth part more on or before the first day of June, 1835, without interest; and that they, the said creditors, would accept the same in satisfaction of their said claims, and, in consideration that the defendant promised the plaintiff to pay him in manner and form as above, the said Reuben promised the defendant to accept the same, in full satisfaction of his said claims; and the defendant avers, that the said accounting on the said 20th May, 1833, was for the mere purpose of ascertaining the amount of the claim of said Reuben, on which said instalments were to be paid, and that in pursuance of said contract, this defendant, on the same 20th May, 1833, paid the plaintiff the one fourth part of his said claim, which said Reuben then and there accepted, and on the 29th day of May, 1835, the defendant paid plaintiff the other fourth part of said claim, which plaintiff accepted, and that the same were accepted and received in pursuance of *said *61 contract, and in full satisfaction and discharge of his said claim, and that said accounting is the identical claim mentioned in said agreement, all which defendant is ready to verify—wherefore, &c. To this plea there was a general demurrer and joinder. The county court rendered judgment for plaintiff, and the defendant excepted.

Maeck & Smalley, for plaintiff. C. Adams, for defendant.

COLLAMER, J. It is not every agreement, however deliberately made, by persons capable to contract, which the law will enforce; nor is it true that the courts of common law have ever taken their suitors under guardianship to set aside contracts, merely because imprudently made. There is one ingredient always necessary, that is, a legal and sufficient consideration. Without this, contracts, executed or executory, are always disregarded by courts, unless thereby innocent third persons would be injured or defrauded. The performance of that, to which a man is already under obligation, can never constitute a consideration for any contract by the other party. The promise by a debtor to pay a debt, which he is then under legal obligation to pay, creates no new duty and can sustain no action, nor constitute the consideration of a promise by the other party. The payment of a debt, by a man then bound to pay, creates no legal obligation on the other party, nor constitutes a consideration for any new promise by him. These principles, in various *forms of practical application, have always been regarded by *67 the courts; nor can any adjudged case be found where they have been violated. It is on this principle that it was early, and has been uniformly, holden that a payment of part of a debt, by the debtor, when the whole is due, is not and cannot, by possibility, be a legal consideration for a contract, on the part of the creditor, to receive it in full satisfaction of the whole debt. The payment of a debt, or any part of a debt, before it is due, is what the debtor is not under any legal obligation to do, and therefore is a legal consideration for a contract by the creditor, which contract may be to release or cancel his debt, as well as any other contract. So, too, the delivery of a collateral article, for a debt due in money, is what the debtor is under no obligation to do, and therefore may be a legal consideration for a contract by the creditor to receive it in full satisfaction, as well as for any other promise he might make.

This has been so often decided, as appears even by the authorities cited by the defendant, that it is entirely unnecessary to repeat them.

It is, however, insisted by the defendant, that there are decisions. cited by him, that contradict or overrule this principle. This however, on examination, will be found incorrect. Those cases which, at first view, seem to favor such a position, may be arranged under these heads:

First. If a debtor, by agreement, delivers to his creditors or to a trustee for them, debts, effects or any collateral property, whether it be the whole or part of what he has, and it be received in satisfaction, it is a good defence. This is like delivering collateral property to a single creditor on a sole debt. It is doing what the debtor is not under legal obligation to do, and it may be the legal consideration for a contract of discharge or any other contract by the other party. This disposes of several decisions.

Second. If a debtor contracts with one or all of his creditors to procure a friend to secure or pay, out of his own means, part, in satisfaction of a whole debt, and it is done, such creditor can never recover more, even of the debtor himself. It would be a fraud on the third *68 person who paid for *the entire release; and the debtor did what he was not under a legal obligation to do, in procuring the act of the third person, which was a legal consideration for the promise on the other part. This disposes of another class of decisions, relied on by the defendant.

Third. If a composition deed has been entered into by a body of creditors and their debtor, by which they agree to receive, and do receive, in money or effects, from the debtor, or in securities from his friends, a part for the whole debts, there, no one who agreed to the composition can collect a balance, because it would operate a fraud on the other creditors who stipulate for a mutuality and have released their debts. The deed being a specialty under seal, is a technical release. Such are a large class of the defendant's cases.

Fourth. If any creditor, professes to enter into a composition deed with others on terms of mutuality, and so induces them to release, when he in fact secretly takes security for more; all such securities, by whomsoever given, are void, being in bad faith and a fraud upon others. This is, however, only so, when others have actually released their debts. This

disposes of all the remainder of the defendant's cases, cited in authority.

In the present case, the defendant did not deliver to the plaintiff or to his creditors, or to any trustee for them, his debts or effects, or any part thereof. He did not procure any third person to give security or to pay any thing. No composition deed has been signed by any one. Nothing has been paid to any creditor, nor any release by them signed, and they may collect their whole debts. For the plaintiff to recover his just debt can therefore operate no fraud on any creditor or any third person. This plea stands upon the simple question, whether the payment, by a debtor, of a part of a debt, when he is bound to pay the whole, can be a legal consideration for a promise, on the part of the creditor, to receive it in full satisfaction. That such could not be the case anciently is certain, and is fully conceded by the defendant's counsel. Let us see the language of the courts in some of the most modern *69 cases, where the subject has *been fully revised and considered. In Fitch v. Sutton, 5 East's Rep. 230, where the defendant had compounded with his creditors, and paid all, including the plaintiff, ten shillings in the pound, and the plaintiff had given therefor his receipt in full, Lord Ellenborough says, "it cannot be pretended that a receipt of part only, though expressed to be in full of all demands, must have the same operation as a release. It is impossible to contend, that acceptance of seventeen pounds ten shillings is an extinguishment of a debt of fifty pounds. There must be consideration for the relinquishment of the residue; something collateral, to show a possibility of advantage to the party relinquishing his further claim, otherwise the agreement is *nudum pactum.*" And, he says, the doctrine of Pinnel's case, 5 Coke, 117, has never been shaken.

In the more modern case of Lewis v. Jones, 4 B. & C. 506, where the creditor had agreed to receive five shillings on the pound for his debt, upon having the note of the debtor's father therefor, and which he received, Holroyd, J. says, "an acceptance of a smaller sum cannot be pleaded in satisfaction of a larger. In point of law, something further is necessary to produce that effect. But, I think, when the plaintiff in this case accepted the father's note, as a security for the payment of the composition money, the agreement did operate as a satisfaction." Indeed, the distinctions, before mentioned, are recognized in all the cases and not one is found to sustain this plea.

Judgment affirmed.

JAFFRAY et al. v. DAVIS et al.

(26 N. E. 351, 124 N. Y. 164.)

Court of Appeals of New York, Second Division. Jan. 14, 1891.

Appeal from supreme court, general term, first department.

John W. Little and O. F. Wisner, for appellants. Isaac L. Miller, for respondents.

POTTER, J. The facts found by the trial court in this case were agreed upon. They are simple, and present a familiar question of law. The facts are that defendants were owing plaintiffs, on the 8th day of December, 1886, for goods sold between that date and the May previous, at an agreed price, the sum of $7,714.37, and that, on the 27th of the same December, the defendants delivered to the plaintiffs their three promissory notes, amounting, in the aggregate, to $3,462.24, secured by a chattel mortgage on the stock, fixtures, and other property of defendants, located in East Saginaw, Mich., which said notes and chattel mortgage were received by plaintiffs, under an agreement to accept same, in full satisfaction and discharge of said indebtedness; that said notes have all been paid, and said mortgage discharged of record. The question of law arising from these facts, and presented to this court for its determination, is whether such agreement, with full performance, constitutes a bar to this action, which was brought after such performance to recover the balance of such indebtedness over the sum so secured and paid.

One of the elements embraced in the question presented upon this appeal is, viz., whether the payment of a sum less than the amount of a liquidated debt, under an agreement to accept the same in satisfaction of such debt, forms a bar to the recovery of the balance of the debt. This single question was presented to the English court in 1602, when it was resolved, if not decided, in Pinnel's Case, 5 Coke, 117, "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole," and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts, and in the courts of this country, in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed upon any recurrence of the question to criticise and condemn its reasonableness, justice, fairness, or honesty. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than was held in Pinnel Case, supra, and Cumber v. Wane, 1 Strange, 426; Foakes v. Beer, L. R. 9 App. Cas. 605; Goddard v. O'Brien, (Q. B. Div.) 21 Amer. Law Reg. 637, and notes. The steadfast adhesion to this doctrine by the courts, in spite of the current of condemnation by the individual judges of the court, and in the face of the demands and conveniences of a much greater business, and more extensive mercantile dealings and operations, demonstrate the force of the doctrine of *stare decisis*. But the doctrine of *stare decisis* is further illustrated by the course of judicial decisions upon this subject; for, while the courts still hold to the doctrine of the Pinnel and Cumber-Wane Cases, supra, they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or, in other words, to extract, if possible, from the circumstances of each case, a consideration for the new agreement, and to substitute the new agreement in place of the old, and thus to form a defense to the action brought upon the old agreement. It will serve the purpose of illustrating the adhesion of the court to settled law, and at the same time enable us, perhaps more satisfactorily, to decide whether there was a good consideration to support the agreement in this case, to refer to (the consideration in) a few of the numerous cases which the courts have held to be sufficient to support the new agreement. Lord BLACKBURN said, in his opinion in Foakes v. Beer, supra, and while maintaining the doctrine, "that a lesser sum cannot be a satisfaction of a greater sum," "but the gift of a horse, hawk, or robe, etc., in satisfaction, is good," quite regardless of the amount of the debt; and it was further said by him, in the same opinion, "that payment and acceptance of a parcel before the day of payment of a larger sum would be a good satisfaction in regard to the circumstance of time;" "and so, if I am bound in twenty pounds to pay you ten pounds at Westminster, and you request me to pay you five pounds at the day, at York, and you will accept it in full satisfaction for the whole ten pounds, is it a good satisfaction?" It was held in Goddard v. O'Brien, 9 Q. B. Div. 37: "A., being indebted to B. in 125 pounds 7s. and 9d. for goods sold and delivered, gave B. a check (negotiable, I suppose) for 100 pounds, payable on demand, which B. accepted in satisfaction,—was a good satisfaction." HUDDLESTON, B., in Goddard v. O'Brien, supra, approved the language of the opinion in Sibree v. Tripp, 15 Mees. & W. 26: "That a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount; the circumstance of negotiability making it in fact a different thing, and more advantageous, than the original debt, which was not negotiable." It was held in Bull v. Bull, 43 Conn. 455: "And, although the claim is a money demand, liquidated, and not doubtful, and it cannot be satisfied with a smaller sum of money, yet, if any other personal property is received in satisfaction, it will be good, no matter what the value." And it was held, in Cumber v. Wane, supra, that a creditor can never bind himself by simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such agreement being *nudum pactum*, but, if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement. It was held in Le Page v.

McCrea, 1 Wend. 164, and in Boyd v. Hitchcock, 20 Johns. 76, that "giving further security for part of a debt, or other security, though for a less sum than the debt, and acceptance of it in full of all demands, make a valid accord and satisfaction;" that, "if a debtor gives his creditor a note indorsed by a third party for a less sum than the debt, (no matter how much less,) but in full satisfaction of the debt, and it is received as such, the transaction constitutes a good accord and satisfaction." Varney v. Conery, (Me.) 1 Atl. Rep. 683. And so it has been held "where, by mode or time of part payment, different than that provided for in the contract, a new benefit is or may be conferred, or a burden imposed, a new consideration arises out of the transaction, and gives validity to the agreement of the creditor." Rose v. Hall, 26 Conn. 392. And so "payment of less than the whole debt, if made before it is due, or at a different place from that stipulated, if received in full, is a good satisfaction." Jones v. Bullitt, 2 Litt. (Ky.) 49; Ricketts v. Hall, 2 Bush, 249; Smith v. Brown, 3 Hawks. 580; Jones v. Perkins, 29 Miss. 139; Schweider v. Lang, 29 Minn. 254, 12 N. W. Rep. 33. In Watson v. Elliott, 57 N. H. 511–513, it was held: "It is enough that something substantial which one party is not bound by law to do is done by him, or something which he has a right to do he abstains from doing, at the request of the other party, is held a good satisfaction."

It has been held in a number of cases that, if a note be surrendered by the payee to the maker, the whole claim is discharged and no action can afterwards be maintained on such instrument for the unpaid balance. Ellsworth v. Fogg, 35 Vt. 355; Kent v. Reynolds, 8 Hun, 559. It has been held that a partial payment made to another, though at the creditor's instance and request, is a good discharge of the whole debt. Harper v. Graham, 20 Ohio, 106. "The reason of the rule is that the debtor in such case has done something more than he was originally bound to do, or, at least, something different. It may be more, or it may be less, as a matter of fact." It was held by the supreme court of Pennsylvania in Bank v. Huston, 11 Wkly. Notes Cas. 389, (February 13, 1882:) The decided advantage which a creditor acquires by the receipt of a negotiable note for a part of his debt, as by the increased facilities of recovering upon it, the presumption of a consideration for it, the ease of disposing of it in market, etc., was held to furnish ample reason why it should be a valid discharge of a larger account or open claim unnegotiable. It has been held that a payment in advance of the time, if agreed to, is a full satisfaction for a larger claim not yet due. Brooks v. White, 2 Metc. (Mass.) 283; Bowker v. Childs, 3 Allen, 434. In some states, notably Maine and Georgia, the legislature, in order to avoid the harshness of the rule under consideration, have, by statute, changed the law upon that subject, by providing: "No action can be maintained upon a demand which has been canceled by the receipt of any sum of money less than the amount legally due thereon, or for any good and valuable consideration, however small." Citing Weymouth v. Babcock, 42 Me. 42. And so in Gray v. Barton, 55 N. Y. 68, where a debt of $820 upon book-account was satisfied by the payment of one dollar by calling the balance a "gift," though the balance was not delivered, except by fiction, and the receipt was in the usual form, and was silent upon the subject of a gift, and this case was followed and referred to in Ferry v. Stephens, 66 N. Y. 321. So it was held in Mitchell v. Wheaton, 46 Conn. 315, that the debtor's agreement to pay, and the payment of $150, with the costs of the suit, upon a liquidated debt of $299, satisfied the principal debt. These cases show in a striking manner the extreme ingenuity and assiduity which the courts have exercised to avoid the operation of the "rigid and rather unreasonable rule of the 'old law,'" as it is characterized in Johnston v. Brannan, 5 Johns. 268–272; or as it is called in Kellogg v. Richards, 14 Wend. 116, "technical and not very well supported by reason;" or, as may be more practically stated, a rule that "a bar of gold worth $100 will discharge a debt of $500, while 400 gold dollars in current coin will not." See note to Goddard v. O'Brien, supra, in 21 Amer. Law Reg. 640, 641.

The state of the law upon this subject, under the modification of later decisions, both in England and in this country, would seem to be as expressed in Goddard v. O'Brien, supra: "The doctrine in Cumber v. Wane, is no doubt very much qualified by Sibree v. Tripp, and I cannot find it better stated than in 1 Smith, Lead. Cas. (7th Ed.) 595: 'The general doctrine in Cumber v. Wane, and the reason of all the exceptions and distinctions which have been ingrafted on it, may perhaps be summed up as follows, viz.: That a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum*. But, if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement.'" Bull v. Bull, 43 Conn. 455; Fisher v. May, 2 Bibb, 449; Reed v. Bartlett, 19 Pick. 273; Bank v. Geary, 5 Pet. 99–114; Le Page v. McCrea, 1 Wend. 164; Boyd v. Hitchcock, 20 Johns. 76; Brooks v. White, 2 Metc. (Mass.) 283; Jones v. Perkins, 29 Miss. 139–141; Hall v. Smith, 15 Iowa, 584; Babcock v. Hawkins, 23 Vt. 561.

In the case at bar, the defendants gave their promissory notes upon time for one-half the debt they owed plaintiff, and also gave plaintiff a chattel mortgage on the stock, fixtures, and other personal property of the defendants, under an agreement with plaintiff to accept the same in full satisfaction and discharge of said indebtedness. Defendants paid the notes as they became due, and plaintiff then discharged the mortgage. Under the cases above cited, and upon principle, this new agreement was supported by a sufficient consideration to make it a valid agreement, and this agreement was, by the parties, substituted in place of the former. The consideration of the new agreement was

that the plaintiff, in place of an open book-account for goods sold, got the defendants' promissory notes, probably negotiable in form, signed by defendants, thus saving the plaintiff perhaps trouble or expense of proving their account, and got security upon all the defendants' personal property for the payment of the sum specified in the notes, where before they had no security. It was some trouble at least, and perhaps some expense, to the defendants to execute and deliver the security, and they deprived themselves of the legal ownership, or of any exemptions, or the power of disposing of this property, and gave the plaintiff such ownership, as against the defendants, and the claims thereto of defendants' creditors, if there were any. It seems to me, upon principle, and the decisions of this state, (save perhaps Keeler v. Salisbury, 33 N. Y. 653, and Platts v. Walrath, Lalor, Supp. 59, which I will notice further on,) and of quite all of the other states, the transactions between the plaintiff and the defendants constitute a bar to this action. All that is necessary to produce satisfaction of the former agreement is a sufficient consideration to support the substituted agreement. The doctrine is fully sustained in the opinion of Judge ANDREWS, in Allison v. Abendroth, 108 N. Y. 470, 15 N. E. Rep. 606, from which I quote: "But it is held that, where there is an independent consideration, or the creditor receives any benefit, or is put in a better position, or one from which there may be legal possibility of benefit to which he was not entitled, except for the agreement, then the agreement is not *nudum pactum*, and the doctrine of the common law, to which we have adverted, has no application." Upon this distinction the cases rest, which hold that the acceptance by the creditor in discharge of the debt of a different thing from that contracted to be paid, although of much less pecuniary value or amount, is a good satisfaction, as, for example, a negotiable instrument binding the debtor and a third person for a smaller sum. Curlewis v. Clark, 3 Exch. 375. Following the same principle, it is held that, when the debtor enters into a new contract with the creditor to do something which he was not bound to do by the original contract, the new contract is a good accord and satisfaction, if so agreed. The case of accepting the sole liability of one of two joint debtors or copartners, in satisfaction of the joint or copartnership debt, is an illustration. This is held to be a good satisfaction, because the sole liability of one of two debtors "may be more beneficial than the joint liability of both, either in respect of the solvency of the parties, or the convenience of the remedy." Thompson v. Percival, 5 Barn. & Adol. 925. In perfect accord with this principle is the recent case in this court of Luddington v. Bell, 77 N. Y. 138, in which it was held that the acceptance by a creditor of the individual note of one of the members of a copartnership after dissolution, for a portion of the copartnership debt, was a good consideration for the creditor's agreement to discharge the maker from further liability. Pardee v. Wood, 8 Hun. 584; Douglass v. White, 3 Barb. Ch. 621–624. Notwithstanding these later and decisive authorities, the plaintiff contends that the giving of the defendants' notes, with the chattel mortgage security and the payment, was an insufficient consideration to support the new or substituted agreement, and cites, as authority for such contention, the cases of Platts v. Walrath, Lalor, Supp. 59, and Keeler v. Salisbury, 33 N. Y. 648. Platts v. Walrath arose in justice court, and the debt in controversy was put forth as a set-off. The remarks of the judge in the former case were quite *obiter*, for there were various subjects in dispute upon the trial, and from which the justice might have reached the conclusion that he did. The judge, in the opinion relied upon, says: "Looking at the loose and secondary character of the evidence as stated in the return, it was, perhaps, a question of fact whether any mortgage at all was given, or at least, whether, if given, it was not in terms a mere collateral security for the large note." "Even the mortgage was left to parol proof. Did it refer to, and profess to be a security for, the note of $1,500, or that sum less the fifty dollars agreed to be thrown off?" etc.

There is so much confusion and uncertainty in the case that it was not thought advisable to publish the case in the regular series of Reports. The case of Keeler v. Salisbury, supra, is not to be regarded as an authority upon this question, or as approving the case of Platts v. Walrath, supra. In the case of Keeler v. Salisbury, the debtor's wife had joined in the mortgage given by her husband, the debtor, to effect the compromise, thus releasing her inchoate right of dower. The court held that fact constituted a sufficient consideration to support the new agreement, though the court, in the course of the opinion, remarked that it had been held that the debtor's mortgage would not be sufficient, and referred to Platts v. Walrath. But the court did not otherwise indicate any approval of that case, and there was no occasion to do so, for, as before stated, the court put its decision upon the fact that the wife had joined in the mortgage. In view of the peculiar facts in these two cases, and the numerous decisions of this and other courts hereinbefore referred to, I do not regard them as authorities against the defendants' contention that the plaintiff's action for the balance of the original debt is barred by reason of the accord and satisfaction, and the judgment must be reversed, with costs.

All concur.

EHLE v. JUDSON.

(24 Wend. 97.)

Supreme Court of New York. May, 1840.

This was an action of assumpsit, tried at the Madison circuit in September, 1838, before the Hon. Philo Gridley, one of the circuit judges.

The action was by the plaintiff as the holder of a note payable to Elisha Swift, or bearer, for the sum of $100, transferred after maturity. The defence set up was want of consideration. The defendant had been in negotiation with one James Blatherwick for the purchase of a farm, but not agreeing as to the price and terms of payment, abandoned the negotiation. Elisha Swift then treated with Blatherwick for the purchase of the farm on his own account, and induced Blatherwick to agree to accept from him a less sum, and also to reduce the amount of the cash payment to be made on the conveyance of the property. Swift told Blatherwick that he thought he should take the farm. The agreement, however, was by parol. In this state of the negotiation, Judson, the defendant in this cause, solicited Swift to give up his bargain, and consent to his becoming the purchaser upon the terms which Blatherwick had agreed to accept from him. The latter assented to the proposal, provided Judson would give him his note for $100, to pay him for his time and trouble in negotiating the purchase. Judson accordingly gave the note in question, and became the purchaser of the farm. Upon this state of facts, the defendant moved for a nonsuit, which was denied by the circuit judge, who held that this was the case of an executed consideration, the payee of the note had been put to trouble, and had by his address induced Blatherwick to reduce his demands for the farm, which was an act beneficial to the defendant, upon which a promise to pay could be sustained; that no actual request from Judson to Swift to render the services performed was necessary to be shewn—that the law would imply a request. The jury, under the direction of the judge, found a verdict for the plaintiff, which the defendant now moves to set aside.

J. A. Spencer, for plaintiff. B. Davis Noxon, for defendant.

BRONSON, J. The note was given on a past or executed consideration. It was to compensate Swift for what he had done in negotiating for the farm, and obtaining the offer of better terms than Blatherwick had proposed to accept when the defendant was in treaty for the purchase. I am unable to see how this makes out a good consideration for the promise. Swift had not acted for the defendant, but for himself. The defendant had relinquished all idea of purchasing the farm before Swift commenced treating for it; and Swift neither acted at the defendant's request, nor with any view to his benefit: and beyond this, Swift had accomplished nothing, in a legal point of view. If a verbal contract had been completed, it would have been void under the statute of frauds. But he had not even made a void contract, if such an expression may be tolerated. He had only got an offer of terms from Blatherwick, and had told him he thought he should take the farm. The owner was under no obligation, not even honorary, to sell upon those terms, or to give Swift a preference over any other person, on whatever terms he might ultimately conclude to part with his property.

Services voluntarily rendered, though they may be beneficial to another, impose no legal obligation upon the party benefited. Bartholomew v. Jackson, 20 Johns. 28. The services must be rendered upon request (Dunbar v. Williams, 10 Johns. 259); and in counting upon a past consideration, a request must, in general, be alleged (Comstock v. Smith, 7 Johns. 87; Parker v. Crane, 6 Wend. 647). It it not necessary that there should be direct evidence of a request. This, like most other facts, may be established by presumptive evidence; and the beneficial nature of the services, though not enough when standing alone, may be very important in a chain of circumstances tending to establish the presumption. 1 Saund. 264, note 1; Oatfield v. Waring, 14 Johns. 188. See, also, Doty v. Wilson, Id. 378. But here the services were not beneficial to the defendant; and besides, we see that they were not and could not have been rendered upon request. Swift was not acting for the defendant in the negotiation with Blatherwick, but for himself.

We are referred to cases where it has been said that a moral obligation is a sufficient consideration to support an express promise. Stewart v. Eden, 2 Caines, 150; Doty v. Wilson, 14 Johns. 378; Lee v. Muggeridge, 5 Taunt. 37. But this rule must be taken with some qualifications. The moral obligation to pay a debt barred by the statute of limitations, or an insolvent's discharge, or to pay a debt contracted during infancy or coverture. and the like, will be a good consideration for an express promise. But a merely moral or conscientious obligation, unconnected with any prior legal or equitable claim, is not enough. 3 Bos. & P. 249, note; Smith v. Ware, 13 Johns. 257; Lawes' Pl. Assump. 54; 16 Johns. 283, note. But here the defendant was under no obligation of any kind to Swift. Nothing had been done at his request, or for his benefit. What Swift had done in negotiating for the farm was no more beneficial to the defendant, than it was to every other man in the state who might wish to buy a farm.

The plaintiff has often failed upon an express promise, in much stronger cases than this. I will only refer to two or three. In Hunt v. Bate, Dyer, 272, the plaintiff had, without request, become bail for the defendant's servant who was imprisoned, to the end that he might go about his master's business; and the defendant afterwards promised to indemnify the plaintiff. After verdict upon this

promise, the judgment was arrested, because, as the court said, "there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement and mainprize made of his servant, for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head." In Freer v. Hardenbergh, 5 Johns. 272, the plaintiff had, without request, made valuable improvements upon the defendant's land, and the defendant afterwards promised to pay for those improvements; but the promise was held to be a nudum pactum, and judgment was rendered for the defendant. The case of Smith v. Ware, 13 Johns. 257, was also upon an express promise, and is equally decisive against maintaining this action.

New trial granted.

POOL v. HORNER et al.

(20 Atl. 1036, 64 Md. 131.)

Court of Appeals of Maryland. June 24, 1885.

Appeal from Baltimore city court.

Assumpsit by Henry Pool against Albert N. Horner and another, executors of Alexander H. Horner. There was a judgment for defendants, and plaintiff appeals.

Argued before ALVEY, C. J., and STONE, MILLER, ROBINSON, RITCHIE, and BRYAN, JJ.

Thomas M. Murray, for appellant. *W. A. Hammond* and *J. J. Wade*, for appellees.

BRYAN, J. The statement filed as a bill of particulars alleges that there was an agreement between the plaintiff below and the testator of defendants that, for certain valuable considerations, the said testator would buy a house and lot for plaintiff, and permit him to occupy it, and, if plaintiff could obtain a larger price than the said testator paid for it, that he would pay to the plaintiff what might be obtained for it, over and above the price originally paid for it. The consideration on the part of the plaintiff was that he gave a note for $150, because of an old debt for $125 which he owed the testator, and that he agreed to pay him annually the interest on the purchase money of the house and lot, and all taxes, insurance, and ground-rent thereon, and agreed to keep the house in good repair. The plaintiff paid the note, and all interest due on it, and performed all the other stipulations of his agreement. The house and lot cost $1,465, and were sold, at the desire and request of the plaintiff, for the sum of $1,700 by the testator, who received the purchase money, and thereupon agreed to pay the plaintiff the sum of $235, and afterwards, on various occasions, promised to pay the same. The contract thus alleged was for the purchase of an interest in land, for the sale of it under certain circumstances, and for the payment to the plaintiff of a portion of the price received by the owner. Being by parol, it comes fully within the fourth section of the statute of frauds, as much so as that set up in White v. Coombs, 27 Md. 489. The plaintiff could not have maintained an action on this contract while it was executory, but the testator's express promise to pay, after it was executed, introduced a new feature into the transaction. It is stated, in the notes to Osborne v. Rogers, 1 Wms. Saund. 264*c*, as a settled rule, "that a past consideration is not sufficient to support a subsequent promise, unless there was a request of the party, express or implied, at the time of performing the consideration; but, where there was an express request at the time, it would, in all cases, be sufficient to support a subsequent promise." This doctrine seems to have been held uniformly ever since the case of Lampleigh v. Brathwait, decided in the reign of James I., and reported in 1 Smith, Lead. Cas. 222. The case is thus stated: The defendant, having feloniously slain one Patrick Mahume, required the plaintiff to endeavor to obtain a pardon for him from the king, and the plaintiff journeyed and labored, at his own charges, and by every means in his power, to effect the desired object, and the defendant afterwards, and in consideration of the premises, promised to give the plaintiff £100. It was held that, although the consideration was passed and gone before the promise was made, yet, inasmuch as the consideration was moved by the previous suit or request of the party, the promise was binding, and capable of sustaining an action. And, in another case, the plaintiff brought his action upon a promise made by the defendant to pay the plaintiff £20, in consideration that the plaintiff, at the instance of the defendant, had taken to wife the cousin of the defendant. It was held that the action was maintainable, although the marriage was executed and past before the undertaking and promise were made, because the marriage ensued at the request of the defendant. Hunt v. Bate, 3 Dyer, 272*b*. So, it seems to be clear that the payment of the note for $150 by the plaintiff, at the request of the testator, and the performance of the other considerations by him, are sufficient to support the promise made by the testator to pay the $235. Some of the testimony offered by the plaintiff did not conform with exactness to the bill of particulars; but the greater portion of it tended to prove the facts therein stated. It was error in the court to exclude the whole of it. Carroll's Lessee v. Manufacturing Co., 11 Md. 399. Judgment reversed, and new trial awarded.

BOOTHE v. FITZPATRICK.

(36 Vt. 681.)

Supreme Court of Vermont. Rutland. Feb. Term, 1864.

Book account. The auditor reported that some time prior to the last of August, 1860, the defendant's bull was impounded by one Matthew Fox in Chittenden; that said bull by some means escaped from the pound and got into the plaintiff's pasture in Pittsford, about the 1st of September, 1860, and was kept by the plaintiff from that time until about the 20th of May following, when the defendant took him away. The plaintiff did not know who was owner of the animal, when it came into his pasture as above stated, but he made frequent inquiries in order to ascertain its owner. In the latter part of November, 1860, the plaintiff having ascertained that the defendant was the owner of said bull, sent word to the defendant that he, the plaintiff, had the defendant's bull; but it did not appear that the defendant got the word at that time. Some time after this, but at what time did not definitely appear, the plaintiff met the defendant in Pittsford, and described the bull in his possession to the defendant, who thereupon said it was his, and that he would pay him, (the plaintiff) for keeping; but also said to the plaintiff that Fox, who had impounded the bull, should pay for it. Some time after the interview last referred to, the defendant went to the plaintiff in Pittsford and saw the bull, told the plaintiff that it was his, and that he would pay the plaintiff for keeping, but did not drive him away at that time. The plaintiff kept the bull through the winter, and at a reasonable time in the spring turned him out to pasture, when becoming troublesome, the plaintiff went to see the defendant in regard to taking him away. The de- *682 fendant on this occasion *informed the plaintiff that he would come and take him away the next day, and did, and at the same time offered the plaintiff his note for the amount charged for keeping. The plaintiff did not accept the note, but told the defendant that he might leave the amount with one Duncklee for the plaintiff, to which the defendant assented; but the defendant did not leave the amount with Duncklee, and the plaintiff's claim for keeping the bull remains unpaid. The amount charged was reasonable, and no more than a fair compensation for the keeping.

The plaintiff ascertained who the owner of the animal was, but at what time did not certainly appear, the plaintiff advertised said bull as an estray by posting up three notices in the town of Pittsford, where the bull was taken up; but no notice was published in a newspaper, although three were published in the county, nor was any copy left at the town clerk's office. Said bull was worth, when taken up and advertised as above stated, the sum of twelve dollars. The plaintiff made no entry of his claim on his book of accounts, nor did it appear that the plaintiff kept such book.

On the auditor's report,— the court, March Term, 1863, KELLOGG, J., presiding, rendered a judgment in favor of the plaintiff. Exceptions by the defendant.

Edgerton & Paul, for the plaintiff.

Reuben R. Thrall, for the defendant.

PECK, J. The defendant's counsel, without distinction between the part of the account that accrued before the defendant's promise to pay, and that which accrued after, insists that the promise was made upon a past consideration and not binding, in as much as there was never any previously existing legal obligation. As to all that part of the account that accrued after the defendant made his first promise to pay for the keeping, the plaintiff's right to recover is clear, as the subsequent keeping must be taken to have been upon the faith of that promise. When the defendant promised to take the bull away and pay for the keeping, the parties must have understood that the defendant *was to pay for the *683 keeping till he should take the bull away. As to the prior portion of the keeping, the promise was upon a past consideration, and the question is whether this is a legal objection to a recovery. It is urged that without an express promise there was at most but a moral obligation, and that a moral obligation is not sufficient to give a legally binding force to an express promise, except in cases where there had once existed a legal obligation, as in case of a debt barred by the statute of limitations or by a discharge in bankruptcy. This is so said in some reported cases, but no case is cited in which the question involved and decided establishes this as a general proposition. That it is not so, is evident from the cases in which it is decided that a minor making a contract may bind himself by a promise made after arriving at the age of majority without a new consideration. In such case there is no legal obligation previously existing, and yet the promise is binding. The same may be said of another class of cases where the consideration has enured to the benefit of the defendant, but without any request on his part, in which it is held that a subsequent promise is equivalent to a previous request, and creates a legal liability, where none existed before for want of a request. If the consideration, even without request, moves directly from the plaintiff to the defendant and enures directly to the defendant's benefit, the promise is binding, though made upon a past consideration. In this case there was such consideration. The plaintiff parted with what was of value to him, and it enured directly to the benefit of the defendant. A promise upon such past consideration is binding. This principle is fundamental and elementary, and is sustained by abundant authority. But for the defendant's promise the plaintiff could not recover for want of a request on the part of the defendant, as one can not thus be made debtor without his assent. The promise of the defendant obviates this objection, it being equivalent to a previous request. The cases cited by the defendant's counsel to show that a moral obligation is not a good consider-

ation for an express promise, except where there had been a previous legal obligation, are not in conflict with these principles. It is true there are some expressions used *by judges that taken literally without reference to the case then under consideration, would seem to be irreconcilable with this view. The language in these cases must be understood in reference to the cases in which the language is used. They were cases where the defendant had received no consideration beneficial to himself; not like this, where the defendant has received a valuable pecuniary benefit at the expense of the plaintiff.

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There would be another objection to a recovery in this case in the absence of a promise by the defendant, arising from the provision of the statute prohibiting a party who takes up an estray, from recovering for keeping in case he neglects to advertise as the statute requires. But it was competent for the defendant to waive this objection, as he has done by an express promise to pay. There is no reason why he may not as well waive this defence by a promise to pay, as the defence of the statute of limitations or the defence of infancy. The plaintiff is entitled to recover his whole account.

Judgment affirmed.

EARLE v. OLIVER.[1]

(2 Exch. 71.)

Court of Exchequer of Pleas. Feb. 7, 1848.

Mr. Maynard, for plaintiff. Mr. Atherton, contra.

PARKE, B. This case was very fully and ably argued before my Brothers ALDERSON, ROLFE, PLATT, and myself, at the sittings after last Michaelmas term. Two questions arose,—the first, as to the sufficiency of the first count on general demurrer; the second, whether the pleadings to the second count, which was money paid, disclosed a sufficient defence. The first count was, in substance, on a promise in writing by the defendant to the plaintiff, in consideration of the defendant's liability, to repay the plaintiff a debt which he had contracted with a banking company as surety for the defendant before the bankruptcy; and the promise was made, before the certificate, to repay the debt when the plaintiff should have paid it, and also the interest on that debt from the time it should be paid by the plaintiff to the time of repaying by the defendant. There was a plea stating that the promise was before certificate, and a special demurrer to the plea, on the ground that it merely stated what was admitted before in the declaration. That is true, and the consequence is, that the question is simply whether the first count is good on demurrer.

So far as relates to the objection that the promise was made before the certificate, the case of Kirkpatrick v. Tattersall, 13 Mees. & W. 766, is an answer. It may be worth while to state that a similar point had been previously decided by Lord Chief Justice Eyre in the case of Roberts v. Morgan, 2 Esp. 736.

The next objection was that, although an existing debt which would be barred by a certificate, and which was due by the bankrupt to the plaintiff, was a good consideration to support a promise to pay it, a mere liability to repay the plaintiff when he should have first paid the debt for the defendant was not. This goes a step further than the cases above cited, but seems to us to fall within the same principle. This liability, like the debt, would be discharged by the certificate; and it seems to us as just and reasonable for the bankrupt, after the fiat, to waive the benefit of his certificate with respect to it, as it is to waive it with respect to a debt; and, if the debt so discharged is a good consideration for a promise to pay it, the liability which is discharged in the same way is a good consideration for a promise to continue liable.

Two further objections were made, on the supposition that this liability is to be put on the same footing as a debt, and is a good consideration: First, that this debt or liability, in a course of being barred by a certificate, cannot be treated as the executed consideration for a promise which a debt or liability, not barred by a certificate, would not support, and that by the course of modern decisions, beginning with the case of Hopkins v. Logan, 5 Mees. & W. 241, and ending with Roscorla v. Thomas, 3 Q. B. 234, a debt cannot be laid as an executed consideration for any promise which the law would not imply from it; and that a promise to pay whenever the party was able was never implied. The second was that a promise to pay interest could not be supported by the consideration, and was as objectionable as if the promise had been to do any collateral thing. We think that these objections ought not to prevail.

The strict rule of the common law was no doubt departed from by Lord Mansfield in Hawkes v. Sanders, Cowp. 290, and Atkins v. Hill, Id. 288. The principle of the rule laid down by Lord Mansfield is that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common-law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it. There is a very able note to the case of Wennall v. Abney, 3 Bos. & P. 252, explaining this at length. The instances given to illustrate the principle are, amongst others, the case of a debt barred by certificate and by the statute of limitations; and the rule in these instances has been so constantly followed that there can be no doubt that it is to be considered as the established law. Debts so barred are unquestionably a sufficient consideration for every promise, absolute or unqualified, qualified or conditional, to pay them. Promises to pay a debt simply, or by installments, or when the party is able, are all equally supported by the past consideration; and, when the debts have become payable instanter, may be given in evidence in the ordinary declaration in indebitatus assumpsit. So, when the debt is not already barred by the statute, a promise to pay the creditor will revive it, and make it a new debt, and a promise to an executor to pay a debt due to a testator creates a new debt to him. But it does not follow that, though a promise revives the debt in such cases, any of those debts will be sufficient consideration to support a promise to do a collateral thing, as to supply goods, or perform work and labour; and so indeed it was held in this court in the case of Reeves v. Hearne, 1 Mees. & W. 323. In such case it is but an accord unexecuted, and no action will lie for not executing it.

We think, therefore, that the conditional promise to pay the debt would be good in this case, and supported by the original consideration; and a conditional promise, which,

[1] Irrelevant parts omitted.

when absolute, will be only a renewal of the original liability, and to the same extent, is equally good and supported by the original consideration.

The next objection relates to the interest. It seems to us to be supported by the same consideration as the original promise. The promise is to pay the debt conditionally; and, if the debt be unpaid, that the defendant will pay interest for it. We are of opinion, therefore, that the first count is good.

* * * * * * *

UNITED STATES v. TINGEY.

(5 Pet. 115.)

Supreme Court of the United States. Jan. Term, 1831.

Atty. Gen. Berrien, and Dist. Atty. Swann, for plaintiffs. Coxe & Jones, contra.

STORY, J. This is a writ of error to the circuit court of the District of Columbia, sitting at Washington. The original action was brought by the United States upon a bond executed by Lewis Deblois, and by Thomas Tingey and others as his sureties, on the 1st of May, 1812, in the penal sum of $10,000, upon condition that if Deblois should regularly account, when thereto required, for all public moneys received by him, from time to time, and for all public property committed to his care, with such person or persons, officer or officers of the government of the United States as should be duly authorized to settle and adjust his accounts, and should, moreover, pay over, as might be directed, any sum or sums that might be found due to the United States upon any such settlement or settlements, and should also faithfully discharge, in every respect, the trust reposed in him, then the obligation to be void, &c. In point of fact, Deblois was at the time a purser in the navy, though not so stated in the condition; and there is an indorsement upon the bond, which is averred in one of the counts of the declaration to have been contemporaneous with the execution of the bond, which recognizes his character as purser, and limits his responsibility as such; and the bond was unquestionably taken, as the pleadings show, to secure his fidelity in office as purser.

The declaration contains two counts: one in the common form for the penalty of the bond; and a second setting forth the bond, condition, and indorsement, and averring the character of Deblois, as purser, his receipt of public moneys, and the refusal to account, &c., in the usual form.

Several pleas were pleaded, upon some of which issues in fact were joined. To the third, fourth, fifth, sixth, and eighth pleas, the United States demurred, and judgment upon the demurrers was given for the defendant in the circuit court; and the object of the present writ of error is to revise that judgment.

There is no statute of the United States expressly defining the duties of pursers in the navy. What those duties are, except so far as they are incidentally disclosed in public laws, cannot be judicially known to this court. If they are regulated by the usages and customs of the navy, or by the official orders of the navy department, they properly constitute matters of averment, and should be spread upon the pleadings. It may be gathered, however, from some of the public acts regulating the departments, that a purser, or as the real name originally was, a burser, is a disbursing officer, and liable to account to the government as such. The act of the 3d of March, 1809, c. 95, § 3 (2 Stat. 536), provided that, exclusively of the purveyor of public supplies, paymasters of the army, pursers of the navy, &c., no other permanent agents should be appointed either for the purpose of making contracts, or for the purchase of supplies, or for the disbursement in any other manner of moneys for the use of the military establishment, or of the navy of the United States; but such as should be appointed by the president of the United States with the advice and consent of the senate. And the next section (section 4) of the same act provided that every such agent and every purser of the navy should give bond, with one or more sureties, in such sums as the president of the United States should direct, for the faithful discharge of the trust reposed in him; and that, whenever practicable, they should keep the public money in their hands in some incorporated bank, to be designated by the president, and should make monthly returns to the treasury of the moneys received and expended during the preceding month, and of the unexpended balance in their hands. This act abundantly shows that pursers are contemplated as disbursing officers and receivers of public money, liable to account to the government therefor. The act of the 30th of March, 1812, c. 47 (2 Stat. 699), made some alterations in the existing law, and required that the pursers in the navy should be appointed by the president, by and with the advice and consent of the senate; and that from and after the 1st day of May then next, no person should act in the character of purser who should not have been so nominated and appointed, except pursers on distant service, &c.; and that every purser, before entering upon the duties of his office, should give bond with two or more sufficient sureties, in the penalty of $10,000, conditioned faithfully to perform all the duties of purser in the navy of the United States. This act, so far as respects pursers giving bond, and the imports of the condition, being in pari materia, operates as a virtual repeal of the former act. The subsequent legislation of congress is unimportant, as it does not apply to the present case.

It is obvious that the condition of the present bond is not in the terms prescribed by the act of 1812, c. 47, and it is not limited to the duties or disbursements of Deblois, as purser, but creates a liability for all moneys received by him, and for all public property committed to his care, whether officially as purser, or otherwise.

Upon this posture of the case a question has been made and elaborately argued at the bar, how far a bond voluntarily given to the United States, and not prescribed by law, is a valid instrument, binding upon the par-

ties in point of law; in other words, whether the United States have, in their political capacity, a right to enter into a contract, or to take a bond in cases not previously provided for by some law. Upon full consideration of this subject, we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. This principle has been already acted on by this court, in the case of Dugan v. U. S., 3 Wheat. 172; and it is not perceived that there lies any solid objection to it. To adopt a different principle, would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments within the proper sphere of their own powers, unless brought into operation by express legislation. A doctrine, to such an extent, is not known to this court as ever having been sanctioned by any judicial tribunal.

We have stated the general principle only, without attempting to enumerate the limitations and exceptions which may arise from the distribution of powers in our government, or from the operation of other provisions in our constitution and laws. We confine ourselves, in the application of the principle, to the facts of the present case, leaving other cases to be disposed of as they may arise; and we hold that a voluntary bond, taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursery of public moneys, is a binding contract between him and his sureties and the United States, although such bond may not be prescribed or required by any positive law. The right to take such a bond is, in our view, an incident to the duties belonging to such a department; and the United States having a political capacity to take it, we see no objection to its validity in a moral or a legal view.

Having disposed of this question, which lies at the very threshold of the cause, and meets us upon the face of the second count in the declaration, it remains to consider whether any one of the pleas demurred to constitutes a good bar to the action.

Without adverting to others, which are open to serious objections on account of the looseness and generality of their texture, we are of opinion that the fifth plea is a complete answer to the action. That plea, after setting forth at large the act of 1812 respecting pursers, proceeds to state that, before the execution of the bond, the navy department did cause the same to be prepared and transmitted to Deblois, and did require and demand of him that the same, with the condition, should be executed by him with sufficient sureties, before he should be permitted to remain in the office of purser, or to receive the pay and emoluments attached to the office of purser; that the condition of the bond is variant, and wholly different from the condition required by the said act of congress, and varies and enlarges the duties and responsibilities of Deblois and his sureties; and "that the same was under color and pretence of the said act of congress, and under color of office required and extorted from the said Deblois, and from the defendant, as one of his sureties, against the form, force, and effect of the said statute, by the then secretary of the navy."

The substance of this plea is that the bond, with the above condition, variant from that prescribed by law was under color of office extorted from Deblois and his sureties, contrary to the statute, by the then secretary of the navy, as the condition of his remaining in the office of purser, and receiving its emoluments. There is no pretence, then, to say that it was a bond voluntarily given, or that though different from the form prescribed by the statute, it was received and executed without objection. It was demanded of the party, upon the peril of losing his office; it was extorted under color of office against the requisitions of the statute. It was plainly, then, an illegal bond; for no officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law. That would be, not to execute, but to supersede the requisitions of law. It would be very different where such a bond was by mistake or otherwise voluntarily substituted by the parties for the statute bond, without any coercion or extortion by color of office.

The judgment of the circuit court is affirmed.

WHITNEY et al. v. DUTCH et al.

(14 Mass. 457.)

Supreme Court of Massachusetts. Suffolk. March Term, 1817.

Assumpsit on a promissory note, made by the defendants to the plaintiffs, on the 18th of December, 1811, for 847 dollars 76 cents.

The defendant Dutch was defaulted. The defendant Green pleaded 1st. The general issue: 2ly. That he was under age at the time when the note was made.—The plaintiffs replied, that after he came of age, he agreed to and confirmed the promise; to which he rejoined, that he did not so agree; on which also issue was joined.

It appeared at the trial, which was had at the last November term in this county before Jackson, J., that Dutch & Green, while the latter was under age, had agreed to be partners, and as such, had often dealt with the plaintiffs. The note in question was signed by Dutch, using the firm and style of the house of Dutch & Green, at a time when the latter was under age.

In March, 1816, after Green arrived at full age, the plaintiffs applied to him for payment of the note; when he acknowledged that it was due, and promised that on his return to Eastport, where he resided, he would endeavour to procure the money and send it to the plaintiffs: saying at the same time that it was hard for him to pay it twice; he alleging, as it was understood, that the supposed partnership had been, a long time before, dissolved; and that Dutch had taken the whole stock, and agreed to pay all the debts of the company.

The counsel for the defendant contended, that the implied power of one partner to bind the other, was void in this case; as Green was a minor at the time of making the note, and therefore could not empower any agent or attorney to bind him in any manner; that the note was therefore void as to him, and not merely voidable; and so the supposed promise could not be confirmed or ratified by the subsequent promise or agreement, which was proved, as above-mentioned.

The judge, intending to reserve the question for the consideration of the whole court, directed a verdict for the plaintiffs on both issues, which was returned accordingly.

If the court should be of opinion that the defendant Green was, under these circumstances, liable to the plaintiffs for the amount due on this note, the verdict was to stand, and judgment entered accordingly; otherwise the verdict was to be set aside, and a verdict entered for the defendants.

Mr. Thurston, for plaintiffs. Mr. Leland, for defendants.

PARKER, C. J. The question presented to the court in this case, and which has been argued is, whether the issue on the part of the plaintiffs is maintained by the evidence reported.

The first objection taken by the defendants' counsel is, that no express promise is proved, after the coming of age of the defendant.—By the authorities, a mere acknowledgment of the debt, such as would take a case out of the statute of limitations, is not a ratification of a contract made during minority. The distinction is undoubtedly well taken. The reason is, that a mere acknowledgment avoids the presumption of payment, which is created by the statute of limitations; whereas the contract of an infant may always, except in certain cases sufficiently known, be voided by him by plea, whether he acknowledges the debt or not: and some positive act or declaration on his part, is necessary to defeat his power of avoiding it.

But the terms of ratification need not be such as to import a direct promise to pay. All that is necessary is, that he expressly agrees to ratify his contract; not by doubtful acts, such as payment of a part of the money due, or the interest; but by words, oral or in writing, which import a recognition and a confirmation of his promise.

In the present case, the defendant acknowledged that the money was due, when called upon to pay the demand; and promised that he would endeavour to procure the money upon his return home, and send it to the plaintiff. This was sufficient to satisfy the jury, that he assented to and ratified the original promise: for it would be a distortion of language, to suppose that he meant only to endeavour to persuade Dutch, to pay the money; and if he succeeded, that he, Green, would send it to the plaintiff.

But the other point made in the defence is more difficult, and presents a question new to us all. This is, that the note, being signed by Dutch for Green, was void in regard to Green; because he was not capable of communicating authority to Dutch, to contract for him; and that being void, it is not the subject of a subsequent ratification.

No such question appears to have occurred in our courts, nor in those of England, or of the neighbouring states. Partnerships have not been uncommon between adults and infants; and simple contracts, signed by one for both, undoubtedly have often been made.

It is unfavourable to the principle, contended for by the counsel for Green, that no such case has been found: for this silence of the books authorizes a presumption, that no distinction has been recognized between acts of this kind done by the infant himself, and those done for him by another. We must however examine the principles, by which the contracts of infants are governed; and see if, by any analogy to settled cases, the present defence can be maintained.

It is admitted generally, that a contract made by an infant, although not for necessaries, is only voidable: and that an express

adoption of it, after he comes of age, will make it valid from its date. Nor does the law require that he shall be sued, as upon the new promise; but gives life and validity to the old one, after it is thus assented to.— But it is urged, that this doctrine applies only to those contracts, which are made by the infant personally; and that the delegation of power by him to another of full age, to act for him, is utterly void; and that no contract, made in virtue of such delegation, can subsist, so as to be made good by subsequent agreement or ratification.

If we confine ourselves to the letter of the authorities, it would seem that this doctrine is correct; for we find that, in the distinctions made in the books between the void and voidable acts of an infant, a power of attorney is generally selected, by way of example, as an act absolutely void: unless it be made to enable the attorney to do some act for the benefit of the infant; such as a power of attorney to receive seizin, in order to complete his title to an estate.

The books are not very clear upon this subject. All of them admit a distinction between void and voidable acts; and yet disagree with respect to the acts to be classed under either of those heads. One result however, in which they all appear to agree, is stated by Lord Mansfield in the case of Zouch v. Parsons, 3 Burrows, 1794, viz. that whenever the act done may be for the benefit of the infant, it shall not be considered void: but that he shall have his election, when he comes of age, to affirm or avoid it; and this is the only clear and definite proposition, which can be extracted from the authorities.

The application of this principle is not however free from difficulty: for when a note or other simple contract is made by an infant himself, it may be made good by his assent, without any inquiry whether it was for his benefit, or to his prejudice. For if he had made a bad bargain in a purchase of goods, and given his promissory note for the price; and when he came of age, had agreed to pay the note, he would be bound by this agreement, although he might have been ruined by the purchase. Perhaps it may be assumed as a principle, that all simple contracts by infants, which are not founded on an illegal consideration, are strictly not void, but only voidable; and may be made good by ratification. They remain a legal substratum for a future assent, until avoided by the infant: and if, instead of avoiding, he confirm them, when he has a legal capacity to make a contract, they are, in all respects, like contracts made by adults.

With respect to contracts under seal also, they are in legal force as contracts, until they are avoided by plea. Whether they can, in all cases, as it is clear they can in some, such as leases, be ratified, so as to prevent the operation of a plea of infancy, except by deed, need not now be decided. A deed of land, by an infant having the title, would undoubtedly convey a seizin; and the grantee would hold his title under it, until the infant, or some one under him, should by entry or action avoid it.

Perhaps it cannot be contended, against the current of authorities, that an act done by another for an infant, which act must necessarily be done by letter of attorney under seal, is not absolutely void: although no satisfactory reason can be assigned for such a position. But as this is a point of strict law, somewhat incongruous with the general rules affecting the contracts of infants; it is not necessary nor reasonable to draw inferences, which may be repugnant to the principles of justice, which ought to regulate contracts between man and man.

The object of the law, in disabling infants from binding themselves, is to prevent them being imposed upon and injured by the crafty and designing. This object is in no degree frustrated by giving full operation to their contracts, if, after having revised them at mature age, they shall voluntarily and deliberately ratify and confirm them. It is enough, that they may shake off promises and other contracts, made upon valuable consideration; if they see fit to do it, when called upon to perform them. To give them still another opportunity to retract, after they have been induced, by love of justice, and a sense of reputation, to make valid what was before defective, will be to invite them to break their word and violate their engagements.

If it be true that all simple contracts, made by infants, are only voidable, the inquiry in this case should be, whether the facts stated furnish an exception to this general rule; or whether the contract now sued is in any sense different from a simple contract.

The only ground for the supposed exception is, that the note declared on was not signed by the infant himself; but by Dutch, claiming authority to sign his name as a copartner. If the authority required a letter of attorney under seal, the exception would be supported by the authorities, which have been alluded to.

But it is well known that copartners may, and generally do undertake to bind each other, without any express authority whatever. Indeed the authority to do so, results from the nature and legal qualities of copartnership. And without any such union of interests, one man may have authority to bind another, by note or bill of exchange, by oral, or even by implied authority. The case of a deed therefore is entirely out of the question: so that the defendant does not bring himself within the letter of the authorities; and certainly not within the reason, on which they are founded. Then upon principle, what difference can there be, between the ratification of a contract made by the infant himself, and one made by another acting under a parole authority from him? And why may not the

ratification apply to the authority, as well as to the contract made under it?

It may be said, that minors may be exposed, if they may delegate power over their property or credit to another. But they will be as much exposed, by the power to make such contracts themselves; and more, for the person delegated will generally have more experience in business than the minor. And it is a sufficient security against the danger from both these sources, that infants cannot be prejudiced: for the contracts are in neither case binding, unless, when arrived at legal competency, they voluntarily and deliberately give effect to the contract so made. And in such case justice requires, that they should be compelled to perform them.

Upon these principles, we are satisfied with the verdict of the jury; and are confident that no principles of law or justice are opposed by confirming it.

Judgment on the verdict.

BORDENTOWN TP. v. WALLACE et al.[1]

(11 Atl. 267, 50 N. J. Law, 13.)

Supreme Court of New Jersey. Nov. 16, 1887.

On demurrer to defendants' pleas.

This action is brought on a joint and several bond given by the defendants to the plaintiff, in the penal sum of $2,500, with the condition that, if the defendants "shall pay unto the said the inhabitants of the township of Bordentown, or to its successors and assigns, the sum of two and a half dollars, each and every week, to the overseer of the poor for the time being of the said township of Bordentown, to be applied to and for the support of a certain female bastard child, of whom William Wallace, one of the parties hereby bound, is the father, for and during such period of time as the said bastard child shall or may be chargeable to the said township, then the said obligation is to be void, otherwise to be and remain in full force and virtue."

The declaration is in the usual form. After praying oyer, and setting out the bond, the defendants plead jointly six several pleas: (1) Non est factum. (2) Infancy of William Wallace. (3) Duress of imprisonment of William Wallace. (4) Bond given before and without hearing of two justices, and when held before one justice of the peace until the bond was given. (5) Bond given to comply with order of filiation when no notice was given of such order. (6) That no order of filiation was made by two justices of the peace, according to law.

The plaintiff joins issue on the first plea, and files a demurrer to each of the five succeeding pleas.

Hutchinson & Belden, for plaintiffs. Gilbert & Atkinson, for defendants.

SCUDDER, J. The defense of the infancy of one of the defendants contained in the joint plea of all is informal and bad. Infancy is a personal privilege of which no one can take advantage but himself. Voorhees v. Wait, 15 N. J. Law, 343; Patterson v. Lippincott, 47 N. J. Law, 457, 1 Atl. 506.

It is also a rule of pleading that personal defenses, as coverture, infancy, etc., shall be pleaded separately; that only when the defense is in its nature joint may several defendants join in the same plea; and that where a plea is bad in part, it is bad in toto; if, therefore, two or more defendants join in a plea which is sufficient but for one, and not for the other, the plea is bad as to both. 1 Chit. Pl. 565-567. But it must not be conceded that in a proper case, under our statute for the maintenance of bastard children, the father of a bastard child can escape his obligation, or liability to indemnify the township or municipal body, for the support of such child, if it become chargeable, by a plea of infancy, however formally it may be pleaded. Co. Litt. 172d, gives the rule of an infant's general liability as follows: "An infant may bind himself to pay for his necessary meat. drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards; but if he bind himself in an obligation or other writing with a penalty, for the payment of any of these, that obligation shall not bind him." He adds: "And generally whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit at law." Lord Mansfield quotes and applies this last expression in Zouch v. Parsons, 3 Burrows, 1794, and adds: "If an infant does a right act, which he ought to do, which he was compellable to do, it shall bind him." This general principle has been used in bastardy cases to bind infants, under statutes passed to protect the public against the support of bastard children that may become chargeable. People v. Moores, 4 Denio, 518; McCall v. Parker, 13 Metc. (Mass.) 372. In this latter case, in an action on a bond given under the statute, for appearance, etc., it was decided that the infancy of the accused is no defense, either for him or his surety. Prof. Parsons, in 1 Pars. Cont. 334, says that there is no principle of law that binds infants when they enter into contracts which owe their validity, and the means of their enforcement, to statutes, because in all statutes containing general words there is an implied or virtual exception in favor of persons whose liability the common law recognizes. He proceeds to illustrate this position by referring to cases where infants have been held exempt from liability to pay calls to shares in incorporated companies, wherein it has been held that there are implied exceptions, in favor of infants, in statutes containing general words. But the words in our bastardy statute requiring the reputed father of a bastard child, who may in some cases be an infant, to give a bond for security, are not so general as to exempt infants from its operation. They are fairly within the words of the act, and its purpose to protect the public against those who would impose the support of their illegitimate offspring on others. Tyler on Infancy, c. 9, p. 139, cites the above principle of liability in its application to bastardy cases with approval.

This second plea is defective in form, being a joint plea of the infancy of one defendant; it is also bad in substance, as in proceedings under the bastardy act the infancy of the reputed father is no defense when he is legally chargeable in exoneration of the public.

[1] Irrelevant parts omitted.

RYDER v. WOMBWELL.

(L. R. 4 Exch. 32.)

Court of Exchequer. Dec. 3, 1868.

Appeal from the decision of the court of exchequer making absolute so much of a rule as called on the plaintiff to show cause why a verdict found for him for £40 15s. should not be reduced by £15 15s.; and discharging the residue of it, which called upon him to show cause why a nonsuit should not be entered; or a new trial had, on the ground of the improper rejection of evidence. L. R. 3 Exch. 90.

The declaration was for money payable for goods sold and delivered. Plea, infancy; replication, necessaries. Issue thereon.

At the trial before Kelly, C. B., at the London sittings after Trinity term, 1867, it appeared that the plaintiff sought to recover for the following (among other) articles of jewelry supplied by him to the defendant, a minor: First, a pair of crystal, ruby, and diamond solitaires, £25; and, secondly, a silver gilt antique chased goblet, engraved with an inscription, £15 15s.

The defendant was the younger son of a deceased baronet of large property in Yorkshire, and during his minority had an income of about £500 per annum, and on attaining his majority he came into £20,000. He had no residence of his own, but occasionally stayed at Limmer's Hotel, Bond street, London. His home was his mother's house in London, and his brother's in Yorkshire, at each of which he was boarded and lodged gratuitously. He pursued no trade or profession, he moved in the highest society, and was in the habit of riding races for his friends, amongst others for the Marquis of Hastings, at whose house he was a frequent visitor, and for whom the goblet was intended, as the plaintiff knew when he supplied it, as a present. The solitaires were ornamental studs or buttons worn by gentlemen as fastenings for the wristbands of the shirt. They were made of crystals set in gold, and ornamented with diamonds representing a horse-shoe in which the nails were represented by rubies.

Evidence was offered on the part of the defendant that at the time of the purchase of the solitaires he had purchased similar articles of jewelry to a large amount from other tradesmen, which rendered any further supply by the plaintiff unnecessary; but, as it was proved that the plaintiff was not aware of this fact, the lord chief baron rejected the evidence.

The jury, in answer to the questions left to them by the learned judge, found that the solitaires and the goblet were necessaries suitable to the estate and condition in life of the defendant, and a verdict was accordingly entered for the plaintiff for £40 15s., being the price of the solitaires and goblet, with leave to move to enter a nonsuit if the court should be of opinion that there was no evidence for the jury that either article was a necessary; or to reduce the damages by the price either of the solitaires or the goblet if the court should be of opinion that there was evidence for the jury in respect of one or other of these articles only. A rule nisi was obtained accordingly, and also for a new trial, on the ground of the improper rejection of the evidence offered on the part of the defendant, that the defendant was, at the time he purchased the solitaires of the plaintiff, supplied already, although not to the knowledge of the plaintiff, with similar articles. This rule was afterwards made absolute to reduce the verdict by £15 15s., the price of the goblet, and discharged as to the residue; the majority of the court being of opinion that the verdict of the jury as to the solitaires ought not to be disturbed, and that the evidence offered to prove that the defendant, when the solitaires were supplied, was already sufficiently supplied with articles of a similar description, was, under the circumstances, properly rejected.

June 20, 1868. Mr. Bulwer, Q. C., (Mr. Mayd, with him), for defendant, contended: First, that a nonsuit ought to be entered, as there was no evidence proper to be left to the jury that the solitaires were necessaries. In addition to the cases referred to in the court below, he cited Rainsford v. Fenwick, Carter, 215; Greene v. Chester, 2 Rolle, 144; Ive v. Chester, Cro. Jac. 560; and Wittingham v. Hill, Cro. Jac. 494;—to show that in former times, when a more precise and accurate form of pleading prevailed, the facts relied upon as showing that the goods supplied were necessaries were stated upon the record, and the court were enabled to give judgment whether in point of law the replication was sufficient. But when it was established (see Coke, Ent. "Debt," 8, p. 125, and Huggins v. Wiseman, Carth. 110) that the plaintiff might reply in the general form now in use, it became necessary that the facts which used formerly to be stated on the record should be found by a jury, and then the court had to determine, as formerly, whether the facts found did, in point of law, furnish an answer to the plea. He contended, secondly, that the evidence was improperly rejected; and on this point referred to the following additional authorities: Story v. Perry, 4 Car. & P. 526; Cook v. Deaton, 3 Car. & P. 114; Ford v. Fothergill, 1 Esp. 211; Steedman v. Rose, Car & M. 422; Berrolles v. Ramsay, Holt, N. P. 77; Brayshaw v. Eaton, 7 Scott, 183; Foster v. Redgrave, Queen's Bench, Feb. 9, 1867; Chit. Cont. (6th Ed.) pp. 136, 137, 140; Leake, Cont. p. 233.

Popham Pike (Mr Coleridge, Q. C., with him), for the plaintiff, contended that the question whether the solitaires were necessaries was rightly left to the jury, and that they had come to a right conclusion. He cited, in addition to the authorities quoted

in the court below, Hands v. Slaney, 8 Term R. 578.

With regard to the rejection of evidence, there was no case similar to the present. In all of those cited in order to show that the evidence was admissible, though not brought to the plaintiff's knowledge, there were peculiarities. Either they were cases of husband and wife, or else of minors, in respect of whom there was a presumption that they were already supplied with all necessaries by reason or their living in their father's houses, or of their being in statu pupillari. Again, in many of the cases cited the tradesmen had peculiar facilities for knowing the actual position of the minor. Putting aside particular and exceptional cases, there seemed to be no difference between a minor being actually supplied with goods similar to those for the price of which he was being sued, and his being in the receipt of an income sufficient to buy them if he chose. Yet the amount of an infant's income had been held immaterial. Brayshaw v. Eaton, 7 Scott, 183. Why should the amount of his income, when he had turned his money into goods, be material?

Mr. Bulwer, Q. C., in reply.

Cur. adv. vult.

Argued before WILLES, BYLES, BLACKBURN, MONTAGUE, SMITH, and LUSH, JJ.

WILLES, J. In this case the plaintiff replied to a plea of infancy that the goods were necessaries suitable to the degree, estate and condition of the defendant, and on this issue was taken. On the trial before the lord chief baron it was proved that the degree, estate and condition of the defendant was that he was the younger son of a deceased baronet of good fortune and family; that during his minority he had an income of about £500 per annum, and on attaining his majority he became entitled to £20,000; that he moved in what is called the highest society, and rode races for a friend, the Marquis of Hastings, at whose house he was a frequent visitor. Amongst the articles supplied by the plaintiff upon credit, and which, according to his case and the verdict of the jury, were necessaries for an infant of this degree, were a silver-gilt goblet which he ordered for the purpose of making a present to the Marquis of Hastings, price £15 15s., and a pair of solitaires or ornamental studs, worn as the fastenings of the wristbands of a shirt, which it is stated in the case were made of crystals set in gold and ornamented with diamonds, representing a horseshoe in which the nails were rubies. The price of these studs or solitaires was £25. No evidence was given of anything peculiar in the defendant's station rendering it exceptionally necessary for him to have such articles.

At the close of the plaintiff's case the defendant's counsel offered evidence that the defendant was already supplied with similar articles of jewelry to a large amount, so as to render any further supply unnecessary, but, it being admitted that the plaintiff was not aware of this, the lord chief baron rejected this evidence.

Leave was reserved to move to enter a nonsuit or reduce the damages, and the question whether these two articles were, under the circumstances, necessaries, was left to the jury, who found for the plaintiff as to both of the articles above mentioned. They found for the defendant as to some other articles, which it is consequently not necessary to notice. A rule nisi was obtained in the court of exchequer to enter a nonsuit or reduce the verdict pursuant to the leave reserved, or for a new trial on the ground of the improper rejection of evidence.

The rule was by the majority of the court of exchequer made absolute to reduce the damages to £25, the value of the studs, thus deciding that there was no evidence on which the jury could find that it was necessary for the infant to buy on credit a goblet for the purpose of making a present, but that there was evidence on which they might find that it was necessary for him to buy such studs as are above described, and the rule for a new trial on the ground of the rejection of evidence was discharged. Bramwell, B., dissented from this judgment, as in his opinion there was no evidence to go to the jury; and the evidence rejected was admissible.

On appeal, therefore, there are two questions raised before us: First, whether there was evidence on which the jury might properly find that both or either of those articles were necessaries, on the determination of which depends whether the verdict should be restored to a verdict for the whole amount of £40 15s., or stand reduced to £25, or to be altogether set aside and a nonsuit entered. Secondly, whether the evidence offered was admissible; the determination of which only affects the question whether there should be a new trial or not.

The general rule of law is clearly established, and is that an infant is generally incapable of binding himself by a contract. To this rule there is an exception introduced, not for the benefit of the tradesman who may trust the infant, but for that of the infant himself. This exception is that he may make a contract for necessaries. And as is accurately stated by Parke, B., in Peters v. Fleming, 6 Mees. & W., at page 46: "From the earliest time down to the present the word 'necessaries' is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station and degree in life in which he is; and therefore we must not take the word 'necessaries' in its unqualified sense, but with the qualification above pointed out. Then the question in this case is whether there was any evidence to go to the jury that any of these articles were of that description." In

the present case the first question is whether there was any evidence to go to the jury that either of the above articles was of that description. Such a question is one of mixed law and fact; in so far as it is a question of fact it must be determined by a jury, subject no doubt to the control of the court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, viz. whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review) is, as is stated by Maule, J., in Jewell v. Parr, 13 C. B., at page 916, not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. In Toomey v. Railway Co., 3 C. B. (N. S.) at page 150, Williams, J., enunciates the same idea thus: "It is not enough to say that there was some evidence. * * * A scintilla of evidence * * * clearly would not justify the judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence,"—the fact in that case to be established. And in Wheelton v. Hardisty, 8 El. & Bl., at page 262, in the considered judgment of the majority of the court, it is said, "The question is, whether the proof was such that the jury would reasonably come to the conclusion" that the issue was proved. "This," they say, "is now settled to be the real question in such cases by the decision in the exchequer chamber, which has, in our opinion, so properly put an end to what had been treated as the rule, that a case must go to the jury if there were what had been termed a scintilla of evidence." In this Lord Campbell agreed, though differing as to the result. See 8 El. & Bl., at page 266. And taking that as the proper test, we think that there was not in this case evidence on which the jury could reasonably find that it was necessary for maintaining the defendant in the station of life in which he moved, either that he should give goblets to his friends or wear shirt-buttons composed of diamonds and rubies costing £12 10s., a piece.

We must first observe that the question in such cases is not whether the expenditure is one which an infant, in the defendant's position, could not properly incur. There is no doubt that an infant may buy jewelry or plate, if he has the money to pay and pays for it. But the question is whether it is so necessary for the purpose of maintaining himself in his station that he should have these articles, as to bring them within the exception under which an infant may pledge his credit for them as necessaries. The lord chief baron, in his judgment, questions whether under any circumstances it is competent to the judge to determine as a matter of law, whether particular articles are or are not to be deemed necessaries suitable to the estate and condition of an infant, and whether, if in any case the judge may so determine, his jurisdiction is not limited to those cases in which it is clear and obvious that the articles in question not merely are not, but cannot be, necessaries to any one of any rank, or fortune, or condition whatever? This is an important principle, which, if correct, fully supports the judgment below; but we cannot assent to it. We quite agree that the judges are not to determine facts, and therefore where evidence is given as to any facts the jury must determine whether they believe it or not. But the judges do know, as much as juries, what is the usual and normal state of things, and consequently whether any particular article is of such a description as that it may be necessary under such usual state of things. If a state of things exists (as it well may) so new or so exceptional that the judges do not known of it, that may be proved as a fact, and then it will be for the jury, under a proper direction, to decide the case. But it seems to us that if we were to say that in every case the jury are to be at liberty to find anything to be a necessary, on the ground that there may be some usage of society, not proved in evidence and not known to the court, but which it is suggested that the jury may know, we should in effect say that the question for the jury was whether it was shabby in the defendant to plead infancy.

We think the judges must determine whether the case is such as to cast on the plaintiff the onus of proving that the articles are within the exception, and then whether there is any sufficient evidence to satisfy that onus. In the judgment of Bramwell, B., in the court below, many instances are put well illustrating the necessity of such a rule. It is enough for the decision of this case if we hold that such articles as are here described are not prima facie necessary for maintaining a young man in any station of life, and that the burthen lay on the plaintiff to give evidence of something peculiar making them necessaries in this special case, and that he has given no evidence at all to that effect.

The cases will, we think, be found to be quite consistent with this view. In Peters v. Fleming, 6 Mees. & W. 42, the court took judicial notice that it was prima facie not unreasonable that an undergraduate at college should have a watch, and consequently a watch chain, and that therefore it was a question for a jury whether the watch chain supplied on credit in that particular case was such a watch chain as was necessary to sup-

port himself properly in his degree. In laying down the law as to the particular case, Parke, B., says, 6 Mees. & W., at page 47: "All such articles as are purely ornamental are to be rejected, as they cannot be requisite for any one." Possibly there may be exceptional cases in which things purely ornamental may be necessary. In such a state of things as we believe existed at the close of the last century it might have been a question for a jury whether it was not necessary, for the purpose of maintaining his station, for a young gentleman moving in society to purchase wigs and hair powder; but, as a general rule, and in the absence of some evidence to show that the usages of society required the use of such things, we think the rule laid down in Peters v. Fleming, 6 Mees. & W., at page 47, is correct. It was approved of in Wharton v. Mackinzie, 5 Q. B. 606, where Coleridge, J., says, at page 612, that in some cases it must be for the judge to decide the question. Where evidence is given, as he observes, of exceptional circumstances, the case must go to the jury with proper directions, but in the absence of any explanation the court will decide. So in Brooker v. Scott, 11 Mees. & W. 67, Parke, B., during the course of the argument, says (11 Mees. & W.), at page 68: "Prima facie, these articles are not necessaries under the circumstances, and the tradesmen must show them to be so;" and in giving judgment he says (11 Mees. & W.), at page 69: "If there had been any explanation of the circumstances under which they were supplied, it might possibly have varied the case, but no explanation whatever is given of them;" and on that ground a nonsuit was entered.

No doubt there are many cases in which the court have held that such evidence had been given, and that the case could not be withdrawn from the jury, several of which are cited by the lord chief baron in his judgment, but none in which it is laid down that the court is bound to consider itself ignorant of every usage of mankind, and therefore bound, in the absence of all evidence on the subject, to take the opinion of a jury as to whether it is not so necessary for a gentleman to wear solitaires of this description, that, though an infant, he must obtain them on credit rather than go without.

There is, no doubt, a possibility in all cases where the judges have to determine whether there is evidence on which the jury may reasonably find a fact, that the judges may differ in opinion, and it is possible that the majority may be wrong. Indeed, whenever a decision of the court below on such a point is reversed, the majority must have been so either in the court above or the court below. This is an infirmity which must affect all tribunals. But in the present case we do not think any such case has arisen, for we do not understand any of the judges to proceed on the ground that they think that, in fact, the solitaires of this expensive character were shirt buttons really got for utility, and that the degree of ornament was only accidental, or that the jury were not wrong if they so found, but on the ground that it was not a question for the court at all.

Taking this view of the law and facts, it follows that the judgment should be reversed, and a nonsuit entered. It becomes therefore unnecessary to decide whether the evidence tendered was properly rejected or not. That is a question of some nicety, and the authorities are by no means uniform. In Bainbridge v. Pickering, 2 W. Bl. 1325, the court of common pleas seem to have acted on a principle which would make the evidence admissible. In Brayshaw v. Eaton, 7 Scott, 183, Bosanquet, J., treats it as clearly admissible, and on those authorities the court of queen's bench (then consisting of Blackburn, J., and Mellor, J.) acted in Foster v. Redgrave, supra. There is much to be argued in support of the view taken by the majority in the court below, and we desire not to be understood as either overruling or affirming that decision. If ever the point again arises, the court before which it comes must determine it on the balance of authority and on principle, without being fettered by a decision of this court.

Judgment reversed, and a nonsuit entered.

McKANNA et al. v. MERRY.

(61 Ill. 177.)

Supreme Court of Illinois. Sept. Term, 1871.

Appeal from circuit court, Jo Daviess county; William Brown, Judge.

Louis Shissler, for appellants. Sheean & Weigley, for appellee.

THORNTON, J. In 1864, Kate Feehan, since intermarried with McKanna, accompanied appellee and wife on a trip from Illinois to California, by water. Her passage money was paid by appellee. Kate was then an infant, and under the control of her guardian, who was desirous that she should attend school for another year, and disapproved of the trip.

The only proof as to the value of her estate is that it consisted of an undivided one-third of some realty, which, after her marriage, and a few years after the advancement of the money, was sold for $3250.

There is no proof that this trip was necessary for her health, or that it subserved any purpose other than pleasure, or as company for the wife of appellee.

The court gave for appellee the following instruction:

"What are necessaries depends upon the circumstances of the case. If the going of defendant, Kate, to California was prudent and proper, under the circumstances proved, and the plaintiff advanced money necessary to take her there, and the same was for her benefit, then it is for the jury to determine whether such advances of money were for necessaries."

There is no positive rule by means of which it may be determined what are and what are not necessaries. Whether articles are of a class or kind for which infants are liable, or whether certain subjects of expenditure are necessaries, are to be judged of by the court. Whether they come within the particular class, and are suitable to the condition and estate of the infant, is to be determined by the jury as matter of fact. For example, suppose this trip had been to Europe, involving, in time, several years, and an expenditure of thousands of dollars, would any court hesitate to decide that the money thus advanced did not constitute necessaries? Chit. Cont. 141a, note 2; 1 Pars. Cont. 296; Beeler v. Young, 1 Bibb, 519; 1 Am. Lead. Cas. 248.

The court, in the instruction, merely informed the jury that if the trip was prudent and proper, and that the money was for her benefit, then the jury must determine whether such advances of money were for necessaries. There was not a particle of proof to enable the jury to determine as to the propriety or impropriety, the prudence or imprudence, of the trip, or that the advancement of the money was for the benefit of appellant.

Even if there had been such proof, the instruction was wrong. The court should have defined necessaries in some manner. Blackstone defines necessaries to be "necessary meat, drink, apparel, physic," and says that an infant may bind himself to pay "for his good teaching and instruction, whereby he may profit himself afterwards." The articles furnished, or money advanced, must be actually necessary, in the particular case, for use, not mere ornament; for substantial good, not mere pleasure; and must belong to the class which the law generally pronounces necessary for infants.

The courts have generally excluded from the term "necessaries" horses, saddles, bridles, pistols, liquors, fiddles, chronometers, etc. It has been held, however, that if riding on horseback was necessary to the health of the infant, the rule was different.

We have been referred to no case, and, after a thorough examination, have found none, in which it has been held that moneys advanced for traveling expenses, under the circumstances of this case, were necessaries.

The court should have instructed the jury as to the classes and general description of articles for which an infant is bound to pay. Then the jury must determine whether they fall within any of the classes, and whether they are actually necessary and suitable to the estate and condition of the infant.

It may be proper to advert to another principle. The infant had a guardian, who had charge and management of her estate, which consisted entirely of realty. It was the duty of the guardian to superintend the education and nurture of his ward, and apply to such purpose, first, the rents and profits of the estate, and next the interest upon the ward's money. This is the positive command of the statute, and he was liable upon his bond for noncompliance. He was the judge of what were necessaries for his ward, if he acted in good faith.

A third party had no right to intervene and usurp the rights and duties of the guardian. Even if the money paid was, in some sense, for the infant's benefit, and the trip was prudent and proper, yet, if the guardian, in good faith, and in the exercise of a wise discretion, and with reference to the best interests of his ward, supplied her wants and contributed means suitable to her age and station in life, and in view of her estate, then the infant would not be liable for the money as necessaries. Beeler v. Young, supra; Kline v. L'Amoureux, 2 Paige, 419; Guthrie v. Murphy, 4 Watts, 80; Wailing v. Tall, 9 Johns. 141.

We express no opinion as to the weight of the evidence, for the reason that there must be a new trial.

The judgment is reversed for the errors indicated, and the cause remanded.

Judgment reversed.

JOHNSON v. LINES.

(6 Watts & S. 80.)

Supreme Court of Pennsylvania. Sept., 1843.

Error to court of common pleas, Washington county.

Edward L. Lines and William W. Scott, trading under the firm of Lines & Scott, against David Eckert, administrator of John Johnson.

This was an action of assumpsit. The declaration contained the common money counts, to which the defendant pleaded that the intestate was an infant at the time of the supposed promises; and the plaintiffs replied that the goods provided were necessaries. The intestate, whose infancy was admitted, contracted a debt with the plaintiffs for goods sold and monies advanced, as appeared by their account, between the 9th October, 1836, and the 30th January, 1838, to the amount of $1,063.27. The items consisted in a great measure of fancy articles, which a wasteful boy, uncontrolled by his parents or guardian, would be apt to purchase. The infant had a guardian; but it did not appear that he exercised any care or control over him, or that he had been consulted in relation to his dealings.

The defendant asked the court to charge "that the plaintiffs had no right to deal with the minor, even for necessaries, unless the guardian refused to furnish him with them." The court charged "that the plaintiffs had no right to deal with the deceased unless by the permission, express or implied, of the guardian; or unless the guardian refused to furnish necessaries to his ward." The defendant also prayed direction "that if the plaintiffs were justified in dealing with him, their bill is so exorbitant that the plaintiffs themselves could not have considered them necessaries, and therefore are not entitled to recover:" to which the court responded, that "what are necessaries is a question of fact mixed with law. It is to be decided by the jury under the direction of the court, and depends on the estate, circumstances and pursuits of the man. The jury will probably think this bill extravagant, and that the plaintiffs could not have supposed many of these items necessary. Some of them, they must have known, were not necessary. The plaintiffs cannot recover for what are not necessaries." The defendant excepted. Verdict and judgment for the plaintiffs.

Mr. Marsh, for plaintiff in error, cited 2 Serg. & R. 44; 2 E. C. L. 600.

Mr. M'Kennon, for defendants in error, cited 7 Watts, 344; 3 Day, 37; 1 Bibb, 519; 7 Watts, 237; 8 Term R. 578; 1 Esp. 212; 3 E. C. L. 33; 5 Esp. 152; 1 Maule & S. 737; 3 Bac. Abr. 593.

GIBSON, C. J. The case of the plaintiffs below is poor in merits. It appears that they supplied a young spendthrift with goods which they call necessaries, but which ill deserve the name. Their account mounts up to more than a thousand dollars, comprising charges for many articles which might be ranked with necessaries when supplied in reason; but not at the rate of twelve coats, seventeen vests, and twenty-three pantaloons, in the space of fifteen months and twenty-one days; to say nothing of three Bowie knives, sixteen penknives, eight whips, ten whip-lashes, thirty-nine handkerchiefs, and five canes, with kid gloves, fur caps, chip hats, and fancy bag, to match. Such a bill makes one shudder. Yet the jury found for the plaintiffs almost their whole demand, including sums advanced for pocket-money, and to pay for keeping the minor's horses, which no one would be so hardy as to call necessaries. How they could reconcile such a verdict to the dictates of conscience, I know not. They surely could not complacently look upon the ruin of their own sons, brought on by ministering to their appetites, and stimulating them with the means of gratification. Every father has a deeper stake in these matters than the public mind is accustomed to suppose; and it intimately concerns the cause of morality and virtue, that the rule of the common law on the subject be strictly enforced. The minor was at the critical time of life, when habits are formed which make or mar the man—which fit him for a useful life, or send him to an untimely grave; and public policy demands that they who deal with such a customer should do so at their peril. This enormous bill was run up at one store, and what other debts were contracted for supplies elsewhere we know not; but let it not be imagined that the infant's transactions with other dealers did not concern the plaintiffs. "With a view to quantity, and quantity only," said Baron Alderson, in Burghart v. Angerstein, 6 Car. & P. 700, "you may look at the bills of the other tradesmen by whom the defendant was also supplied; for if another tradesman had supplied the defendant with ten coats, he would not then want any more, and any further supply would be unnecessary. If a minor is supplied, no matter from what quarter, with necessaries suitable to his estate and degree, a tradesman cannot recover for any other supply made to the minor just after." And the reason for it is a plain one. The rule of law is that no one may deal with a minor. The exception to it is that a stranger may supply him with necessaries proper for him, in default of supply by any one else; but his interference with what is properly the guardian's business must rest on an actual necessity, of which he must judge, in a measure, at his peril. In Ford v. Fothergill, 1 Esp. 211, Peake, N. P. 299, Lord Kenyon ruled it to be incumbent on the tradesman, before trusting to an appearance of necessity, to inquire whether the minor is provided by his parent or friends. That case may be thought to have been shaken in Dalton v. Gib, 5

Bing. N. C. 198, in which it was held that inquiry is not a condition precedent to recovery where the goods seem to be necessary from the outward appearance of the infant, though the mother was at hand and might have been questioned; but in Brayshaw v. Eaton, Id. 231, this was explained to mean that, as such an inquiry is the tradesman's affair, being a prudential measure for his own information, the omission of it is not a ground of non-suit; but that the question is, on the fact put in issue by the pleadings, whether the supply was actually necessary. It is the tradesman's duty to know, therefore, not only that the supplies are unexceptionable in quantity and sort, but also that they are actually needed. When he assumes the business of the guardian for purposes of present relief, he is bound to execute it as a prudent guardian would, and consequently, to make himself acquainted with the ward's necessities and circumstances. The credit which the negligence of the guardian gives to the ward, ceases as his necessities cease; and, as nothing further is requisite when these are relieved, the exception to the rule is at an end. In this case, the supply of articles which were proper in kind, was excessive in quantity. I impute no intentional wrong to the plaintiffs, for they dealt with the intestate, as others may have done, evidently supposing him to be sui juris; but I certainly do blame the jury for finding nearly the whole demand, after it had been conceded that he was an infant.

That the charge, though not palpably wrong in the abstract, tended to mislead in its application to the facts, is visible in the verdict it produced. The defendant went to the court for direction that the plaintiffs could not lawfully deal with the infant, even for necessaries, unless the guardian had refused to furnish them; and had, for response, a direction that "the plaintiffs had no right to deal with the deceased, unless by the permission, express or implied, of the guardian; or unless the guardian had refused to furnish necessaries for his ward." This very significant addition to the principle assumed in the prayer was meant to indicate a liberty to deal by permission beyond the bounds of necessaries, or it meant nothing. It indicated that an authority to deal with a minor in a way to charge him personally, emanates from his guardian's permission, which is paramount, or at least equal, to the authority so to deal with him, that emanates from his necessities. The jury would naturally so understand it. And this was predicated in reference to the question before them, whether the ward's estate could be subjected to payment for luxuries. They might readily understand, therefore, that the guardian's permission to run up this bill would charge the ward's estate with it, independently of its propriety. If that was not the drift of the direction, it is not easy to see why anything was said about permission at all. In a case of doubtful propriety, I can readily understand how the guardian's sanction, or that of a relative, might justify a supply beyond the limits of strict necessity, which a dealer might furnish bona fide on the credit of the ward; but, though the guardian might subject himself to payment of a grossly improvident bill, by a permission amounting to an order, his connivance at an improper supply by a tradesman, would not subject the ward to payment of it. Indeed, it has been said (3 Wils. Bacon, 595, in marg.) to have been several times decided that where credit has been given to the parent or guardian, the creditor has no recourse to the infant. The guardian is set over the ward for the very purpose of preventing him from making such a bill; and his desertion of his trust would not help the case of one who had dealt with the ward mala fide. As, then, the plaintiffs were bound to know that the guardian abused his trust in allowing the infant to run up this bill, they can recover no more of it than was proper to relieve the ward's necessities. This notion that the guardian's permission might legitimate the demand, may have had a misguiding influence on the jury; for a passive acquaintance with the transaction which the law would presume from his duty to have an eye on the doings of the ward, would be a constructive permission; or it might be implied from the fact that he had left the ward to shift for himself.

Again, the defendant prayed direction, "that if the plaintiffs were justifiable in dealing with the ward, the bill is so exorbitant that the plaintiffs themselves could not have considered them (the goods) necessaries; and that they are therefore not entitled to recover;" in answer to which, the court charged that: "What are necessaries, is a question of fact mixed with law. It is to be decided by the jury under the direction of the court, and depends on the estate, circumstances and pursuits of the minor. The jury will probably think this bill extravagant, and that the plaintiffs could not have supposed many of the items necessary. Some of them, they must have known, were not necessary. The plaintiffs cannot recover for what were not necessaries." Not a word in this in response to the prayer for direction as to the effect of the plaintiffs' consciousness that the supply was extravagant, though consciousness would affect them with mala fides, and deprive them at once of whatever merit they might otherwise pretend to have from the guardian's implied sanction. The judge said truly that what are necessaries is a question mixed of fact and law; but he did not say, as he might and perhaps ought to have done, that an over-supply of goods otherwise proper ceases to be a supply of necessaries as to the excess. The jury were indeed left to say what were necessaries; but rather as regards the sort than the quantity, in respect to which the

effect of excess was overlooked throughout. Had it been properly impressed, the jury could not have found more than a fourth part of the bill. To them doubtless belongs the question of extravagance; but where the supply has been so grossly profuse as to shock the sense, it is the business of the judge to say so as matter of law, and charge that there can be no recovery for more than was absolutely necessary.

Judgment reversed, and a venire facias de novo awarded.

STAFFORD v. ROOF.

(9 Cow. 626.)

Court of Errors of New York. Dec., 1827.

On error from the supreme court. 7 Cow. 179. John Stafford brought trover for a horse against Roof, in the C. P. of the city of Albany, called the mayor's court; and the cause was tried there in October, 1824. On the trial, the plaintiff below proved that in July, 1834, he owned the horse, and on the 23d of that month sold it to the defendant below; and took his note in these words: "For value received, I promise to pay John Stafford fifty dollars in liquor at my bar." On this note the following payments were endorsed by the plaintiff below: July 26th, 1824, $4. Same day, $1 25. July 30th, cash, $5 50. August 4th, cash, $18 00. August 7th, $12 34. The defendant below also proved, that at the time of the purchase of the horse, the plaintiff below owed the defendant below between thirty and forty dollars for board, lodging, carriage-hire, and liquor. The plaintiff below proved that some time after the sale of the horse, the defendant below offered the horse for sale as his own property, to one John Griffith, who declined to purchase; and farther, that the plaintiff below was but 19 years of age at the time of the sale of the horse; that Spencer Stafford was his general guardian.

The defendant below moved for a nonsuit, on the ground that no conversion had been proved; and also on the ground that it was not competent for the plaintiff below to avoid his contract while yet under age. The motion was overruled; and the defendant below excepted.

The defendant below then proved a receipt given by the plaintiff below, dated August 27th, 1824, during the pendency of the suit, in full of the note; and that the plaintiff below had disavowed the suit.

The court below charged that the plaintiff below had a right to bring his action while yet an infant; that the contract was void; that the defendant below was not entitled to have any of the payments made by him allowed, except such as were in necessaries; and that the plaintiff was entitled to recover. The defendant below excepted. Verdict for the plaintiff below of $55, upon which the mayor's court gave judgment. The defendant below brought error to the supreme court. who reversed the judgment on the sole ground that an infant cannot avoid his executed contract during his minority. Upon which the defendant below brought error to this court.

The reasons for the judgment of the supreme court were now assigned, as in 7 Cow. 180–185.

Jacob Lansing, for plaintiff in error. A. Taber, contra.

JONES, Ch., said, It is true in general that the deed of an infant is voidable merely, when delivered with his own hand, and is of equal validity, whether it be of lands or chattels. Some of the old writers seem to make a distinction between deeds and other contracts of infants accompanied by manual delivery; but the distinction is now discarded, and the same effect is given to both. They are not void, but voidable, where any act of delivery is done by the infant calculated to carry an estate; and this whether the contract be beneficial to the infant or not. But a manual delivery seems in such case to be essential. None was shown in this case. The fact of possession by the vendee would be evidence of delivery in the case of an adult; but in case of an infant vendor, there should be strict proof of a personal delivery. An infant cannot make an attorney. The appointment would be void; and there being no proof of actual manual delivery, the contract would seem to be void. The agreement to sell conferred no right upon the vendee to take. The mere agreement of the infant to sell would not protect the vendee against an action of trespass for taking the horse. The taking would be tortious; and in itself a conversion.

But suppose the sale to be merely voidable; could the infant or his guardian avoid it before he arrived at 21 years of age? The general rule is, that an infant cannot avoid his contract executed by himself, and which is therefore voidable only while he is within age. Bool v. Mix, 17 Wend. 119; Slocum v. Hooker, 13 Barb. 536. He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall not work unavoidable prejudice to the infant; or the object of his privilege, which is intended for his protection, would not be answered. When applied to a sale of his property, it must be his land; a case in which he may enter and receive the profits until the power of finally avoiding shall arrive; and such was the doctrine of Zouch v. Parsons, 3 Burrows, 1794. Should the law extend the same doctrine to sales of his personal estate, it would evidently expose him to great loss in many cases; and we shall act up to the principle of protection much more effectually by allowing him to rescind while under age, though he may sometimes misjudge, and avoid a contract which is for his own benefit. The true rule, then, appears to me to be this; that where the infant can enter, and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time; but where the possession is changed, and there is no legal means to regain and hold it in the mean time, the infant, or his guardian for him, has the right to exercise the power of rescission immediately. Now the common law gives no action or other means by which the mere possession of personal property can be reclaimed, and held subject to the right of avoidance.

Besides, in this case the infant had a gen-

eral guardian. It may well be doubted whether he could make any contract of sale which should bind him, for any purpose, during his wardship.

STEBBINS, Senator. Whatever may be the correct opinion (and I am not prepared to express any) upon the question discussed by the supreme court in this cause, and in the opinion of his honor the chancellor, as to the right of an infant to avoid, during his minority, a sale of property made by him, there is another point upon which I must place my vote.

The plaintiff brought his action of trover against the defendant in the mayor's court, for the horse which he had sold him during his infancy, and recovered. The defendant took a bill of exceptions upon the ground, among others, that no conversion was proved.

The cause coming before the supreme court upon this bill of exceptions, the judgment is reversed, for the reason that the plaintiff, being an infant, could not legally avoid his contract of sale, until he should become of age. This court is possessed of the cause upon a writ of error brought to reverse the judgment of the supreme court, and to restore to the plaintiff his judgment obtained in the mayor's court.

It is obvious, therefore, that if no conversion of the horse was proved in the mayor's court, the judgment of that court ought to have been reversed by the supreme court, for that reason as well as for the reason assigned by them; and if the exception was well taken by the defendant, the judgment of the supreme court ought now to be affirmed.

The only evidence of conversion is, that the defendant upon one occasion, offered to sell the horse; and this, in my judgment, does not amount to a conversion. There is no evidence of any tortious taking, or demand and refusal.

The defendant came into possession as a purchaser. The sale was not void, but voidable by the infant; and conceding, therefore, that he may avoid it before coming of age, it is certainly good until avoided; and the possession of the defendant must have been rightful until such avoidance. His offer to sell, then, can be no conversion.

The first evidence, or notice of his election to avoid the contract which the plaintiff seems to have given, was the commencement of this suit. I think he should first have given notice of his election to avoid the contract, and demanded the horse, and waited for a refusal to deliver, as evidence of conversion, before he commenced his prosecution; and for this reason I am in favor of affirming the judgment of the supreme court.

JONES, Ch., said his attention had been mainly employed upon the question discussed by the supreme court. He had attended but slightly to that branch of the case examined by the honorable senator; nor did he feel prepared to express himself strongly upon the question whether an offer to sell a chattel by one who comes lawfully into the possession of it, shall be holden a conversion. He inclined to think that it was an act of such control, inconsistent with, and in defiance of the rights of the true owner, as to be, prima facie, evidence of a conversion.

But here is a sale set up as having been made by an infant under the care of a general guardian, and accompanied with no evidence whatever of a manual delivery by the ward. He had remarked that such a delivery cannot be intended, though it would be otherwise in the case of an adult. It then stands before us, at best, as the case of an infant contracting to sell; and the vendee taking possession in virtue of the contract, without its being followed up by any act of delivery. Such a taking would be tortious, and a conversion in itself.

He was of opinion, on the whole case, that the judgment of the supreme court should be reversed.

For reversal: THE CHANCELLOR, ALLEN, CRARY, ELSWORTH, ENOS, GARDINER, HAIGHT, HART, JORDAN, LAKE, McMARTIN, WATERMAN, and WILKESON, Senators.

For affirmance: BURROWS, DAYAN, McCALL, NELSON, OLIVER, SMITH, and STEBBINS, Senators.

Judgment reversed.

GOODNOW et al. v. EMPIRE LUMBER CO. et al.

(18 N. W. 283, 31 Minn. 468.)

Supreme Court of Minnesota. Jan. 28, 1884.

Appeal from an order of the district court, Winona county.

W. H. Yale and J. M. Gilman, for respondents, Mary Hamilton Goodnow and another. Thomas Wilson, for appellants, the Empire Lumber Co. and another.

GILFILLAN, C. J. November 27, 1857, Elizabeth M. Hamilton, then a married woman and owner of certain real estate in the city of Winona, conveyed the same, her husband joining in the deed, to the defendant Huff, under whom the other defendant claims. Mrs. Hamilton was born April 21, 1842. She died December 16, 1867, and her husband died November 10, 1874. Plaintiffs are their children, Mary, born March 31, 1859, and Eugenia, January 29, 1863. They bring the action to avoid the conveyance, because of the minority of Elizabeth M. Hamilton when she executed it. Plaintiffs gave notice to the lumber company of their intent to disaffirm the conveyance, March 22, 1883. Treating this as a sufficient act of disaffirmance in case they then had the right to disaffirm, and it is not material whether it was or not, for the bringing of the action, which was sufficient, immediately followed, there elapsed between the execution of the deed and its disaffirmance twenty-five years and four months. The disability of infancy on the part of the infant grantor ceased April 21, 1863, and as the real estate was owned by her at the time of her marriage, her disability from coverture, so far as affected her right to reclaim, hold and control the property ceased August 1, 1866, when the General Statutes (1866) went into effect; so that for four years and eight months before she died she was free of the disability of infancy, and for one year four and a half months, she was practically free of the disability of coverture. During the latter period, at least, she was capable in law to disaffirm the deed, if she had the right to do so, and if she was required to exercise the right within a reasonable time after her disability ceased, the time was running for that period. The youngest of the plaintiffs became of age January 29, 1881, so that even if the period of minority of plaintiffs were to be excluded (and we doubt if it should be) there is to be added at least two years and two months to the time which had elapsed when the grantor died, making the time three years and over six months.

The main question in the case is, must one who, while a minor, has conveyed real estate, disaffirm the conveyance within a reasonable time after minority ceases, or be barred. Of the decided cases the majority are to the effect that he need not, (where there are no circumstances other than lapse of time and silence,) and that he is not barred by mere acquiescence for a shorter period than that prescribed in the statute of limitations. The following are the principal cases so decided: Vaughan v. Parr, 20 Ark. 600; Boody v. McKenney, 23 Me. 517; Davis v. Dudley, 70 Me. 236; Praut v. Wiley, 28 Mich. 164; Gause v. Norcum, 12 Mo. 550; Norcum v. Gaty, 19 Mo. 69; Peterson v. Laik, 24 Md. 541; Baker v. Kennett, 54 Mo. 82; Huth v. Dock Co., 56 Md. 206; Hale v. Gerrish, 8 N. H. 374; Jackson v. Carpenter, 11 Johns. 538; Voorhies v. Voorhies, 24 Barb. 150; McMurray v. McMurray, 66 N. Y. 175; Lessee of Drake v. Ramsey, 5 Ohio, 252; Cresinger v. Lessee of Welsh, 15 Ohio, 156; Irvine v. Irvine, 9 Wall. 617; Ordinary v. Wherry, 1 Bailey, 28.

On the other hand, there are many decisions to the effect that mere acquiescence beyond a reasonable time after the minority ceases bars the right to disaffirm, of which cases the following are the principal ones: Holmes v. Blogg, 8 Taunt. 35; Railway Co. v. Black, 8 Exch. 180; Thomasson v. Boyd, 13 Ala. 419; Delano v. Blake, 11 Wend. 85; Bostwick v. Atkins, 3 N. Y. 53; Chapin v. Shafer, 49 N. Y. 407; Jones v. Butler, 30 Barb. 641; Kline v. Beebe, 6 Conn. 494; Wallace's Lessee v. Lewis, 4 Har. 80; Hastings v. Dollarhide, 24 Cal. 195; Scott v. Buchannan, 11 Humph. 467; Hartman v. Kendall, 4 Ind. 403; Bigelow v. Kinney, 3 Vt. 353; Richardson v. Boright, 9 Vt. 368; Harris v. Cannon, 6 Ga. 382; Cole v. Pennoyer, 14 Ill. 158; Black v. Hills, 36 Ill. 376; Robinson v. Weeks, 56 Me. 102; Little v. Duncan, 9 Rich. Law, 55.

The rule holding certain contracts of an infant voidable (among them his conveyances of real estate) and giving him the right to affirm or disaffirm after he arrives at majority, is for the protection of minors, and so that they shall not be prejudiced by acts done or obligations incurred at a time when they are not capable of determining what is for their interest to do. For this purpose of protection the law gives them an opportunity, after they have become capable of judging for themselves, to determine whether such acts or obligations are beneficial or prejudicial to them, and whether they will abide by or avoid them. If the right to affirm or disaffirm extends beyond an adequate opportunity to so determine and to act on the result, it ceases to be a measure of protection, and becomes, in the language of the court in Wallace's Lessee v. Lewis, "a dangerous weapon of offense, and not a defense." For we cannot assent to the reason given in Boody v. McKenney (the only reason given by any of the cases for the rule that long acquiescence is no proof of ratification) "that by his silent acquiescence he occasions no injury to other persons and secures no benefits or new rights to himself. There is nothing to urge him as a duty to others to act speedily."

The existence of such an infirmity in one's title as the right of another at his pleasure to defeat it, is necessarily prejudicial to it, and

the longer it may continue the more serious the injury. Such a right is a continual menace to the title. Holding such a menace over the title is of course an injury to the owner of it; one possessing such a right is bound in justice and fairness towards the owner of the title to determine without delay whether he will exercise it. The right of a minor to disaffirm on coming of age, like the right to disaffirm in any other case, should be exercised with some regard to the rights of others,—with as much regard to those rights as is fairly consistent with due protection to the interests of the minor.

In every other case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. There is no reason for allowing greater latitude where the right exists because of infancy at the time of making the contract. A reasonable time after majority within which to act is all that is essential to the infant's protection. That 10, 15, or 20 years, or such other time as the law may give for bringing an action, is necessary as a matter of protection to him is absurd. The only effect of giving more than a reasonable time is to enable the mature man, not to correct what he did amiss in his infancy, but to speculate on the events of the future—a consequence entirely foreign to the purpose of the rule which is solely protection to the infant. Reason, justice to others, public policy, (which is not subserved by cherishing defective titles,) and convenience, require the right of disaffirmance to be acted upon within a reasonable time. What is a reasonable time will depend on the circumstances of each particular case, and may be either for the court or for the jury to determine. Where, as in this case, there is mere delay, with nothing to explain or excuse it, or show its necessity, it will be for the court. Cochran v. Toher, 14 Minn. 385 (Gil. 293); Derosia v. Railroad Co., 18 Minn. 133 (Gil. 119). Three years and a half, the delay in this case, (excluding the period of plaintiff's minority, after the time within which to act had commenced to run,) was prima facie more than a reasonable time, and prima facie the conveyance was ratified. Order reversed.

MANSFIELD v. GORDON.

(10 N. E. 773, 144 Mass. 168.)

Supreme Judicial Court of Massachusetts. Suffolk. Feb. 26, 1887.

Bill in equity to set aside a mortgage made by one Burrell, an insolvent debtor, while a minor. Trial in the superior court upon issues framed for a jury, which found that the mortgagor, Burrell, was a minor, under 21 years of age, when he executed the mortgage; that he did not at the time represent to the defendant that he was 21 years of age; and that neither he nor plaintiff ratified or affirmed said mortgage after Burrell became 21 years of age, or waive the objection of his minority. After further hearing in said court before Barker, J., the bill was dismissed, and the plaintiff appealed. Other facts appear in the opinion.

A. Hemenway and A. L. Murray, for plaintiff. J. Willard and J. R. Churchill, for defendant.

DEVENS, J. The plaintiff by his bill seeks to relieve the realty of Burrell, an insolvent debtor, of whose estate he is assignee, from the incumbrance of a mortgage thereon conditioned for the payment of a note of $1,000. The note and mortgage were executed by Burrell when under age. He is now of age, and was so when the plaintiff was appointed assignee. Since his majority, he has not ratified the note and mortgage, nor is it alleged that he has done any act in disaffirmance thereof. The assignment vests in the assignee not only all the property of the debtor, both real and personal, which he could lawfully have sold, assigned, or conveyed, including debts due him and the securities therefor, but also "all his rights of action for goods or estate, real or personal." "By the right of action mentioned in the statute," it is said by Chief Justice Shaw, "the legislature intended all valuable rights actually subsisting, whether absolute or conditional, legal or equitable, which were to be obtained by the aid of any species of judicial process." Gardner v. Hooper, 3 Gray, 404.

It is the contention of the plaintiff that, by virtue of this clause, as assignee he is entitled to exercise the privilege which the insolvent might have exercised on reaching his majority, and disaffirm this mortgage, and thus is entitled to a decree relieving the estate therefrom. That an individual creditor cannot attach property conveyed by a debtor while a minor, the conveyance of which such debtor might have disaffirmed, and thus avail himself of the infant's privilege, is well settled. McCarty v. Murray, 3 Gray, 578; Kendall v. Lawrence, 22 Pick. 540; Kingman v. Perkins, 105 Mass. 111. While the rights of the assignee are not always tested by those of the individual creditor, there would seem to be no reason why larger rights in an estate conveyed by a minor are obtained by an assignee acting on behalf of all the creditors. The contracts of an infant are voidable only, and not void, and it has often been said that the right to avoid his contracts is a personal privilege of the infant only, not to be availed of by others. Nightingale v. Withington, 15 Mass. 272; Chandler v. Simmons, 97 Mass. 508–511; 1 Chit. Cont. (11th Ed.) note 6. It is said in Austin v. Charlestown Fem. Sem., 8 Metc. 196–200, by Judge Wilde: "Voidable acts by an infant, or matters of record done or suffered by him, can be avoided by none but himself, or his friends in blood, and not by privies in estate, and this right of avoidance is not assignable." Bac. Abr. "Infancy and Age," 1, 6; Whittingham's Case, 8 Coke, 43.

It is said that it is for the benefit of the debtor that the assignee should be allowed to avoid his mortgage, as the assets of the estate are thus increased. The ground upon which an infant is allowed to avoid his contracts is for personal benefit, and for protection against the improvidence which is the consequence of his youth. He may therefore avoid his contract without returning the consideration received, but it is not easy to see why his creditors, or the assignee as representing them, should have this right. It may well be that the estate of the insolvent has been augmented to that extent by the very sum of money which the minor received. The fact that the infant may rescind without returning the consideration indicates that the right is strictly a personal privilege; and that, as the rule permitting him to thus avoid his contract is established solely for his protection, so he alone can have the benefit of it. Decree affirmed.

TUCKER v. MORELAND.

(10 Pet. 58.)

Supreme Court of the United States. Jan. Term, 1836.

The case is stated in the opinion of the court.

Mr. Coxe, for plaintiff. Bradley & Swann, contra.

STORY, J. This is a writ of error to the circuit court for the county of Washington, and District of Columbia.

The original action was an ejectment brought by the plaintiff in error against the defendant in error; and both parties claimed the title under Richard N. Barry. At the trial of the cause upon the general issue, it was admitted that Richard N. Barry, being seised in fee of the premises sued for, on the 1st day of December, 1831, executed a deed thereof to Richard Wallach. The deed, after reciting that Barry and one Bing were indebted to Tucker and Thompson, in the sum of $3,238, for which they had given their promissory note, payable in six months after date, to secure which the conveyance was to be made, conveyed the premises to Wallach, in trust, to sell the same in case the debt should remain unpaid ten days after the 1st day of December then next. The same were accordingly sold by Wallach, for default of payment of the note, on the 23d of February, 1833, and were bought at the sale by Tucker and Thompson, who received a deed of the same on the 7th of March, of the same year. It was admitted, that after the execution of the deed of Barry to Wallach, the former continued in possession of the premises until the 8th of February, 1833, when he executed a deed, including the same and other parcels of land, to his mother, Eliza G. Moreland, the defendant, in consideration (as recited in the deed) of the sum of $1,138.61, which he owed his mother; for the recovery of which she had instituted a suit against him, and of other sums advanced him, a particular account of which had not been kept, and of the further sum of $5. At the time of the sale of Wallach, the defendant gave public notice of her title to the premises, and she publicly claimed the same as her absolute right. The defendant further gave evidence at the trial, to prove that at the time of the execution of the deed by Barry to Wallach, he, Barry, was an infant under 21 years of age; and, at the time of the execution of the deed to the defendant, he was of the full age of 21 years.

Upon this state of the evidence, the counsel for the defendant prayed the court to instruct the jury, that if upon the whole evidence given as aforesaid to the jury, they should believe the facts to be as stated as aforesaid, then the deed from the said Wallach to the plaintiffs, did not convey to the plaintiffs any title which would enable them to sustain the action. This instruction the court gave; and this constitutes the exception now relied on by the plaintiff in error in his first bill of exceptions.

Some criticism has been made upon the language in which this instruction is couched. But, in substance, it raises the question which has been so fully argued at the bar, as to the validity of the plaintiffs' title to recover; if Barry was an infant at the time of the execution of his deed to Wallach. If that deed was originally void, by reason of Barry's infancy, then the plaintiff, who must recover upon the strength of his own title, fails in that title. If, on the other hand, that deed was voidable only, and not void, and yet it has been avoided by the subsequent conveyance to the defendant by Barry; then the same conclusion follows. And these, accordingly, are the considerations which are presented under the present instruction.

In regard to the point whether the deed of lands by an infant is void or voidable at the common law, no inconsiderable diversity of opinion is to be found in the authorities. That some deeds or instruments under seal of an infant are void, and others voidable, and others valid and absolutely obligatory, is not doubted. Thus, a single bill under seal given by an infant for necessaries, is absolutely binding upon him; a bond with a penalty for necessaries is void, as apparently to his prejudice; and a lease reserving rent is voidable only. The difficulty is in ascertaining the true principle, upon which these distinctions depend. Lord Mansfield, in Zouch v. Parsons, 3 Burrows, 1804, said, that it was not settled what is the true ground upon which an infant's deed is voidable only; whether the solemnity of the instrument is sufficient, or it depends upon the semblance of benefit from the matter of the deed upon the face of it. Lord Mansfield, upon a full examination of the authorities on this occasion, came to the conclusion (in which the other judges of the court of king's bench concurred) that it was the solemnity of the instrument, and delivery by the infant himself, and not the semblance of benefit to him, that constituted the true line of distinction between void and voidable deeds of the infant, but he admitted that there were respectable sayings the other way. The point was held by the court not necessary to the determination of that case; because in that case the circumstances showed that there was a semblance of benefit sufficient to make the deed voidable only, upon the matter of the conveyance. There can be little doubt that the decision in Zouch v. Parsons was perfectly correct; for it was the case of an infant mortgagee, releasing by a lease and release his title to the premises, upon the payment of the mortgage money by a second mortgagee, with the consent of the mortgagor. It was precisely such an act as the infant was bound to do; and would have been compelled to do by a court of equity, as a trustee of the

mortgagor. And certainly it was for his interest to do, what a court of equity would, by a suit, have compelled him to do.

Upon this occasion, Lord Mansfield and the court approved the law as laid down by Perkins (section 12,) that "all such gifts, grants, or deeds made by infants, which do not take effect by delivery of his hand, are void. But all gifts, grants, or deeds made by infants by matter of deed or in writing, which do take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate." And in Lord Mansfield's view, the words "which do take effect," are an essential part of the definition; and exclude letters of attorney, or deeds, which delegate a mere power, and convey no interest. So that, according to Lord Mansfield's opinion, there is no difference between a feoffment and any deeds which convey an interest. In each case, if the infant makes no feoffment, or delivers no deed in person, it takes effect by such delivery of his hand, and is voidable only. But if either be done by a letter of attorney from the infant, it is void, for it does not take effect by a delivery of his hand.

There are other authorities, however, which are at variance with this doctrine of Lord Mansfield, and which put a different interpretation upon the language of Perkins. According to the latter, the semblance of benefit to the infant or not, is the true ground of holding his deed voidable or void. That it makes no difference, whether the deed be delivered by his own hand or not; but whether it be for his benefit or not. If the former, then it is voidable; if the latter, then it is void. And that Perkins, in the passage above stated, in speaking of gifts and grants taking effect by the delivery of the infant's hand, did not refer to the delivery of the deed, but to the delivery of the thing granted; as, for instance, in the case of a feoffment to a delivery of seisin by the infant personally; and in case of chattels, by a delivery of the same by his own hand. This is the sense in which the doctrine of Perkins is laid down in Sheppard's Touchstone, 232. Of this latter opinion, also, are some other highly respectable text writers (see Prest. Conv. 248, 250; Com. Dig. "Enfant," c. 2; Shep. Touch. 232, and Acherly's note; Bac. Abr. "Infancy," I, 3; Eng. Law J. 1804, p. 145; 8 Am. Jur. 327. But see 1 Pow. Mortg. [by Coventry] note, 208; Zouch v. Parsons, 1 W. Bl. 575; Ellsley's notes, h and v, Co. Litt. 51; 6 Harg. note, 331; Holmes v. Blogg, 8 Taunt. 508; 1 Fonbl. Eq. bk. 1, c. 11, § 3, and notes y, z, a, b); and perhaps, the weight of authority, antecedent to the decision in Zouch v. Parsons, 3 Burrows, 1804, inclined in the same way. Lord Chief Justice Eyre, in Keane v. Boycott, 2 H. Bl. 515, alluded to this distinction in the following terms. After having corrected the generality of some expressions in Litt. § 259, he added: "We have seen that some contracts of infants, even by deed, shall bind them; some are merely void, namely, such as the court can pronounce to be to their prejudice; others, and the most numerous class, of a more uncertain nature as to benefit or prejudice, are voidable only; and it is in the election of the infant to affirm them or not. In Rolle, Abr. 728, tit. 'Enfant,' and in Com. Dig. under the same title, instances are put of the three different kinds, of good, void, and voidable contracts. Where the contract is by deed, and not apparently to the prejudice of the infant, Comyns states it as a rule, that the infant cannot plead non est factum, but must plead his infancy. It is his deed; but this is a mode of disaffirming it. He indeed states the rule generally; but I limit it to that case, in order to reconcile the doctrine of void and voidable contracts." A doctrine of the same sort was held by the court in Thompson v. Leach, 3 Mod. 310; in Fisher v. Mowbray, 8 East, 330; and Baylis v. Dineley, 3 Maule & S. 477. In the last two cases, the court held that an infant cannot bind himself in a bond with a penalty, and especially to pay interest. In the case of Baylis v. Dineley, Lord Ellenborough said: "In the case of the infant lessor, that being a lease, rendering rent, imported on the face of it a benefit to the infant; and his accepting the rent at full age was conclusive that it was for his benefit. But how do these authorities affect a case, like the present, where it is clear upon the face of the instrument that it is to the prejudice of the infant, for it is an obligation with a penalty, and for the payment of interest? Is there any authority to show, that if, upon looking to the instrument, the court can clearly pronounce, that it is to the infant's prejudice, they will, nevertheless, suffer it to be set up by matter ex post facto after full age?" And then, after commenting on Keane v. Boycott, and Fisher v. Mowbray, he added: "In Zouch v. Parsons, where this subject was much considered, I find nothing, which tends to show that an infant may bind himself to his prejudice. It is the privilege of the infant, that he shall not; and we should be breaking down the protection, which the law has cast around him, if we were to give effect to a confirmation by parol of a deed, like this, made during his infancy."

It is apparent then, upon the English authorities, that however true it may be that an infant may so far bind himself by deed in certain cases, as that in consequence of the solemnity of the instrument it is voidable only, and not void; yet that the instrument, however solemn, is held to be void, if upon its face it is apparent, that it is to the prejudice of the infant. This distinction, if admitted, would go far to reconcile all the cases; for it would decide that a deed by virtue of its solemnity should be voidable only, unless it appeared on its face to be to his prejudice, in which case it would be void. See Bac. Abr. "Infancy and Age," I, 3, I, 7.

The same question has undergone no inconsiderable discussion in the American courts. In Oliver v. Houdlet, 13 Mass. 239, the court seemed to think the true rule to be, that those acts of an infant are void, which not only apparently, but necessarily operate to his prejudice. In Whitney v. Dutch, 14 Mass. 462, the same court said, that whenever the act done may be for the benefit of the infant, it shall not be considered void; but that he shall have his election, when he comes of age, to affirm or avoid it. And they added, that this was the only clear and definite proposition which can be extracted from the authorities. See Boston Bank v. Chamberlain, 15 Mass. 220. In Conroe v. Birdsall, 1 Johns. Cas. 127, the court approved of the doctrine of Perkins (section 12), as it was interpreted and adopted in Zouch v. Parsons; and in the late case of Roof v. Stafford, 7 Cow. 180, 181, the same doctrine was fully recognized. But in an intermediate case, Jackson v. Burchin, 14 Johns. 126, the court doubted whether a bargain and sale of lands by an infant was a valid deed to pass the land, as it would make him stand seised to the use of another. And that doubt was well warranted by what is laid down in 2 Inst. 673, where it is said that if an infant bargain and sell lands, which are in the realty, by deed indented and enrolled, he may avoid it when he will, for the deed was of no effect to raise a use.

The result of the American decisions has been correctly stated by Mr. Chancellor Kent, in his learned Commentaries (2 Comm. Lect. 31), to be, that they are in favor of construing the acts and contracts of infants generally to be voidable only, and not void, and subject to their election, when they become of age, either to affirm or disallow them; and that the doctrine of Zouch v. Parsons has been recognized and adopted as law. It may be added, that they seem generally to hold that the deed of an infant conveying lands is voidable only, and not void; unless, perhaps, the deed should manifestly appear on the face of it to be to the prejudice of the infant; and this upon the nature and solemnity, as well as the operation of the instrument.

It is not, however, necessary for us in this case to decide whether the present deed, either from its being a deed of bargain and sale, or from its nature, as creating a trust for a sale of the estate, or from the other circumstances of the case, is to be deemed void, or voidable only. For if it be voidable only, and has been avoided by the infant, then the same result will follow, that the plaintiff's title is gone.

Let us, then, proceed to the consideration of the other point, whether, supposing the deed to Wallach to be voidable only, it has been avoided by the subsequent deed of Barry to Mrs. Moreland. There is no doubt that an infant may avoid his act, deed, or contract, by different means, according to the nature of the act, and the circumstances of the case. He may sometimes avoid it by matter in pais, as in case of a feoffment by an entry, if his entry is not tolled; sometimes by plea, as when he is sued upon his bond or other contract; sometimes by suit as when he disaffirms a contract made for the sale of his chattels, and sues for the chattels; sometimes by a writ of error, as when he has levied a fine during his nonage; sometimes by a writ of audita querela, as when he has acknowledged a recognizance or statute staple or merchant; (see Com. Dig. "Enfant," bks. 1, 2, cc. 2–5, 8, 9, 11; 2 Inst. 673; 2 Kent, Comm. § 31; Bac. Abr. "Infancy and Age," I, 5, I, 7); sometimes, as in the case of an alienation of his estate during his nonage by a writ of entry, dum suit infra ætatem, after his arrival of age. The general result seems to be that where the act of the infant is by matter of record, he must avoid it by some act of record, (as, for instance, by a writ of error, or an audita querela,) during his minority. But if the act of the infant is a matter in pais, it may be avoided by an act in pais of equal solemnity or notoriety; and this according to some authorities, either during his nonage or afterwards; and according to others, at all events, after his arrival of age. See Bac. Abr. "Infancy and Age," I, 3, I, 5, I, 7; Zouch v. Parsons, 3 Burrows, 1794; Roof v. Stafford, 7 Cow. 179, 183; Com. Dig. "Enfant," C, 9, C, 4, C, 11. In Co. Litt. 380b, it is said: "Herein a diversity is to be observed between matters of record done or suffered by an infant, and matters in fait; for matters in fait he shall avoid either within age or at full age, as hath been said; but matters of record, as statutes, merchants, and of the staple, recognizances acknowledged by him, or a fine levied by him, recovery against him, &c., must be avoided by him, namely, statutes, &c., by audita querela; and the fine and recovery by a writ of error during his minority, and the like." In short, the nature of the original act or conveyance generally governs, as to the nature of the act required to be done in the disaffirmance of it. If the latter be of as high and solemn a nature as the former, it amounts to a valid avoidance of it. We do not mean to say, that in all cases the act of disaffirmance should be of the same, or of as high and solemn a nature as the original act; for a deed may be avoided by a plea. But we mean only to say, that if the act of disaffirmance be of as high and solemn a nature, there is no ground to impeach its sufficiency. Lord Ellenborough, in Baylis v. Dineley, 3 Maule & Selw. 481, 482, held a parol confirmation of a bond given by an infant after he came of age to be invalid; insisting that it should be by something amounting to an estoppel in law, of as high authority as the deed itself; but that the same deed might be avoided by the plea of infancy. There are cases, however, in which a confirmation may be good with-

out being by deed; as in case of a lease by an infant, and his receiving rent after he came of age. See Bac. Abr. "Infancy and Age," I, 8.

The question then is, whether, in the present case, the deed to Mrs. Moreland, being of as high and solemn a nature as the original deed to Wallach, is not a valid disaffirmance of it. We think it is. If it was a voidable conveyance which had passed the seisin and possession to Wallach, and he had remained in possession, it might, like a feoffment, have been avoided by an entry by an infant after he came of age. See Inhabitants of Worcester v. Eaton, 13 Mass. 375; Whitney v. Dutch, 14 Mass. 462. But in point of fact Barry remained in possession; and therefore he could not enter upon himself. And when he conveyed to Mrs. Moreland, being in possession, he must be deemed to assert his original interest in the land, and to pass it in the same manner as if he had entered upon the land and delivered the deed thereon, if the same had been in an adverse possession.

The cases of Jackson v. Carpenter, 11 Johns. 593, and Jackson v. Burchin, 14 Johns. 124, are directly in point, and proceed upon principles which are in perfect coincidence with the common law, and are entirely satisfactory. Indeed, they go further than the circumstances of the present case require; for they dispense with an entry where the possession was out of the party when he made the second deed. In Jackson v. Burchin, the court said that it would seem not only upon principle but authority, that the infant can manifest his dissent in the same way and manner by which he first assented to convey. If he has given livery of seisin, he must do an act of equal notoriety to disaffirm the first act; he must enter on the land and make known his dissent. If he has conveyed by bargain and sale, then a second deed of bargain and sale will be equally solemn and notorious in disaffirmance of the first. See the same point, 2 Kent, Comm. § 31. We know of no authority or principle which contradicts this doctrine. It seems founded in good sense, and follows out the principle of notoriety of disaffirmance in the case of a feoffment by an entry; that is, by an act of equal notoriety and solemnity with the original act. The case of Frost v. Wolveston, 1 Strange, 94, seems to have proceeded on this principle.

Upon these grounds we are of opinion that the deed of Barry to Mrs. Moreland was a complete disaffirmance and avoidance of his prior deed to Wallach; and consequently, the instruction given by the circuit court was unexceptionable. To give effect to such disaffirmance, it was not necessary that the infant should first place the other party in statu quo.

The second bill of exceptions, taken by the plaintiff, turns upon the instructions asked upon the evidence stated therein, and scarcely admits of abbreviation. It is as follows:

"The plaintiff, further to maintain and prove the issue on his side, then gave in evidence, by competent witnesses, facts tending to prove that the said Richard N. Barry had attained the full age of twenty-one years on the 14th day of September, 1831; and that, in the month of November, 1831, the said defendant, who was the mother of the said Richard, did assert and declare that said Richard was born on the 14th day of September, 1810; and that she did assert to Dr. McWilliams, a competent and credible witness, who deposed to said facts, and who was the accoucheur attending on her at the period of the birth of her said son, that such birth actually occurred on the said 14th of September, 1810, and applied to said Dr. McWilliams to give a certificate and deposition that the said day was the true date of the birth; and thereupon the counsel for the plaintiff requested the court to instruct the jury—

"1. That, if the said jury shall believe, from the said evidence, that the said Richard N. Barry was of full age, and above the age of twenty-one years, at the time of the execution of said deed to said Wallach, or if the defendant shall have failed to satisfy the jury from the evidence that said Barry, was at the said date, an infant under twenty-one years, that then the plaintiff is entitled to recover.

"2. Or if the jury shall believe, from the said evidence, that if said Richard was under age at the time of the execution of said deed, that he did, after his arrival at age, voluntarily and deliberately recognize the same as an actual conveyance of his right, or during a period of several months acquiesce in the same without objection, that then the said deed cannot now be impeached on account of the minority of the grantor.

"3. That the said deed from the said Richard N. Barry to the defendant, being made to her with full notice of said previous deed to said Wallach, and including other and valuable property is not so inconsistent with said first deed as to amount to a disaffirmance of the same.

"4. That, from the relative position of the parties to said deed to defendant, at and previous to its execution, and from the circumstances attending it, the jury may infer that the same was fraudulent and void.

"5. That, if the lessors of plaintiff were induced, by the acts and declarations of said defendant, to give a full consideration for said deed to Wallach, and to accept said deed as a full and only security for the debt bona fide due to them, and property bona fide advanced by them, and to believe that the said security was valid and effective, that then it is not competent for said defendant in this action to question or deny the title of said plaintiff under said deed, whether the said acts and declarations were made fraudulently, and for the purpose of practising deception, or whether said defend-

ant, from any cause, wilfully misrepresented the truth.

"Whereupon, the court gave the first of the said instructions so prayed as aforesaid, and refused to give the others.

"To which refusal the counsel for the plaintiff excepted."

The 1st instruction being given by the court, is, of course, excluded from our consideration on the present writ of error. The second instruction is objectionable on several accounts. In the first place, it assumes, as matter of law, that a voluntary and deliberate recognition by a person after his arrival at age, of an actual conveyance of his right during his nonage, amounts to a confirmation of such conveyance. In the next place, that a mere acquiescence in the same conveyance, without objection, for several months after his arrival at age, is also a confirmation of it. In our judgment, neither proposition is maintainable. The mere recognition of the fact, that a conveyance has been made, is not per se, proof of a confirmation of it. Lord Ellenborough, in Baylis v. Dineley, 3 Maule & S. 482, was of opinion that an act of as high a solemnity as the original act was necessary to a confirmation. "We cannot," said he, "surrender the interests of the infant into such hands as he may chance to get. It appears to me, that we should be doing so in this case, (that of a deed,) unless we required the act after full age to be of as great a solemnity as the original instrument." Without undertaking to apply this doctrine to its full extent, and admitting that acts in pais may amount to a confirmation of a deed, still, we are of opinion that these acts should be of such a solemn and unequivocal nature as to establish a clear intention to confirm the deed, after a full knowledge that it was voidable. See Bank v. Chamberlin, 15 Mass. 220. A fortiori, mere acquiescence, uncoupled with any acts demonstrative of an intent to confirm it, would be insufficient for the purpose. In Jackson v. Carpenter, 11 Johns. 542, 543, the court held that an acquiescence by the grantor in a conveyance made during his infancy, for eleven years after he came of age, did not amount to a confirmation of that conveyance; that some positive act was necessary, evincing his assent to the conveyance. In Curtin v. Patton, 11 Serg. & R. 311, the court held that, to constitute a confirmation of a conveyance or contract by an infant, after he arrives of age, there must be some distinct act, by which he either receives a benefit from the contract after he arrives at age, or does some act of express ratification. There is much good sense in these decisions, and they are indispensable to a just support of the rights of infants according to the common law. Besides, in the present case, as Barry was in possession of the premises during the whole period until the execution of his deed to Mrs. Moreland, there was no evidence to justify the jury in drawing any inference of any intentional acquiescence in the validity of the deed to Wallach.

The 3d instruction is, for the reasons already stated, unmaintainable. The deed to Mrs. Moreland contains a conveyance of the very land in controversy, with a warranty of the title against all persons claiming under him, (Barry,) and a covenant, that he had good right and title to convey the same, and, therefore, is a positive disaffirmance of the former deed.

The 4th instruction proceeds upon the supposition that if the deed to Mrs. Moreland was fraudulent between the parties to it, it was utterly void, and not merely voidable. But it is clear that, between the parties, it would be binding and available; however, as to the persons whom it was intended to defraud, it might be voidable. Even if it was made for the very purpose of defeating the conveyance to Wallach, and was a mere contrivance for this purpose, it was still an act competent to be done by Barry, and amounted to a disaffirmance of the conveyance to Wallach. In many cases, the disaffirmance of a deed made during infancy, is a fraud upon the other party. But this has never been held sufficient to avoid the disaffirmance, for it would otherwise take away the very protection which the law intends to throw round him, to guard him from the effects of his folly, rashness, and misconduct. In Saunderson v. Marr, 1 H. Bl. 75, it was held that a warrant of attorney, given by an infant, although there appeared circumstances of fraud on his part, was utterly void, even though the application was made to the equity side of the court, to set aside a judgment founded on it. So, in Conroe v. Birdsall, 1 Johns. Cas. 127, a bond made by an infant, who declared at the time that he was of age, was held void, notwithstanding his fraudulent declaration; for the court said that a different decision would endanger all the rights of infants. A similar doctrine was held by the court in Curtin v. Patton, 11 Serg. & R. 309, 310. Indeed, the same doctrine is to be found affirmed more than a century and a half ago, in Johnson v. Pie, 1 Lev. 169, 1 Sid. 258; 1 Kebb. 905, 913. See Bac. Abr. "Infancy and Age," H; 2 Kent, Comm. Lect. 31.

But what are the facts on which the instruction relies as proof of the deed to Mrs. Moreland being fraudulent and void? They are "the relative positions of the parties to said deed, at and previous to its execution;" that is to say, the relation of mother and son, and the fact that she had then instituted a suit against him, and arrested him, and held him to bail, as stated in the evidence, and "from the circumstances attending the execution of it;" that is to say, that Mrs. Moreland was informed by Barry, before his deed to her, that he had so conveyed the said property to Wallach, and that subsequently, and with such knowledge, she prevailed on Barry to execute to her the

same conveyance. Now, certainly, these facts alone could not justly authorize a conclusion that the conveyance to Mrs. Moreland was fraudulent and void; for she might be a bona fide creditor of her son. And the consideration averred in that conveyance showed her to be a creditor, if it was truly stated, (and there was no evidence to contradict it;) and if she was a creditor, then she had a legal right to sue her son, and there was no fraud in prevailing on him to give a deed to satisfy that debt. It is probable that the instruction was designed to cover all the other facts stated in the bill of exceptions, though in its actual terms it does not seem to comprehend them. But if it did, we are of opinion that the jury would not have been justified in inferring that the deed was fraudulent and void. In the first place, the proceedings in the orphans' court may, for aught that appears, have been in good faith, and under an innocent mistake of a year of the actual age of Barry. In the next place, if not so, still, the mother and the son were not estopped in any other proceeding to set up the nonage of Barry, whatever might have been the case as to the parties and property involved in that proceeding. In the next place, there is not the slightest proof that these proceedings had, at the time, any reference to, or intended operation upon, the subsequent deed made to Wallach, or that Mrs. Moreland was party to, or assisted in, the negotiations or declarations on which the deed to Wallach was founded. Certainly, without some proofs of this sort, it would be going too far to assert that the jury might infer that the deed to Mrs. Moreland was fraudulent. Fraud is not presumed either as a matter of law or fact, unless under circumstances not fairly susceptible of any other interpretation.

The 5th instruction was properly refused by the court, for the plain reason that there was no evidence in the case of any acts or declarations by Mrs. Moreland to the effect therein stated. It was, therefore, the common case of an instruction asked upon a mere hypothetical statement, ultra the evidence.

The third bill of exceptions is as follows:—

"The court having refused the 2d, 3d, 4th, and 5th instructions prayed by the plaintiffs, and the counsel, in opening his case to the jury, contending that the questions presented by the said instructions were open to the consideration of the jury, the counsel for the defendant thereupon prayed the court to instruct the jury that if, from the evidence so as aforesaid given to the jury, and stated in the prayers for the said instructions, they should be of opinion that the said Richard was under the age of twenty-one years at the time he made his deed as aforesaid to the said Richard Wallach, under whom the plaintiffs claim their title in this case, and that at the time he made his deed as hereinbefore mentioned to the defendant he was of full age, that such last-mentioned deed was a disaffirmance of his preceding deed to him the said Richard Wallach, and that in that case the jury ought to find their verdict for the defendant, and that the evidence upon which the 2d, 3d, 4th, and 5th instructions were prayed by the plaintiff as aforesaid, which evidence is set forth in the instructions so prayed, is not competent in law to authorize the jury to find a verdict for the plaintiff upon any of the grounds or for any of the reasons set forth in the said prayers, or to authorize them to find a verdict for the plaintiff, if they should be of opinion that the said Richard Barry was under the age of twenty-one years at the time he made his deed as aforesaid to the said Richard Wallach.

"Which instruction the court gave as prayed, and the counsel for the plaintiff excepted thereto."

It is unnecessary to do more than to state, that the bill of exceptions is completely disposed of by the considerations already mentioned. It contains no more than the converse of the propositions stated in the second bill of exceptions, and the reassertion of the instruction given by the court in the first bill of exceptions.

Upon the whole, it is the opinion of the court that the judgment of the circuit court ought to be affirmed, with costs.

HENRY v. ROOT.

(33 N. Y. 526.)

Court of Appeals of New York. Sept., 1865.

L. J. Burditt, for appellant. E. M. Harris, for respondent.

DAVIES, J. This action was brought to recover the amount of a promissory note for $600 made at Fort Des Moines, in the state of Iowa, by the defendant, whereby he promised to pay to the plaintiff, for value received, the said sum of $600, with interest at the rate of ten per cent per annum, on or before the 15th day of April, 1857.

The defendant set up in his answer two distinct grounds of defense: First. That the note was given for part of the consideration of certain lots, situated in the town of Logan, in the territory of Nebraska; that the agreement for the purchase of said lots was made by the defendant with one Campbell, the agent of the plaintiff, when and whereby the defendant agreed to purchase said lots at and for a price of $700; that he paid in cash $100, and gave said note for the residue of the consideration or purchase-money of said lots; that said purchase was the only consideration for the same, and that he relied wholly upon the statements and representations of said Campbell as to the situation and value of said lots. The answer then sets out the representations made, and that the plaintiff's title was good, whereas he had no title to the same, and such representations were untrue, and that he was deceived and defrauded thereby; that he, the defendant, never had possession of said lots, and had never sold or conveyed any or either of them.

For a second defense, the defendant averred that at the time of making and executing the said note, he was an infant under the age of twenty-one years. On the trial the note was produced and read in evidence; and the plaintiff rested.

The defendant then offered himself as a witness, and testified that at the time the note was executed he was not twenty-one years of age, and further testimony to the same effect was offered. The defendant attained the age of twenty-one years on the 25th of February, 1857. The witness testified that on the 29th of January, 1857, the day after date of the note, he received a conveyance for said lots of land executed by Campbell as agent of the plaintiff, and that the same was acknowledged the same day. The plaintiff then offered the same in evidence, and the deed was objected to by the defendant's counsel, on the ground that it was not properly acknowledged nor authenticated; that it was not shown that the person who executed it had authority from the grantor, and also that it was not under seal, and therefore void. The court sustained the objection, and the plaintiff excepted. The plaintiff then offered to show by the witness that defendant took possession of the land under this deed, and that on the 19th of May, 1857, defendant conveyed a portion of the land to one Sandford B. Perry of Chicago by a deed not under seal, for the consideration of $100. This was objected to by the defendant, on the ground that no title was obtained by the defendant by the paper received by him, and the objection was sustained by the court, and the plaintiff excepted. The witness testified that the consideration of the note was for the conveyance of real estate.

The deed was then put in evidence by the defendant, and by it the plaintiff, for the consideration of $100 paid, the receipt whereof was acknowledged, and the further consideration of $600, to be paid on the 15th day of April, 1857, sold, released, and forever quitclaimed to the defendant all his right, title and interest to the said real estate, and the plaintiff did thereby warrant and defend the above property. It was dated June 29, 1857, and signed, "Wm. R. Henry, by his agent, H. C. Campbell." It was acknowledged on the same day by the agent before a notary public.

The court held and decided the paper in evidence conveyed no title to the land in question to the defendant, not being under seal, and no power of attorney shown; to which ruling and decision the counsel for the plaintiff excepted. The court also decided that the defendant was not bound to tender to the plaintiff a reconveyance; to which ruling and decision the counsel for the plaintiff also duly excepted. The court also held and decided that the defendant was not liable on the note, because he was an infant when he executed it: to which ruling and decision the plaintiff also duly excepted. And thereupon the court directed the jury to render a verdict for the defendant; to which ruling and direction the plaintiff also excepted. Thereupon, the exceptions were directed to be heard in the first instance at the general term, where judgment thereon was given for the defendant. The plaintiff now appeals to this court.

There is no controversy that the defendant was an infant at the time this note was executed. If he has done nothing since attaining his majority which makes the contract obligatory upon him, then the direction of the court to the jury to find a verdict for the defendant was correct. But if however he promised to pay the note, after arriving at full age, or ratified the contract, or affirmed the purchase for which the note was given, then the note became obligatory upon him.

The defendant failed to sustain the allegation by his answer that any fraudulent representations had been made to him to induce him to enter into the purchase, or that there was any failure of title in the plaintiff, and consequently a failure of the consideration of the note.

There has been much discussion in the books as to what acts or declarations of a party will revive a debt barred by the statute of limitations, or one discharged by an in-

solvent or bankrupt discharge, or render obligatory and valid the contract of an infant. There has been a commingling of all these cases in judicial opinions, and frequently no clear and marked lines of distinction have been presented. I shall make the effort to eliminate some principles which are applicable to each of these cases, and endeavor to show wherein they differ and the reasons for such difference, and wherein they are coincident and the principles which have been established as applicable to these three classes of cases. A clear understanding of the various decisions and the principles settled by them, makes such an examination imperative, and from it we shall discover the doctrine settled, and the reasons therefor.

In Sands v. Gelston, 15 Johns. 519, Spencer, J., lays down what appears to be the correct rules in reference to debts barred by the statute of limitations, debts of infants not for necessaries, and the debts of bankrupts discharged under the bankrupt acts. In all these cases, although by reason of certain provisions of law such debts cannot be enforced against the debtors, still the debt remains, and the moral obligation to pay continues in full force. Hence it is after a debt is barred by the statute in the one case or discharged by the operation of the bankrupt or insolvent laws in the other, or in the case of the infant who on attaining his majority, and not before, can make a legal contract, which can be eo instanti enforced against him, that in all these cases the moral obligation has been held a sufficient and legal consideration without any other, for the promise or undertaking to pay the debt, by acknowledgment, ratification or a new promise. In other words, the courts have, in truth, regarded the old debt as continued or revived, and no new consideration was required to support it. Spencer, J., says, in Sands v. Gelston: "I never could see the difference as regards the revival of a debt, between one barred by the statute of limitations and one from which the debtor has been discharged under the bankrupt or insolvent laws. The remedy is equally gone in both cases. The statute of limitations requires all actions on contract to be commenced within six years next after the cause of such action accrued, and not after. The remedy being suspended after six years, there yet exists a moral duty on the part of the debtor to pay the debt; and accordingly a promise to pay a debt not extinguished, but as to which the remedy is lost, is a valid promise, and may be enforced on the ground of the pre-existing moral duty. There is then no substantial difference between a debt barred by the statute of limitations, and a debt from the payment of which the debtor is exonerated by a discharge under bankrupt or insolvent laws. Both of these rest on the same principle with a debt contracted by an infant not for necessaries; yet it is singular that in neither of the latter cases will the bare acknowledgment that the debt once existed and has not been paid, support an action—an express promise to pay being necessary." A review of the cases on the question of what is necessary to revive a debt barred by the statute of limitations, will clearly show that a bare or mere acknowledgment of the existence of the debt is sufficient, as the law will imply or infer from its existence a promise to pay it; and it is of little moment whether it be regarded as a new promise or a revivor and continuation of the old one.

In Johnson v. Beardslee, 15 Johns. 4, an acknowledgment of the debt was holden to be sufficient evidence for the jury to presume a new promise. In Sluby v. Champlin, 4 Johns. 461, the defendant said the debt ought to be paid, and mentioned eighteen months as the time he wanted for payment. This was held a promise sufficient to make him liable. In Jones v. Moore, 7 Bin. 573, an acknowledgment of a subsisting debt was sufficient to take the case out of the statute, and it was held it would authorize the jury to infer a new promise to pay, or rather that the old promise was continued, or as some choose to call it, revived. Mosher v. Hubbard, 13 Johns. 510. On the claim being presented to the defendant, he did not intimate that he intended to avail himself of the statute; but the only question to his mind seemed to be whether the account had not been paid, and he promised to examine his papers, and if he found he had paid the order he was to write the witness, but as the witness testified he had never written, the court held that this was sufficient to raise an implied promise to pay the money, unless on examination it should be found that the order had been paid, and there was no evidence whatever of any payment. Sands v. Gelston, supra. Spencer, J., says: "I am bound by authority to consider the acknowledgment of the existence of a debt within six years before the suit was brought, as evidence of a promise to pay the debt."

In Clemenstine v. Williamson, 8 Cranch, 72, Marshall, C. J., says: "It has been frequently decided that acknowledgment of a debt, barred by the statute of limitations, takes the case out of that statute, and revives the original cause of action. So far as decisions have gone, principles may be considered as settled, and the court will not lightly unsettle them. * * * It is not sufficient to take the case out of the act that the claim should be proved, or be acknowledged to have been originally just: the acknowledgment must go to the fact that it is still due."

The same learned judge, in Wetzel v. Buzzard, 11 Wheat. 309, remarked: "It is contended on the part of the plaintiff that he has proved an acknowledgment of the debt, and that such acknowledgment, according to a long series of decisions, revived the original promise, or it lays the foundation upon which the law raises a new promise. The English

and American books are filled with decisions which support this general proposition. An unqualified admission that the debt was due at the time has always been held to remove the bar created by the statute."

In Bloodgood v. Bruen, 8 N. Y. 362, Gardiner, J., says: "A mere acknowledgment of an indebtedness is but evidence from which a promise to pay may be inferred. When it is unconditional, a court or jury may infer a willingness to pay, or a promise to that effect, because it would be difficult to assign any other reason for a voluntary admission of this sort."

Marcy, J., says in Depuy v. Swart, 3 Wend. 139, "that the bare acknowledgment of a debt, barred by the statute of limitations, is held to revive it."

In Purdy v. Austin, 3 Wend. 189, the same justice says, after discussing the reasoning of the court in Sands v. Gelston, that the unqualified and unconditional acknowledgment of a debt, made by a party within six years before suit brought, is adjudged at law to imply a promise to pay.

In Bell v. Morrison, 1 Pet. 351, Justice Story, in delivering the opinion of the court, observes, that "the rule announced in 11 Wheat. was the result of a deliberate examination by the court of the English and American authorities," and adds: "We adhere to the doctrine as there stated, and think it the only exposition of the statute which is consistent with its true object and import." He then says: "If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of the previous subsisting debt which the party is liable and willing to pay." At the conclusion of the opinion, he says that it is to be understood that it is not unanimous, but that of a majority of the court, and that it has been principally, if not exclusively, influenced by the course of decision in Kentucky on this subject. I think particular note should be made of this remark, as Judge Story's observations in this cause have been disapproved of by two of the judges of our own state, hereafter alluded to. It is to be observed that Judge Story introduces an element which is not, so far as my researches extend, contained in any previous authority, viz.: that the party making the acknowledgment must be "willing to pay." He does not say that he must express that willingness, as some judges have supposed, or whether that willingness may be inferred from his acknowledgment of the previous subsisting debt. I think the latter view must be the correct interpretation of this remark, as I am unable to find any dictum of any judge anterior to this, that in addition to the acknowledgment it was required that the party must also express a willingness to pay. In Purdy v. Austin, supra, the judgment was reversed on the ground that the acknowledgment of the defendant did not amount to an unequivocal and positive recognition of the subsisting claim in favor of the plaintiff.

In Stafford v. Bryan, 3 Wend. 535, Sutherland, J., in delivering the opinion of the court of errors, says: "All acknowledgment, which is to have the effect of taking a demand out of the effect of the statute of limitations, ought to be clear and explicit in relation to the subject of the demand to which it refers. The acknowledgment or new promise is to be affirmatively established by the plaintiff." He adds: "Although I cannot yield my assent to all the points decided in that case (Bell v. Morrison), nor to all the reasonings and positions advanced by the learned judge who delivered the opinion of the court, the general views to which I have assented appear to me to be sound and impressive." In Deau v. Hewitt, 5 Wend. 257, Marcy, J., remarks, that "the statute of limitations proceeds upon the presumption of payment; a recognition of the existence of the debt, after the statute has attached, revives the remedy which was lost, but the cause of action is the same as it was before the remedy. This court has always considered the acknowledgment or new promise as a continuance of the old promise. * * * The acknowledgment rebuts the presumption of payment; and when made before the statute attaches, has the same effect as though made afterward. It keeps alive, if I may so express it, the remedy. * * * It cannot be said that the new promise either revives the cause of action or the remedy; it only continues the latter." He adds, that he is aware that some of the positions there stated conflict with the views of Mr. Justice Story, as expressed in Bell v. Morrison, but we cannot yield to these views, and give full effect to them, without unsettling principles that have been so long established as to entitle them to be evidence of the laws of this state.

In Hancock v. Bliss, 7 Wend. 267, Chief Justice Savage said, the acknowledgment must however be explicit, and without a denial of the equity or legality of the demand, hence if the defendant denies the justice of the demand, or reposes himself upon the statute, a promise will not be presumed.

In Patterson v. Choate, 7 Wend. 445, the court by Sutherland, J., held that an acknowledgment of an existing indebtedness was sufficient to raise a new promise. There the witness first stated what the defendant said, as follows: That "the balance as exhibited by their books of account was due to the plaintiff at the time of the dissolution of the copartnership, and had not been paid to his knowledge." Upon being interrupted by the plaintiff's counsel, he said the expression used by Patterson was that the balance was due at the time of the dissolution, and still is due, as witness thought; it might have been, that it was then due and had never been paid; either version of it amounts to a clear and explicit admission of a subsisting indebtedness.

In Gailey v. Crane, 21 Pick. 523, the supreme court of Massachusetts says, the doctrine laid down in the case of Bangs v. Hall, 2 Pick. 368, was well considered, has since been tested by experience, and is undoubtedly sound and wise. It has been everywhere acknowledged as sound law (citing a large number of authorities to sustain this position). The court further say: "The principles there laid down are, that to take a debt out of the statute of limitations there must be either an express promise to pay, or an unqualified acknowledgment of present indebtedness. In the latter case the law will imply a promise to pay."

In Allen v. Webster, 15 Wend. 284, Savage, C. J., after reviewing all the authorities, says: "Whatever therefore may be the true philosophy of the rule, and learned judges have differed on that subject, yet since the case of Sands v. Gelston, there has been no dispute as to what the rule in fact is, to-wit: that to revive a debt barred by the statute of limitations, whether the statute theoretically operates upon the debt itself, or upon the remedy only, there must be an express promise or an acknowledgment of a present indebtedness, a subsisting liability, and a willingness to pay." This last remark about a willingness to pay has no foundation, but Judge Story's observation in Bell v. Morrison, and which had been disapproved of by two of our judges; Gardiner, J., states the rule as he is inclined to think it is in Wakeman v. Sherman, 9 N. Y. 91, in these words: "That to revive a demand thus barred there must be an express promise to pay, either absolute or conditional, or an acknowledgment of the debt as subsisting, made under such circumstances, that such a promise may be fairly implied." And this case also enunciates the rule laid down in many other cases, that the acknowledgment of existing indebtedness or the promise to pay must be made to the party to whom the debt is due, or to his agent; an acknowledgment or promise to a stranger will not answer.

As has been seen from the remarks of Chief Justice Spencer in Sands v. Gelston, something more has been required to establish a debt against a bankrupt, which has been discharged by his certificate, or a discharge from his debts under an insolvent law. In the latter case the debt has ceased to exist. It has been extinguished, and though the moral obligation notwithstanding remains to pay it, and is held to be a good consideration for the promise to pay it, yet there must be a new promise equivalent to a new contract. In the case of a debt barred by the statute of limitations, we have seen that the debt is not discharged, but the remedy by action is only taken away or suspended until the debt is revived. In the case of Roberts v. Morgan, 2 Exch. 736, Eyre, C. J., says a debt barred by a certificate, under a commission of bankruptcy, by a new promise to pay it, becomes a new debt. Lord Mansfield also says, when there has been a new promise after the discharge, the bankrupt is liable as on a new contract. Doug. 192. The moral obligation uniting to the new promise makes what he calls in the case of Truman v. Fenton, Cowp. 544, "a new undertaking and agreement."

In Dupuy v. Swart, 3 Wend. 135, Marcy, J., says: "The bare acknowledgment of a debt barred by the statute of limitations is held to revive it; but an acknowledgment of a debt from which the defendant has been discharged, be it ever so explicit, gives no chance of action." After referring to the authorities also alluded to he says: "The authorities clearly show that the new promise is the contract upon which the action against the defendant must rest. The old debt has no further connection with this suit than what arises from the circumstance that it is resorted to for the purpose of furnishing a consideration for the promise, by reason of its moral obligation after its legal obligation is destroyed by the discharge. The liability therefore of the defendant is on the new contract."

A protracted struggle has been maintained in the courts, on the one hand to protect infants or minors from their own improvidence and folly, and to save them from the depredations and frauds practiced upon them by the designing and unprincipled, and on the other to protect the rights of those dealing with them in good faith and on the assumption that they could lawfully make contracts.

Much discussion has been had in the books, by eminent and learned judges, whether the contracts of an infant were void or voidable, and the earlier decisions were that such contracts were void. And the method adopted by the courts to protect an infant against the effects of his own weakness, has been to consider his acts as not binding. Bing. Inf. 5. Miserable (says Lord Mansfield, in 3 Burrows, 1801) must the condition of minors be, excluded from the society and commerce of the world, deprived of necessaries, education, employment and many advantages, if they could do no binding acts. Great inconvenience must arise to them if they were bound by no act. The law therefore at the same time that it protects their inability and indiscretion from injury, through their own imprudence, enables them to do binding acts, and without prejudice to themselves, for the benefit of others. And in that case (Couch v. Parsons), it was expressly decided that an infant's conveyance, by lease and release, was voidable only and not void. This decision has been considered by many judges and lawyers as unsound, and particularly by Mr. Preston, in his work on Conveyancing, in which he says: "No lawyer of eminence has thought it safe to follow that decision in practice. To admit indeed that such a decision is law, is to confound all distinctions and to oppose all authorities on this head" (2 Prest. Conv. 248); and at page 375 he also says: "It would be well for every lawyer that such a decision had never existed." These views

of this learned author show how firmly implanted in the legal mind was the doctrine, that the acts and contracts of an infant were void and not voidable.

We shall see that the modern doctrine is fully in harmony with that laid down in Couch v. Parsons, and that such is now the well and firmly-established rule of law. A void act never is nor never can be binding, either on the person with whom it originates or on others. All who claim through or under it must fail, and it never can, at any time or by any means, be confirmed or rendered valid. A voidable act is binding on others until disaffirmed by the party with whom it originated; it is capable, at a proper time and by proper means, of being confirmed or rendered valid. Bing. Inf. 7.

I think it will be found, on a careful examination of the cases and the current of decision by learned judges, that the doctrine of an express promise by an infant, after his attaining his majority, being necessary to establish a contract as binding made by him during infancy, originated mainly from two sources: First, the notion of the English judges that it was their peculiar duty to protect infants from their own acts of imprudence and folly; and second, that their contracts being wholly void, something must be done equivalent to a new contract after coming of age to make that legal and effective which before had no force or existence. And from this latter consideration I think another error had its origin into which so many judges have fallen, that to make binding a contract of an infant after he attained his majority, acts must be done of an equal character or degree which a bankrupt discharged from a debt must perform to give new life, vigor and vitality to a debt discharged and canceled by his bankrupt or insolvent discharge. The promise to pay a debt discharged under an insolvent law, as we have seen, becomes a new contract. In the case of Roberts v. Morgan, 2 Exch. 736, Eyre, C. J., says a debt barred by a certificate under a commission of bankruptcy, by a new promise to pay it, becomes a new debt. Lord Mansfield also says, when there has been a new promise after the discharge, the bankrupt is liable as on a new contract. Doug. 192. The moral obligation, uniting to the new promise, makes what he calls, in the case of Truman v. Fenton, Cowp. 544, "a new undertaking and agreement."

In Lynbury v. Weightman, 5 Exch. 198, Lord Ellenborough said, that in order to bind a bankrupt by a new promise, he should expect a positive and precise promise to pay; and in a note to this case it is said that bankrupts and infants stand on a different ground with respect to debts from which they are discharged.

If the contract of the infant be not void, but only voidable, can it be justly said that it has been discharged paid, that is, as if it had no existence? It seems to me not, and that the course of argument of many learned judges, in assuming that the contract of the infant and that of a bankrupt discharged by the act are to be placed on the same footing, cannot be sustained, either by sound reasoning or by authority. I think the foundation of the reasoning lies in the assumption that the contracts of the infant were void. If this were so, then the analogy would certainly be complete. But if voidable only, then it is submitted that it wholly fails, and that the contracts of an infant, which are only suspended during his minority, may be revived and ratified by him on arriving at age, upon the same principles and for the same reasons, and by the same means, as a debt barred by the statute of limitations may be revived and restored to its pristine vigor and efficacy. A review of the cases will I think warrant us in arriving at this conclusion.

In Stone v. Weythipol, Cro. Eliz. 126, an action was brought against the executor of an infant, on a debt due by him, and which he had promised to pay. Egerton, for the plaintiff, contended that the promise of an infant is not void, but for his non-age he may help himself by plea; but if debt had been brought against him, and he pleads nil debet, it shall be found against him, and if at his full age he had payment, it had been good and in foro conscientiæ, the promise of the infant had been good. Coke contended that it is no consideration, for every consideration that doth charge the defendant in an assumpsit must be to the benefit of the defendant, or charge of the plaintiff, and no case can be put out of this rule, and this contract by the infant was void; and afterward the court was clearly of the opinion that the action did not lie, for the contract of the infant was merely void, and in debt against him he might plead nil debet. Egerton then said: "It had been adjudged in that court, in Edmonds v. Burton, that when an infant was bound in an obligation, and at his full age he promised payment, an action was maintainable against his executor on this promise, to which the court agreed, for the bond, which was the ground of it, was not void, but voidable, and he could not plead non est factum or nil debet to a bond, and if at his full age he had accepted a defeasance of the bond, this had made it good, and in the case cited the promise was by the infant himself, which in conscience he ought to pay." Moning v. Knoss, Cro. Eliz. 700, was an action of assumpsit, where an infant being bound in a bond for the payment of £17 at his full age, in consideration that the plaintiff, the obligee, would stay the suit he had brought on the bond, he answered that he would pay the £17 on a certain day after. Upon nonassumpsit pleaded, it was found for the plaintiff, and it was alleged in arrest of judgment that there was not any consideration to ground an assumpsit, and in proof thereof the case of Stone v. Weythi-

pol, supra, was cited; for the bond not being sufficient to bind him, there is not any cause for him to make this assumpsit, and of this opinion was Turner, but Clinch arrested, and the other judges being absent, the matter was adjourned.

In Thrupp v. Fielden, 2 Exch. 628, the action was assumpsit, and the plaintiff proved a payment of £40, on account of the bill, since defendant came of age. For the plaintiff, it was contended that this was an admission by the defendant of his liability to pay, and tantamount to a new promise. But Lord Kenyon said: "This is not such a promise as satisfies the issue. The case of infancy differs from the statute of limitations; in the latter case, a bare acknowledgment has been held to be sufficient. In the case of an infant, I shall hold an acknowledgment not to be sufficient, and require proof of an express promise to pay made by the infant after he had attained that age when the law presumes that he has discretion."

It seems to me, these cases have proceeded on the principle, that the obligations of the infant were void, and that on his attaining his majority he was as much discharged from them, on that ground, as a bankrupt is by his discharge under the bankrupt or insolvent laws.

It will be convenient here to examine the course of decision in this country upon this branch of the law.

In an early case in Connecticut (Rodgers v. Hand [1809] 4 Day, 57) the supreme court of errors held, that all contracts made by infants against their interest were void, and that the same evidence might be required of the confirmation of a voidable contract after full age as of the execution of a new one, to avoid fraud and imposition.

This case was followed by the court in Benham v. Bishop, 9 Conn. 333. Daggett, J., there lays down the rule very broadly, that the note of an infant cannot be satisfied by merely acknowledging that he made it, or that it is due. Unlike an admission of the debt barred by the statute of limitations, which has been held to remove the bar, and authorize a recovery, he says, in the case of a note or bond of a minor, there must be a promise to pay when of full age.

In Wilcox v. Roath, 12 Conn. 550, the language used by the court is broad and sweeping. It is, that it has been contended that the evidence which would take a case out of the statute of limitations is sufficient to prove the ratification of a contract made by an infant. Such however the court says is not the rule. The cases are not analogous. They stand on different grounds, and are governed by different principles. In the one case, the debt continues from the time it was contracted. A new promise merely rebuts the presumption created by the statute, and the plaintiff recovers not on the ground of any new right of action, but that the statute does not apply to bar the old one. In the other, there never was any legal right capable of being enforced, and in case of a promise, after the infant became of age, to take upon himself a new liability, proceeded indeed upon a moral obligation existing before. Accordingly it is well settled that a bare acknowledgment is sufficient to take a case out of the statute of limitations. But in regard to the contract of an infant, it has been repeatedly adjudged that there must be an express promise to pay the debt after he arrives at full age, otherwise there is no ratification.

In Smith v. Mayo, 9 Mass. 62, the supreme court held that a direct promise when of age is necessary to establish a contract made during minority, and that a mere acknowledgment, as in cases under the statute of limitations, will not have that effect; and it is also stated that the rule is, that such promise must be made deliberately and with a knowledge that the party is not liable by law. In this case the infant made a bond, and after he came of age made his will, disposing of his estate, "after his just debts are paid;" and the court held that this expression did not amount to a promise to pay the bond; that it contained a direction only to pay just debts, and there was nothing in the case from which the court could infer that what was not in law a debt could be considered by the testator as a just debt. The same doctrine was repeated in Ford v. Phillips, on the authority of this case, and it was affirmed that a direct promise was necessary; a mere acknowledgment of the debt is not sufficient. But the true doctrine is more accurately laid down in Whitney v. Dutch, 14 Mass. 460. There Parker, C. J., says: "By the authorities, a mere acknowledgment of the debt, such as would take the case out of the statute of limitations, is not a ratification of the contract made during minority. The distinction is no doubt well taken. The reason is, that a mere acknowledgment avoids the presumption of payment which is accepted by the statute of limitations; whereas the contract of an infant may always, except in certain cases sufficiently known, be voided by him by plea, whether he acknowledge the debt or not, and such positive act or declaration on his part is necessary to defeat his power of avoiding it. But the terms of the ratification need not be such as to import a direct promise to pay. All that is necessary is, that he expressly agrees to ratify his contract, not by doubtful acts, such as payment of a part of the money due, or the interest, but by words, oral or in writing, which import a recognition and a confirmation of his promise."

In Thompson v. Lay, 4 Pick. 48, Parker, C. J., says the cases of Whitney v. Dutch and Ford v. Phillips explicitly lay down the principle that the promise of an infant cannot be revived so as to sustain an action, unless there be an express confirmation or ratification after he comes of age. "A promise to

pay is evidence of a ratification; so is a direct confirmation, though not in words amounting to a direct promise; as if the party should say, after coming of age, 'I do ratify and confirm,' or, 'I do agree to pay the debt.'" And in Reed v. Batchelder, 1 Metc. (Mass.) 559, Shaw, C. J., says, the question, what acts of an infant are voidable and what void, is not very definitely settled by authorities; but in general it may be said, the tendency of modern decisions is to consider them voidable, and thus leave the infant to affirm or disaffirm when he comes of age, as his own views of his interest may lead him to elect, and that it is established in Massachusetts that the note of an infant is voidable only, and may be regarded as a good foundation for a new promise when he comes of age,—citing Whitney v. Dutch and Thompson v. Lay, supra, and Martin v. Mayo, 10 Mass. 137.

In Pierce v. Tobey, 4 Metc. (Mass.) 168, the court said: "A contract made by a minor may be affirmed after his arrival at full age; and if so done, and by words proper to give it force and effect, as a valid contract, it will be operative and binding upon him. A mere acknowledgment of a debt so existing is not sufficient; but there must be a direct promise, or a direct confirmation, before any liability attaches."

In Hall v. Gerrish, 8 N. H. 574, the supreme court of that state say: "An acknowledgment of a subsisting debt, when a claim has been barred by the statute of limitations, furnishes evidence, unless explained or qualified, from which a new promise may be implied; but the promise of an infant cannot be revived so as to sustain an action, unless there be an express confirmation or ratification, after he comes of age. This ratification must either be a direct promise or by saying, 'I ratify and confirm,' or, 'I agree to pay the debt,' or by positive acts of the infant, after he has been of age a reasonable time in favor of his contract, which are of a character to constitute a perfect evidence of ratification as an express and unqualified promise." To the same effect is the case of Robbins v. Eaton, 10 N. H. 561.

We will now advert to the course of judicial decisions in this state. A reference has already been made to the remarks of Chief Justice Spencer in Sands v. Gelston, where he observed that he could never see the difference, as regards the revival of a debt, between one barred by the statute of limitations and one from which the debtor had been discharged under the bankrupt or insolvent laws. He says: "There is no substantial difference between a debt barred by the statute of limitations, and a debt from the payment of which the debtor is exonerated by a discharge under a bankrupt or insolvent act. A fortiori, a debt not discharged, as that of an infant, ought certainly not be placed on the same footing with one which is."

I think we shall find, on examination of the cases in this state, that there has been a great change of views and modification of opinion on the subject of infants' contracts. All the cases hold that the contract of the minor is not void, but voidable only. Goodsell v. Myers, 3 Wend. 479; Everson v. Carpenter, 17 Wend. 417; Delano v. Blake, 11 Wend. 85; Bay v. Gunn, 1 Denio, 108; Taft v. Sergeant, 18 Barb. 320.

Having now as I think conclusively established that the promissory note or contract of an infant is voidable only and not void, and that it is a subsisting liability which cannot however be enforced without some further act on his part after he attains his majority, it will be necessary in the next place to inquire what is the rule of law in this state as to acts or declarations of his, which may have the effect of making it legally binding upon him, so that it may be enforced in the courts against him. It is well to bear in mind that principles of law which were recognized and enforced to protect infants against their acts of indiscretion and folly while of such years as the law assumed they could not act with prudence and discretion, should not be invoked to aid them in the perpetration of gross fraud, and to wrong the innocent and confiding.

Not a few have been of the opinion that a man who by representing himself as competent to contract, and on the faith of such representations does contract and obtain a benefit to himself, which he retains, should not be allowed afterward, when that contract is sought to be enforced against him, to set up and allege that he had no legal power to make the contract, and therefore he was not liable on it. Common honesty and fair dealing among men would seem to require that he should be estopped from setting up such a defense.

It is certainly the duty of courts not to aid such defenses, when their countenance can be withheld without doing violence to established principles of law. If we find that the rules of law as expounded by the courts and learned authors will sustain us in overruling such a defense, we should not be slow in following their leadings. We have seen by the earlier cases, that to bind a bankrupt or infant there must be proven a precise and positive promise to pay the particular debt after the discharge, or after attaining full age, and the reason assigned was, that in such cases they were discharged from their liabilities, or were never subject to answer. This was certainly so as to the bankrupts, and undoubtedly so as to the infant if his contract was void. He had no capacity to make it, and his state of infancy discharged him therefrom, or made it no contract. In both cases the debts were in the eye of the law as though they had never been, and therefore the court in this respect required proof equivalent to a new contract to make them binding.

But it has been found, on a more careful examination of the cases, the later ones especially, that the contracts of an infant were not void but only voidable, and therefore the ground was changed, and a different element was thrown in; and the courts have adopted the more sound and sensible rule, that ratification or confirmation of the contract made in infancy will bind the party if done after his coming of age. This new promise, positive and precise, equivalent to a new contract, is not now essential; but a ratification or confirmation of what was done during the minority, is sufficient to make the contract obligatory. These words "ratify or confirm," necessarily import that there was something in existence to which the ratification or confirmation could attach, entirely ignoring therefore the notion that an infant's obligations or contracts were discharged or extinguished by reason of the state of infancy. And it was said in the case of Whitney v. Dutch, supra, that the terms of the ratification need not be such as to import a direct promise to pay. All that is necessary is that the infant, after attaining his majority, should expressly agree to ratify his contract by words, oral or in writing, or by acts which import a recognition and a confirmation of his promise. In Goodsell v. Myers, supra, Savage, C. J., said: "A ratification of an infant's contract should be something more than a mere admission to a stranger that such a contract existed; there should be a promise to a party in interest or to his agent, or at least an explicit admission of an existing liability from which a promise is implied." This rule is affirmed in Delano v. Blake, supra. In the case of Insurance Co. v. Grant, 2 Edw. Ch. 544, the vice-chancellor held, that a provision in a will, made after attaining full age, directing "all his just debts and personal expenses to be first paid and satisfied," was a confirmation of a mortgage given by the testator while an infant.

In Bigelow v. Grannis, 2 Hill, 120, the court says: "In the case of infancy, there must be a new promise, or a ratification of the contract, after the defendant has attained the age of twenty-one years, and so in the cases of contract. The minds of the parties must meet. A promise to a stranger will not answer."

The same rule is recognized in Watkins v. Stevens, 4 Barb. 168.

I think that the course of decision in this state authorizes us to assume that the narrow and stringent rule, formerly enunciated, that to establish the contract, when made in infancy, there must be a precise and positive promise to pay the particular debt, after attaining majority, is not sustained by the more modern decisions. A brief reference to the course of legislation and decisions in England of a more modern date, will illustrate and confirm these views. In 1828 an act was passed, called "Lord Tenterden's Act," (9 Geo. IV. c. 14), having reference to the acts necessary to be done to revive and give full force to the contracts barred by the statute of limitations and the contracts of infants.

A statute had been passed in 6 Geo. IV. (65 St. at Large, 46), in reference to bankrupts, the one hundred and thirty-first section of which declares that no bankrupt, after his discharge, shall be liable to pay or satisfy any debt, claim or demand from which he shall have been discharged, upon any contract, promise or agreement made or to be made after the suing out of the commission, unless such promise, contract or agreement be made in writing, and signed by the bankrupt or some person authorized by him.

The first section of the act of 9 Geo. IV. declares that to take a debt or simple contract out of the operation of the statute of limitations, no acknowledgment or promise by words orally shall be deemed sufficient evidence of a new or continuing contract, and to make it operative, such acknowledgment or promise shall be in writing, signed by the party to be charged thereby.

And section 5 enacts, that no action shall be maintained whereby to charge any person upon any promise, made after full age, to pay any debt contracted during infancy, or upon any ratification, after full age, of any promise or simple contract, made during infancy, unless such promise or ratification shall be in writing to be signed by the party to be charged thereby. The framers of this act make the same distinction as the courts in this state, viz.: a promise to pay, and a ratification of a promise or of the contract; the only difference now being, that in England such promise or ratification must by this statute be in writing, while with us it may rest in parol or acts. The principle is the same in both countries, and the difference is only in matter of evidence.

In Hartley v. Wharton, 11 Adol. & E. 934, an infant was held to have ratified a contract for the purchase of goods sold and delivered to him during infancy, by a letter or paper which was given to the agent of the plaintiff when he called and demanded payment of the debt.

He made no other answer, and the paper had no address. It was in these words: "Sir, I am sorry to give you so much trouble in calling, but I am not prepared for you, but will without neglect remit you in a short time. Yours, respectfully, Frederick Wharton." Lord Denman, C. J., says, the effective words in the act are, "promise" and "ratification." The mischief to be provided against was, not the want of particularity as to the sum, but looseness of proof as to the fact of acknowledgment, and the defendant was held to have ratified the contract.

Harris v. Wall, 1 Exch. 122, is an important case, and deserves careful consideration. It was an action of assumpsit by indorsee against the acceptor of a bill of exchange,

dated 29th March, 1845, for the sum of £500. Defendant plead that at the time of making the promise, etc., he was an infant under the age of twenty-one years. Replication that before the commencement of the suit, and after he attained his full age of twenty-one years, he, the defendant, by a certain memorandum signed by him, ratified and confirmed the said contracts and promises, and then promised the plaintiff to pay him the moneys mentioned in the declaration. It appeared that there was another acceptance of the defendant for £1,500, but by whom held does not distinctly appear, though little doubt can exist it was by the plaintiff. It was proven that the defendant attained his full age on the 10th of December, 1845. The ratification and confirmation were sought to be made out by letters, addressed to the plaintiff, and written and signed by the defendant. The first, dated January 2, 1846, was in these words: "Mr. Harris: I should feel particularly obliged if you would arrange to keep the bills back for a little time, as my late brother's executors have lost their mother and only sister lately, and which prevents them from settling with you. The money will shortly be paid, say £2,000. I have heard from Mr. Burnett this morning; and he tells me a Mr. Green has written to him for the money. Please arrange with him, and write to me by return." It is stated that the executors of defendant's brother, referred to in the foregoing letter, were the Messrs. Hall mentioned in defendant's letter of January 19, 1846. The defendant's brother had died in February, 1845, and had left him a considerable fortune, more than ample for the payment of the £2,000. When the bills became due they were dishonored, and the defendant shortly thereafter wrote the plaintiff as follows, under date of January 6, 1846: "The bills drawn out by Mr. Burnett and me, and my acceptances, one for £1,500 and the other for £500, due on the first of January last, will most likely be settled shortly, and would have been settled before had not a sudden accident occurred, which prevented their being paid." On the 19th of January, 1846, the defendant addressed the plaintiff this letter: "Sir: I beg to inform you that I have this day forwarded your letter to Messrs. Hall, and also the letters from Messrs. Green and Burnett. I cannot exactly tell you about what time they will be settled, as I have not the money myself, and as I have told you before, have left it entirely in their hands." On the 25th January, 1846, he again addressed to the plaintiff this letter: "Sir: I received your letter of yesterday, and am sorry to find that you are not contented with the letter I gave you when at my house some short time ago. I have heard from the Messrs. Hall yesterday, and they said they had written to their agents in Dublin to arrange the whole thing. I therefore beg you will immediately see and inform Mr. Lazarus, who I heard from this day, of it. It is not a bit of use writing these sort of letters, as payment will not be made the sooner for them. What I tell you is perfectly correct, and the matter will be settled shortly." Rolfe, B., in delivering the opinion of the court says: "The question is, whether from all or any of these letters, the court can say that the defendant ratified the promise made during his infancy to pay the £500 bill. There is some difficulty in cases like the present, in understanding clearly what is meant by a ratification. * * * But whatever difficulty may exist, the case clearly recognizes ratification as something distinct from a new promise. Indeed, Lord Tenterden's act (9 Geo. IV. c. 14), which was cited in the argument before us, expressly makes a distinction between a new promise and the ratification, after majority, of the old promise, made during minority, in both cases requiring a written instrument signed by the party. The first step therefore to take toward a decision of this case is to understand clearly what is meant by a ratification, as distinguished from a new promise. We are of opinion (from Lord Tenterden's act), that any act or declaration, which recognizes the existence of the promise as binding, is a ratification of it. As in the case of agency, any thing which recognizes as binding an act done by an agent, or by a party who has acted as agent, is an adoption of it. Any written instrument signed by the party, which in case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant, who has attained his majority, amount to a ratification. Applying this test to the case now before us, we think it clear that there has been a ratification. There cannot we think be a doubt but that if the bill in question, instead of having been accepted by an infant, had been accepted by A. B. on behalf of the defendant, being an adult, the letter in question would have amounted to an adoption of the agency of A. B., and that the defendant would have been liable. And he must on the same ground be liable in the present case. He in truth treats his own act during infancy as having been done on behalf of himself, after his majority. Our decision is thus conformable to that of the queen's bench, in Hartley v. Wharton, where however the letter of ratification was certainly stronger than the letters now before us. We should have had great difficulty in holding that the letters of the present defendant were such as to amount to another promise; but according to the meaning we have attributed to the word 'ratification,' we think that the plaintiff has made out his ratification, and is therefore entitled to judgment"

We have quoted thus liberally from this case, because, we think, it states with clearness and accuracy the rules and principles applicable to cases of this character, and such as have been recognized and affirmed in our own courts.

The legislation and adjudications in England have clearly defined what is to be done, in the three classes of cases under consideration, to revive and make effective debts and contracts, of infants, bankrupts, or those barred by the statute of limitations. In the latter case, they are revived and restored to their original vigor by an acknowledgment or promise; in the case of infants, by a new promise or ratification of the acts done in infancy, after attaining full age; and the case of bankrupt, by a new promise, contract, or agreement made after the discharge.

It may be conceded that the paper produced in evidence by the defendant, for want of a seal, could not operate as a deed and valid conveyance of the land therein mentioned. But clearly the defendant could have availed himself of it as a contract of sale of those lands, and have enforced a specific performance of it by a valid and effectual conveyance. All that the statute of fraud requires is, that a contract of sale of lands shall be in writing, and that such writing express the consideration and be subscribed by the party by whom the sale is to be made, or by his agent lawfully authorized. The evidence of the authority may be by parol. Neither a written authority nor an authority under seal is required. Worrall v. Munn, 5 N. Y. 229; 2 Rev. St. 135, §§ 8, 9; 10 Paige, 386; 5 Hill, 107. But in the present case, the authority of the agent cannot be questioned. In the first place the principal, the present plaintiff, has fully ratified the act of his agent in making the sale. The commencement of this suit to recover the balance of the purchase-money, is a full and complete ratification of the sale by the agent to this defendant. Again, the plaintiff offered on the trial to show by the agent that he was authorized by the plaintiff to sell this land for him, and did so sell it; that he had a power of attorney from the plaintiff to sell and convey the lots, and that as such attorney he made and executed a quit-claim deed to the defendant of the lots. This testimony, which was taken on commission, was offered by the plaintiff and objected to, and excluded by the court as immaterial, and to which the plaintiff excepted. The defendant accepted the deed as made out, and executed by the agent, and went into possession under it, and we are authorized to assume, as these facts were offered to be proved, actually sold and conveyed away a portion of the premises, and the defendant must be regarded as having acquired at least an equitable title to the lands. Worrall v. Munn, supra; Delano v. Blake, 11 Wend. 85; Roof v. Stafford, 8 Cow. 179; Palmer v. Miller, 25 Barb. 399; Jones v. Phenix Bank, 8 N. Y. 234; Am. Lead. Cas. 258. In Delano v. Blake, supra, the court, by Judge Nelson, says: "The purchase by an infant of real estate is voidable, but it vests in him the freehold until he disagrees to it, and the continuance in possession after he arrives of age is an implied confirmation of the contract." So as to a lease to an infant, the continuance in possession, after the party arrives of age, is a confirmation, and he must pay the rent. Bac. Abr. tit. "Infant," 611, 612.

The infant in this case certainly acquired an equitable title to the real estate purchased of the plaintiff.

He went into the possession and continued in possession after he attained the age of twenty-one, and bargained and sold a portion of the real estate, and received the consideration therefor. And these circumstances must be regarded as affording the strongest evidence of his having affirmed the purchase, and his consequent liability upon the note in suit. When an infant purchases property, and continues to enjoy the use of the same, and then sells it, or any part of it, and receives the money for it, he must be considered as having elected to affirm the contract, and he cannot afterward avoid payment of the consideration. Boody v. McKenney, 23 Me. 517; Lawson v. Lovejoy, 8 Me. 405; Boyden v. Boyden, 9 Metc. (Mass.) 519. In this last case, Chief Justice Shaw observes, that if the infant, after coming of age, retains the property purchased by him during his minority, for his own use, or sells or otherwise disposes of it, such detention, use or disposition, which can be conscientiously done only on the assumption that the contract of sale was a valid one, and by it the property became his own, is evidence of an intention to affirm the contract, from which a ratification may be inferred, when he purchases land and goes into possession, and continues in possession after his arrival at full age, for he thereby affirms the purchase and ratifies the contract of sale. Hubbard v. Cummings, 1 Greenl. 11; Boody v. McKenney, supra; Robbins v. Eaton, 10 N. H. 561; 1 Pars. Cont. 271.

In Hubbard v. Cummings, supra, Chief Justice Mellen said, we have seen that the infant continued in possession of the lands until he sold to Cummings, and until after his arrival at full age. If an infant make an agreement and receive interest upon it after he is of full age, he confirms the agreement. Citing 1 Vt. 132. Or if he make an exchange of land, and after he is of full age, continue in possession of the land received in exchange. 2 Vt. 225. So if he purchase lands while under age; and continue in possession after he arrives at full age, it is an affirmation of the contract. Co. Litt. 3a; 3 Com. Dig. "Enfant," C, 6; 2 Bulst. 69; 2 Vent. 203; 3 Burrows, 1710. On this point, says the chief justice, the authorities seem clear and decisive; the law is plain as the fact. In Robbins v. Eaton, supra, the court say, some authorities confine an affirmation of a purchase of land to an actual subsequent sale of the same by the infant after he becomes of age; but it seems to be limiting to a very narrow point the evidence of affirmation of such a contract, and without any sufficient reason, as many other acts may constitute just as

full and undoubted evidence of a design on the part of the infant to affirm such contract as an actual sale of the land. The court thinks the better authority to be, that if the grantee being an infant continues in possession of the land after becoming of full age, this is an affirmance of the contract. In the case at bar the ratification was attempted to be shown by the facts, that the infant continued in possession after full age, and sold a portion of the premises, and received the consideration therefor. Within all the cases these acts amount to an unequivocal ratification of the contract of purchase by the infant, and settle conclusively his liability for the purchase-money. Another principle is firmly established by the cases, namely, that the infant on attaining full age cannot hold on to the purchase and thus affirm that, and plead his infancy to avoid the payment of the purchase-money. Kline v. Beall, 6 Conn. 494; Bigelow v. Kinny, 3 Vt. 353; 4 Bac. Abr. 376; Cheshire v. Barrett, 4 McCord, 241; Lynde v. Budd, 2 Paige, Ch. 191; Kitchen v. Lee, 11 Paige, Ch. 107; Deason v. Boyd, 1 Dana, 45; Badger v. Phinney, 15 Mass. 359.

In Dana v. Coombs, supra, the court say, had the suit been upon notes given for the purchase-money of land, and the defendant had set up the defense of infancy, it might well have been assumed that they were given as part of the consideration of the purchase of lands, which the tenant at full age chose to retain. In Cheshire v. Barrett, supra, the court say, a very slight circumstance demonstrating his assent will bind an infant, or any act by which his assent is manifested. Thus if an infant purchase land and continue in possession, after he attains full age, it will be regarded as a confirmation of the purchase. Citing cases. In Lynde v. Budd, supra, Chancellor Walworth held that an infant who had purchased land, by continuing in possession after he became twenty-one years of age, and conveying the land, affirmed the whole bargain and made himself legally liable for the payment of the residue of the purchase-money. And in Kitchen v. Lee, supra, the same learned judge declared the rule of law to be, that an infant cannot be permitted to retain the property purchased by him, and at the same time repudiate the contract upon which he received it.

It is therefore entirely clear upon all the authorities that the acts of the defendant, after he attained full age, were a ratification and confirmation of the contract of purchase, so as to render him liable to pay the purchase-money. The defendant set up in his answer, but did not prove, any failure of the consideration of the note. The only ground of defense set forth in his answer, proved and relied upon on the trial, was that of infancy. It has been seen that that is unavailing to him.

It is now urged that as the deed of the plaintiff was not under seal, no valid title was conveyed to the defendant, and that therefore he has ratified or confirmed nothing. Several answers to these objections present themselves. In the first place we have seen that the paper produced, if not valid as a deed, is as a contract for the sale of lands. It stated the consideration, the thing sold, and is signed by the party to be charged thereby, or his lawful agent. If the defendant has not got such a deed as he was entitled to under his contract, he can compel the plaintiff to give him one upon the payment of the purchase-money. He could have asked by his answer that such a deed be given, and it could have been provided for in the judgment in this action. It was the contract of purchase which the defendant has ratified and confirmed, by such unequivocal acts as make it binding and obligatory upon him, and subjects him to the payment of the purchase-money.

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

DAVIS, J. The note in suit was given by defendant, for the purchase-price of lands situate in Nebraska territory, on the 6th day of January, 1857. The defendant became of age on the 25th day of February following. At the time of receiving the note, the plaintiff, by his attorney, executed to defendant an instrument, which in form purported to be a conveyance of the lands sold, but it was without seal, and for that reason, invalid at common law as a conveyance of the title to real estate. No proof of the validity of this instrument, as a grant under the law of Nebraska, was given on the trial. The legal presumption was therefore that the common law prevailed in that territory, and that it was the same as the common law of this state. Holmes v. Broughton, 10 Wend. 75; Starr v. Peck, 1 Hill, 270; 15 N. Y. 353; 2 How. 201.

In answer to the defense of infancy, the plaintiff offered in substance, to show that the defendant took possession of the lands under the instrument above mentioned, and after he became of age, sold a portion of them to one Perry, for the sum of $100, and executed to him what is called in the offer, "a deed not under seal," which it may be assumed was an instrument like that executed to defendant by plaintiff. This was objected to by defendant, on the ground that he obtained no title by the paper he received; and on that ground the evidence was rejected by the court.

The fact of defendant's infancy at the time he gave the note having been established, it was incumbent upon the plaintiff, and competent for him, to show a ratification of the transaction by defendant after he attained his majority. The rejected offer was made with that view. The court below has sustained the ruling at circuit, on the assumption that "the defendant never acquired any title to the land for which he gave the note,

and that he never conveyed any title to another to any part of it." It is not asserted that, if the legal title had passed to the defendant by the instrument, his entering into possession and sale of a part of the land after he became of age would not have ratified his contract with plaintiff and given validity to the note. Hubbard v. Cummings, 1 Greenl. 11; Robbins v. Eaton, 10 N. H. 561; 1 Pars. Cont. 271.

It seems to me the court below overlooked the true question on this subject of ratification. Conceding that the instrument, for want of a seal, passed no legal title in the lands to the infant, did it not transfer to him a valuable equitable interest, which he could enforce and maintain against the plaintiff? Failing as a deed, it contains sufficient to constitute it a contract of purchase and sale between the parties, and it contains an agreement of warranty by which plaintiff undertakes "to warrant and defend the above property against the lawful claims of all persons whomsoever," with a specific exception. The fact that it is executed by but one of the parties is no objection to its validity as a contract. In Worrall v. Munn, 5 N. Y. 229, it was held by the court that such a contract "can be enforced either at law or in equity against the vendor, and wanting mutuality is no defense." It is upon sufficient consideration; and the offer was to show that the defendant entered into possession of the land under it. Under such a state of facts the rights of the infant under the contract would, in the courts of the state, be very clear. Upon the basis of this instrument and his possession under it he could, on attaining his majority, have elected to enforce his equities by compelling the plaintiff to execute a proper conveyance; and I can conceive of no defense the plaintiff could have made, beyond perhaps the protection of payment of the consideration money, which the court would have given him. Who can doubt that on discovery by a vendee that a supposed deed of his property, of which he has taken possession and for which he has paid or secured the consideration, is defective for want of a seal, he may call on his supposed grantor to execute a perfect conveyance, and enforce his call by suit, if the vendor unjustly refuse? When the defendant became of age he was under no obligation to have taken that course. The instrument as to him was voidable, and he might undoubtedly have avoided it, abandoned the possession of the lands and repudiated his note. He did not elect to do so. On the contrary, if the offer be true, he retained the possession, several months afterwards sold a portion of the lands to a third party for $100, and executed to him a supposed conveyance, but without a seal. It is essential to the rights of that party, as well as of the defendant, that this should be regarded as a ratification. As to him the defendant has no defense of infancy to interpose; and unquestionably that person has acquired by his purchase all the rights in the parcel sold that defendant had under his contract with plaintiff. But it is enough for this case to say that the evidence offered tended to show a ratification; for it showed that defendant, after he became twenty-one, elected to deal with the property as his own, and to dispose of it accordingly. I am clearly of opinion that the evidence offered should have been received. The objection that the authority of the plaintiff's agent who executed the instrument was not shown was of no force. The plaintiff was by the very suit affirming the authority, by offering the supposed deed as his own, and by claiming and enforcing the note given for the consideration. And under such circumstances, it was not necessary he should give evidence of the actual authority of his agent to make the instrument at the time it was made. Besides the case passed off altogether on the other ground; and if the court had intimated an adverse opinion on this point, the plaintiff could doubtless have readily cured it by calling himself the agent and a witness.

In my opinion, the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

LEMMON v. BEEMAN.

(15 N. E. 476, 45 Ohio St. 505.)

Supreme Court of Ohio. Jan. 10, 1888.

Error to district court, Sandusky county.

William J. Beeman, the plaintiff below, sued the defendant, James F. Lemmon, as administrator, for money paid by him upon the purchase of a certain stock of drugs of James Lemon, the defendant's decedent, the plaintiff being a minor at the time of the purchase, and having elected, on becoming of age, to rescind the contract. On the trial of the case, in the common pleas, the defendant excepted to a part of the charge of the court, and took a bill of exceptions, setting forth the evidence and the charge; to which exception was taken. The judgment was for the plaintiff, and was affirmed in the district court. The part of the charge to which exception was taken is to the effect that, upon the facts of the case, the plaintiff could recover without returning the property. The facts are stated in the opinion.

M. B. Lemmon and J. M. Lemmon, for plaintiff in error. J. H. Rhodes, for defendant in error.

MINSHALL, J., (after stating the facts as above.) In 1881, Beeman, then a minor, purchased of James Lemmon, then in life, but since deceased, a certain stock of drugs, for which he paid at the time $400, the price as agreed on between them. The stock was in a store in the state of Illinois; and the sale was made by Lemmon, through his agent, Dr. Everett, who some time before had sold the stock to Lemmon, and, as his agent, had continued in possession of the property, and conducted the business for him. In a short time after the sale had been made to Beeman, the goods were taken from him under an execution issued upon a judgment against Everett, upon the claim of the creditor of the latter that they belonged to him, and not to Lemmon. Beeman made an effort to recover the property; and, in a short time after he became of age, (which was in 1882,) disaffirmed the contract, presented a claim to the administrator of Lemmon's estate for the money he had paid on the purchase, and demanded its return; which was refused and the claim rejected.

No point is made as to the ownership of the goods; it is averred in the petition, and must be taken as the fact, that they belonged to the deceased at the time of the sale to Beeman. Again, there is no room for a claim, nor is it made, that the property purchased was in the nature of necessaries, and the contract, for such reason, incapable of being disaffirmed; nor is it claimed that the decedent or his agent was in any way deceived as to the age of Beeman at the time the sale was made. The only question presented upon the record is whether, upon the facts as stated, the minor had the right, on becoming of age, to rescind the contract, and recover the consideration he had paid, without returning the property that had been sold and delivered to him. The true doctrine now seems to be that the contract of an infant is in no case absolutely void. 1 Pars. Cont. 295, 328; Pol. Cont. 36; Harner v. Dipple, 31 Ohio St. 72; Williams v. Moor, 11 Mees. & W. 256. An infant may, as a general rule, disaffirm any contract into which he has entered; but, until he does so, the contract may be said to subsist, capable of being made absolute by affirmance, or void by disaffirmance, on his arriving at age; in other words, infancy confers a privilege rather than imposes a disability. Hence the disaffirmance of a contract by an infant, in the exercise of a right similar to that of rescission in the case of an adult, the ground being minority, independent of questions of fraud or mistake. But, in all else, the general doctrine of rescission is departed from no further than is necessary to preserve the grounds upon which the privilege is allowed; and is governed by the maxim that infancy is a shield, and not a sword. He is not in all cases, as is an adult, required to restore the opposite party to his former condition; for if he has lost or squandered the property received by him in the transaction that he rescinds, and so is unable to restore it, he may still disaffirm the contract and recover back the consideration paid by him without making restitution; for, if it were otherwise, his privilege would be of little avail as shield against the inexperience and improvidence of youth. But when the property rescinded by him from the adult is in his possession, or under his control, to permit him to rescind, without returning it, or offering to do so, would be to permit him to use his privilege as a sword, rather than as a shield. This view is supported, not only by reason, but by the greater weight of authority. It was recognized and applied by this court in Cresinger v. Welch, 15 Ohio, 156, decided in 1846. The following is the language used by Mr. Tyler on the subject: "If the contract has been executed by the adult, and the infant has the property or consideration received at the time he attains full age, and he then repudiates the transaction, he must return such property or consideration, or its equivalent, to the adult party. If, however, the infant has wasted or squandered the property or consideration received during infancy, and on coming of age repudiates the transaction, the adult party is remediless." He then adds that "there are expressions of judges and text writers against this latter proposition, but," he says, "the weight of authority is in harmony with it, and is decidedly in accord with the general principles of law for the protection of infants." Tyler, Inf. (2d Ed.) 80, and cases cited by the author. See, also, the case of Price v. Furman, 27 Vt. 268, and the notes thereto of Mr. Ewell, in his Leading Cases on Infancy & Coverture, 119. After an exhaustive review of the cases, this author says: "The

true doctrine, and the one supported by the weight of authority, (at least in the United States,) would seem to be that when an infant disaffirms his executed contract, after arriving at age, and seeks a recovery of the consideration moving from him, and where the specific consideration received by him remains in his hands, in specie at the time of disaffirmance, and is capable of return, it must be returned by him; but if he has, during infancy, wasted, sold, or otherwise disposed of, or ceased to possess the consideration, and has none of it in his hands in kind on arriving at majority, he is not liable therefor, and may disaffirm without tendering or accounting for such consideration." This statement of the law, supported, as it is, not only by the greater weight of authority, but also of reason, meets with our full approval. There is, however, much conflict in the decisions of the different states; greater perhaps than upon any other question connected with the law of infancy, (Metc. Cont. 76;) but we deem it unnecessary to attempt to review or discuss them, for the very good reason, that it has been done with thoroughness and ability by the authors just referred to. See, also, the notes of Mr. Ewell to the recent case of Adams v. Beall, decided by the Maryland court of appeals, 26 Am. Law Reg. 710 (8 Atl. 664).

We have been cited, by counsel for the defendant below, to a number of the previous decisions of this court, supposed to affect the right of the plaintiff to recover; but a careful examination will disclose that such is not the case. In Starr v. Wright, 20 Ohio St. 97, a conveyance had been made by a father to his minor son, it being without any consideration and intended to defraud creditors; and, during minority, the son had reconveyed to the father to enable him to raise money and pay his creditors, who, for a full consideration, then conveyed to the defendant. The court denied the right of the son on arriving at age to disaffirm his deed of reconveyance. Being the voluntary grantee of his father, the son had done no more than was his moral duty to do; and what he might have been compelled to do in favor of creditors and purchasers. The court applied the maxim, that infancy is a shield and not a sword. The case is quite analogous in principle to the leading one of Zouch v. Parsons, decided by Lord Mansfield, in 1765. It was there held that where an infant does what he might have been compelled by a court of equity to do, he cannot afterwards disaffirm his act. 3 Burrows, 1794. In Harner v. Dipple, 31 Ohio St. 72, the question was whether an undertaking executed by an infant for stay of execution was void, or only voidable. The court held that it was voidable only, and might therefore be, as it had been, affirmed by the infant on arriving at age. In Curtiss v. McDougal, 26 Ohio St. 67, it appears an infant has purchased a team of mules, and at the same time had executed a mortgage on them to secure the purchase money. He afterwards sold the property to his father, who brought an action in replevin against an assignee of the mortgage to recover possession. The claim was based on the theory that, by the subsequent sale of the mortgaged property, the infant had disaffirmed the mortgage, as he would have had a right to do so. It is difficult to see how the sale of the property purchased could be treated as a disaffirmance of the contract by which he had acquired it; it was rather an affirmance than a disaffirmance of that contract, and entirely consistent with the existence of the mortgage that he had given to secure the payment of the purchase money. Again, there was no positive disaffirmance by the infant, the claim being made by a third person, his grantee, although the rule is well settled that the privilege is personal to the infant, and is not available to third persons. 1 Pars. Cont. 329. But the court placed its decision upon the broader ground that it was not within the privilege of the infant to disaffirm the security he had given for the purchase money without also avoiding the purchase, saying that "in such case, if the infant would rescind a part, he must rescind the whole contract, and thereby restore to the vendor the title acquired by the purchase;" again applying the principle that infancy may be used as a shield, but not as a sword. So that the claim of the plaintiff in replevin defeated his right to recover, as a disaffirmance of the mortgage would necessarily have divested the title by which he claimed the property. It is apparent that none of these cases, when rightly considered, affect the right of the plaintiff to disaffirm the purchase made of the decedent, and to recover the consideration paid. Neither he, nor any one claiming under him, makes any claim to the property purchased. By his disaffirmance, the title has been restored to the estate of the vendor, and the property, or its value, may be recovered by the administrator, if it was wrongfully taken by the sheriff under the execution against Everett. Judgment affirmed.

RICE v. BOYER.

(9 N. E. 420, 108 Ind. 472.)

Supreme Court of Indiana. Dec. 16, 1886.

Appeal from circuit court, Clinton county.

F. F. Moore, for appellant. Kent & Merritt, for appellee.

ELLIOTT, C. J. It is alleged in the complaint of the appellant that the appellee, with intent to defraud the appellant, falsely and fraudulently represented that he was 21 years of age; that, relying on this representation, the appellant was induced to sell and deliver to the appellee, on one year's credit, a buggy and a set of harness; that the appellee, in payment for the property, delivered to appellant a buggy, and executed to him a promissory note, payable one year after date, and also executed a chattel mortgage to secure the payment of the note; that the appellee's representation was untrue; that he had not attained the age of 21 years; that, on account of appellee's nonage, the note cannot be enforced; that the appellee avoided his note and mortgage by a sale of the mortgaged property, and repudiates and refuses to be bound by his contract in reference thereto; that the appellant brings into court the note and mortgage executed to him, and tenders them to the appellee. Prayer for judgment for the value of the property delivered to appellee. To this complaint a demurrer was sustained, and error is assigned on that ruling.

The appellee's counsel defend the ruling principally upon the ground that the action was prematurely brought, inasmuch as it cannot be determined that any injury will be done the appellant until the expiration of the year fixed for the payment of the property purchased of the appellant. We agree with counsel that the contract is voidable, not void, and that the appellee might have performed it notwithstanding his nonage, if he had so elected. Price v. Jennings, 62 Ind. 111; Board, etc., v. Anderson, 63 Ind. 367; Shrock v. Crowl, 83 Ind. 243.

But this principle is not broad enough to meet the averment of the complaint that the appellee has repudiated his contract, and refuses to be bound by it. As the authorities relied on by counsel do not fully cover the case, further investigation is necessary, and the first step in this investigation is to ascertain and declare the effect of the infant's repudiation of his contract.

In Shrock v. Crowl, supra, the holding in Mustard v. Wohlford, 15 Grat. 329, that, where a voidable act of an infant is disaffirmed, it avoids the contract ab initio, is fully approved. If this is the law, then, when the appellee repudiated his contract, he destroyed it for all purposes. It no longer bound him, nor could he take any benefit from it. If the contract was destroyed back to the beginning, it ceased to be operative for anybody's benefit. We think the principle of law is correctly stated in the cases to which we have referred, and that the conclusion we have stated is the logical, and, indeed, inevitable, sequence of that principle. Tyler, Inf. 78.

An infant may repudiate a contract respecting personal property, during nonage. Briggs v. McCabe, 27 Ind. 327; Manufacturing Co. v. Wilcox, 59 Ind. 429; Clark v. Van Court, 100 Ind. 113; House v. Alexander, 105 Ind. 109, 4 N. E. 891; Hoyt v. Wilkinson, 57 Vt. 404; Price v. Furman, 27 Vt. 268; Willis v. Twambly, 13 Mass. 204; Stafford v. Roof, 9 Cow. 628; Bool v. Mix, 17 Wend. 119.

The repudiation by the appellee was therefore a complete avoidance of the contract, effectually putting an end to its existence, both as to him, and as to the adult with whom he contracted.

It is evident, from what we have said, that the ground taken by the appellee's counsel is not tenable; for, when their client repudiated the contract, as it is alleged he did do, it ceased to be effective for any purpose.

It is contended by appellee's counsel that the appellant cannot recover the value fixed on the property by the contract, and that the complaint is therefore insufficient. There is a plain fallacy in this argument. If a complaint states facts entitling the plaintiff to relief, it will repel a demurrer, although it may not entitle him to all the relief prayed. Bayless v. Glenn, 72 Ind. 5, and cases cited. The question as to the measure of damages is not presented by a demurrer to a complaint, where a cause of action is presented entitling the plaintiff to some damages, for the question which the demurrer presents is whether the facts are sufficient to constitute a cause of action. The material and controlling question in the case is this: Will an action to recover the actual loss, sustained by a plaintiff, lie against an infant who has obtained property on the faith of a false and fraudulent representation that he is of full age?

Infants are, in many cases, liable for torts committed by them, but they are not liable where the wrong is connected with a contract, and the result of the judgment is to indirectly enforce the contract. Judge Cooley says: "If the wrong grows out of contract relations, and the real injury consists in the non-performance of the contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly by counting on the infant's neglect to perform it, or omission of duty under it, as a tort." Cooley, Torts, 116. In another place the same author says: "So, if an infant effects a sale by means of deception and fraud, his infancy protects him." Cooley, Torts, 107. Addison, following the English cases, says an infant is not liable "if the cause of action is grounded on a matter of contract with the infant, and constitutes a breach of con-

tract as well as a tort." Add. Torts, par. 1314.

Upon this principle it has been held in some of the cases that an infant is not liable for the value of property obtained by means of false representations. Howlett v. Haswell, 4 Camp. 118; Green v. Greenbank, 2 Marsh. 485; Vasse v. Smith, 6 Cranch, 226, 1 Am. Lead. Cas. 237; Studwell v. Shapter, 54 N. Y. 249. It is also generally held that an infant is not estopped by a false representation as to his age; but this doctrine rests upon the principle that one under the disability of coverture or infancy has no power to remove the disability by a representation. Carpenter v. Carpenter, 45 Ind. 142; Sims v. Everhardt, 102 U. S. 300; Whitcomb v. Joslyn, 51 Vt. 79; Conrad v. Lane, 26 Minn, 389, 4 N. W. 695; Wieland v. Kobick, 110 Ill. 16; Ward v. Insurance Co., 9 N. E. 361.

It is evident, from this brief reference to the authorities, that it is not easy to extract a principle that will supply satisfactory reasons for the solution of the difficulty here presented. It is to be expected that we should find, as we do, stubborn conflict in the authorities as to the question here directly presented, namely, whether an action will lie against an infant for falsely representing himself to be of full age. Johnson v. Pye, 1 Sid. 258; Price v. Hewett, 8 Exch. 146; Association v. Fairhurst, 9 Exch. 422; Brown v. Dunham, 1 Root, 272; Curtin v. Patton, 11 Serg. & R. 309; Homer v. Thwing, 3 Pick. 492; Word v. Vance, 1 Nott & M. 197; Fitts v. Hall, 9 N. H. 441; Norris v. Vance, 3 Rich. 164; Gilson v. Spear, 38 Vt. 311.

Our judgment, however, is that, where the infant does fraudulently and falsely represent that he is of full age, he is liable in an action ex delicto for the injury resulting from his tort. This result does not involve a violation of the principle that an infant is not liable where the consequence would be an indirect enforcement of his contract; for the recovery is not upon the contract, as that is treated as of no effect, nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud. In holding him responsible for the consequences of his wrong, an equitable conclusion is reached, and one which strictly harmonizes with the general doctrine that an infant is liable for his torts. Nor does our conclusion invalidate the doctrine that an infant has no power to deny his disability; for it concedes this, but affirms that he must answer for his positive fraud.

Our conclusion that an infant is liable in tort for the actual loss resulting from a false and fraudulent representation of his age is well sustained by authority, although, as we have said, there is a fierce conflict, and it is strongly entrenched in principle. It has been sanctioned by this court, although, perhaps, not in a strictly authoritative way; for it was said by Worden, J., speaking for the court, in Carpenter v. Carpenter, supra, that "the false representation by the plaintiff, as alleged, does not make the contract valid, nor does it estop the plaintiff to set up his infancy, although it may furnish ground of an action against him for tort. See 1 Pars. Cont. 317; 2 Kent, Comm. (12th Ed.) 241." The reasoning of the court in the case of Pittsburgh, etc., Co. v. Adams, 105 Ind. 151, 5 N. E. 187, tends strongly in the same direction.

In Neff v. Landis (Pa. Sup.) 1 Atl. 177, it was said: "It cannot be doubted that a minor who, under such circumstances, obtains the property of another, by pretending to be of full age and legally responsible, when in fact he is not, is guilty of a false pretense, for which he is answerable under the criminal law. 2 Whart. Cr. Law, 2099." If it be true, as asserted in the case from which we have quoted, that an infant who falsely and fraudulently represents himself to be of full age is amenable to the criminal law, it must be true that he is responsible in an action of tort to the person whom he has wronged.

The earlier English cases were undoubtedly against our conclusion, but the later cases seem to take a different view of the question. Thus, in Ex parte Unity, etc., Ass'n, 3 De Gex & J. 63, it was held that, in equity, an infant, who falsely and fraudulently represented himself to be of full age, was bound to pay the obligation entered into on the faith of his representation. In the note to the case of Humphrey v. Douglass, 33 Am. Dec. 177, Mr. Freeman says, in speaking of the decision in Kilgore v. Jordan, 17 Tex. 341, that, "aside from any question of authority, the rule given in the case last cited by Hemphill, C. J., as the rule of the Spanish, derived from the civil law, that if a minor represents himself to be of age, and from his person he appears to be so, he will be bound by any contract made with him, seems to be most consonant with reason and justice." Mr. Pomeroy pushes the doctrine much further than we are required to do here, for he says, "If an infant procures an agreement to be made through false and fraudulent representations that he is of age, a court of equity will enforce his liability as though he were an adult, and may cancel a conveyance or executed contract obtained by fraud." 2 Pom. Eq. 465.

In addition to cases cited which sustain our view may be cited the following authorities: Fitts v. Hall, 9 N. H. 441; Eckstein v. Frank, 1 Daly, 334; Schunemann v. Paradise, 46 How. Prac. 426; Tyler, Inf. 182; 1 Pars. Cont. 317, note; 1 Story, Eq. 385.

The English cases recognize a distinction between suits of equitable cognizance and actions at law, and declare that a representation as to age, when falsely and fraudulently made, will bind an infant in equity. Ex

parte Unity, etc., Ass'n, supra, and authorities cited. Under our system, we can recognize no such distinction,—a distinction which is, as we think, a shadowy one under any system, for, in our system, the rules of law and equity are merged and mingled. Under such a system as ours, courts should pursue such a course as will render justice to suitors under the rules of equity, which, after all, are but the embodiment of the principles of natural justice.

It cannot be the duty of any court of Indiana to deny substantial justice because the complaint states a cause of action in a peculiar form; for, under our system, courts must render such judgments as yield justice to those who invoke their aid, irrespective of mere forms, in all cases where the substantial facts are stated, and are such as entitle the party to the general relief sought. They will not inquire whether the proceeding which asks their aid is at law or in equity, but they will render justice, to those who ask it, in the method prescribed by our Code of Civil Procedure. It is laid down as a general rule by all the text writers that infants are liable for their torts; but many of these writers, when they come to consider such a question as we have here, are sorely perplexed by the early English decisions, and, by subtle refinement, attempt to discriminate between pure torts and torts connected with contracts, and to create an artificial class of actions. Their reasoning is not satisfactory. Aside from mere personal torts, it is scarcely possible to conceive a tort not in some way connected with a contract, and yet all the authorities agree that the liability of infants is not confined to mere personal torts. There is a connection between a contract and a tort in every case of bailment, of the bargain and sale of personal property, and of the purchase and sale of real estate; and, if an infant is not responsible for his fraudulent representation of his age in connection with such transaction, there is not within the whole range of business transactions any case in which he could be made liable for his fraud. There are many cases, far too numerous for citation, where there is some connection between the contract and the tort, and yet it is unhesitatingly held that the infant is liable for his tort. Cooley, Torts, 112, authorities cited in notes. The cases certainly do agree—it is, indeed, difficult, if not impossible, to perceive how it could be otherwise—that, although there may be some connection between the contract and the wrong, the infant may be liable for his tort. It seems to us that the only logical and defensible conclusion is that he is liable, to the extent of the loss actually sustained, for his tort, where a recovery can be had without giving effect to his contract. The test, and the only satisfactory test, is supplied by the answer to the question: Can the infant be held liable without directly or indirectly enforcing his promise?

There is no enforcement of a promise where an infant, who has been guilty of a positive fraud, is made to answer for the actual loss his wrong has caused to one who has dealt with him in good faith, and has exercised due diligence; nor does such a rule open the way for designing men to take advantage of an infant, for it holds one who contracts with an infant to the exercise of good faith and reasonable diligence, and does not enable him to make any profit out of the transaction with the infant, for it allows him only compensation for the actual loss sustained. It does not permit him to make any profit out of an executory contract, but it simply makes good his actual loss.

It is worthy of observation that, in the cases which hold that an infant's representation will not estop him to deny his disability, it is generally declared that he may, nevertheless, be held liable for his tort. It may often happen that the age and appearance of the infant will be such as to preclude a recovery for a fraud, because reasonable diligence, which is exacted in all cases, would warn the plaintiff of the nonage of the defendant. On the other hand, the infant may be in years almost of full age, and in appearance entirely so, and thus deceive the most diligent by his representations. Suppose a minor who is really 20 years and 10 months old, but in appearance a man of full age, should obtain goods by falsely and fraudulently representing that he is 21 years of age, ought he not, on the plainest principles of natural justice, to be held liable, not on his contract, but for the loss occasioned by his fraud? The rule which we adopt will enable courts to protect, in some measure, the honest and diligent, but none other, who are misled by a false and fraudulent representation; and it will not open the way to imposition upon infants, for in no event can anything more than the actual loss sustained be recovered, and no person who trusts where fair dealing and due diligence require him not to trust can reap any benefit. It will not apply to an executory contract which an infant refuses to perform, for, in such a case, the action would be on the promise, and the only recovery that could be had would be for the breach of contract, and the terms of our rule forbid such a result; but it will apply where an infant, on the faith of his false and fraudulent representation, obtains property from another, and then repudiates his contract.

Any other rule would, in many cases, suffer a person guilty of positive fraud to escape loss, although his fraud had enabled him to secure and make way with the property of one who had trusted in good faith to his representation, and had exercised due care and diligence. We are unwilling to sanction any rule which will enable an infant, who has obtained the property of another by falsely and fraudulently representing himself to be of full age, to enjoy the fruits of his fraud,

either by keeping the property himself, or selling it to another, and, when asked to pay its just and reasonable value, successfully plead his infancy. Such a rule would make the defense of infancy both a shield and a sword, and this is a result which the principles of justice forbid, for they require that it should be merely a shield of defense.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

ALLIS v. BILLINGS.

(6 Metc. 415.)

Supreme Judicial Court of Massachusetts. Sept. Term, 1843.

Writ of entry to recover seven acres of land in Hatfield. At the trial, the tenant gave in evidence a deed from the demandant, dated March 25th, 1835, conveying the demanded premises, and several other parcels of land, being the farm and outlands belonging to the demandant, whose previous title, by devise from his father, was admitted. The consideration of said deed was a note, given to the demandant by the tenant and a surety, for $4,600, payable in six years, with yearly interest. On this note were sundry indorsements, reducing it to about $3,000. Some of these indorsements were in the hand-writing of the tenant, and some in that of the demandant. The demandant did not offer to return the note or the money received.

The tenant sold the said farm, and part of said outlands for a sum somewhat exceeding $5,000; and a writ of entry was commenced against his grantee, by the demandant, to recover the same; which writ was returnable at a term subsequent to that at which the present action was tried.

It appeared that the tenant went into possession under said deed, and was in possession of the demanded premises, when this action was commenced, claiming title thereto under said deed.

The demandant, to avoid the effect of the said conveyance to the tenant, offered to prove that he was insane when it was executed by him, and also that it was obtained by undue influence. The evidence which he introduced tended to show that he had been insane and sane, at different times, for a number of years prior to the making of said conveyance, and also since.

The tenant requested the judge who tried the cause to instruct the jury: "That if the demandant was subject only to temporary turns of insanity, and insane when he made the deed, yet if, after he became sane, and when sane, he did acts in affirmation of the contract, as by receiving payments on the note, and the like, he could not afterwards maintain an action to avoid the deed on the ground of insanity; that, as between the present parties, this action could not be maintained for one of several parcels described in the deed, and remaining in the possession of the tenant; and that the demandant, to maintain his action, should return the note and the money received."

The judge instructed the jury, that if they were satisfied that the demandant was not of sane mind when he made the deed, it was void absolutely, and not voidable merely, and that the receipt of money on the note would not bar an action, though the demandant was sane at the time he received it; that it was not necessary for him to return the note or money received, under the circumstances of this suit; and that the demandant was not obliged to demand in this action all the parcels in the possession of the tenant and unsold.

The jury found that the deed was made when the demandant was insane, and they did not consider the allegation of fraud.

New trial to be granted, if the ruling of the judge was incorrect; otherwise, judgment to be rendered for the demandant, on the verdict.

Mr. Huntington, for the tenant. Wells & Forbes, for the demandant.

DEWEY, J. The question raised in the present case is whether the deed of one who is insane at the time of the execution thereof is void absolutely, or merely voidable.

The term "void," as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to its peculiar and limited sense as contradistinguished from "voidable"; it being frequently introduced, even by legal writers and jurists, where the purpose is nothing further than to indicate that a contract was invalid, and not binding in law. But the distinction between the terms "void" and "voidable," in their application to contracts, is often one of great practical importance; and whenever entire technical accuracy is required the term "void" can only be properly applied to those contracts that are of no effect whatsoever; such as are a mere nullity, and incapable of confirmation or ratification.

This question, then, arises: Is the deed of a person non compos mentis of such a character that it is incapable of confirmation? This point is not now for the first time raised, but has been the subject of comment both by elementary writers and in judicial opinions. Mr. Justice Blackstone, in his Commentaries (volume 2, p. 291), states the doctrine thus: "Idiots, and persons of non-sane memory, infants, and persons under duress, are not totally disabled to convey or purchase, but sub modo only, for their conveyances and purchases are voidable, but not actually void." Chancellor Kent says, "By the common law, a deed made by a person non compos is voidable only, and not void." 2 Kent, Comm. (4th Ed.) 451. In Wait v. Maxwell, 5 Pick. 217, this court adopted the same principle, and directly ruled that the deed of a non compos, not under guardianship, was not void, but voidable. Such a deed conveys a seizin to the grantee, and the deed, to that extent, is valid, until, by entry or action the same is avoided. Mitchell v. Kingman, 5 Pick. 431, is to the like effect. In Seaver v. Phelps, 11 Pick. 305, the contracts of insane persons are noticed as contracts not absolutely void, but voidable.

It may seem somewhat absurd to hold that a deed should have any effect when wanting in one of the essential elements of a valid contract, viz. that of parties capable of giving an assent to such contract. But this ob-

jection as strongly applies to cases of deeds executed by infants, who are alike wanting in capacity to make a binding contract. Yet this principle of giving so much effect to the contract as removes it beyond that of a mere nullity, and renders it, to some present purpose, effectual, and susceptible of complete future ratification, is well settled and understood as to infants who enter into contracts; and it will be found that there is a common principle on this subject, alike applicable to the inability of a contracting party, arising from lunacy or infancy. The civil and the common law writers group together idiots, madmen, and infants, as parties incapable of contracting for want of a rational and deliberate consenting mind. 1 Story, Eq. § 223, and authorities there cited.

It is true that the rule of the common law, as held at one time, seemed to sanction, in one particular, a most unwarrantable distinction between the cases of deeds made by persons non compos and those made by infants; holding that the former could not be avoided by the party, upon the ground that no man of full age should be admitted to stultify himself, although it allowed privies in blood, or privies in representation, after the death of the non compos, to avoid the deed, on the ground of incapacity in the grantor. This distinction has not been adopted by our courts. On the contrary, we hold that such conveyance by one non compos mentis may be avoided by himself, as in the case of an infant grantor. This principle was directly recognized in the case of Mitchell v. Kingman, 5 Pick. 431. Indeed, the English rule has, in modern times, been often questioned in England; and in the courts of our sister states it has received little if any sanction. 1 Story, Eq. § 225, and cases there cited.

It was urged by the demandant's counsel that the doctrine that the deed of a non compos person was voidable only, and not void, was to be limited to feoffments, or cases where there is livery of seizin, or what is equivalent, and would not embrace a conveyance by an unrecorded deed. But we do not think that such a distinction can be maintained. As between the grantor and grantee, such unrecorded deed is good and effectual, by force of our statute; and the effect of such a conveyance would be to vest the title of the grantor in the grantee immediately upon the execution of the deed, and before the same is recorded. Marshall v. Fisk, 6 Mass. 31. A deed made in proper form, and duly acknowledged and recorded, is, in this commonwealth, equivalent to a feoffment with livery of seizin. Somes v. Brewer, 2 Pick. 197. Without the registry, where the delivery of the deed is accompanied by the surrender of the possession of the conveyed premises to the grantee, the effect would be the same as to the conveyance by a non compos as would result from a feoffment made by him. A deed of bargain and sale, it is said, places the grantee upon the footing of a feoffment, as it passes the estate by the delivery of the hand; such grants or deeds as take effect by delivery of the hand being voidable only. Somes v. Brewer, 2 Pick. 197; Zouch v. Parsons, 3 Burrows, 1804. We come, therefore, to the result, that the deeds of infants and insane persons are alike voidable, but neither are absolutely void.

Upon the trial of the present action the plaintiff put his case upon two distinct grounds: 1st. That he was insane at the time he executed the deed under which the tenant derives his title: 2d. That the deed was obtained by undue influence and fraud on the part of the tenant. Upon both these points the plaintiff introduced evidence. What was the extent of the evidence upon the latter ground, and what would have been the finding of the jury upon that point, we have no means of judging. This was a distinct and independent ground, and one which, if found in favor of the demandant, might have been decisive of the case, but which, in the final disposition of the cause, was not considered or passed upon by the jury. All the evidence, therefore, bearing upon this point, is now to be treated as if never offered, and the sole inquiry for our consideration is whether the instructions of the court were such, in matter of law, that the verdict may be maintained, taken as it was upon the first ground solely.

The presiding judge ruled, as a matter of law, that a deed of an insane person was absolutely void. Under this ruling, all that was required of the demandant to entitle himself to a verdict in his favor was to show a temporary insanity at the time of the execution of the deed. No matter what might have occurred subsequently, or how soon afterwards the demandant might have been restored to a sound mind; no matter what acts of confirmation may have been done by him, or however fully he may have adopted and ratified the transaction, by the receipt of money, or other valuable consideration paid for the land,—still the legal title in the land would be in him. This was the necessary result of the doctrine that the deed of a non compos was absolutely void, while, if it had been held only voidable, these subsequent acts of the party might materially affect the verdict of the jury. But adopting, as we do, the principle that the deed of an insane person is only voidable, this, while it gives the insane grantor full power and authority to avoid his deed, and thus furnishes full protection to him against all acts injurious to his interests, done while he was non compos, also entitles the other party to set up the deed, if he can show a ratification or adoption of it by the grantor, after he is restored to a sound mind. If the grantor when thus capable of acting, and with full knowledge of his previous acts, and of the nature and extent of them, will deliberately adopt and ratify them; if he will knowingly and in the exercise of his proper faculties, take the bene-

fit of a contract made while he was insane,—it is competent for him to do so. But the consequence will be, to give force, effect, and legal validity to his contract, which was before voidable.

In the present case, therefore, upon the point first relied upon in the defence, viz. that the demandant was insane when he executed the deed, the jury should have been instructed that this fact, if established, rendered the deed voidable, and that it was competent for the demandant to avoid it on that ground if not estopped by his subsequent acts, done while in his right mind; but that a voidable deed was capable of confirmation; and that if the grantor, in his lucid intervals, or after a general restoration to sanity, then being of sound mind and well knowing and understanding the nature of the contract, ratified it, adopted it as a valid contract, and participated in the benefits of it by receiving from the purchaser the purchase money due on the contract, this would give effect to the deed, and render the same valid in the hands of the grantee, and would thus become effectual to pass the lands, and divest the title of the grantor. Such instructions would have presented the question in issue in a different aspect to the jury, and might have led to a different result upon the only point upon which they passed.

Verdict set aside, and a new trial granted.

HOVEY v. HOBSON.

(53 Me. 451.)

Supreme Judicial Court of Maine. 1866.

A. Merrill, for plaintiff. H. P. Deane, for defendant.

APPLETON, C. J. On July 27, 1835, Stephen Neal, then owning the land in controversy, conveyed the same to Samuel E. Crocker, from whom the tenant by various mesne conveyances derives his title.

On Dec. 28, 1836, Stephen Neal died, leaving Lydia Dennett, then wife of Oliver Dennett, his sole heiress at law. On Dec. 18, 1851, Oliver Dennett died.

On July 15, 1858, Lydia Dennett conveyed the demanded premises to the plaintiff.

The plaintiff introduced evidence tending to show that Stephen Neal at the date of his deed to Crocker was insane, and claimed to avoid said deed by reason of such insanity.

After the testimony reported had been introduced, the presiding justice ruled "that, if Samuel E. Crocker without fraud, for an adequate consideration, purchased the land of Stephen Neal, and afterwards said Crocker and those claiming under him, conveyed said land in good faith until it came into the hands of the tenant, for a valuable consideration, without any knowledge on his part of any defect in the title, or of any right or claim of any other person therein, then Mrs. Dennett or those claiming under her could not avoid her father's deed as against the defendant, on the ground of his unsoundness of mind; and that the tenant would be entitled to a verdict."

If Crocker, "without fraud, for an adequate consideration, purchased the land of Stephen Neal," Neal being sane, his grantees would undoubtedly acquire a good title. The ruling is that, if insane, the same result would follow, the grantees of Crocker being bona fide purchasers, and ignorant of the insanity of Neal. The questions therefore arise, (1) as to the rights of an insane man when restored to sanity, or of his heirs to avoid, as against his immediate grantee, his deed executed and delivered when insane; and, (2) as to the rights of those deriving a title in good faith without notice, and for a valid consideration from such grantee.

1. The deed of an insane man not under guardianship is not void but voidable, and may be confirmed by him if afterwards sane, or by his heirs. If under guardianship, the deed is absolutely void. Wait v. Maxwell, 5 Pick. 219. The right of avoiding a contract exists, notwithstanding the person with whom the insane man contracted was not apprized of and had no reason to suspect the existence of such insanity, and did not overreach him by any fraud or deception. Seaver v. Phelps, 11 Pick. 304. So an infant may avoid his contract, though the person dealing with him supposed him of age (Van Winkle v. Ketcham, 3 Caines, 323); or even when he fraudulently and falsely represented himself of age (Conroe v. Birdsall, 1 Johns. Cas. 127). The deed of an insane man being voidable, he may ratify it after he becomes sane, or his heirs after his decease. Allis v. Billings, 6 Metc. (Mass.) 415. An insane person or his guardian may bring an action to recover land of which a deed was made by him while insane, without first restoring the consideration to the grantee, the deed not having since been ratified nor confirmed. Gibson v. Soper, 6 Gray, 279. In this case, the remark of Shaw, C. J., in Arnold v. Iron Works, 1 Gray, 434, that if "the unfortunate person of unsound mind, coming to the full possession of his mental faculties, desires to relieve himself from a conveyance made during his incapacity, he must first restore the price, if paid, or surrender the contract for it, if unpaid," is limited and restricted by Thomas, J., "to the case of a grantor having in his possession the notes which were the consideration of the deed and restored to the full possession of his mind." In the deed or other contract of an insane man the consenting mind is wanting. "To say that an insane man," observes Thomas, J., "before he can avoid a voidable deed, must first put the grantee in statu quo, would be to say, in effect, that, in a large majority of cases, his deed shall not be avoided at all. The more insane the grantor was when the bargain was made, the less likely will he be to retain the fruits of his bargain, so as to be able to make restitution. It would be absurd to annul the bargain for the mental incompetency of a party, and yet to require of him to retain and manage the proceeds of his sale so wisely and discreetly that they shall be forthcoming, when with restored intellect he shall seek its annulment." Lunatics and persons non compos are not bound by their contracts, though no fraud nor imposition has been practiced on them. Chew v. Bank, 14 Md. 318.

The ruling presupposes a sale without fraud and for an adequate consideration. That a grantor sold his land for a fair price, that the purchase money was fully secured, that in the transaction he evinced by his conduct a knowledge of the value of his property and capacity in its management, would go far to negative an utter incompetency to contract, inferable only from a loss of memory common to old age or from a disregard of the decencies or courtesies of life. So the conversion by a feeble old man past labor, of property unproductive and burdened by taxation, into notes well secured and bringing an annual income, would hardly be deemed proof of utter imbecility, if the price was equal to the fair market value of the property sold.

As the deed of an insane man is voidable only, it follows that it is capable of subsequent ratification by the grantor if he be restored to reason, or by his heirs. The reten-

tion of the notes after such restoration and the receiving payments on them, would be evidence of such ratification. In the analogous case of infancy, it seems that there may be an acquiescence by the grantor under such circumstances as would amount to an equitable estoppel. In Wallace's Lessee v. Lewis, 4 Har. 75, it was held, that an infant's acquiescence in a conveyance for four years after age and seeing the property extensively improved, would be a confirmation. Though mere lapse of time will not amount to a confirmation, unless continued for twenty years, yet in connection with other circumstances it may amount to a ratification. Cresinger v. Welch, 15 Ohio, 156; Wheaton v. East, 5 Yerg. 41. Whether, in the case before us, the deed of Stephen Neal has been affirmed by the reception, by those authorized, of the purchase money for the land, or the heir at law after the death of her husband or the passage of the laws in relation to married women is equitably estopped by her omission to act under circumstances which required action on her part, are questions which at this time are not pressing for consideration.

It is true the English courts adopt a somewhat different doctrine from that of the American courts as to the right of an insane man when sane, or of his heirs to avoid a deed or contract executed when insane. Thus, in Selby v. Jackson, 6 Beav. 200, Lord Langdale refused to set aside a deed executed in good faith by an insane man and for an adequate consideration, when the parties could not be reinstated. "There are," observes Tuck, J., in Chew v. Bank, 14 Md. 318, "many cases in England to show that such persons are held by their contracts unless fraud and imposition have been practiced, but to this we cannot assent. The doctrine in this country is the other way, and, as we think, is sustained by better reasoning than the English rule as announced in some of their decisions. The effect in many cases would be to place lunatics on the same footing with persons of sound mind, with less effective means to protect the injured party against the fraud, for at law, as well as in equity, fraud or imposition may be relied on, without reference to the mental capacity of the parties except so far as such defect may give weight to other facts, from which the fraud may be deduced."

The ruling, however, in the case at bar, is not in accordance with that of the English courts, which require that, in addition to good faith and a full consideration, the person contracting should be apparently of sound mind, and not known to be otherwise to the party with whom he contracts. Molton v. Camroux, 2 Exch. 487. These elements are not required by the ruling under consideration.

2. It is insisted, even if the deed of Neal might have been avoided as between the original grantor and grantee, that this right of avoidance ceases when the title has passed into the hands of third persons in good faith, for an adequate consideration, and ignorant of any facts tending to impeach such title.

It is apparent that the protection of the insane and the idiotic will be materially diminished, if the heirs cannot follow the property conveyed, but are limited in their right of avoidance to the immediate grantee of such insane or idiotic person.

The acts of lunatics and infants are treated as analogous, and subject to the same rules. Key v. Davis, 1 Md. 32; Hume v. Barton, 1 Ridg. Pl. 77. "The grants of infants and persons non compos are parallel both in law and reason." Thompson v. Leach, 3 Mod. 310.

The law is well settled that a minor when of age may avoid his deed given when an infant. He may do this not merely against his grantee, but he may follow the title wherever it may be found and recover his land. "It may be objected," observes Marshall, J., in Myers v. Sanders' heirs, 7 Dana, 524, "that these restrictions upon the right of an adult to avoid his deed obtained by fraud are inconsistent with the principle which allows an infant to avoid his deed, into whose hands soever the bill may have passed and without regard to time, except as a statutory bar running after he becomes of age. But, waiving the inquiry how far the mere acquiescence of an infant grantee after he becomes of age may determine his right of revoking his title from the hands of a purchaser for value, who has acquired it after such acquiescence, we think the analogy between the cases is too slight to have any decisive influence upon the present question. The right of an infant to avoid his deed is an absolute uncontrollable privilege, founded upon an incapacity conclusively fixed by the law to bind himself absolutely by deed or to pass an indefeasible title. These principles are irreversibly fixed by the law, and it enforces them without inquiring into particular circumstances, and without regard to consequences. It must do so in order to maintain them. The right of an adult grantor, to avoid his deed for fraud, stands upon an entirely different basis. It grows out of the particular circumstances; it is founded in a regard to justice between man and man; it is given as a remedy for the hardship of his case. In its very foundation and essence, it is limited by the justice which is due to others, and therefore cannot be exercised without a regard to their rights and interests."

"But again, infancy is not, like fraud, a circumstance wholly extraneous from the title. The deed shows who the grantee is; the purchaser knows that an infant grantee cannot pass an indefeasible title; he is bound to know the identity of the person, who assumes to convey the title; and it is not an unreasonable requisition that he shall know whether the grantee, under whom he claims title, is under incapacity or not. In this view of the subject, no purchaser under an infant's

deed is innocent in the eye of the law, until the title has been confirmed by the matured consent of the grantor." In Bool v. Mix, 17 Wend. 119, the suit was against one claiming by a title derived from the grantee of the minor, but the ground was not taken that in consequence thereof the tenant had an indefeasible title. The principles applicable to deeds voidable for the infancy of the grantor are equally applicable where the grantor is insane. When a man is defrauded, he may, as against his grantee, avoid his deed, but not against those deriving in good faith and for an adequate consideration a title from such grantee. He has the ability to convey an indefeasible title,—and he does convey such title to all bona fide purchasers from his grantee. The insane man has not the power to convey such indefeasible title. This incapacity inheres in all titles derived from him. The grantee, whose title is thus derived, must rely on the covenants of his deed. He risks the capacity to convey of all through whom his title has passed. The right of infants and of the insane alike to avoid their contracts is an absolute and paramount right, superior to all equities of other persons, and may be exercised against bona fide purchasers from the grantee. 1 Am. Lead. Cas. 259.

Exceptions sustained. The case to stand for trial.

CUTTING, WALTON, DICKERSON, DANFORTH and TAPLEY, JJ., concurred.

MUTUAL LIFE INS. CO. v. HUNT.

(79 N. Y. 541.)

Court of Appeals of New York. 1879.

Robert P. Harlow, for appellants. Winchester Britton, for respondent.

DANFORTH, J. The action is for the foreclosure of a bond and mortgage, dated April 23, 1870, and then executed by the defendant Hunt for the purpose of securing to the plaintiff the payment of $4,000 on the 1st of September, 1871. The complaint shows that interest was paid on the 1st of March, 1871, but default made in September following; that in December, 1871, the defendant Hunt was adjudged a lunatic, and Arnold H. Wagner appointed committee of her person and estate. He was made co-defendant with her; and in her behalf, and by way of defense, alleges "that at the time of the execution of the bond and mortgage she was a lunatic, and incapable of making or executing them." The issue thus presented was tried before a careful and experienced judge at special term and he found as a fact: "That at the time of the execution and delivery of the bond and mortgage, the said Camilla Hunt was of sound mind, and was capable of making and executing said bond and mortgage," and ordered judgment in accordance with the prayer of the complaint. The finding is well warranted by the evidence, and upon this ground alone we should be required to affirm the judgment.

But the learned court at general term went beyond it and for the purposes of the appeal assumed, without deciding the contrary of the finding to be the truth, yet held that as the case presented a contract executed upon a valuable consideration, of which the lunatic had the benefit, made by the plaintiff "in good faith, without fraud or unfairness, without knowledge of the insanity, and without notice or information calling for inquiry," the plaintiff was entitled to recover. The correctness of this conclusion is strenuously assailed by the learned counsel for the appellant, but both upon principle and authority we think it must be sustained. Upon principle because the plaintiff's money was had by the defendant, appropriated to her use, and thus tended to increase the body of her estate, and although in some cases a man may now, notwithstanding the old common-law maxim to the contrary (Beverly's Case, 2 Coke, 568, pt. 4, 123b), "be admitted to stultify himself" yet he cannot do so to the prejudice of others, for he would thus make his own misfortune an excuse for fraud, and against that the doctrine of the maxim stands unaffected by any exception. 1 Story, Eq. Jur. § 226. In this case the loan was made in the ordinary course of business; it was a fair and reasonable transaction; the defendant acted for herself, but with the aid of an attorney; if mental unsoundness existed it was not known to the plaintiff, and the parties cannot now be put in statu quo. The defendant was therefore properly held liable.

Very much in point and upon circumstances similar to those above stated was Molton v. Camroux, 2 Welsb. H. & G. 487; affirmed in error, 4 Welsb. H. & G. 17. Concerning it the chancellor, in Elliott v. Ince, 7 De Gex, M. & G. 487, says: "The principle of that case was very sound, viz.: that an executed contract, when parties have been dealing fairly and in ignorance of the lunacy, shall not afterward be set aside; that was a decision of necessity, and a contrary doctrine would render all ordinary dealings between man and man unsafe." And so it has been held, and like contracts enforced upon the same principle, in repeated instances, in the courts of this and other states. Loomis v. Spencer, 2 Paige, 153; Matter of Beckwith, 3 Hun, 443; Canfield v. Fairbanks, 63 Barb. 461; Bank v. Moore, 78 Pa. St. 407; Wilder v. Weakley, 34 Ind. 181; Matthiessen v. McMahon, 38 N. J. Law, 536; Behrens v. McKenzie, 23 Iowa, 333. These cases stand on the maxim, "that he who seeks equity must do equity," and it is applicable to the case in hand; for the defendant seeks to deprive the plaintiff of its remedies to enforce the security while she retains the benefit of the contract. This is so plainly inequitable and unjust as to render a further discussion unnecessary. Nor does the fact that the borrower was subsequently, upon inquisition taken, declared to be insane, alter the result. Such proceeding has no effect upon a contract made without such notice, and on the faith of the presumption that the person contracted with was of competent understanding.

The judgment should be affirmed.

All concur.

Judgment affirmed.

SEAVER v. PHELPS.

(11 Pick. 304.)

Supreme Judicial Court of Massachusetts. Hampden. Sept. Term, 1831.

Trover, to recover the value of a promissory note, pledged by the plaintiff to the defendant. The suit was brought on the ground that the plaintiff was in a state of insanity at the time when he made the pledge. At the trial in the common pleas, before Williams, J., the counsel for the defendant requested the judge to instruct the jury, that although they should believe the plaintiff was insane and incapable of understanding at the time of making the contract, yet that if the defendant was not apprized of that fact, or had no reason, from the conduct of the plaintiff or from any other source, to suspect it, and did not overreach or impose upon the plaintiff, or practise any fraud or unfairness, then the contract was not to be annulled. But the judge held this not to be law, and instructed the jury otherwise; and the jury returned a verdict for the plaintiff. To this opinion the defendant excepted.

Mr. Willard, in support of the exceptions. G. Bliss and G. Ashmun, opposed.

WILDE, J., delivered the opinion of the court. The general doctrine that the contracts, and other acts in pais, of idiots and insane persons, are not binding in law or equity, is not denied. Being bereft of reason and understanding, they are considered incapable of consenting to a contract, or of doing any other valid act. And although their contracts are not generally absolutely void, but only voidable, the law takes care effectually and fully to protect their interests; and will allow them to plead their disability in avoidance of their conveyances, purchases and contracts, as was settled in Mitchell v. Kingman, 5 Pick. 431. And such is probably the law in England at the present day, although the doctrine for a long time prevailed there, that no one should be allowed to plead his own incapacity and to stultify himself. These principles are not controverted by the defendant's counsel; but they maintain, that if the plaintiff was of unsound mind and incapable of understanding, at the time he pledged the note to the defendant, yet if the defendant was not apprized of that fact, or had no reason to suspect it from the plaintiff's conduct, or from any other source, and did not overreach him, or practise any fraud or unfairness, then that the contract of bailment was valid and binding, and could not be avoided in the present action. And they requested the court of common pleas so to instruct the jury. That court, however, were of opinion that the law was otherwise, and we all concur in the same opinion. If it had been only proved that the plaintiff was a person of weak understanding, the instructions requested would have been appropriate and proper. For every man after arriving at full age, whether wise or unwise, if he be compos mentis, has the capacity and power of contracting and disposing of his property, and his contracts and conveyances will be valid and binding, provided no undue advantage be taken of his imbecility.

It is sometimes difficult to determine what constitutes insanity, and to distinguish between that and great weakness of understanding. The boundary between them may be very narrow, and in fact often is, although the legal consequences and provisions attached to the one and the other respectively are widely different.

In the present case however this point is settled by the verdict, and no question is made respecting it. We are to consider the plaintiff as in a state of insanity at the time he pledged his note to the defendant; and this being admitted, we think it cannot avail him, as a legal defence, to show that he was ignorant of the fact, and practised no imposition. The fairness of the defendant's conduct cannot supply the plaintiff's want of capacity.

The defendant's counsel rely principally on a distinction between contracts executed, and those which are executory. But if this distinction were material, we do not perceive how it is made to appear that the contract of bailment is an executed contract, for if the note was pledged to secure the performance of an executory contract, and was part of the same transaction, it would rather be considered an executory contract. But we do not consider the distinction at all material. It is well settled that the conveyances of a non compos are voidable, and may be avoided by the writ dum fuit non compos mentis, or by entry.

The case of Bagster v. Earl of Portsmouth, 5 Barn. & C. 172, but more fully reported in 7 Dowl. & R. 614, has been relied on as countenancing the distinction contended for, and to show its bearing on the point in question; and it is true that some of the remarks which fell from the court in giving their opinion, may be thought to have some bearing in this respect. But the point decided, and the grounds of the decision, not only fail to support the defence in this action, but may be considered as an authority in favor of the plaintiff. That was an action of assumpsit for the use of certain carriages hired by the defendant, he being at the time of unsound mind, and judgment was rendered for the plaintiff, on the ground that no imposition had been practised on his part; and particularly because the carriages furnished appeared to be suitable to the condition and degree of the defendant, considering the contracts of a non compos on the same footing as those of an infant; and the court say in Thompson v. Leach, 3 Mod. 310, "that the grants of infants, and of persons non compos, are parallel both in law and reason." Now no one would, we apprehend, undertake to maintain that the plaintiff would have been bound, if he had been a minor when he pledged the

note. It does not appear to have been pledged for necessaries; and all contracts of infants are either void or voidable, unless made for education or necessaries suitable to their degree and condition. And even if the note had been pledged as security for the payment of necessaries, it would not have been binding if the plaintiff had been an infant. For a pledge is in the nature of a penalty, and may be forfeited, and can be of no advantage to the infant, and therefore shall not bind him.

If then idiots and insane persons are liable on their contracts for necessaries, they are certainly entitled to as much protection as infants. It matters not, however, how this may be, since the contract in question is not one for necessaries.

In the case of Browne v. Joddrell, 1 Moody & M. 105, Lord Tenterden expressed an opinion, that in assumpsit for goods sold and delivered and for work and labor, it would be no defence that the defendant was of unsound mind, unless the plaintiff knew of, or in any way took advantage of his incapacity, to impose on him. This, however, was an opinion expressed at nisi prius, and whether the opinion was followed up to the final decision of the cause or not, does not appear. But however this may be, the opinion is founded on the old rule, somewhat qualified, that no one can be allowed to plead his own disability or incapacity, in avoidance of his contracts. This rule having been wholly exploded in this commonwealth, Lord Tenterden's opinion can have no weight here, unless some good reason could be shown for overruling the case of Mitchell v. Kingman; which we think cannot be done.

We are aware that insanity is sometimes hard to detect, and that persons dealing with the insane may be subjected to loss and difficulty; but so they may be by dealing with minors. The danger, however, cannot be great, and seems to furnish no sufficient cause for modifying the rules of law in relation to insane people, if we had any power and authority so to do; which we have not.

Judgment of court of common pleas affirmed.

SAWYER v. LUFKIN.

(56 Me. 308.)

Supreme Judicial Court of Maine. Hancock. 1868.

The following is the official report:

Assumpsit on an account annexed, for "labor in taking care" of the defendant "144 weeks, to March, 1859, at $1.50 per week," with certain credits.

On the part of the plaintiff it appeared that the defendant was insane, and entirely incapable of taking care of herself; that her family consisted of herself and two minor sons; that in May, 1856, at the request of one of the sons, who was then about eighteen years of age, the plaintiff went to the defendant's house, and nursed and took care of her; that she found her in a very filthy condition as to clothing, etc.; that the defendant was violent at times, and needed much care; that the guardian came to the defendant's house but two or three times during the whole time the plaintiff was there, and exercised no control and furnished nothing; that the plaintiff continued there during the time mentioned in the writ; and that the defendant's sons were absent most of the time.

Thomas S. Fuller appeared as guardian of the defendant, duly appointed prior to the time the plaintiff's services were rendered, established his guardianship, contested the plaintiff's claim, and offered testimony tending to prove that the guardian contracted with the defendant's sons to take care of and support their mother, that in consideration thereof they were to be paid out of her property, and that the items of credit were received from the sons. If the action was maintainable, the action was to stand for trial.

Mr. Knowles, for plaintiff.

C. J. Abbott, for defendant.

There is no conflict between sections 7 and 22, c. 67, Rev. St.; the former includes those under as well as those over twenty-one years of age.

They have different objects; the former renders void all contracts and transfers of property made during the pendency of an application for the appointment of a guardian; the other declares all contracts and transfers of property made by persons over twenty-one years of age and under guardianship to be unqualifiedly and absolutely void, notwithstanding the death, resignation, or removal of the guardian.

APPLETON, C. J. This is an action for necessaries furnished the defendant, an insane person, over twenty-one years of age, and under guardianship. The guardian appears and contests the plaintiff's claim.

If necessaries are furnished a person in this condition in good faith and under circumstances justifying their being so furnished, the person furnishing may recover. If the law were not so, the insane might perish, if a guardian, having means, should neglect or refuse to furnish the supplies needed for their support. They stand in the same position as minors, and are liable for necessaries. Seaver v. Phelps, 11 Pick. 304; Leach v. Marsh, 47 Me. 548. Such is the rule of the common law.

Nor is this limited liability changed by Rev. St. 1857, c. 67, § 22, which provides that "when a person over twenty years of age is under guardianship, he shall be deemed incapable of disposing of his property otherwise than by his last will, or of making any contract, notwithstanding the death, resignation or removal of the guardian," etc. This prohibits all express contracts by the insane. They cannot be liable on any express promise. But their estate may be held when the law implies one. The insane must not be allowed to starve, though the guardian is dead, has resigned or been removed. The estate of the insane is legally, as well as equitably, liable for necessaries furnished in good faith, and under circumstances justifying their being so furnished. McCrillis v. Bartlett, 8 N. H. 569; 1 Pars. Cont. 313 et seq. The case to stand for trial.

KENT, WALTON, BARROWS, and DANFORTH, JJ., concurred.

BARRETT v. BUXTON.

(2 Aik. 167.)

Supreme Court of Vermont. Rutland. Jan., 1826.

Assumpsit, on a promissory note, for the sum of one thousand dollars and the interest. Plea, the general issue.

The case was, the plaintiff and defendant had entered into a written contract for an exchange of certain real estate, and the note was given on that occasion, by the defendant to the plaintiff, for the difference money agreed to be paid, between the two parcels of real estate. The plaintiff afterwards executed a deed on his part, according to the contract, and tendered it to the defendant. The defendant refused to accept the deed, or pay the note.

These facts being proved on the trial of the issue, the defendant offered testimony tending to prove, that at the time of executing the said contract and note, and of making the bargain therein specified, he was drunk, and thereby incapacitated to judge of the nature or consequences of said bargain. But the plaintiff objecting, the court refused to admit said testimony, unless the same could be accompanied with testimony, tending to prove that the said drunkenness was procured by or at the instigation of the plaintiff. To which decision the defendant excepted.

The defendant also offered testimony tending to prove, that the farm which he had agreed to convey to the plaintiff, at the time of giving said note, was actually worth as much, or more than the premises which the plaintiff had agreed to convey to the defendant in exchange. This testimony, being objected to, the court refused to receive; and to this decision also, the defendant excepted.

A verdict was returned for the plaintiff; and the defendant now moved that the same be set aside, and for a new trial, for the reasons apparent in the exceptions aforesaid.

The counsel for the defendant, in support of the motion, relied on a recent decision of *168 this court in Addison county. They *also cited 1 Chitty's Pl. 470, 479.—3 Campb. 33, Pitt vs. Smith.—Bull. N. P. 172.

For the plaintiff, it was contended, that drunkenness will not relieve a man, for it is a great offence and aggravates the act done, and is no excuse for him, unless it was procured by the contrivance or management of the man who received the deed, or made the contract with him.

To avoid any contract made, or deed given by the party when drunk, would be taking advantage of his own wrong; which no man is permitted to do.—2 Co. Rep. 568, Beverley's case.—1 Mad. Chancery. 238.—1 Fonblanque 60. —3 Campb. Rep. 35.—4 Mass. 161, Churchhill vs. Suter.

Chauncey Langdon and Chs. K. Williams, for plaintiff.

Wm. Page and R. B. Bates, for defendant.

The opinion of the Court was pronounced by

PRENTISS, J. This is an action upon a promissory note, executed by the defendant to the plaintiff for the sum of $1000, being the difference agreed to be paid the plaintiff on a contract for the exchange of lands. The agreement of exchange was in writing, and the plaintiff afterwards tendered to the defendant a deed, in performance of his part of the agreement, which the defendant refused. The defendant offered evidence to prove, that at the time of executing the note and agreement, he was intoxicated, and thereby incapable of judging of the nature and consequences of the bargain. The court refused to admit the evidence, without proof that the intoxication was procured by the plaintiff. The question is, whether the evidence was admissible as a defence to the action, or, in other words, whether the defendant could be allowed to set up his intoxication to avoid the contract.

This question has been already substantially decided by the court on the present circuit; but the importance of the question, and the magnitude of the demand in this case, have led us to give it further consideration. According to Beverley's case, 4 Co. 123, a party cannot set up intoxication in avoidance of his contract under any circumstances. Although Lord Coke admits, that a drunkard, for the time of his drunkenness, is *non compos mentis*, yet he says, "his drunkenness shall not extenuate his act or offence, but doth aggravate his offence, and doth not derogate from his act, as well touching his life, lands, and goods, as any thing that concerns him." He makes no distinction between criminal and civil cases, nor intimates any qualification of his doctrine, on the ground of the drunkenness being procured by the contrivance of another who would profit by it. His doctrine is general, and without any qualification whatever; and connected with it, he holds, that a party shall not be allowed to stultify himself, or disable himself, on the ground of idiocy or lunacy. The latter proposition is supported, it is true, by two or three cases in the year books, during the reigns of Edward 3 and Henry 6; by Littleton, s. 405, who lived in the time of Hen. 6; and by Stroud vs. Marshall, Cro. Eliz. 398, and Cross vs. Andrews, Cro. Eliz. 622. Sir William Blackstone, however, *who traces the progress of this no- *169 tion, as he calls it, considers it contrary to reason, and shows that such was not the ancient common law. The Register, it appears, contains a writ for the alienor himself, to recover lands aliened by him during his insanity; and Britton states, that insanity is a sufficient plea for a man to avoid his own bond. Fitzherbert also contends, "that it stands with reason that a man should show how he was visited by the act of God with infirmity, by which he lost his memory and discretion for a time." Blackstone considers the rule as having been handed down from the loose cases in the times of Edw. 3, and Hen. 6, founded upon the absurd reasoning, that a man cannot know, in his sanity, what he did when he was *non compos mentis;* and he says, later opinions, feeling the inconvenience of the rule, have, in many points, endeavoured to restrain it. (2 Blac. Com. 291.) In Thompson vs. Leach, 3 Mod. 301, it was held, that the deed of a man *non compos mentis*, was not merely voidable, but was void *ab initio*, for want of capacity to bind himself or his property. In Yates vs. Boen, 2 Stra. 1104, the defendant pleaded *non est factum* to debt on articles, and upon the trial, offered to give lunacy in evidence. The chief justice at first thought it ought not to be admitted, upon the rule in Beverley's case, that a man shall not stultify himself; but on the authority of Smith vs. Can, in 1728, where Chief Baron Pengelley, in a like case admitted it; and on considering the case of Thompson vs. Leach, the chief justice suffered it to be given in evidence, and the plaintiff became nonsuit. The most approved elementary writers and compilers of the law refer to this case, and lay it down as settled law, that lunacy may be given in evidence, on the plea of *non est factum*, by the party himself; and it is said to have been so ruled by Lord

Mansfield, in Chamberlain of London vs. Evans, mentioned in note to 1 Chit. Pl. 470. In this country, it has been decided in several instances, that a party may take advantage of his own disability, and avoid his contract, by showing that he was insane and incapable of contracting. (Rice vs. Peet, 15 Johns. Rep. 503.—Webster vs. Woodford, 3 Day's Rep. 90.) These decisions are founded in the law of nature and of justice, and go upon the plain and true ground, that the contract of a party *non compos mentis* is absolutely void, and not binding upon him. The rule in Beverley's case, as to lunacy, therefore, is not only opposed to the ancient common law, and numerous authorities of great weight, but to the principles of natural right and justice, and cannot be recognized as law; and it is apprehended, that the case is as little to be regarded, as authority in respect to intoxication, which rests essentially upon the same principle.

It is laid down in Buller's N. P. 172, and appears to have been decided by Lord Holt, in Cole vs. Robins, there cited, that the defendant may give in evidence under the plea of *non est factum* to a bond, that he was made to sign it when he was so drunk that he did not know what he did. And in Pitt vs. Smith, 3 Campb. Cas. 33, where an objection was made to *170 an attesting *witness being asked whether the defendant was not in a complete state of intoxication when he executed the agreement, Lord Ellenborough says, "you have alleged that there was an agreement between the parties; but there was no agreement, if the defendant was intoxicated in the manner supposed. He had not an agreeing mind. Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, and of *non assumpsit* to a promise." Chitty, Selwyn, and Phillips lay down the same doctrine and Judge Swift in his digest says, that an agreement, signed by a man in a complete state of intoxication, is void. (1 Chit. Pl. 470.—Selw. N. P. 563.—1 Phil. Ev. 128.—1 Swift's Dig. 173.) In these various authorities, it is laid down generally, and without any qualification, that drunkenness is a defence, and no intimation is made of any distinction, founded on the intoxication being procured by the party claiming the benefit of the contract. It is true, that in Johnson vs. Medlicott, 3 P. Wms. 130, that circumstance was considered essential to entitle the party to relief in equity against his contract. Sir Joseph Jekyl held, that the having been in drink was not any reason to relieve a man against his deed or agreement, unless the party was drawn into drink by the management or contrivance of him who gained the deed. But from what is said in 1 Fonb. Eq. 68, it would not seem that the author considered this circumstance as indispensable. He says, equity will relieve, especially if the drunkenness were caused by the fraud or contrivance of the other party, and he is so excessively drunk, that he is utterly deprived of the use of his reason or understanding; for it can by no means be a serious and deliberate consent; and without this, no contract can be binding by the law of nature. In Spiers vs. Higgins, decided at the Rolls in 1814, and cited in 1 Mad. Ch. 304, a bill filed for a specifick performance of an agreement, which was entered into with the defendant when drunk, was dismissed with costs, although the plaintiff did not contribute to make the defendant drunk.

On principle, it would seem impossible to maintain, that a contract entered into by a party when in a state of complete intoxication, and deprived of the use of his reason, is binding upon him, whether he was drawn into that situation by the contrivance of the other party or not. It is an elementary principle of law, that it is of the essence of every contract, that the party to be bound should consent to whatever is stipulated, otherwise no obligation is imposed upon him. If he has not the command of his reason, he has not the power to give his assent, and is incapable of entering into a contract to bind himself. Accordingly Pothier holds, (vol. 1. c. 1, a. 4, s. 1.) that ebriety, when it is such as to take away the use of reason, renders the person who is in that condition, while it continues, unable to contract, since it renders him incapable of assent. And it seems Heineccius and Puffendorf both consider contracts entered into under such circumstances, as invalid. By the Scotch law, also, an obligation granted by a person while he is in a state of abso*lute and total drunkenness, *171 is ineffectual, because the grantor is incapable of consent; but a lesser degree of drunkenness, which only darkens reason, is not sufficient. (Ersk. Inst. 447.) The author of the late excellent treatise on the principles and practice of the court of chancery, after reviewing the various cases in equity on the subject, and citing the Scotch law with approbation, observes, "the distinction thus taken seems reasonable; for it never can be said that a person absolutely drunk, has that freedom of mind, generally esteemed necessary to a deliberate consent to a contract; the reasoning faculty is for a time deposed. At law it has been held, that upon *non est factum* the defendant may give in evidence, that they made him sign the bond when he was so drunk that he did not know what he did. So a will made by a drunken man is invalid. And will a court of equity be less indulgent to human frailty? It seems to be a fraud to make a contract with a man who is so drunk as to be incapable of deliberation." (1 Mad. Ch. 302.) Mr. Maddock seems to consider it as settled, that at law, complete intoxication is a defence, and that it ought to be a sufficient ground for relief in equity; and, indeed, it would seem difficult to come to a different conclusion. As it respects crimes and torts, sound policy forbids that intoxication should be an excuse; for if it were, under actual or feigned intoxication, the most atrocious crimes and injuries might be committed with impunity. But in questions of mere civil concern, arising *ex contractu*, and affecting the rights of property merely, policy does not require that any one should derive an unjust profit from a bargain made with a person in a state of intoxication, although brought upon himself by his own fault, or that he should be a prey to the arts and circumvention of others, and be ruined, or even embarrassed, by a bargain, when thus deprived of his reason. It is a violation of moral duty, to take advantage of a man in that defenceless situation, and draw him into a contract; and if the intoxication is such as to deprive him of the use of his reason, it cannot be very material, whether it was procured by the other party, or was purely voluntary. The former circumstance would only stamp the transaction with deeper turpitude, and make it a more aggravated fraud. The evidence which was offered and rejected at the trial in the case before us, went not only to show that the defendant was so intoxicated at the time of giving the note, as to be incapable of the exercise of his understanding, but that the contract was grossly unequal and unreasonable; and, both on principle and authority, we think the evidence was admissible, and that a new trial must be granted.

New trial granted.

MARTIN v. DWELLY et al.[1]

(6 Wend. 9.)

Court for the Correction of Errors of New York. Dec., 1830.

J. Crary, for appellant. S. Stevens and D. Russell, for respondents.

SUTHERLAND, J. The general question presented by this case is, whether a deed of a feme covert, not executed and acknowledged according to the provisions of the statute (1 R. L. 369), and therefore void and inoperative at law, is to be considered and treated in a court of equity as a valid agreement to convey, the specific performance of which will be decreed as against the feme covert or her heirs.

By the common law a feme covert could not by uniting with her husband in any deed or conveyance, bar herself or her heirs of any estate of which she was seised in her own right, or of her right of dower in the real estate of her husband. This disability is supposed to be founded in the principle that the separate legal existence of the wife is suspended during the marriage, and is strengthened by the consideration that from the nature of the connection, there is danger that the influence of the husband may be improperly exerted, for the purpose of forcing the wife to part with her rights in his favor. The law therefore considers any such deed or conveyance as the act of the husband only, although the wife may have united in it, and restrained its operation to the husband's interest in the premises, and gives to it the same effect as though he alone had executed the conveyance.

The only mode in which a feme covert could at common law convey her real estate, was by uniting with her husband in levying a fine. This is a solemn proceeding of record, in the face of the court, and the judges are supposed to watch over and protect the rights of the wife, and to ascertain by a private examination that her participation in the act is voluntary and unconstrained. This is the principle upon which the efficacy of a fine is put by most of the authorities. 3 Cruise, Dig. 153, tit. 35, c. 10; 2 Inst. 515; 1 Vent. 121a. But whatever may be the foundation of the doctrine, it is now fully established.

Our statute declares that no estate of a feme covert residing in this state shall pass by her deed, without a previous acknowledgment made by her before a proper officer apart from her husband, that she executed such deed freely without fear or compulsion of her husband. 1 R. L. 369. This provision, it will be observed, is an enlargement and not a restraint of the common law powers of a feme covert. It authorizes a less formal mode of conveyance than was known to the common law. It gives to her deed, when duly acknowledged, the same power and effect as a fine; but if not acknowledged according to the directions of the statute, it declares that no estate shall pass by it. It leaves it as it would have stood at the common law, if the statute had never been passed, absolutely void and inoperative.

It was conceded that such must be the consequence at law; but it was contended that a court of equity would consider it as an agreement to convey, and if it was shown to have been voluntarily made for a valuable consideration, would compel the wife or her heirs specifically to perform it. This doctrine appears to me to be unsound in principle and unsupported by any color of authority. A feme covert, by the principles of the common law, is not only incapable of conveying her real estate by deed, but she cannot, as a general rule make a valid contract of any description in relation either to real or personal property. This disability results from the nature of the matrimonial connection. In contemplation of law, the wife is hardly considered as having a separate legal existence. She and her husband constitute but one person. She cannot bind either her husband or herself by any contract. She may execute a naked power, and as to her separate estate, that is, such estate, either real or personal, as is settled on her for her separate use, without any control over it on the part of her husband, a court of chancery for certain purposes will consider her a feme sole, and her contracts in relation to it may be binding (5 Day, 496; 2 Kent, Comm. 137–141; 1 Johns. Cas. 450; 3 Johns. 77; 17 Johns. 548); but her own lands, or her right of dower in the lands of her husband are not her separate estate, within the meaning of this rule. It certainly will not be contended that the conveyance in this case can have any greater effect than an express covenant on the part of the husband and wife to convey; and I apprehend that an examination of the cases will show that such a covenant made during coverture would be absolutely void against the wife and her heirs, both at law and in equity. The greatest extent to which the English courts have ever gone, is to hold that an action would lie against a wife after the death of her husband, upon a covenant of warranty contained in a fine, executed by her and her husband, though she was a feme covert when it was levied. This was held in the case of Wotton v. Hele, 2 Saund. 178, and 1 Mod. 290. It was also held in some of the earlier cases, that if baron and feme joined in a lease for years by indenture of the wife's land, and she accepted rent after his death, she was liable to the covenants in the lease. Greenwood v. Tyber, Cro. Jac. 563, 564; 2 Saund. 180, note 9. The acceptance of the rent is a confirmation of the lease, and may be considered equivalent to a new execution

[1] Irrelevant parts omitted.

and delivery, though the wife was at liberty, after her husband's death, to avoid or affirm it if she had chosen.

The doctrine that a wife is bound by her covenant of warranty, entered into during coverture, is considered by Chancellor Kent (2 Kent, Comm. 140) as at war with the established principle of the common law; that she is incapable of binding herself by any contract; and a contrary doctrine has been expressly held, both in this state and in Massachusetts (Fowler v. Shearer, 7 Mass. 21; Colcord v. Swan, 7 Mass. 291). In these cases it was observed, that although the deed of a married woman is ipso facto void by the common law of England, yet by the immemorial usage of Massachusetts it would pass her estate, and she would be estopped by her covenants, though no action would lie against her for a breach of them. But the supreme court of this state, in Jackson v. Vanderheyden, 17 Johns. 167, went still further, and held that a feme covert not only was not liable to an action on the covenants contained in a deed executed and acknowledged according to the statute, by her and her husband, but that she was not estopped by her covenant from setting up any outstanding title to the premises, or any other defence. Chief Justice Spencer, in delivering the opinion of the court, observed, that it was a settled principle of the common law, that coverture disqualifies a feme covert from entering into a contract or covenant personally binding upon her. She may at common law pass her real property by a fine duly levied; and under our own statute, she may also in conjunction with her husband, on due examination before a competent officer, convey her real estate; but such deed cannot operate as an estoppel to her subsequently acquired interest in the same land.

There is a class of cases in which, where the husband had expressly covenanted that his wife should join in a fine of her real estate, he has been decreed specifically to perform his covenant, or to suffer imprisonment by way of penalty. Griffin v. Taylor, Toth. 106; Barrington v. Horn, 2 Eq. Cas. Abr. 17, pl. 7; Hall v. Hardy, 3 P. Wms. 187; Morris v. Stephenson, 7 Ves. 474; Withers v. Pinchard, cited in Morris v. Stephenson. In most of those cases, however, it did not appear that the wife had refused to unite in the fine; and the only reason on which the decisions are put, is, that it is to be presumed she was consulted by her husband before he entered into the covenant, and gave her assent to it. Lord Cowper, however, questioned this doctrine in Outread v. Round, 4 Viner, Abr. 203, pl. 4, cited in 1 Fonbl. 293, note 7, as did the master of the rolls in Daniels v. Adams, Ambl. 495. Its soundness was also denied by Chief Baron Gilbert, in his Lex Prætoria, 245, and most pointedly by Lord Eldon, in Emery v. Wade, 8 Ves. 514, and in Martin v. Mitchell, 2 Jac. & W. 425. It was conceded by the counsel and by Sir Thomas Plumer, the master of the rolls, that such was not the law at this day. The same opinion had been previously expressed by the same learned judge, in Howell v. George, 1 Madd. Ch. 16.

The case of Baker v. Childs, 2 Vern. 61, is the only one which I have been able to find which contains the slightest intimation that a feme will be decreed specifically to execute an agreement made by her during coverture. The whole report of that case is this: "Where a feme covert, by agreement made with her husband, is to surrender or levy a fine, though the husband die before it be done, the court will by decree compel the woman to perform the agreement." No facts or circumstances are stated. Whether it was an ante-nuptial agreement between the husband and wife, or an agreement made by them with some third person, it is difficult to discover. It is altogether too loose and bald a case to be entitled to any consideration; and it is said of that case, in 1 Eq. Cas. Abr. 62, pl. 2, that upon looking into the register's minutes, it appeared that the court made no decree in it; but it was, by consent referred to Mr. Serjt. Rawlinson for his arbitration. It is in no point of view, therefore, an authority. The case of Roupe v. Atkinson, Bunb. 163, cited by the counsel for the appellants, was this: A lease for a term of years was assigned to the trustees before marriage, in trust that they should make leases for the benefit of the husband and wife. After marriage, the husband and wife assigned the lease to one Sparke for a valuable consideration. After the death of the husband, the widow brought her bill against Sparke, to be levied against this assignment made during coverture, on the ground that no fine had been levied. It was held that the assignment by the cestuis que trust was in the nature of an appointment, and should bind him in equity as much as if it had been made by the trustees by their direction. It bears no analogy to this case. The anonymous case in Moseley, 248, is equally inapplicable. An estate was purchased in trust for the husband and wife and their heirs, and the husband and wife joined in a mortgage to the vendor to secure a part of the purchase money. The mortgagee brought a bill of foreclosure, and the husband and wife put in a joint answer, in which it is to be inferred no objection was taken to the mortgage on account of the coverture of the wife. The husband died pending the suit, and the wife then moved for leave to amend her answer, in order to set up the defence that no fine had been levied. The lord chancellor refused the motion, with the single observation, that though the mortgage was insufficient at law, he should consider the answer that had been put in as equal to a fine. Penne v. Peacock, Cas. t. Talb. 41, was a case of a mortgage given by the husband to the plaintiff upon the

lands of his wife, which had been conveyed by her to trustees, with his privity, before the marriage, in trust to pay the rents and profits to her separate use for her life. After the mortgage given, the husband and wife levied a fine of the mortgaged premises, and both declared the uses of the fine to be to the plaintiff, for securing the principal and interest of the mortgage. The wife insisted in her answer that she had joined in the fine by duress of her husband, and that she had no estate in the premises upon which a fine could operate. The suggestions of duress and fraud were not sustained by the proofs, and it was held as an established doctrine, that the operation of a fine is the same upon trust as upon legal estates. That case also is entirely inapplicable to this.

The precise question, however, involved in this case has arisen in a sister state, and been very ably discussed both by the counsel and the court. I allude to the case of Butler v. Buckingham, 5 Conn. 492. It was there held that an agreement by a feme covert, with the assent of her husband, for the sale of her real estate, was absolutely void at law, and could not be enforced against her in a court of equity. The defendant in that case, Mrs. Buckingham, as the widow of her former husband Joseph Bryan, had a right of dower in a particular lot of land of which he died seised. She subsequently married Gideon Buckingham, and she and her husband, in January, 1793, agreed to sell all her interest in the premises to the plaintiffs Butier and Atwater, and joined in a penal bond to them; the condition of which was, that if she should quit-claim all her right of dower in the premises to the obligees, then the bond should be void. The petition (which was in the nature of a bill in chancery) stated that the petitioners immediately entered into the possession of said land, and from that time to the date of the petition, a period of more than 20 years, had had peaceable and uninterrupted possession of the same; that they had made valuable improvements thereon, with the knowledge of the defendant and her husband, in full confidence that they would perform their agreement; that Gideon Buckingham, the husband of the defendant, died in 1810; and that she, upon regular and repeated applications, had refused to quit-claim her right of dower, and had recently commenced an action at law to recover the same from the plaintiffs. The petition prayed for a perpetual injunction, or that the defendant should be decreed to convey her right of dower in the premises. Upon a demurrer to this petition, it was held by the nine judges sitting as a court of errors, that the petitioners were entitled to no relief. It was observed by the court that the whole system of the common law was opposed to the doctrine on which the petition was founded; that it was a fundamental principle of the common law that the contract of a feme covert is absolutely void, except where she conveys her estate by fine duly acknowledged, or by some matter of record, when she is privately examined in order to ascertain whether such conveyance is voluntary on her part; and it is pertinently said, How absurd then would it be to enforce such a contract to convey, made without such examination? It would be saying that a feme covert cannot directly convey her real estate, unless she be privately examined; and yet she can contract to convey without such examination, and such contract will be enforced against her. By this mode, the established law in relation to a feme covert and her real estate will be completely subverted.

A feme covert, in relation to her separate property, that is, property settled to her separate use by deed or will, with a power of appointment, and rendered subject to her exclusive control, and also with respect to property which she holds as trustee without any beneficial interest in her own right, is considered as a feme sole, and her contracts in relation to those subjects may be valid, and a court of equity may interfere to enforce them. As to all other matters, they are absolutely void, and it is no less a moral than a legal absurdity, to say that a court of equity will enforce a void contract; it is a mere nullity; there is nothing to be carried into execution. The deed of a feme covert, not acknowledged according to the statute, forms no consideration for a promise to pay the purchase money; a note given under such circumstances is a nudum pactum and void as between the parties. This was expressly adjudged by the supreme court of Massachusetts, in Fowler v. Shearer, 7 Mass. 14, and must be so upon every principle applicable to contracts. If an absolute sale consummated by a deed is void, unless such deed is acknowledged in the mode prescribed by the statute, it is impossible that a contract to sell and convey at some future time should be valid.

The language of the master of the rolls, Sir Thomas Plumer, in Martin v. Mitchell, 2 Jac. & W. 424, upon the general principle applicable to the contracts of married women, is very strong and explicit. He says: "The acts of a married woman with respect to her estate are perfectly void. She has no disposing power, though she may have a disposing mind. An agreement signed by her with her husband cannot affect her estate, and cannot give the party a right to call upon her in a court of equity to execute a conveyance, to bar her if she survives, and to bind her inheritance. If an agreement is signed by a person competent to contract, and is for a valuable consideration, but defective in form, there is a remedy in equity; for you have a valid contract to stand upon. But with a married woman there can be no binding contract. The instrument is not good as an agreement; then how can it be said to bind her?" The same language substantially is used by the court in the case of Wright v.

Buller, 2 Ves. Jr. 676, and is to be found in all the elementary treatises upon the subject. The cases of Jackson v. Stevens, 16 Johns. 114; Jackson v. Cairns, 20 Johns. 303; and Doe ex dem. Depeyster v. Howland, 8 Cow. 277,—show very conclusively the opinion which has always been entertained in our courts of the absolute nullity of a conveyance or contract made by a married woman in relation to her real estate. In the first case Judge Spencer observed, that the conveyance, although signed and sealed by the wife, was not her deed until she had acknowledged it according to the statute. It could not bind her as a contract. She was not confirming an inchoate and imperfect agreement. The deed took its efficacy from the period of her acknowledgment. There was nothing prior, to which it could relate. The other cases are equally strong to the same point. Vide, also, 7 Johns. 81. The bill is not framed with a view to the refunding of the purchase money paid by the appellant for the premises in question. It seeks distinctly a specific execution of the agreement, or a perpetual injunction of any suit at law. Whether the representatives of Abner Dwelly could be compelled to refund, it is not now necessary to consider.

I am in favor of affirming the decree, with costs.

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GREGORY v. PIERCE.

(4 Metc. 478.)

Supreme Judicial Court of Massachusetts. 1842.

Assumpsit on a promissory note, signed by the defendant in the presence of an attesting witness, dated October 6th, 1825, and payable to Putnam & Gregory, partners, of whom the plaintiff is survivor.

The case was submitted to the court of common pleas, on an agreed statement of facts, as follows: "The defendant was married to Varney Pierce, Jr., in 1806, who, in 1816, became insolvent, and left her and went out of the commonwealth, and did not return till 1818, when he came back and remained with her about a week. He then left her and went to Ohio, where he remained till his death in 1832. He made no provision for the support of his wife and family, after he left her in 1816; but she supported herself and family, after he left her, by her own labor, contracting debts and making contracts in her own name. Putnam & Gregory employed her to do work for them, and supplied her with necessaries for the support of herself and family; and the note in suit was given for the balance of account between the parties."

The court of common pleas rendered judgment for the plaintiff, and the defendant appealed to this court.

Wells & Davis, for plaintiff. Mr. Brooks, for defendant.

SHAW, C. J. The principle is now to be considered as established in this state, as a necessary exception to the rule of the common law, placing a married woman under disability to contract or maintain a suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name, as a feme sole. It is an application of an old rule of the common law, which took away the disability of coverture when the husband was exiled or had abjured the realm. Gregory v. Paul, 15 Mass. 31; Abbot v. Bayley, 6 Pick. 89. In the latter case, it was held, that in this respect, the residence of the husband in another state of these United States, was equivalent to a residence in any foreign state; he being equally beyond the operation of the laws of the commonwealth, and the jurisdiction of its courts.

But, to accomplish this change in the civil relations of the wife, the desertion by the husband, must be absolute and complete; it must be a voluntary separation from and abandonment of the wife, embracing both the fact and intent of the husband to renounce de facto, and as far as he can do it, the marital relation, and leave his wife to act as a feme sole. Such is the renunciation, coupled with a continued absence in a foreign state or country, which is held to operate like an abjuration of the realm.

In the present case, the court are of opinion, that the circumstances stated are not sufficient to enable the court to determine whether the husband had so deserted his wife, when the note in question was given. The only facts stated are, that he was insolvent when he went away; that he was absent, residing seven or eight years in Ohio; that he made no provision for his wife and her family, after 1816; and that she supported herself and them by her own labor. But it does not appear that he was of ability to provide for her; that he was not in correspondence with her; that he declared any intention to desert her, when he left, or manifested any such intention afterwards; or that he was not necessarily detained by sickness, imprisonment or poverty.

The fact of desertion by a husband may be proved by a great variety of circumstances leading with more or less probability to that conclusion; as, for instance, leaving his wife, with a declared intention never to return; marrying another woman or otherwise living in adultery, abroad; absence for a long time, not being necessarily detained by his occupation or business, or otherwise; making no provision for his wife, or wife and family, being of ability to do so; providing no dwelling or home for her, or prohibiting her from following him; and many other circumstances tending to prove the absolute desertion before described. The general rule being that a married woman cannot make a contract or be sued, the burden of proof is upon the plaintiff to show that she is within the exception. In an agreed statement of facts, such fact of desertion, using this term in the technical sense above expressed, as a total renunciation of the marriage relation, must be agreed to, or such other facts must be agreed to, as to render the conclusion inevitable. If the facts stated are all that can be proved in the case, the court would consider that the plaintiff had not sustained the burden of proof, and therefore could not have judgment. See Williamson v. Dawes, 9 Bing. 292; Stretton v. Bushnach, 4 Moore & S. 678, 1 Bing. 139; Bean v. Morgan, 4 McCord, 148. But apprehending that the statement may have been agreed to, under a misapprehension of the legal effect of the facts stated, and that other evidence may exist, the court are of opinion, and do order, that the agreed statement of facts be discharged. and a trial had at the bar of the court of common pleas.

WILLARD v. EASTHAM et al.

(15 Gray, 328.)

Supreme Judicial Court of Massachusetts. March, 1860.

A. G. Burke, for plaintiff. G. H. Preston, for defendants.

HOAR, J. This case presents a question entirely novel in the jurisprudence of this commonwealth, and which could not have come before us until the grant of the full equity powers which were conferred upon this court by a recent statute. St. 1857, c. 214. It is a bill in equity, by which the plaintiff seeks to charge the separate estate of a married woman with the payment of a promissory note made by her. The bill avers, in substance, that the brother of Mrs. Eastham purchased of the plaintiff his interest in a copartnership; that, being himself of no sufficient credit or pecuniary responsibility, he procured the note of his sister, who was then, and still is, a married woman, payable to himself, and indorsed it to the plaintiff in payment of the purchase money; that she made the note for this purpose, and promised to pay it at maturity; that it has not been paid; and that Mrs. Eastham was at the date of the note, and still is, possessed of valuable real estate, which she holds as her separate property, and which is leased to two persons who are joined in the bill as defendants, who pay her rent for the same; and prays that these rents may be sequestered and appropriated to the payment of the note. The husband of Mrs. Eastham is joined as a defendant; and to this bill all the defendants demur.

The question is, to what extent and under what limitations the separate estate of a married woman is to be applied in equity to the discharge of her contracts and engagements.

It was held from a very early period in England, that a married woman although incompetent at law to make a valid contract, would be regarded in equity as a feme sole, in respect to her separate estate. Grigby v. Cox, 1 Ves. Sr. 517; Peacock v. Monk, 2 Ves. Sr. 190. And the rule seems to have been universally recognized, where a married woman made an express contract respecting such an estate, of which she was entitled to the beneficial use, that she and the party with whom she contracted might have the aid of a court of equity to make the contract effectual. This doctrine is the legitimate consequence of the principle that a married woman may execute a power, and so may make a valid appointment.

But in Hulme v. Tenant, 1 Brown, C. C. 16, the doctrine was extended much farther; and Lord Thurlow there says that "determined cases seem to go thus far; that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply personal estate, and rents and profits when they arise, to the satisfaction of such general engagement." At a subsequent stage of the case he expresses the principle thus: "I have no doubt about this principle; that if a court of equity says a feme covert may have a separate estate, the court will bind her to the whole extent as to making that estate liable to her own engagements; as, for instance, for payment of debts, etc."

The decision in Hulme v. Tenant, although repeatedly doubted by Lord Eldon, was followed and acted upon by him and by all the chancellors through a long series of cases. In some of these there was an attempt to restrict the application of the doctrine to cases of written contracts, and to treat these contracts as in the nature of appointments. But this distinction was subsequently abandoned as unsound; and a full discussion of the whole subject, presenting with great clearness the result of the modern English authorities, is found in the elaborate judgment of Lord Brougham, in Murray v. Barlee, 3 Mylne & K. 209, and in that of Lord Cottenham in Owens v. Dickenson, Craig & P. 58.

"In all these cases," says Lord Brougham, "I take the foundation of the doctrine to be this: The wife has a separate estate, subject to her own control, and exempt from all other interference or authority. If she cannot affect it, no one can; and the very object of the settlement which vests it in her exclusively is to enable her to deal with it as if she were discovert. The power to affect it being unquestionable, the only doubt that can arise is whether or not she has validly incumbered it. At first, the court seems to have supposed that nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the court held her to have charged it, and made the trustees answer the demand thus created against it. A good deal of the nicety that attends the doctrine of powers thus came to be imported into this consideration of the subject. If the wife did any act directly charging the separate estate, no doubt could exist; just as an instrument expressing to be in an execution of a power was always of course considered as made in execution of it. But so, if by any reference to the estate it could be gathered that such was her intent, the same conclusion followed. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a feme covert, without any reference to her separate estate, it was held, in the cases I have above cited, that she must be intended to have designed a charge on that estate, since in no other way could the instrument thus made

by her have any validity or operation, in the same manner as an instrument, which can mean nothing if it means not to execute a power, has been held to be made in execution of that power, though no direct reference is made to the power. Such is the principle. But doubts have been in one or two instances expressed as to the effect of any dealing whereby a general engagement only is raised; that is, where she becomes indebted without executing any written instrument at all. I own I can perceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in equity taken as a feme sole, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the statute of frauds, and to require writing where that act requires none? Is there any equity, reaching written dealings with the property, which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle."

In Owens v. Dickenson, Lord Cottenham says of a written agreement: "It would have been operative upon the feme covert's separate estate, but not by way of the execution of a power, although that has been an expression sometimes used, and, as I apprehend, very inaccurately used, in cases where the court has enforced the contracts of married women against their separate estate. It cannot be an execution of the power, because it neither refers to the power nor to the subject-matter of the power; nor, indeed, in many of the cases has there been any power existing at all. Besides, as it was argued in Murray v. Barlee, if a married woman enters into several agreements of this sort, and all the parties come to have satisfaction out of her separate estate, they are paid pari passu; whereas, if the instruments took effect as appointments under a power, they would rank according to the priorities of their dates. It is quite clear therefore that there is nothing in such a transaction, which has any resemblance to the execution of a power. What it is, it is not easy to define. It has sometimes been treated as a disposing of the particular estate; but the contract is silent as to the separate estate, for a promissory note is merely a contract to pay, not saying out of what it is to be paid, or by what means it is to be paid; and it is not correct, according to legal principles, to say that a contract to pay is to be construed into a contract to pay out of a particular property, so as to constitute a lien on that property. Equity lays hold of the separate property, but not by virtue of anything expressed in the contract; and it is not very consistent with correct principles to add to the contract that which the party has not thought fit to introduce into it. The view taken of the matter by Lord Thurlow, in Hulme v. Tenant, is more correct. According to that view, the separate property of a married woman being a creature of equity, it follows that if she has a power to deal with it, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied."

The result of the English decisions would therefore seem to be that the separate estate of a married woman is answerable for all her debts and engagements, to the full extent to which it is subject to her own disposal.

The rule adopted by most of the courts in the United States has been materially different from that established in England; and the general current of American authorities supports the principle that a married woman has no power in relation to her separate estate but such as is expressly conferred in the creation of the estate; and that her separate estate is not chargeable with her debts or obligations, unless where a provision for that purpose is contained in the instrument creating the separate estate. These authorities are very fully collected and commented on in the notes to the case of Hulme v. Tenant, 1 White & T. Lead. Cas. Eq. (Hare & W. Ed.) 324.

The decisions in the state of New York approximate somewhat more nearly to the English rule, but with some important modifications. The courts of chancery have there held that a feme covert, with respect to her separate estate, is so far to be regarded as a feme sole that she may dispose of it without the consent of her trustee, unless she is specially restrained by the instrument under which she acquires it; that if she enters into an agreement, and sufficiently indicates her intention to affect by it her separate estate, a court of equity will apply it to the satisfaction of such an engagement; but that her general personal engagement will not of itself affect her separate property; and therefore, where creditors do not claim under any charge or appointment made in pursuance of the instrument of settlement, they must show that the debt was contracted either for the benefit of her separate estate, or for her own benefit upon the credit of the separate estate; and that such estate is not to be charged upon any implied undertaking. Jaques

v. Church, 17 Johns. 548; Dyett v. Coal Co., 20 Wend. 570; Gardner v. Gardner, 7 Paige, 112; Curtis v. Engel, 2 Sandf. Ch. 287; Knowles v. McKamley, 10 Paige, 343; Cruger v. Cruger, 5 Barb. 227. In Vanderheyden v. Mallory, 1 N. Y. 453, it is said that any debt contracted by a married woman for herself or her husband will generally be regarded as prima facie evidence of an intention to charge her separate estate. But in the recent case of Yale v. Dederer, 18 N. Y. 265, the question arose of the liability of the wife's separate estate for the payment of a note which she had signed as a surety with her husband, the whole consideration having been received by him; and the court of appeals held that it was not liable.

The relation of married women to their separate estates in this commonwealth has been materially affected by statute, especially so far as concerns the case at bar, by the statutes of 1845 (chapter 208) and 1855 (chapter 304). By the provisions of these statutes, a married woman may, by a marriage settlement, or by any deed, gift, or devise, made to her by any person except her husband after her marriage, take and hold any property, real or personal, to her sole and separate use, free from the intervention or control of her husband; and may hold in like manner any property belonging to her at the time of her marriage; and may contract, sue and be sued, and have and be subject to the same remedies in law or equity in relation to property so held, and to any contracts respecting it made by her, as if she were unmarried. She may also engage in any trade or business on her own account, and may sue and be sued as if sole in regard to her trade, business, labor, services and earnings.

It is obvious from these provisions, that if the contract which we are considering were to be regarded, in conformity with the English decisions, as a contract relating to the separate estate of the wife, merely because it would be otherwise wholly ineffectual and without validity, the plaintiff has made no case calling for the aid of a court of equity, because he has a plain, adequate and complete remedy at law. A married woman may now be sued upon any contract relating to her separate estate, and a judgment may be recovered against her upon it, and her separate estate may be attached in the suit and afterwards taken on execution, in like manner as if she were sole.

But aside from this objection to the plaintiff's suit, we cannot assent to the correctness of the principle upon which it is founded. We can see no sufficient reason for holding a contract which is wholly void at law, from which neither the married woman nor her estate receives any benefit, and which does not in any manner refer to her separate property or undertake to make any charge upon it, to be a contract relating to such property.

If the giving of a note or a bond could be considered as equivalent to an appointment or charge upon her separate estate, and the source of the equity against her be found in such a charge or appointment, there would seem to be no well founded distinction between a contract by her as a surety and a contract as principal. But against this the reasoning in Murray v. Barlee and Owens v. Dickenson, before cited, is quite conclusive.

And we think, upon mature and full consideration, that the whole doctrine of the liability of her separate estate to discharge her general engagements rests upon grounds which are artificial, and which depend upon implications too subtle and refined. The true limitations upon the authority of a court of equity in relation to the subject are stated with great clearness and precision in the elaborate and well reasoned opinions of the court of appeals in New York in the case of Yale v. Dederer. And our conclusion is that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid for such estate or its income, to the extent to which the power of disposal by the married woman may go. But where she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it.

Demurrer sustained, and bill dismissed, with costs.

OWEN v. CAWLEY.[1]

(36 N. Y. 600.)

Court of Appeals of New York. 1867.

Appeal from the supreme court.

The action was for professional services rendered to a married woman for the benefit of her separate estate, and the relief sought was that the same be declared an equitable lien on such separate estate, and that so much thereof as might be necessary be appropriated to the satisfaction of the claim.

On the first hearing, before Judge Mitchell, the referee, judgment was rendered for the plaintiffs for a greater amount than on the last trial. That judgment was reversed at the general term, for the reasons appearing in the report of the case. 36 Barb. 52.

The order of reversal procured on that occasion provided that the evidence taken on the first trial should stand as evidence on the new trial, and that either party should be at liberty to add such further evidence as they might be advised. Neither party appealed from this order, and, so far as appears, it was mutually acquiesced in and acted upon by both.

On the last hearing, before the same referee, judgment was recovered by the plaintiffs, pursuant to the prayer of the complaint; the amount of the lien, charged on the defendant's estate, being adjudged to be $61.25, with interest from the 30th of May, 1859, and costs.

The defendant appealed to the general term of the supreme court in the First district, and the judgment was unanimously affirmed, the opinion of the court being delivered by Mr. Justice Sutherland.

The following facts were admitted in the verified pleadings, as amended:

(1) That the plaintiffs were attorneys and counselors, in partnership, in the city of New York.

(2) That the appellant, Jane F. Cawley, was the wife of the defendant, Samuel B. Cawley.

(3) That she was possessed, in her own right, separate from her husband, of a large amount of real and personal property in this state, including a house and lot in Queens county, and a store of goods in New York, in which she had conducted the ship chandlery business from a period before the 1st of January, 1858, down to the commencement of the suit; and that, in the course thereof, in the years 1858 and 1859, and prior to the commencement of this action, she had various sums due and owing to her by various individuals, ships and vessels.

(4) That during these periods, and previous thereto, her husband carried on the business, as her agent, and, as such, managed and conducted the same in all its details.

The complaint also alleged the professional services and disbursements of the plaintiffs, at her request and that of her agent; the amount due therefor, and the fact that such services were rendered and such disbursements made, on the credit and for the benefit of her separate estate. These allegations were put in issue by the answer.

The referee found, among other things, as a matter of fact, that all the services alleged were rendered, and that all the facts stated in the complaint were true, with certain exceptions as to amounts, etc., not material to be stated. He found, as matter of fact, that all the services embraced in the amount he allowed were rendered for the benefit of Mrs. Cawley and of her separate estate; that she employed the plaintiffs to render them, through the agency of her husband, to whom she had intrusted the whole management of the business of her separate estate, having full confidence in his ability to act for her, and not restricting his authority in any way, but requesting him "to let law alone, if possible, and to do a cash business." This request was not made known to the plaintiffs. The prosecution of each of the actions and proceedings was expedient, and there was no prospect that the demands would be collected without suit.

The defendant attempted to establish a special agreement that no compensation should be made for services which did not result in collecting the money; but the referee found, as matter of fact, that no such agreement was made.

A question was raised whether some of the proceedings which were taken in the names of nominal assignees of the appellant, for particular reasons disclosed by the evidence, were not really for the benefit of such assignees; but the referee found, as matter of fact, that they were so taken for the benefit of Mrs. Cawley, and of her separate estate, and by the direction of the husband as her agent.

He also found, that each of the claims presented by the plaintiff, arose out of sales by her husband as her agent, of goods belonging to her separate estate, except in a single instance. In that case the claim was for goods sold by J. C. Sleight & Co., the previous proprietors of the store, and which, with other goods and demands, had been absolutely assigned to her, in payment of a debt for advances from her separate estate.

The defendant attempted to prove a subsequent agreement between Sleight and his creditors, for the purpose of showing that the transfer to her was only colorable; but the referee found that such agreement was not satisfactorily proved.

In the course of the trial several questions arose as to the admission of evidence; and exceptions were also taken to the refusal of the referee to dismiss the complaint, and to his ultimate conclusions of law upon the facts as found.

D. McMahon, for the appellant. Thomas G. Shearman, for the respondent.

[1] Concurring opinion of Parker, J., omitted.

PORTER, J. The principal question in this case arises under the statutes of 1848 and 1849, in relation to the property of married women. The primary purpose of these acts was to enable every feme covert to hold property in her own right, without the intervention of trusts or marriage settlements. It was neither their design nor effect to place such property beyond the reach of all remedial process, nor to secure to the wife a mere dormant and barren title, with none of the usual incidents of the jus disponendi. Under their operation she succeeded to the right which a trustee could have exercised under the old law, to protect the interests thus vested by all the usual agencies, and to enforce and defend her claims in the tribunals of law and equity. While her antecedent disabilities arising from the conjugal relation were not wholly removed, they were necessarily so far modified as to secure her in the beneficial enjoyment of the new interests she was permitted by law to acquire. Yale v. Dederer, 18 N. Y. 272, 278, 22 N. Y. 451; Buckley v. Wells, 33 N. Y. 522. She was still left without capacity to bind herself personally by a naked promise, note or bond; but she could exercise the right of an owner by subjecting her separate estate to charges in equity, for services rendered at her request for the benefit of such estate; or she could dedicate it to other purposes if she chose to evince her intention by a formal and deliberate pledge. The mere fact however that she was the owner of a separate estate, did not affix to it, under these acts, a liability in equity in respect to her engagements at large. Such a lien could only be deduced from an express or implied agreement to that effect on her part, or from some equivalent obligation resulting from her acts by operation of law. Where services are rendered for a married woman by her procurement, on the credit and for the benefit of her separate estate, there is an implied agreement and obligation springing from the nature of the consideration, which the courts will enforce by charging the amount on her property as an equitable lien. Yale v. Dederer, 18 N. Y. 276, 282, 284, 22 N. Y. 460. Where a charge is created by her own express agreement, for a good consideration, though for a purpose not beneficial to her separate estate, or even for the sole benefit of her husband, she is bound in equity by the obligation which she thus deliberately chooses to assume. Yale v. Dederer, 28 N. Y. 276, 283, 22 N. Y. 451.

It was at one time a mooted question in the courts, whether under the statutes above referred to, and prior to the act of 1860, the common-law disabilities of the wife were so far modified as to permit her to manage her estate through the intervention of agents and employees; but it is now entirely settled that she acquired in this respect, the usual rights incident to absolute ownership, and that she could avail herself of any agency, even that of her husband, with the same effect as if they were not united in marriage. Knapp v. Smith, 27 N. Y. 277, 280; Buckley v. Wells, 33 N. Y. 518, 522; Smith v. Sweeney, 35 N. Y. 294, 295; Draper v. Stouvenel, Id. 513; Abbey v. Deyo, 44 Barb. 382.

In this case the referee finds as matter of fact, that the plaintiffs were employed by the appellant through her authorized agent, to whom she had intrusted the entire management of her business and estate. She was as effectually bound by the act done in her name, as if she had personally engaged the professional services of the respondents. She accredited her husband to the public, as her general agent in all that pertained to her business; and as the plaintiffs had no notice of any private restrictions upon his authority, the fact that any such were given would have been unavailing, even if she had succeeded in proving it. Bank v. Astor, 11 Wend. 87; Johnson v. Jones, 4 Barb. 369, 373.

It is also found as matter of fact that all the services in question were rendered for Mrs. Cawley, and for the benefit of her separate estate. Her counsel insists that such of them as appertained to suits in which there was a failure to collect the amount of the claims, should not be deemed beneficial in their character. No such distinction can be maintained. The rule of equity under which the estate of a married woman is subject to a charge in respect to services rendered for its benefit, has reference to the subject-matter and nature of such services, and not to the contingent and ultimate gain or loss of the parties procuring them. A builder, who at the request of a feme covert, erects a dwelling on her land, performs a service for the benefit of her estate within the meaning of the rule; and its nature would not be changed, though the edifice should afterward be destroyed by fire. An employee who tills her land for hire, has an equitable claim to compensation; and if he discharges his duty faithfully, he has a remedy for his wages, though her fields should prove unproductive. In this case the claims in question formed a part of the separate estate, and the services were for its direct and immediate benefit. Dillaye v. Parks, 31 Barb. 132. The appellant preferred not to prosecute the suits in person; and the attorneys who conducted them in her behalf, having served her with suitable skill and fidelity, are not responsible for any defects in her proof, or for the inability of her debtors to respond to their obligations. It follows from these views, that on the principal questions involved in the case, the referee was right in his conclusions.

The plaintiffs were properly allowed to prove the admissions of the appellant on the previous hearing. They constituted a portion of the evidence, which under the order entered at the general term, either party was entitled to read, and this right was exercised on the second trial by both. Where an absolute and unqualified admission is made in a pending cause, whether by written stipu-

lation of the attorney or as matter of proof on the hearing, it cannot be retracted on a subsequent trial, unless by leave of the court. No cause for granting such leave was shown, and there was no allegation of mistake, imposition or surprise. People v. Rathbun, 21 Wend. 543, 544; Elton v. Larkins, 24 E. C. L. 372; Doe v. Bird, 32 N. Y. 416; Langley v. Earl of Oxford, 1 Mees. & W. 508.

It is claimed in behalf of the appellant that the referee should not have permitted the reading, on the new trial, of the evidence on the former hearing, as provided in the order of reversal. We see no reason why the parties are not concluded by that order, in which both of them seem to have acquiesced. No appeal from it has ever been taken, no motion was made to modify it, and both parties have acted under it. Vail v. Remsen, 7 Paige, 207. It was read in evidence without objection, and no question in regard to it was raised before the referee. Portions of the proof, introduced under it, were objected to on other and specific grounds; but the position now taken, that the whole was inadmissible, was not even suggested on the trial. Upon the facts disclosed by the case, we do not think the objection tenable; but if it had been well founded, it would be too late to raise it on appeal. Newton v. Harris, 6 N. Y. 345; Judd v. O'Brien, 21 N. Y. 190.

In the course of the trial, objections were taken to proof of the acts and declarations of the defendant's agent, in relation to the legal proceedings conducted by the plaintiffs. They constituted a part of the res gestæ, and as his agency was conceded, they were admissible as acts and declarations of his principal. McCotter v. Hooker, 8 N. Y. 503; Fleming v. Smith, 44 Barb. 554. Other grounds of error are alleged, but they seem to us plainly untenable.

The judgment should be affirmed, with costs.

PARKER, J., concurs.

DOWNING v. MT. WASHINGTON ROAD CO.

(40 N. H. 230.)

Supreme Court of New Hampshire. Merrimack June Term, 1860.

Assumpsit, brought by Lewis Downing & Sons, to recover the price of eight omnibuses, and a model for the same, one light wagon, and one baggage wagon, made for the defendants, under a contract entered into by D. O. Macomber, president of the defendant corporation in their behalf.

The light wagon was made and sent to one Cavis, the agent for building the road, and was used by him in making it. The omnibuses and baggage wagon were intended to be used in conveying passengers up and down the mountain, after the road was completed. The omnibuses were constructed in a peculiar way, and are not fit for use on ordinary roads.

By their act of incorporation, passed July 1, 1853, the corporation was empowered to lay out, make, and keep in repair, a road from such point in the vicinity of Mt. Washington as they may deem most favorable, to the top of said mountain, etc., and thence to some point on the northwesterly side of said mountain, etc., to take tolls of passengers and for carriages, to build and own toll-houses, and to take land for their road.

The corporation was duly organized, and at a meeting of the directors on the 31st of August, 1853, before said contract was made, it was "voted that the president be the legal agent and commissioner of the company;" and his compensation as such was fixed.

"The president" was "directed to proceed with the letting of the work for the construction of the road, * * * the obtaining the right of way," and "what other action he shall deem proper for the interests of the company," etc.

A committee was appointed "to settle in relation to the right of way, etc., and in relation to land on which to build stables and other buildings, for the use of the road, and also for building all such stables and houses as may be necessary for the operations of the company."

It appeared that by an additional act, passed July 12, 1856, the corporation were authorized "to erect and maintain, lease and dispose of any building or buildings, which may be found convenient for the accommodation of their business, and of the horses and carriages and travellers passing over said road."

The defendants denied the authority of Macomber to make such a contract in behalf of the corporation, and the power of the corporation under its charter either to authorize or to enter into such a contract.

BELL, C. J. Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental, or necessary to carry into effect the purposes for which they were established. Trustees v. Peaslee, 15 N. H. 330; Perrine v. Chesapeake Canal Co., 9 How. 172. In giving a construction to the powers of a corporation, the language of the charter should in general neither be construed strictly nor liberally, but according to the fair and natural import of it, with reference to the purposes and objects of the corporation. Enfield Bridge v. Hartford R. R., 17 Conn. 454; Strauss v. Eagle Co., 5 Ohio St. 39.

If the powers conferred are against common right, and trench in any way upon the privileges of other citizens, they are, in cases of doubt, to be construed strictly, but not so as to impair or defeat the objects of the incorporation.

In the present case the power to take the lands of others, and to take tolls of travellers, must be strictly construed, if doubts should arise on those points; but it is not seen that the other grants to the defendant corporation should not receive a fair natural construction.

The charter of the Mt. Washington Road empowers them to lay out, make and keep in repair, a road from Peabody River Valley to the top of Mount Washington, and thence to some point on the northwest side of the mountain. It grants tolls on passengers and carriages, and authorizes them to take lands of others for their road, and to build and own toll-houses, and erect gates, and appoint toll-gatherers to collect their tolls. The remaining provisions contain the ordinary powers of corporations relating to directors, stock, dividends, meetings, etc. Laws 1853, c. 1486.

This chapter confers the usual powers heretofore granted to turnpike corporations, and no others. The most natural and satisfactory mode of ascertaining what are the powers incidentally granted to such companies, is to inquire what powers have been usually exercised under them, without question by the public or by the corporators. It may be safely assumed that the powers which have not heretofore been found necessary, and have not been claimed or exercised under such charters, are not to be considered generally as incidentally granted. Such charters have in former years been very common in this and other states, and they have not, so far as we are aware, been understood as authorizing the corporations to erect hotels, or to establish stage or transportation lines, to purchase horses or carriages, or to employ drivers in transporting passengers or freight over their roads; and no such powers have anywhere been claimed or exercised under them. We are, therefore, of opinion that the power to establish stage and transportation lines to and from the mountain, to purchase carriages and horses for the purpose of carrying on such a business, was not incidentally granted to the de-

fendant corporation by their charter. State v. Commissioners of Mansfield, 23 N. J. Law, 510.

But it is contended that the power to make this contract is conferred by the act in amendment of the charter, passed July 12, 1856. By this act the corporation may "erect and maintain, lease and dispose of any building or buildings which may be found convenient for the accommodation of their business, and of the horses and carriages and travellers passing over their said road." By their business, which the buildings to be erected were designed to accommodate, it is said the legislature must have intended some permanent and continuing business beyond that of merely building and maintaining a road; and that it could be no other than that of erecting a hotel on the mountain, and establishing lines of carriages, for the purpose of carrying visitors up and down the mountain.

But the foundation of this implication is very slight. The express grant is of an authority to erect, etc., buildings, not of all kinds, but such as may be found convenient for the accommodation of their business, and of travellers, etc. The business here referred to must be understood to be such as they are by their charter authorized to engage in. If nothing had been said of horses and travellers, there could hardly be any foundation for the idea that a hotel could have been contemplated by the legislature. Buildings suitable for the accommodation of their toll-gatherers and workmen employed on their road, would probably be thought everything the legislature intended to authorize by this additional act. Connected as this authority now is with travellers, horses, and carriages, there is scarce a pretence for argument that this additional act goes any further than the original act, to authorize a stage and transportation company. It is not unlikely that some of the projectors of this enterprise intended to secure much more extensive rights than those of a turnpike and hotel company, but it seems certain they have not exhibited this feature of their case to the legislature so distinctly as to secure their sanction, and the charter and its amendment as yet justifies them in no such claim.

The power of buying and selling real and personal property for the legitimate purposes of the corporation, and the power of contracting generally for the same purposes, within the limits prescribed by the charter, being granted, we understand the principle to be, that their purchases, sales, and contracts generally, will be presumed to be made within the legitimate scope and purpose of the corporation, until the contrary appears, and that the burden of showing that any contract of a corporation is beyond its legitimate powers, rests on the party who objects to it. Indiana v. Woram, 6 Hill, 37; Ex parte Peru Iron Co., 7 Cow. 540; Farmers' Loan & Trust Co. v. Clowes, 3 N. Y. 470; Farmers' Loan & Trust Co. v. Curtis, 7 N. Y. 466; Beers v. Phœnix Glass Co., 14 Barb. 358.

If a corporation attempt to enforce a contract made with them in a case beyond the legitimate limits of their corporate power, that fact, being shown, will ordinarily constitute a perfect defence. Green v. Seymour, 3 Sandf. Ch. 285; Bangor Boom v. Whiting, 29 Me. 123; Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. 31; New York, etc., Ins. Co. v. Ely, 5 Conn. 560.

And if a suit is brought upon a contract alleged to be made by the corporation, but which is shown to be beyond its corporate power to enter into, the contract will be regarded as void, and the corporation may avail themselves of that defence. Beach v. Fulton Bank, 3 Wend. 573; Albert v. Savings Bank, 1 Md. Ch. Dec. 407; Abbot v. Baltimore, etc., Co., Id. 542; Strauss v. Eagle Ins. Co., 5 Ohio St. 59; Baron v. Mississippi Ins. Co., 31 Miss. 116; Bank of Genesee v. Patchin Bank, 13 N. Y. 315; Gage v. Newmarket, 18 Q. B. 457.

The contract set up in this case, was made not by the corporation itself, by a vote, nor by an agent expressly authorized to sign a contract already drawn, but it was made by the president of the corporation, acting under an appointment as their general agent; and it is argued that he was fully authorized by votes of the corporation to bind them by such a contract as the present; but it is not necessary to consider this question, as we think it settled that the powers of the agents of corporations to enter into contracts in their behalf are limited, by the nature of things, to such contracts as the corporations are by their charters authorized to make. This principle is distinctly recognized in McCullough v. Moss, 5 Denio, 567, overruling the case of Moss v. Rossie Lead Co., 5 Hill, 137, and in Central Bank v. Empire Stone-Dressing Co., 26 Barb. 23; Bank of Genesee v. Patchin Bank, 13 N. Y. 315.

The same want of power to give authority to an agent to contract, and thereby bind the corporation in matters beyond the scope of their corporate objects, must be equally conclusive against any attempt to ratify such contract. What they cannot do directly they cannot do indirectly. They cannot bind themselves by the ratification of a contract which they had no authority to make. 5 Denio, 567, above cited. The power of the agent must be restricted to the business which the company was authorized to do. Within the scope of the business which they had power to transact, he, as its agent, may be authorized to act for it, but beyond that he could not be authorized, for its powers extend no further.

This view seems to us entirely conclusive against the claim made for the omnibuses and model, and probably for the baggage wagon.

As to the light wagon, that may stand on a different ground. Such a wagon might be useful and necessary for the use of the agent of the company, in conducting the undoubted business of the corporation,—the building and maintaining the road.

We are unable to assent to the position taken in the argument, that a ratification of part is a ratification of the whole contract. While the corporation may be restricted from ratifying a contract beyond the scope of the objects of the corporation, there could be no such objection as to any matter clearly within their power. The other contracting party might have a right to reject such ratification, claiming that the contract is entire, and if not ratified as such, it should not be made good for a part only. But if they claim the benefit of the partial ratification, the corporation can hardly object.

THOMAS v. RAILROAD COMPANY.

(101 U. S. 71.)

Supreme Court of United States. Oct. Term, 1879.

Error to the circuit court of the United States for the Eastern district of Pennsylvania.

This was an action of covenant, by George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, against the West Jersey Railroad Company, and they, to maintain the issue on their part, offered to prove the following facts:

On the eighth day of October, 1863, the Millville and Glassboro Railroad Company, a corporation incorporated by the legislature of New Jersey, March 9, 1859, entered into an agreement with them, whereby it was stipulated that the company should, and did thereby, lease its road, buildings, and rolling-stock to them for twenty years from the first of August, 1863, for the consideration of one-half of the gross sum collected from the operation of the road by the plaintiffs during that period; that the company might at any time terminate the contract and retake possession of the railroad, and that in such case, if the plaintiffs so desired, the company would appoint an arbitrator, who, with one appointed by them, should decide upon the value of the contract to them, and the loss and damage incurred by, and justly and equitably due to them, by reason of such termination thereof; that in event of a difference of opinion between the arbitrators, they were to choose a third, and the decision of a majority was to be final, conclusive, and binding upon the parties.

On the 10th of April, 1867, the legislature of New Jersey passed an act entitled "A supplement to the act entitled 'An act to incorporate the Millville and Glassboro Railroad Company.'" It was therein enacted that it should be unlawful for the directors, lessees, or agents of said railroad to charge more than the sums therein named for passengers and freight respectively. The plaintiffs claim that at the date of the passage of this act, it was well known that they were acting under the said agreement of 8th October, 1863.

On the 12th of October, 1867, articles of agreement were entered into between the Millville and Glassboro Railroad Company and the West Jersey Railroad Company, the defendant, whereby it was agreed that the former should be merged into and consolidated with the latter.

In November, 1867, a written notice was served by the Millville and Glassboro Railroad Company upon the plaintiffs, putting an end to the contract and to all the rights thereby granted, and notifying them that the company would retake possession of the railroad on the first day of April, 1868.

On the 18th of March, 1868, the legislature of New Jersey passed an act whereby it was enacted that, upon the fulfillment of certain preliminaries, the Millville and Glassboro Railroad Company should be consolidated with the West Jersey Railroad Company, "subject to all the debts, liabilities, and obligations of both of said companies." The conditions required by that act were fulfilled, and the railroad was duly delivered by the plaintiffs to the West Jersey Railroad Company on the first of April, 1868.

On April 13, 1868, and again on May 22 of the same year, notices to arbitrate according to the terms of the agreement were served by the plaintiffs upon the Millville and Glassboro Railroad Company, and immediately thereafter upon the West Jersey Railroad Company. The latter company refused to comply with the terms of either notice; but subsequently, on the 21st of December, 1868, an agreement of submission was entered into between the plaintiffs and the latter company, whereby H. F. Kenney and Matthew Baird were appointed arbitrators, with power to choose a third, to settle the controversy between the parties. These arbitrators, disagreeing, called in a third, who joined with said Baird in an award, by which the value of the unexpired term of the lease, and the loss sustained by reason of the termination thereof, to and by the plaintiffs, was adjudged to be the sum of $159,437.07; and the West Jersey Railroad Company was ordered to pay that sum to the plaintiffs. This award was subsequently set aside in a suit in equity brought in New Jersey.

The plaintiffs further offered to prove their compliance in all respects with the terms of the lease, its value, and the loss and damage they had sustained by reason of its termination as aforesaid. The court excluded the offered testimony on the ground that the lease by the Millville and Glassboro Railroad Company to the plaintiffs was ultra vires, and directed the jury to return a verdict for the defendant. The plaintiffs duly excepted, and sued out this writ.

They assign for error that the court below erred,—

1. In excluding from the consideration of the jury the offered evidence of the said agreement between the Millville and Glassboro Railroad Company and the plaintiffs; of the acts of assembly of New Jersey, one an act to incorporate the Millville and Glassboro Railroad Company, approved the 9th of March, 1859, and another an act entitled "A supplement to the act entitled 'An act to incorporate the Millville and Glassboro Railroad Company,' passed the tenth day of April, 1867," and the acts referred to therein; of the fact that it was well known at the date of the last-named act that the plaintiffs were lessees acting under the said contract and agreement; and of all the other acts of the legislature of the state of New Jersey relating

to the West Jersey Railroad Company, and to the Millville and Glassboro Railroad Company.

2. In directing the jury that their verdict must be for the defendant.

3. In entering judgment upon the verdict for the defendant.

Mr. Justice MILLER, after stating the case, delivered the opinion of the court.

The ground on which the court held the contract to be void, and on which the ruling is supported in argument here, is that the contract amounted to a lease, by which the railroad, rolling-stock, and franchises of the corporation were transferred to plaintiffs, and that such a contract was ultra vires of the company.

It is denied by the plaintiffs that the contract can be fairly called a lease.

But we know of no element of a lease which is wanting in this instrument. "A lease for years is a contract between lessor and lessee, for possession of lands, etc., on the one side, and a recompense by rent or other consideration on the other." 4 Bac. Abr. 632.

"Any thing corporeal or incorporeal lying in livery or in grant may be the subject-matter of a lease, and, therefore, not only lands and houses, but commons, ways, fisheries, franchises, estovers, annuities, rent-charges, and all other incorporeal hereditaments are included in the common-law rule." Bouv. Law Dict. "Lease"; 1 Washb. Real. Prop. 310.

The railroad and all its appurtenances and franchises, including the right to do the business of a railroad and collect the proper tolls, are for a period of twenty years leased by the company to the plaintiffs, from whom in return it receives as rent one-half of all the gross earnings of the road. The usual provision for a right of re-entry on the failure to perform covenants in addition to the special right to terminate the lease on notice, and the usual covenant for repairs and proper running of the road, equivalent to good husbandry on a farm, are inserted in the instrument.

The provision for the complete possession, control, and use of the property of the company and its franchises by the lessees is perfect. Nothing is left in the lessor but the right to receive rent. No power of control in the management of the road and in the exercise of the franchises of the company is reserved. A solitary exception to this statement, of no value in the actual control of affairs, is found in the sixth clause of the lease, which covenants that the lessees will discharge any one in their service on the request of the corporation, evidenced by a resolution of the board of directors.

But while we are satisfied that the contract is both technically and in its essential character a lease, we do not see that the decision of that point either way affects the question on which we are to pass. That question is, whether the railroad company exceeded its powers in making the contract, by whatever name it may be called, so that it is void.

It is, perhaps, as well to consider this question in the order of its presentation by the learned counsel for plaintiffs, upon whom the burden of showing the error of the circuit court devolved as well as the duty of proving one of the following propositions:

1. The contract was within the powers granted to the railroad company by the act of the New Jersey legislature under which it was organized.

2. That if this be not established, the lease was afterwards ratified and approved by another act of that legislature.

3. That if both these propositions are found to be untenable, the contract became an executed agreement under which the rights acquired by plaintiffs should be legally respected.

The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter:

"That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfillment of such contracts."

This is no more than saying: "You may do the business of carrying goods and passengers, and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals." No doubt a contract by which the goods received from railroad or other carrying companies should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease, or transfer to others the entire road and the rights and franchises of the corporation. To do so is to deprive the company of the power of making those contracts which this clause confers, and of performing the duties which it implies.

In Ashbury Railway Carriage & Iron Co. v. Riche (decided in the house of lords in 1875) L. R. 7 H. L. 653, the memorandum of association, which, as Lord Cairns said, stands under the act of 1862 in place of a legislative charter, thus described the business which the company was authorized to conduct: "The objects for which this company is established are to make, sell, or lend on hire railway-carriages and engines, and all kinds of railway plant, fittings, machinery, and rolling-stock; and to carry on the business of mechanical engineers and general contractors; to purchase and sell as merchants timber, coal,

metals, or other materials; and to buy and sell any such materials on commission or as agents." This company purchased a concession for a railroad in Belgium, and entered into a contract for its construction, on which it paid large sums of money. The company was sued afterwards on its agreement with Riche, the contractor, and the contract was held valid in the exchequer chamber by a majority of the judges, on the ground that while it was in excess of the power conferred on the directors by the memorandum, it had been made valid by ratification of the shareholders, to whom it had been submitted.

The house of lords reversed this judgment, holding unanimously that the contract was beyond the powers conferred by the memorandum above recited, and being beyond the powers of the association, no vote of the shareholders whatever could make it valid. The case is otherwise important in its relation to the one before us, but it is cited here for its parallelism in the construction of the clause defining the powers of the company.

If a memorandum which describes the parties as engaging in furnishing nearly all the materials, machinery, and rolling-stock which enter into the construction of a railroad and its equipments, and then empowers them to carry on the business of mechanical engineers and general contractors, cannot authorize a contract to build a railroad, surely the authority to build a railroad and to contract for carrying passengers and goods over it and other roads is no authority to lease it, and with the lease to part with all its powers to another company or to individuals. We do not think there is anything in the language of the charter which authorized the making of this agreement.

It is next insisted, in the language of counsel, that though this may be so, "a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its execution, and the state may, by proper process, forfeit the charter."

We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.

This class of subjects has received much consideration of late years in the English courts, and counsel have relied largely on the decisions of those courts. Among the cases cited by both sides is East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775.

In that case the Eastern Counties Railway Company had made a contract in which, among other things, it covenanted to take a lease of several other railroads whose companies had introduced into parliament a bill for consolidation under the name of East Anglian Railways Company, and to assume the payment of the parliamentary expenses of this act of consolidation.

This covenant was held void as beyond the power conferred by the charter. "They cannot," said the court, "engage in a new trade, because they are incorporated only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be their object or prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they cannot embark in new trades because they have only a limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority." This case, decided in 1851, was afterwards cited with approval by the lord chancellor in 1857 in delivering the opinion of the house of lords in Eastern Counties Ry. Co. v. Hawkes, 5 H. L. Cas. 331; and it is there stated that it was also acted on and recognized in the exchequer chamber in McGregor v. Deal & Dover Ry. Co., 22 Law J. Q. B. 69, 18 Q. B. 618. Both these cases are cited approvingly in the opinion of Lord Cairns in the Ashbury Case on appeal in the house of lords.

This latter case, as decided in the exchequer chamber (L. R. 9 Exch. 224), is much relied on by counsel for plaintiffs here as showing that, though the contract may be ultra vires when made by the directors, it may be enforced if afterwards ratified by the shareholders or if partly executed.

But in the house of lords, where the case came on appeal, this principle was overruled unanimously in opinions delivered by Lord Chancellor Cairns, Lords Selborne, Chelmsford, Hatherly, and O'Hagan, and the broad doctrine established that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action.

It would be a waste of time to attempt to examine the American cases on the subject, which are more or less conflicting, but we think we are warranted in saying that this latest decision of the house of lords represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle.

There is another principle of equal importance and equally conclusive against the va-

lidity of this contract, which, if not coming exactly within the doctrine of ultra vires as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in New York & M. L. R. Co. v. Winans, 17 How. 30. The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the legislature of that state. The stock in it was taken by a Maryland corporation, called the Baltimore and Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling stock. In reference to this state of things, and its effect upon the liability of the Pennsylvania corporation for infringing a patent of the defendant in error, Winans, this court said: "This conclusion [argument] implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature. Beman v. Rufford, 1 Sim. (N. S.) 550; Winch v. Birkenhead, L. & C. J. Ry. Co., 13 Eng. Law & Eq. 506."

And in the case of Black v. Delaware & R. Canal Co., 22 N. J. Eq. 130, Chancellor Zabriskie says: "It may be considered as settled that a corporation cannot lease or alien any franchise, or any property necessary to perform its obligations and duties to the state, without legislative authority." Id. 399. For this he cites some ten or twelve decided cases in England and in this country.

This brings us to the proposition that the legislature of New Jersey has given its consent by an act which amounts to a ratification of this lease.

That act is entitled "A supplement to the act entitled 'An act to incorporate the Millville and Glassboro Railroad Company," approved April 10, 1867; and its only purpose was to regulate the rates at which freight and passengers should be carried. It reads as follows:

"That it shall be unlawful for the directors, lessees, or agents of said railroad to charge more than three and a half cents per mile for the carrying of passengers, and six cents per ton per mile for the carrying of freight or merchandise of any description, unless a single package, weighing less than one hundred pounds; nor shall more than one-half of the above rate be charged for carrying any fertilizing materials, either in their own cars or cars of other companies running over said railroad: provided, that nothing contained in this act shall deprive the said railroad company, or its lessees, of the benefits of the provisions of an act entitled 'An act relative to freights and fares on railways in the state,' approved March 4, 1858, and applicable to all other railroads in this state."

It may be fairly inferred that the legislature knew at the time the statute was passed that plaintiffs were running the road, and claiming to do so as lessees of the corporation. It was not important for the purpose of the act to decide whether this was done under a lawful contract or not. No inquiry was probably made as to the terms of that lease, as no information on that subject was needed.

The legislature was determined that whoever did run the road and exercise the franchises conferred on the company, and under whatever claim of right this was done, should be bound by the rates of fare established by the act. Hence, without undertaking to decide in whom was the right to the control of the road, language was used which included the directors, lessees, and agents of the railroad.

The mention of the lessees no more implies a ratification of the contract of lease than the word "directors" would imply a disapproval of the contract. It is not by such an incidental use of the word "lessees" in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the state.

It remains to consider the suggestion that the contract, having been executed, the doctrine of ultra vires is inapplicable to the case. There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided

or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred.

In regard to corporations the rule has been well laid down by Comstock, C. J., in Parish v. Wheeler, 22 N. Y. 494, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.

But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action. Damages for a material part of the contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this it is not an executed contract.

Not only so, but it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the company and to the public, give to the plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts.

We cannot see that the present case comes within the principle that requires that contracts, which, though invalid for want of corporate power, have been fully executed, shall remain as the foundation of rights acquired by the transaction.

We have given this case our best consideration on account of the importance of the principles involved in its decision, and after a full examination of the authorities we can see no error in the action of the circuit court. Judgment affirmed.

BRADLEY v. BALLARD.

(55 Ill. 413.)

Supreme Court of Illinois. Sept. Term, 1870.

Appeal from circuit court, Cook county.

LAWRENCE, C. J. This was a bill in chancery brought by Bradley against Ballard and others, for the purpose of enjoining the prosecution of a suit pending in the circuit court of Cook county, against a corporation called "The North Star Gold and Silver Mining Company," in which complainant was a stockholder, upon certain promissory notes given by said company, and also to cancel certain other notes not yet in suit. The court sustained a demurrer to the bill, and the complainant not asking to amend, a decree of dismissal was entered.

It appears by the averments in the bill that various persons associated themselves together in the city of Chicago in the year 1866, and filed their articles of organization in the circuit court of Cook county, under the general incorporation law, whereby they became incorporated under the title above stated. The statute requires the certificate to state the town and county in which the operations of a company thus incorporated are to be carried on, and the certificate of this company stated that their operations were to be carried on in the city of Chicago, in the county of Cook and state of Illinois. It further appears from the bill that the company thus organized engaged in mining in the territory of Colorado, and in the prosecution of that work borrowed large sums of money, for which the notes described in the bill were given, except some that are alleged to have been given for official salaries. It is not claimed that they were not given for a full and fair consideration, but their cancellation is sought upon the ground that they were given for money borrowed to enable the company to prosecute a business which it had no power to prosecute, and that this purpose was known to the lenders of the money. It is insisted that, although the business of the corporation was mining, yet, by the terms of its certificate, it had no power to prosecute that business beyond the limits of the city of Chicago, or certainly not beyond the limits of this state.

Whether this is the proper construction of the statute is a question we do not find it necessary to decide. Conceding that it is, and that this corporation had no power to engage in mining in Colorado, we are still of opinion the complainant has not, by his bill, entitled himself to relief. He became a stockholder to the extent of $25,000, and from the name and character of the company he must have known it was organized for the purpose of mining beyond the limits of this state. He subsequently became one of the directors of said company, and it is a legitimate inference from the bill that at least a part of these debts were created while he was thus participating in the control of the company. There is no pretence in the bill that he ever, in any mode, objected to the mining operations of the company, in Colorado, or to the borrowing of money therefor, and the fair, and, indeed unavoidable inference, from the nature of the company, the connection of complainant with it, and the silence of the bill in this regard, is that he did not object. On what ground, then, can he ask a court of equity to enjoin the collection of these notes?

It is said by counsel for complainant, that a corporation is not estopped to say, in its defence, that it had not the power to make a contract sought to be enforced against it, for the reason, that if thus estopped, its powers might be indefinitely enlarged. While the contract remains unexecuted on both sides, this is undoubtedly true; when, under cover of this principle, a corporation seeks to evade the payment of borrowed money, on the ground that, although it had power to borrow money, it expended the money borrowed in prosecuting a business which it was not authorized to prosecute, it is pressing the doctrine of ultra vires to an extent that can never be tolerated, even though the lender of the money knew that the corporation was transacting a business beyond its chartered powers, and that his money would be used in such business, provided the business itself was free from any intrinsic immorality or illegality.

Neither is it correct to say that the application to corporations of the doctrine of equitable estoppel, where justice requires it to be applied, as when, under a claim of corporate power, they have received benefits for which they refuse to pay, from a sudden discovery that they had not the powers they had claimed, can be made the means of enabling them indefinitely to extend their powers. If that were true, it would be an insuperable objection to the application of the doctrine, even for the purpose of preventing injustice in individual cases. But it is not true. This doctrine is applied only for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act ultra vires has been accomplished. But while a contract remains executory, it is perfectly true that the powers of corporations cannot be extended beyond their proper limits, for the purpose of enforcing a contract. Not only so, but on the application of a stockholder, or of any other person authorized to make the application, a court of chancery would interfere and forbid the execution of a contract ultra vires. So too, if a contract ultra vires is made between a corporation and another person, and, while it is yet wholly unexecuted, the corporation recedes, the other contracting party would probably have no claim for damages. But if such other party proceeds in the performance of the contract,

expending his money and his labor in the production of values which the corporation appropriates, we can never hold the corporation excused from payment, on the plea that the contract was beyond its power.

Take, for example, the case of a corporation chartered to build a railway from Chicago to Rock Island. Under such a charter, the company would have no power to build steamboats for the purpose of running a line of such vessels between Rock Island and St. Louis. But suppose the company, notwithstanding the want of power, should make a contract for the building of a vessel, and it is built by the contractor, and accepted and used by the railway. Could any court permit the corporation, when sued for the value of the vessel, to excuse itself from payment, on the ground that, although it has and uses the steamer, it had no authority to do so by its charter? Or, suppose that instead of having a vessel built by a contractor it employs a superintendent to build it, and hires mechanics by the day. Could it escape the payment of their wages, on the ground that it had employed them in a work ultra vires?

In cases of such character, courts simply say to corporations: You cannot in this case raise the question of your power to make the contract. It is sufficient that you have made it, and by so doing have placed in your corporate treasury the fruits of others' labor, and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter.

We are aware that cases may be cited in apparent conflict with the principles here announced, but the tendency of recent decisions is in harmony with them. While courts are inclined to maintain with vigor the limitations of corporate action, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though ultra vires, of which they have received the benefit. This is demanded by the plainest principles of justice. 2 Kent, Comm. (11th Ed.) p. 381, note; Zabriskie v. Railroad Co., 23 How. 381; Bissell v. Railroad Co., 22 N. Y. 258; Cary v. Railroad Co., 29 Barb. 35; Parish v. Wheeler, 22 N. Y. 494; De Groff v. Thread Co., 21 N. Y. 124; Argenti v. San Francisco, 16 Cal. 255; McCluer v. Railroad, 13 Gray, 124; Chapman v. Railroad Co., 6 Ohio, 137; Hall v. Insurance Co., 32 N. H. 297; Railroad Co. v. Howard, 7 Wall. 413.

If the complainant in this case had, as a stockholder, asked a court of chancery to enjoin this corporation from mining in Colorado, it would have examined the charter, and if it had arrived at the conclusion that such mining was beyond the powers derived from filing the certificate in question, under our statute, would have issued the injunction. But this he did not do. On the contrary, he has participated in the work, and so long as there was hope of gain, he was willing the money should be borrowed by which the work was to be carried forward. The borrowing of the money was not, in itself, an act ultra vires, nor was the giving of the notes. The money was not borrowed to be used for an illegal or immoral purpose. The lenders have been guilty of no violation of law, nor wrong of any kind. The corporation has received their money and used it for a purpose, which, whether ultra vires or not, was unquestionably the sole purpose for which the corporators associated themselves together, and for which this complainant became a stockholder. Justice requires the corporation to repay the money it has thus borrowed and expended.

What we have said applies only to private corporations, organized for pecuniary gain. If, to increase their profits they embark in enterprises not authorized by their charter, still, as to third persons, and when necessary for the advancement of justice, the stockholders will be presumed to have assented, since it is in their power to restrain their officers when they transgress the limits of their chartered authority. But municipal corporations stand upon a different ground. They are not organized for gain, but for the purpose of government, and debts illegally contracted by their officers cannot be made binding upon the taxpayers, from the presumed assent of the latter.

There are some vague charges in the bill of conspiracy between the holders of the notes upon which suit has been brought and some of the directors, but no facts are alleged showing, or tending to show, any wrongful or fraudulent intent. The alleged conspiracy seems merely to be an understanding between the holders of the notes and the majority of the directors, by which the latter will allow the former to obtain judgment on their notes, and we do not perceive why they should not. If the complainant has had the misfortune to associate himself with persons of less pecuniary responsibility than himself for the purpose of carrying on a hazardous business, in which heavy debts have been incurred, it is a misfortune of which the courts cannot relieve him, merely on a vague and general charge of conspiracy against his fellow stockholders or directors. No facts are alleged in this bill which can be made the foundation of relief. As before remarked, the counsel of appellant has presented his case simply on the question of corporate power. We are of opinion the demurrer was properly sustained to the bill. Decree affirmed.

Mr. Justice SCOTT dissents.

UNION BANK v. JACOBS.

(6 Humph. 515.)

Supreme Court of Tennessee. Sept. Term, 1845.

On the 28th day of September, 1841, Jacobs, as president of the Hiwassee Railroad Company, executed a note, binding that company to pay to said Jacobs the sum of $5,641, negotiable and payable at the branch of the Union Bank at Knoxville, four months after date. The note was indorsed by Jacobs to Trautwine, and by Trautwine to the Union Bank, and delivered to the president and directors of the bank, and discounted by the bank for the benefit of the Hiwassee Company. At maturity, the note was protested, and suit brought by the bank against Jacobs, as indorser, in the circuit court of Knox county.

It was tried by Judge Lucky and a jury at the February term, 1845. He charged the jury that the Hiwassee Company had no power to borrow money, and that the note given in execution of a void contract was null and void also.

The jury returned a verdict for the defendant, and plaintiff appealed.

TURLEY, J. At the session of the legislature of the state of Tennessee, in the year 1835–1836, the Hiwassee Railroad Company was created a body corporate, with perpetual succession, with power to sue and be sued, plead and be impleaded, and to possess and enjoy all the rights, privileges, and immunities, with power to make such by-laws, ordinances, rules, and regulations, not inconsistent with the laws of this state and the United States, as shall be necessary to the well ordering and conducting the affairs of said company; and be capable in law of purchasing, accepting, selling, and conveying estates, real, personal, and mixed, to the end, and for the purpose of facilitating the intercourse and transportation from Knoxville, East Tennessee, through the Hiwassee district, to a point on the southern boundary of Tennessee, to be designated by commissioners as the most practicable route to intersect the contemplated railroad from Augusta to Memphis.

By the 2d section of the act of incorporation the capital stock of the company is limited to six hundred thousand dollars, in shares of one hundred dollars each; and it is provided, that, so soon as four thousand shares are subscribed, the corporate power of said company shall commence, and have as full operation as if the whole of the shares comprising the capital stock were subscribed.

By the 4th section it is provided, that there shall be paid on each share subscribed, but not till after four thousand shares shall have been subscribed, such sum as the president and directors, or a majority of them, may direct, and in such instalments, not exceeding one fourth of the subscription in any one year: Provided, no payment shall be demanded until at least thirty days' notice shall have been given by the said president and directors in the newspapers printed in the towns of Knoxville and Athens, of the time and place of payment; and if any subscriber shall fail or neglect to pay any instalment or part of said subscription thus demanded, for thirty days next after the time it fell due, the stock on which it was demanded, together with the amount paid in, may, by the president and directors, or a majority of them, be declared forfeited, and, after due notice, shall be sold at auction for the benefit of the company, or they may waive the forfeiture after thirty days default, and sue the stockholders, at their discretion, for the instalments due.

By the 13th section, the president and directors of said company are invested with all the powers and rights necessary for the building, constructing, and keeping in repair of a railroad from Knoxville, East Tennessee, through the Hiwassee district, to a point on the southern boundary of Tennessee, on the nearest, best, and most practicable route,—the road to have as many tracks as may be deemed necessary by the board of directors, but not to be more than one hundred feet wide, which the company may purchase, or cause the same to be condemned for the use of the road, or any less breadth, at the discretion of the directors; and they may cause to be made, or contract with others for making of said road or any part thereof; and they, or their agents, or those with whom they may contract for making any part of said road, may enter upon, use, and excavate any land which may be laid out for the site of said road, for the erection of warehouses, engine arbors, reservoirs, booths, stables, offices, and mechanics' shops, or other works necessary or useful in the construction and repair thereof; and may fix scales and weights, build bridges, lay rails, make embankments and excavations; may use any earth, ground, rock, timber, or other material which may be wanted for the construction and repair of any part of said road; and may construct and acquire all necessary steam-engines, cars, wagons, and carriages for transportation on said road by horses or steam power, and all necessary apparatus for the same.

Sections 15 and 16 make provision for compensation and payment by the company to individuals for land or other property appropriated under the provisions of the charter to the making of said road, and incidental injuries done by reason of its construction.

These are all the provisions of the charter that need be adverted to, for the purpose of investigating the questions of law arising in the case. Under the provisions of this charter, the company was legally organized and proceeded to construct the road; much work was done in excavations, embankments, building bridges, etc., and much money expended therefor, and in the payment of the salaries of the different officers necessary for

the superintendence thereof. In the construction, the company became indebted to one Kennedy Lonergin, a contractor for grading the road, in the sum of five thousand dollars; for the payment of which, it executed, by its president, its promissory note to S. D. Jacobs, negotiable and payable at the office of discount and deposit of the Union Bank of the state of Tennessee at Knoxville; this note was negotiated by S. D. Jacobs to John C. Trautwine, and by him to the Union Bank, and the proceeds passed by the bank to the credit of Kennedy Lonergin. When the note fell due, it was protested for nonpayment, and due notice thereof given to the indorsers, Jacobs and Trautwine. They failing to pay, suit was instituted thereon against S. D. Jacobs, the first indorser, in the circuit court of Knox county, and the same was brought to trial before a jury, at the February term thereof, 1845, when the circuit judge charged the jury, "that the note was drawn by the Hiwassee Railroad Company, in violation of its corporate powers; that it was, therefore, null and void; and that the plaintiffs were not entitled to recover." Under this charge, a verdict was returned in favor of the defendant, and judgment rendered thereon against the plaintiffs, to reverse which, a writ of error is prosecuted to this court.

It is contended against the plaintiff's right to recover that there is no power given, either expressly or by necessary implication, by the charter to the Hiwassee Railroad Company, to borrow money or to execute promissory notes; and that, therefore, the note executed and indorsed to the bank is void, both as against the maker and indorsers, and that no action can be maintained against them thereon.

The construction of the powers of corporations has been a fruitful source of litigation, both in the courts of Great Britain and the United States. In the earlier cases they were construed with great strictness, and a stringent rule, as to the mode of exercising them, enforced. Mr. Story, in the case of Bank of Columbia v. Patterson, 7 Cranch, 305, says: "Anciently it seems to have been held that corporations could not do anything without deed. 13 Hen. VIII. 12; 4 Hen. VII. 6; 7 Hen. VII. 9. Afterwards, the rule seems to have been relaxed, and they were for convenience' sake permitted to act in ordinary matters without deed, as to retain a servant, cook, or butler (Plow. 91; 2 Saund. 395); and gradually this relaxation widened to embrace other objects (Bro. Corp. 51; 3 Salk. 191; 3 Lev. 107). At length, it seems to have been established, that, though they could not contract directly except under their corporate seal, yet they might, by mere vote or other corporate act, not under their corporate seal, appoint an agent whose acts and contracts within the scope of his authority would be binding on the corporation. 3 P. Wms. 419. And courts of equity, in this respect, seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal. 1 Fonbl. Eq. 305. This technical doctrine has in more modern times been entirely broken down." The same judge, in continuation in the same case, observes: "The doctrine that a corporation could not contract except under its seal, or, in other words, could not make a promise, if it had ever been fully settled, must have been productive of great mischief. Indeed, as soon as the doctrine was established, that its regularly appointed agents could contract in their name without seal, it was impossible to support it; for, otherwise, the party who trusted such contract would be without remedy against the corporation. Accordingly, it would seem to be a sound rule of law, that whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts, made by its authorized agents, are express promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. 3 Brown Ch. 262; Doug. 524; 3 Mass. 364; 5 Mass. 89, 491; 6 Mass. 50." Whatever of strictness may have existed in the earlier cases, in restricting their power of contracting to the express grant of authority, has been also greatly relaxed, and the doctrine upon the subject been made more conformable to reason and necessity, the powers granted to corporations being now construed like all other grants of power, not according to the letter, but the spirit and meaning. In Ang. & A. Corp. p. 192, § 12, it is said, "A corporation having been created for a specific purpose, can not only make no contracts forbidden by its charter, which is, as it were, the law of its nature, but in general can make no contract which is not necessary, either directly or incidentally, to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular contract, we are to consider, in the first place, whether its charter, or some statute binding upon it, forbids or permits it to make such a contract; and if the charter and valid statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation, as directly or incidentally necessary to enable it to fulfil the purpose of its existence, or whether the contract is entirely foreign to that purpose. In general, an express authority is not indispensable to confer upon a corporation the right to become drawer, indorser, or acceptor of a bill of exchange, or to become a party to any other negotiable paper. It is sufficient, if it be implied as the usual and proper means to accom-

plish the purposes of the charter. Chit. Bills (5th Ed.) 17–21; Baily, Bills (5th Ed.) p. 69, c. 2, § 7; Story, Bills Exch. p. 94, § 79. In the case of Mum v. Commission Co., 15 Johns. 52, Spencer, J., who delivered the opinion of the court, says: 'It has been strongly urged, that, under the act of incorporating this company, they could neither draw nor accept bills of exchange. Their power is undoubtedly limited; they are required to employ their stock solely in advancing money, when required, on goods and articles manufactured in the United States, and the sale of such goods and articles on commission. The acceptance of a bill is an engagement to pay money; and the company may agree to pay or advance money at a future day, and they may engage to do this by the acceptance of a bill. When a charter or act of incorporation and valid statutory law are silent as to what contracts a corporation may make, as a general rule it has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created, and none other. The creation of a corporation for a specific purpose implies a power to use the necessary and usual means to effectuate that purpose.'" Ang. & A. Corp. p. 200, § 3.

Mr. Story, in his treatise on Bills of Exchange (page 95), speaking of the power of corporations to draw, indorse, and accept bills of exchange, says: "It is sufficient if it be implied as a usual and appropriate means to accomplish the objects and purposes of the charter. But when the drawing, indorsing, or accepting such bills is obviously foreign to the purposes of the charter, or repugnant thereto, then the act becomes a nullity, and not binding on the corporation."

In the case of People v. Utica Ins. Co., 15 Johns., Thompson, C. J., who delivered the opinion of the court, says, at page 383, "An incorporated company has no rights but such as are specially granted, and those that are necessary to carry into effect the powers so granted."

In the case of Mott v. Hicks, a quantity of wood was purchased for the president and directors of the Woodstock Glass Company by Whitehead Hicks, the president thereof, for which he executed the promissory note of the company at six months. It appears, from a reference in argument to the charter of the company, that there was no clause authorizing it to issue bills or notes, or making such, if issued, binding and obligatory upon the company; yet it was held by the court, that an action would lie against the corporation upon the note, it having been executed by its legally authorized agent, acting within the scope of the legitimate purposes of such corporation. 1 Cow. 513.

In the case of Hayward v. Pilgrim Soc., 21 Pick. 270, it was held that the trustees of a society incorporated for the purpose of building a monument, in virtue of their authority to manage the finances and property of the society, were held competent to bind the society by a promissory note through the agency of their treasurer.

These authorities fully establish the proposition, that, in the construction of charters of corporations, the power to contract, and the mode of contracting, is not limited to the express grant, but may be extended by implication to all necessary and proper means for the accomplishment of the purposes of the charter. Now, what are necessary and proper means? Mr. Story, as we have seen, says, if the means are usual and appropriate, the implication of power arises. Story, Bills, 95.

Chief Justice Marshall, in the case of McCullock v. State of Maryland, 4 Wheat. 413, says: "But the argument on which most reliance is placed, is drawn from the peculiar language of this clause of the constitution. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the government, but such only as may be necessary and proper for carrying them into execution. The word 'necessary' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves congress, in each case, that only which is most direct and simple. Is it true, that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong that one thing to which another may be termed necessary cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of the human mind, that no word conveys to it, in all situations, one single definite idea, and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words, which import something excessive, should be understood in a more mitigated sense,—in that sense which common usage justifies. The word 'necessary' is of this description. It has no fixed character peculiar to itself. It admits of all degrees of comparison, and is often con-

nected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases." In conclusion upon this subject, he says, page 421, same case: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Now, if this be true doctrine in relation to the constitution of the United States, surely it will not be contended that a more stringent rule will be applied in the construction of the powers of a corporation, than is applied in the construction of the powers of congress under the constitution of the United States.

To apply these principles, as established by the authorities cited, to the case under consideration. The Hiwassee Railroad Company is chartered to construct a railroad, a thing of itself necessarily involving a heavy expenditure of money; but in addition thereto, it is empowered to sue and be sued, to acquire and hold, sell, lease, and convey estates, real, personal, and mixed, which necessarily involves the power of making contracts for the same. How shall these contracts be made, both for the construction of the road and the purchase of the property? It is argued, that the capital stock of the company is the only means provided for the payment, and that no other can be resorted to for that purpose; or, in other words, that it must pay cash for every contract, for that no power is given, by which it may contract upon time; for if it may create a debt, of necessary consequence it may create written evidences of that debt, and these may be either promissory notes or bills of exchange. It is true, that the capital stock of the company is the source from whence an ultimate payment of the debts of the company must be made, but to hold that a sufficient amount of this stock must always be on hand, to pay immediately for every contract made, would be destructive of the operations of the company. By the provisions of the charter, not more than one-fourth of the stock shall be called for in any one year, and this upon thirty days' notice; and if, within thirty days after such notice, the amount called for be not paid, the company is authorized to take steps against the delinquent stockholders, to enforce payment. Now, it is obvious that it never was intended that all the stock should be paid in before the company commenced operations. The early completion of the road was a desirable object for commercial purposes, and can it be pretended that the expenditures of the company were to be limited and restricted to the amount of capital actually paid in by the stockholders, and that under no circumstances was the company to exceed them? If, upon failure of the means on hand, the stockholders should neglect to pay upon a proper call, are the works to be suspended until such time as payments could be enforced? Are the persons who may have done work for it, and for which they have not been paid, to wait the slow process of the law before they can receive satisfaction? And shall the company not be permitted to use its credit in such emergency? It is so argued for the defendant. This construction of the charter would be ruinous in its consequences. The company might be compelled to suspend all operations at a time when great loss would result from deterioration to unfinished work, and be greatly injured also in its credit.

The restriction contended for is too refined and technical. It might have suited the days of the Year Books, when it was held that a corporation could contract for nothing except under its corporate seal; but it is strange that it should be urged at this day of enlightened jurisprudence, when the substance of things is looked to rather than forms. A corporation is, in the estimation of law, a body created for special purposes, and there is no good reason why it should not, in the execution of these purposes, resort to any means that would be necessary and proper for an individual in executing the same, unless it be prohibited by the terms of its charter, or some public law, from so doing.

There is no principle which prevents a corporation from contracting debts within the scope of its action; and, as has been observed, if it may contract a debt, it necessarily may make provision for its payment, by drawing, or indorsing, or accepting notes or bills. It is not pretended that this power extends to the drawing, indorsing, or accepting of bills or notes generally, and disconnected from the purposes for which the corporation was created.

The corporation, in the present case, was indebted to one of its contractors for work done upon the road, for the payment of which the note in question was drawn. This, upon principle and authority, was a usual and appropriate means for accomplishing the object and purposes of the charter, viz., the construction of the road. Not only do all the elementary writers sustain this view

of the subject, but, as we have seen, there are three adjudicated cases in courts of high authority directly in its favor,—the case of Mum v. Commission Co., 16 Johns. 52, the case of Mott v. Hicks, 1 Cow. 513, and the case of Hayward v. Pilgrim Soc., 21 Pick. 270.

There has not been produced a single case to the contrary. The cases cited relied upon are decided upon different grounds entirely. The case of Broughton v. Manchester & Salford Waterworks, 3 Barn. & Ald. 1, decides nothing more than that a corporation, not established for trading purposes, cannot be acceptors of a bill of exchange, payable at a less period than six months from the date, because such a case falls within the provisions of the several acts passed for the protection of the Bank of England, by which it is enacted, that it shall not be lawful for any body corporate to borrow, owe, or take up any money upon their bills or notes payable at demand, or at any less time than six months from the borrowing thereof. It is true, that Baily, J., in his opinion, says: "There being no power expressly given to the corporation to make promissory notes or become parties to bills of exchange, I should doubt very much (even if the bank acts were entirely out of the question) whether such corporation would have any power to bind itself for purposes foreign to those for which it was originally established;" and Best, J., in his opinion, says, "I am also of opinion, that this action is not maintainable, because this case comes within that rule of law by which corporations are prevented from binding themselves by contract not under seal. When a company, like the Bank of England, or East India Company, are incorporated for the purposes of trade, it seems to result from the very object of their being so incorporated, that they should have power to accept bills or issue promissory notes; it would be impossible for either of these companies to go on without accepting bills. In the case of Stark v. Highgate Arch-Way Co., 5 Taunt. 792, the court of common pleas seemed to think that, unless express authority was given by the act establishing the company to make promissory notes eo nomine, a corporation could not bind itself except by deed. Now, there is nothing in the act of parliament establishing this company, which authorizes them to bind themselves except by deed." So, the authority of this case for the defendant rests solely upon the dubitatur of Baily and the opinion of Best, that the company could only bind itself by deed. How much, under these circumstances, it is worth, need not be said.

The case of People v. Utica Ins. Co., 15 Johns. 358, decides, that, since the act to restrain unincorporated banking associations (April 11, 1804, re-enacted April 6, 1813), the right or privilege of carrying on banking operations by an association or company, is a franchise which can only be exercised under a legislative grant; that a corporation has no other powers than such as are specifically granted by the act of incorporation, or are necessary for the purposes of carrying into effect the powers expressly granted; and that the act to incorporate the Utica Insurance Company does not authorize the company to institute a bank, issue bills, discount notes, and receive deposits, such powers not being expressly granted by the legislature, and not being within their intention, as collected from the act of incorporation; and that the company having assumed and exercised these powers, they were held to have usurped a franchise.

It is scarcely necessary to enter into an investigation, to show the ground upon which this decision rests. Banking privileges, by an association or company, in New York, rest upon express grant. There was no such grant to the Utica Insurance Company, and an exercise of the power was not necessary and proper to the performance of the purposes for which it is created, but wholly foreign thereto.

In the case of New York Firemen Ins. Co. v. Ely, 2 Cow. 678, it is held, that a company incorporated for the purpose of insurance, and forbidden to carry on any other trade or business, also forbidden to exercise banking powers, with a clause in the act incorporating them enumerating the kind of securities upon which they may loan money, but not including promissory notes in such enumeration, have no power to loan moneys upon promissory notes or any securities other than those especially enumerated. This company being incorporated for the purpose of insurance only, the discounting of promissory notes would have been foreign to the purpose of its creation; but, in addition thereto, it is expressly prohibited from carrying on any other trade or business, or exercising banking powers, and the kind of securities upon which it may loan money are especially enumerated, promissory notes being excluded, it is a well-settled maxim of the law, the "expressio unius exclusio est alterius";—then, for many reasons, this company had no power under its charter to discount notes. It is not only not given expressly or by implication, but upon every principle of legal construction is withheld.

In the case of Life Ins. & Fire Ins. Co. v. Mechanics' Fire Ins. Co. of New York, 7 Wend. 31, it is held, that "a corporation authorized to lend money only on bond and mortgage cannot recover money lent by the corporation, except a bond and mortgage be taken for its re-payment; every other security, as well as the contract itself, is void, and not the basis of action." The reason for this decision is obvious; bond and mortgage being specified as the securities upon which the company might lend money, all others were considered as excluded, upon

the principle mentioned above, "Expressio unius exclusio est alterius."

These are all the cases relied upon by the defendant for the support of the position assumed by him; we are satisfied that they have no applicability to the question, and are not authority in this case.

We are then of opinion (to use the words of Chief Justice Marshall, in the case of McCulloch v. State of Maryland) that the end proposed by the Hiwassee Railroad Company, in executing the note in question, was legitimate, and within the scope of its charter; that as a means it was appropriate, and plainly adapted to that end, which is not prohibited, but consistent with the letter and spirit of the charter, and therefore, not void, but binding and effectual upon the company and the indorsers.

Let the judgment of the circuit court be reversed, and the case be remanded for a new trial.

FOSTER v. MACKINNON.

(L. R. 4 C. P. 704.)

Court of Common Pleas. July 5, 1869.

BYLES, J. This was an action by the plaintiff as indorsee of a bill of exchange for £3,000 against the defendant, as indorser. The defendant by one of his pleas traversed the indorsement, and by another alleged that the defendant's indorsement was obtained from him by fraud. The plaintiff was a holder for value before maturity, and without notice of any fraud.

There was contradictory evidence as to whether the indorsement was the defendant's signature at all; but, according to the evidence of one Callow, the acceptor of the bill, who was called as a witness for the plaintiff, he, Callow, produced the bill to the defendant, a gentleman advanced in life, for him to put his signature on the back, after that of one Cooper, who was payee of the bill and first indorser, Callow not saying that it was a bill, and telling the defendant that the instrument was a guarantee. The defendant did not see the face of the bill at all. But the bill was of the usual shape, and bore a stamp, the impress of which stamp was visible at the back of the bill. The defendant signed his name after Cooper's, he, the defendant (as the witness stated), believing the document to be a guarantee only.

The lord chief justice told the jury that, if the indorsement was not the defendant's signature, or if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, the defendant was entitled to the verdict. The jury found for the defendant.

A rule nisi was obtained for a new trial, first, on the ground of misdirection in the latter part of the summing-up, and, secondly, on the ground that the verdict was against the evidence.

As to the first branch of the rule, it seems to us that the question arises on the traverse of the indorsement. The case presented by the defendant is that he never made the contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently misdescribed to him; that, when he signed one thing, he was told and believed that he was signing another and an entirely different thing; and that his mind never went with his act.

It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign, the contract to which his name is appended.

The authorities appear to us to support this view of the law. In Thoroughgood's Case, 2 Coke, 9b, it was held that, if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, that parchment is nevertheless not his deed. In a note to Thoroughgood's Case, 2 Coke, 9b, in Fraser's edition of Coke's Reports, it is suggested that the doctrine is not confined to the condition of an illiterate grantor; and a case in Keilwey's Reports (70 pl. 6), is cited in support of this observation. On reference to that case, it appears that one of the judges did there observe that it made no difference whether the grantor were lettered or unlettered. That, however, was a case where the grantee himself was the defrauding party. But the position that if a grantor or covenantor be deceived or misled as to the actual contents of the deed, the deed does not bind him, is supported by many authorities. See Com. Dig. "Fait" (B, 2); and is recognized by Bayley, B., and the court of exchequer, in the case of Edwards v. Brown, 1 Cromp. & J. 312. Accordingly, it has recently been decided in the exchequer chamber that if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least, if that be done without the grantor's negligence), it is not the deed of the grantor. Swan v. North British Australasian Land Co., 2 Hurl. & C. 175.

These cases apply to deeds, but the principle is equally applicable to other written contracts. Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man writes his name across the back of a blank bill-stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover.

In these cases, however, the party signing knows what he is doing. The indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined.

But in the case now under consideration the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple church, or on the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case the signer would not have been bound by his signature, for two reasons: First, that he never in fact signed the writing declared on; and, secondly, that he never intended to sign any such contract.

In the present case the first reason does not apply, but the second reason does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the actual contents of the instrument.

We are not aware of any case in which the precise question now before us has arisen on bills of exchange or promissory notes, or been judicially discussed. In the case of Ingham v. Primrose, 7 C. B. (N. S.) 83; 28 L. J. (C. P.) 294, and in the case of Nance v. Lary, 5 Ala. 370, cited 1 Pars. Bills, 114, note,—both cited by the plaintiff,—the facts were very different from those of the case before us, and have but a remote bearing on the question. But in Putnam v. Sullivan, an American case, reported in 4 Mass. 45, and cited in 1 Pars. Bills, p. 111, note, a distinction is taken by Chief Justice Parsons between a case where an indorser intended to indorse such a note as he actually indorsed, being induced by fraud to indorse it, and a case where he intended to indorse a different note, and for a different purpose. And the court intimated an opinion that, even in such a case as that, a distinction might prevail, and protect the indorsee.

The distinction in the case now under consideration is a much plainer one, for on this branch of the rule we are to assume that the indorser never intended to indorse at all, but to sign a contract of an entirely different nature.

For these reasons we think the direction of the lord chief justice was right.

With respect, however, to the second branch of the rule, we are of opinion that the case should undergo further investigation. We abstain from giving our reasons for this part of our decision only lest they should prejudice either party on a second inquiry.

The rule, therefore, will be made absolute for a new trial.

Rule absolute.

CUNDY et al. v. LINDSAY et al.[1]

(3 App. Cas. 459.)

House of Lords. March 4, 1878.

Appeal from court of appeal.

In 1873, one Alfred Blenkarn hired a room at a corner house in Wood street, Cheapside. It had two side windows opening into Wood street, but, though the entrance was from Little Love Lane, it was by him constantly described as 37 Wood street, Cheapside. His agreement for this room was signed "Alfred Blenkarn." The now respondents, Messrs. Lindsay & Co., were linen manufacturers, carrying on business at Belfast. In the latter part of 1873, Blenkarn wrote to the plaintiffs on the subject of a purchase from them of goods of their manufacture—chiefly cambric handkerchiefs. His letters were written as from "37 Wood street, Cheapside," where he pretended to have a warehouse, but in fact occupied only a room on the top floor, and that room, though looking into Wood street on one side, could only be reached from the entrance in 5 Little Love Lane. The name signed to these letters was always signed without any initial as representing a Christian name, and was, besides, so written as to appear "Blenkiron & Co." There was a highly respectable firm of W. Blenkiron & Son, carrying on business in Wood street, but at number 123 Wood street, and not at 37. Messrs. Lindsay, who knew the respectability of Blenkiron & Son, though not the number of the house where they carried on business, answered the letters, and sent the goods addressed to "Messrs. Blenkiron & Co., 37 Wood Street, Cheapside," where they were taken in at once. The invoices sent with the goods were always addressed in the same way. Blenkarn sold the goods thus fraudulently obtained from Messrs. Lindsay to different persons, and among the rest he sold 250 dozen of cambric handkerchiefs to the Messrs. Cundy, who were bona fide purchasers, and who resold them in the ordinary way of their trade. Payment not being made, an action was commenced in the mayor's court of London by Messrs. Lindsay, the junior partner of which firm, Mr. Thompson, made the ordinary affidavit of debt, as against Alfred Blenkarn, and therein named Alfred Blenkarn as the debtor. Blenkarn's fraud was soon discovered, and he was prosecuted at the Central criminal court, and convicted and sentenced. Messrs. Lindsay then brought an action against Messrs. Cundy as for unlawful conversion of the handkerchiefs. The cause was tried before Mr. Justice Blackburn, who left it to the jury to consider whether Alfred Blenkarn, with a fraudulent intent to induce the plaintiffs to give him the credit belonging to the good character of Blenkiron & Co., wrote the letters, and by fraud induced the plaintiffs to send the goods to 37 Wood street—were they the same goods as those bought by the defendants—and did the plaintiffs by the affidavit of debt intend, as a matter of fact, to adopt Alfred Blenkarn as their debtor. The first and second questions were answered in the affirmative, and the third in the negative. A verdict was taken for the defendants, with leave reserved to move to enter the verdict for the plaintiffs. On motion accordingly, the court, after argument, ordered the rule for entering judgment for the plaintiffs to be discharged, and directed judgment to be entered for the defendants. 1 Q. B. Div. 348. On appeal this decision was reversed, and judgment ordered to be entered for the plaintiffs, Messrs. Lindsay. 2 Q. B. Div. 96. This appeal was then brought.

Sir H. S. Giffard, Sol. Gen., Mr. Benjamin, Q. C., and B. Francis Williams, for appellants.

The question here is whether the property in the goods passed from the respondents to Blenkarn. It is submitted that it did.

A title to goods may be acquired even where they are obtained upon false pretences. Though it will not be an indefeasible title, and may be voidable, it will, as to third persons at least, be good till it has been avoided. It must in some sense pass the property, for if it did not it may be doubtful whether a conviction for obtaining the goods could be sustained. Here it is clear that there was in the first instance an intention on the part of the original owner that the property should pass. [LORD PENZANCE: But was it not the intention that it should pass to Blenkiron, but not to Blenkarn?] As to some person in Wood street the intention plainly did exist that it should pass. [LORD PENZANCE: Is there no distinction between the case of a man who, being deceived, enters into a contract, and that of a man who, being also deceived, does not enter into a contract?] The latter was the case of Hardman v. Booth, 1 Hurl. & C. 803, so much relied on in the court below. But that case is distinguishable from the present, for there the facts shewed distinctly that the intention was to contract with Thomas Gandell & Co., and with them alone; and the firm of Edward Gandell & Todd was a different firm, and carried on business at a different place, and was wholly unknown to the plaintiffs; and Edward Gandell, having by fraud got hold of the goods sent to the warehouse of Thomas Gandell, carried them off to his own place, and so disposed of them. Here the plaintiffs themselves sent the goods to the person who had corresponded with them, and who did carry on business at 37 Wood street. The goods reached that destination, and were delivered there according to the address which the plaintiffs had put upon them. The facts of the two cases were unlike, and, without in the least doubting the decision in that case, it may well be contended not to be applicable here. Here the original owner allowed the goods to remain in the

[1] Irrelevant parts omitted.

hands of the person to whom he had sent them, and while there they were sold to the defendants, who were bona fide purchasers for value. After that the vendor could no longer follow them as his own. His intention had been to transfer them, and the transfer was complete. In no way whatever could the case be compared to one in which money or a bill of exchange was delivered to a person for a particular purpose, and he used it for another, and so could give no title whatever to a third person to whom he passed it. Neither was this a delivery to B., who stated himself to be the agent of some one else, when he was not so. It was a delivery to B. himself. Credit was therefore given to him. It was given to Blenkarn & Co., of 37 Wood street. Then again, in the first instance, Mr. Thompson, one of the partners in Messrs. Lindsay's house, made an affidavit of debt against Alfred Blenkarn, which shewed that the house recognized Blenkarn as the debtor, and the transaction as one of a sale. That, though not conclusive on the subject, was at least strong evidence of previous intention. It may be admitted that where the authority to part with the property is limited, and the property is parted with in disregard of that limited authority, the title to it would not pass. Reg. v. Middleton, L. R. 2 Cr. Cas. 38. But that cannot affect this case, for here the goods were transmitted by the owners themselves to a person and a place described by themselves. The title to the goods was for the time perfect in law, and, being so, the transfer to the defendants made during that time, being made bona fide, could not be impeached. Pease v. Gloahec, L. R. 1 P. C. 219. Till the title of Blenkarn was disaffirmed it was good, and the property disposed of in the meantime could not afterwards be followed in the hands of a third person who had honestly purchased it.

Mr. Wills, Q. C., and Mr. Fullarton, for respondents.

Where the circumstances are such that no contract has ever arisen, mere delay in declaring a disaffirmance cannot affect the case. Kingsford v. Merry, 1 Hurl. & N. 503; Boulton v. Jones, 2 Hurl. & N. 564. See In re Reed, 3 Ch. Div. 123; Hardman v. Booth, 1 Hurl. & C. 803. Here there was no contract. The plaintiffs did not know of the existence of two firms of names similar to each other carrying on business in Wood street. They knew only of Blenkiron & Co., and thought they were dealing with Blenkiron & Co., and sent their goods to that firm. But Blenkiron & Co. knew nothing whatever of the matter. There was, therefore, no contract with them. Nor was there any with Blenkarn, for by a fraud in using the name of other persons he obtained possession of goods intended for those other persons, and not for him. There was, therefore, no contract with him. If so, no moment existed during which a title to the goods could be given to the defendants. Their conversion of the goods was consequently unlawful.

CAIRNS, L. Ch. My lords, you have in this case to discharge a duty which is always a disagreeable one for any court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. My lords, in discharging that duty your lordships can do no more than apply rigorously the settled and well-known rules of law. Now, with regard to the title to personal property, the settled and well-known rules of law may, I take it, be thus expressed: By the law of our country the purchaser of a chattel takes the chattel, as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it, by a de facto contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling the original owner of the goods or of the chattel to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.

My lords, the question, therefore, in the present case, as your lordships will observe, really becomes the very short and simple one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing that property, even although, as I have said, that contract might afterwards be open to a process of reduction, upon the ground of fraud, still, in the meantime, Blenkarn might have conveyed a good title for valuable consideration to the present appellants.

Now, my lords, there are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods in question passed, it could only pass by way of contract. There

is nothing else which could have passed the property. The second observation is this: Your lordships are not here embarrassed by any conflict of evidence, or any evidence whatever as to conversations or as to acts done; the whole history of the whole transaction lies upon paper. The principal parties concerned, the respondents and Blenkarn, never came in contact personally; everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case.

Now, my lords, discharging that duty and answering that inquiry, what the jurors have found is, in substance, this: It is not necessary to spell out the words, because the substance of it is beyond all doubt. They have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the respondents; that by all those means he led, and intended to lead, the respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well known and solvent house of Blenkiron & Co., doing business in the same street. My lords, those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case.

If that is so, what is the consequence? It is that Blenkarn—the dishonest man, as I call him—was acting here just in the same way as if he had forged the signature of Blenkiron & Co., the respectable firm, to the applications for goods, and as if when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to and intended for, not himself, but the firm of Blenkiron & Co. Now, my lords, stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required. With the firm of Blenkiron & Co. of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure.

The result, therefore, my lords, is this: that your lordships have not here to deal with one of those cases in which there is de facto a contract made which may afterwards be impeached and set aside on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case, namely, in which the contract never comes into existence. My lords, that being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the respondents, and the title which was attempted to be given to the appellants was a title which could not be given to them.

My lords, I therefore move your lordships that this appeal be dismissed with costs, and the judgment of the court of appeal affirmed.

Judgment appealed from affirmed, and appeal dismissed, with costs.

COUTURIER et al. v. HASTIE et al.

(5 H. L. Cas. 673.)

House of Lords. June 27, 1856.

The plaintiffs were merchants at Smyrna; the defendants were corn factors in London; and this action was brought to recover from them the price of a cargo of Indian corn, which had been shipped at Salonica, on board a vessel chartered by the plaintiffs for a voyage to England, and had been sold in London by the defendants in error, upon a del credere commission. The purchaser, under the circumstances hereafter stated, had repudiated the contract.

In January, 1848, the plaintiffs chartered a vessel at Salonica, to bring a cargo of 1180 quarters of corn to England. On the 8th of February a policy of insurance was effected on "corn, warranted free from average, unless general, or the ship be stranded." On the 22d of that month, the master signed a bill of lading, making the corn deliverable to the plaintiffs, or their assigns, "he or they paying freight, as per charter-party, with primage and average accustomed." On the 23d February the ship sailed on the homeward voyage. On the 1st May, 1848, Messrs. Bernouilli, the London agents of the plaintiffs, and the persons to whom the bill of lading had been indorsed, employed the defendants to sell the cargo, and sent them the bill of lading, the charter-party, and the policy of insurance, asking and receiving thereon an advance of £600.

On the 15th May the defendants sold the cargo to A. B. Callander, who signed a bought note, in the following terms: "Bought of Hastie & Hutchinson, a cargo of about 1,180 (say eleven hundred and eighty) quarters of Salonica Indian corn, of fair average quality when shipped per the Kezia Page, Captain Page, from Salonica; bill of lading dated twenty-second February, at 27s. (say twenty-seven shillings) per quarter, free on board, and including freight and insurance, to a safe port in the United Kingdom, the vessel calling at Cork or Falmouth for orders; measure to be calculated as customary; payment at two months from this date, or in cash, less discount, at the rate of five per cent. per annum for the unexpired time, upon handing shipping documents."

In the early part of the homeward voyage, the cargo became so heated that the vessel was obliged to put into Tunis, where, after a survey and other proceedings, regularly and bona fide taken, the cargo was, on the 22d April, unloaded and sold. It did not appear that either party knew of these circumstances at the time of the sale. The contract having been made on the 15th of May, Mr. Callander, on the 23d of May, wrote to Hastie & Hutchinson: "I repudiate the contract of the cargo of Indian corn, per the Kezia Page, on the ground that the cargo did not exist at the date of the contract, it appearing that the news of the condemnation and sale of this cargo at Tunis, on the 22d April, was published at Lloyds, and other papers, on the 12th instant, being three to four days prior to its being offered for sale to me."

The plaintiffs afterwards brought this action. The declaration was in the usual form. The defendants pleaded several pleas, of which the first four are not now material to be considered. The fifth plea was that before the sale to Callander, and whilst the vessel was on the voyage, the plaintiffs sold and delivered the corn to other persons, and that since such sale the plaintiffs never had any property in the corn or any right to sell or dispose thereof, and that Callander on that account repudiated the sale, and refused to perform his contract, or to pay the price of the corn. Sixthly, that before the defendants were employed by the plaintiffs, the corn had become heated and greatly damaged in the vessel, and had been unloaded by reason thereof, and sold and disposed of by the captain of the said vessel on account of the plaintiffs at Tunis, and that Callander, for that reason, repudiated the sale, &c.

The cause was tried before Mr. Baron Martin, when his lordship ruled that the contract imported that at the time of the sale the corn was in existence as such, and capable of delivery, and that, as it had been sold and delivered by the captain before this contract was made, the plaintiffs could not recover in the action. He therefore directed a verdict for the defendants. The case was afterwards argued in the court of exchequer before the Lord Chief Baron, Mr. Baron Parke, and Mr. Baron Alderson, when the learned judges differed in opinion, and a rule was drawn up directing that the verdict found for the defendants should be set aside on all the pleas, except the sixth, and that on that plea judgment should be entered for the plaintiffs, non obstante veredicto. That the defendants should be at liberty to treat the decision of the court as the ruling at nisi prius, and to put it on the record and bring a bill of exceptions. 8 Exch. 40. This was done, and the lord chief baron sealed the bill of exceptions, adding, however, a memorandum to the effect that he did so as the ruling of the court, but that his own opinion was in opposition to such ruling.

The case was argued on the bill of exceptions in the exchequer chamber, before Justices Coleridge, Maule, Cresswell, Wightman, Williams, Talfourd, and Crompton, who were unanimously of opinion that the judgment of the court of exchequer ought to be reversed. 9 Exch. 102. The present writ of error was then brought.

The judges were summoned, and Mr. Baron Alderson, Mr. Justice Wightman, Mr. Justice Cresswell, Mr. Justice Erle, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, Mr. Justice Willes, and Mr. Baron Bramwell attended.

Sir F. Thesiger and Mr. James Wilde, for plaintiffs in error.

The purchase here was not of the cargo absolutely as a thing assumed to be in existence, but merely of the benefit of the expectation of its arrival, and of the securities against the contingency of its loss. The purchaser bought in fact the shipping documents, the rights and interests of the vendor. A contract of such a kind is valid. Paine v. Meller, 6 Ves. 349; Cass v. Ruddle, 2 Vern. 280. The language of the contract implies all this. The representation that the corn was shipped free on board at Salonica means that the cargo was the property of, and at the risk of the shipper. Cowasjee v. Thompson, 5 Moore, P. C. 165. The court of exchequer proceeded on the words of this contract, and gave the correct meaning to them. Mr. Baron Parke, 8 Exch. 54, said: "There is an express engagement that the cargo was of average quality when shipped, so that it is clear that the purchaser was to run the risk of all subsequent deterioration by sea damage or otherwise, for which he was to be indemnified by having the cargo fully insured; for the 27s. per quarter were to cover, not merely the price, but all expenses of shipment, freight, and of insurance." In a contract for the sale of goods afloat there are two periods which are important to be regarded, the time of sale and the time of arrival. If at the time of the sale there is any thing on which the contract can attach, it is valid, and the vendee bound. Barr v. Gibson, 3 Mees. & W. 390. The goods are either shipped, as here, "free on board," when it is clear that they are thenceforward at the risk of the vendee; or they are shipped "to arrive," which saves the vendee from all risk till they are safely brought to port. Johnson v. Macdonald, 9 Mees. & W. 600. The intention of the parties is understood to be declared by different terms of expression, and the judgment of the exchequer chamber here really violates that intention. The case of Strickland v. Turner, 7 Exch. 208, which was referred to by the lord chief baron (8 Exch. 49), is not in point, for there the annuity, which was the subject of the sale, had actually ceased to exist when the sale took place. There was nothing whatever on which the contract could attach; and the principles therefore on which all contracts of sale must proceed, as explained and illustrated by Pothier (Poth. Cont. pt. 1, § 2, art. 1), whose definitions of a sale are literally adopted by Mr. Chancellor Kent (2 Kent, Comm. 468), applied there, but they do not apply here, for here the parties were dealing with an expectation, namely, the expectation of the arrival of the cargo. As Lord Chief Baron Richards said, in Hitchcock v. Giddings, 4 Price, 135, "If a man will make a purchase of a chance, he must abide by the consequences." Here, however, the chance was only that of the arrival of the cargo, and that chance was covered by the policy, for the cargo itself, as stated in the contract, had been actually shipped. Had the cargo been damaged at the time of this contract, the loss thereby arising must have been borne by the purchaser. Suppose the corn had been landed at Tunis, and had remained in the warehouse there, it would have ceased to be a cargo in the strict and literal meaning of the word, but the purchaser would still have been bound by his contract.

The court of exchequer chamber, admitting that the vendee might have recovered an average loss under the policy on this cargo, said that he could not have recovered if a total loss had occurred, and referred to an admission to that effect supposed to have been made by the present Baron Martin when arguing Sutherland v. Pratt, 11 Mees. & W. 296. That admission does not mean what is thus supposed; and after the case of Roux v. Salvador, 3 Bing. N. C. 266, where there was a total loss, and the plaintiff recovered on the policy, it is difficult to understand how such an opinion could be entertained. A technical objection arising on the form of the policy would not affect this question. The purchaser's right on this policy would have been complete. 1 Phil. Ins. 438; 1 Marsh. Ins. 333; and March v. Pigott, 5 Burrows, 2802.

By what has happened here, the purchaser has been saved the payment of freight (Vlierboom v. Chapman, 13 Mees. & W. 230); and Owens v. Dunbar, 12 Ir. Law, 304, shows that he would have been bound to accept the cargo. The contract here was that the cargo was shipped "free on board." To that extent the vendor was bound, but he was not bound by any further and implied warranty. Dickson v. Zizinia, 10 C. B. 602.

Mr. Butt and Mr. Bovill, for defendants in error, were not called on.

CRANWORTH, Ch. My lords, this case has been very fully and ably argued on the part of the plaintiffs in error, but I understand from an intimation which I have received that all the learned judges who are present, including the learned judge who was of a different opinion in the court of exchequer, before the case came to the exchequer chamber, are of opinion that the judgment of the court of exchequer chamber sought to be reversed by this writ of error was a correct judgment, and they come to that opinion without the necessity of hearing the counsel for the defendants in error. If I am correct in this belief, I will not trouble the learned counsel for the defendants in error to address your lordships, because I confess, though I should endeavor to keep my mind suspended till the case had been fully argued, that my strong impression in the course of the argument has been, that the judgment of the court of exchequer chamber is right. I should there-

fore simply propose to ask the learned judges whether they agree in thinking that that judgment was right. [The judges consulted together for a few minutes, at the end of which time]

Mr. Baron ALDERSON said: My lords, her majesty's judges are unanimously of opinion that the judgment of the exchequer chamber was right, and that the judgment of the court of exchequer was wrong; and I am also of that opinion myself now, having been one of the judges before whom the case came to be heard in the court of exchequer.

THE LORD CHANCELLOR. My lords, that being so, I have no hesitation in advising your lordships, and at once moving that the judgment of the court below should be affirmed. It is hardly necessary, and it has not ordinarily been usual, for your lordships to go much into the merits of a judgment which is thus unanimously affirmed by the judges who are called in to consider it, and to assist the house in forming its judgment. But I may state shortly that the whole question turns upon the construction of the contract which was entered into between the parties. I do not mean to deny that many plausible and ingenious arguments have been pressed by both the learned counsel who have addressed your lordships, showing that there might have been a meaning attached to that contract different from that which the words themselves import. If this had depended not merely upon construction of the contract but upon evidence, which, if I recollect rightly, was rejected at the trial, of what mercantile usage had been, I should not have been prepared to say that a long-continued mercantile usage interpreting such contracts might not have been sufficient to warrant, or even to compel, your lordships to adopt a different construction. But, in the absence of any such evidence, looking to the contract itself alone, it appears to me clearly that what the parties contemplated—those who bought and those who sold—was that there was an existing something to be sold and bought, and if sold and bought then the benefit of insurance should go with it. I do not feel pressed by the latter argument, which has been brought forward very ably by Mr. Wilde, derived from the subject of insurance. I think the full benefit of the insurance was meant to go as well to losses and damage that occurred previously to the 15th of May as to losses and damage that occurred subsequently, always assuming that something passed by the contract of the 15th of May. If the contract of the 15th of May had been an operating contract, and there had been a valid sale of a cargo at that time existing, I think the purchaser would have had the benefit of insurance in respect of all damage previously occurring. The contract plainly imports that there was something which was to be sold at the time of the contract, and something to be purchased. No such thing existing, I think the court of exchequer chamber has come to the only reasonable conclusion upon it, and consequently that there must be judgment given by your lordships for the defendants in error.

Judgment for the defendants in error, with costs.

IRWIN v. WILSON.

(15 N. E. 209, 45 Ohio St. 426.)

Supreme Court of Ohio. Nov. 22, 1887.

Error to circuit court, Hardin county.

The original suit was begun in the common pleas to obtain the rescission of an exchange of lands that had been made between the parties, on the ground that the defendant had made fraudulent representations as to the location, character and value of the lands given by him in exchange for those of the plaintiff. Judgment was rendered in favor of the defendant on the issue as to fraud, and the plaintiff appealed to the district court, then in existence. The plaintiff, by leave of court, then amended his petition, so as to aver that there was a mutual mistake as to the location, character, and value of the lands exchanged by the defendant for those of the plaintiff. On the issues made as to this, the case was subsequently heard and determined by the circuit court, as the successor of the district court. It made, at the request of the plaintiff, a special finding of facts, and rendered judgment thereon in favor of the defendant, dismissing the action of the plaintiff. The plaintiff moved the court to set aside its finding and judgment as not supported by the evidence; and, also, as not supported by law. The motion was overruled, and the rulings of the court in this regard are assigned for error here. The facts as found by the court are as follows: "(1) That on the fourteenth day of December, 1881, the plaintiff, William S. Irwin, was the owner of the house and lot in Kenton, Ohio, in the petition described, which was worth $1,700. (2) That the defendant, Joseph H Wilson, was at said date the owner of the land described in the petition, being 80 acres of land situate in the county of Monona, in the state of Iowa. (3) That on the said date one Isaac H. Wilson, who was the father and agent of defendant, proposed to sell and exchange said 80 acres of land in Iowa, to and with plaintiff, for said house and lot of plaintiff, which said 80 acres of land said Isaac H. Wilson then stated had been taken by defendant in a trade of lands at $1,200; that he had never been in Iowa, and had not seen the land, and knew nothing of it, but that one Henry Pugh, he was informed, had been to see the land, and Pugh, he was informed, said it was good, dry land, and within three to four miles of the county-seat of said county of Monona, in the state of Iowa, and that said Henry Pugh lived near Ada, in said Hardin county; that on the seventeenth day of December, 1881, said agent proposed to said plaintiff to go and see and inquire of said Henry Pugh as to the location and quality of said land in Monona county, Iowa, and said Isaac H. Wilson, did, on the nineteenth day of December, 1881, furnish a conveyance for that purpose, and he and plaintiff did go to the house of said Henry Pugh, and said plaintiff did then, in the presence of said Isaac H. Wilson, make inquiries of and concerning said land in Monona county, Iowa; and on said day the said Henry Pugh stated to the said plaintiff, in the presence and hearing of said Isaac H. Wilson, that he had seen and been upon the said lands of defendant in Monona county, Iowa, in the month of October, 1879; that the same were about four miles from the county-seat of Monona county, Iowa; that the said lands were good, dry, tillable lands; that there was improved land and corn growing within 30 rods of the same; that the said land was worth $10 per acre, and would be worth more now; that he had gone to see said lands for Nicholas High, who was a former owner of a tract of which this was a part, and he had never seen the plaintiff and had never spoken to said agent, Isaac H. Wilson, previous to the interview; that said plaintiff relied upon the statements made by Pugh; that the said plaintiff, the said defendant, and the said Isaac H. Wilson, agent, were entire strangers to the said Henry Pugh. (4) That neither said plaintiff, said defendant, nor said Isaac H. Wilson, ever saw said lands in Monona county, Iowa, prior to the date of said exchange, and never since that date, except that said plaintiff went to see the same in May, 1882, after the commencement of this suit. (5) That on the twenty-first day of December, 1881, the said plaintiff and said defendant entered into a contract in writing for the exchange of said lands, of which contract the following is a copy:

" 'December 21, 1881. Article of agreement between W. S. Irwin, of the first part, and J. H. Wilson, of the second part, wherein said Irwin, of the first part, agrees to sell, and has sold, to J. H. Wilson, of the second part, the property he now lives in, being the east half of a part of outlot number six, in the eastern addition to the town of Kenton, Ohio, for, and in the consideration of nineteen hundred dollars ($1,900) paid as follows, to-wit: Twelve hundred in hand, in 80 acres of land in Iowa, and three hundred and fifty dollars ($350) payable April 1, 1883, with one year's interest at six per cent., and three hundred and fifty dollars ($350) payable April 1, 1884, with two years' interest at six per cent. Said Wilson to have possession of said property on or before the first day of April, 1882; said property to be left in good condition. Wm. S. Irwin. J. H. Wilson. Isaac H. Wilson, Agent.'

"Thereafter, on said twenty-first day of December, 1881, said defendant, Joseph H. Wilson, executed and delivered to plaintiff a deed of conveyance in fee-simple for said 80 acres of land in Monona county, Iowa, naming in said deed the sum of $1,200 as the consideration therefor, and also made and delivered to plaintiff his two notes for $350 each, payable, respectively, April 1, 1883, and April 1, 1884, with interest thereon at six per cent. per annum, secured by mort-

gage on said Kenton property; and at the same time said plaintiff executed and delivered to said defendant a deed of conveyance for said house and lot in Kenton, the consideration named in said deed being $1,900. (6) That said Henry Pugh did not see and was not on the lands so conveyed by said defendant to plaintiff when in Monona county, Iowa, in 1879, or at any other time; that the land seen by said Pugh in said county of Monona, Iowa, was prairie, and dry, tillable land, and within 20 to 30 rods of growing corn in October, 1879, and that the land so conveyed by defendant to said plaintiff in Monona county, Iowa, was wet, marshy land unfit for cultivation, and was not worth at said time to exceed three dollars per acre; that on the twenty-fifth day of March, 1882, the said plaintiff tendered to said defendant a deed of conveyance duly executed for said 80 acres of land in Iowa, being the same real estate before that time conveyed to him by defendant; also tendered to defendant the said notes and mortgages so executed by defendant to plaintiff, and demanded a deed of conveyance for said house and lot in Kenton, Ohio, so conveyed by plaintiff to defendant; which tender by said plaintiff and conveyance by said defendant were then refused by said defendant, to all of which the said plaintiff then and there excepted."

The answer of the defendant, among other things, contains the following denials: "Defendant denies the averment of said amended petition that said Pugh, by mistake or design, had not seen the lands described in defendant's deed, and denies that the description given by said Pugh was erroneous and untrue; and denies that there was any mistake as to the identity of said lands on the part of said Pugh."

William Lawrence, for plaintiff in error.
Howenstine & Sweet, for defendant in error.

MINSHALL, J., (after stating the facts as above.) The exchange in this case was conducted on behalf of the defendant by his father acting as his agent. But this can make no difference as to the rights of the plaintiff, if the knowledge and acts of the agent were such that the plaintiff would be entitled to a rescission had the party acting as agent been the owner of the land, and acted for himself in effecting the exchange, instead of an agent; for in such case, the agent personates the principal, and, as to third persons, his knowledge and acts must be regarded as those of the principal. Dunlap, Paley, Ag. 259, and cases cited in note 4. Any other rule would make it utterly unsafe to deal with one acting as the agent of another. From the facts found by the court it appears that the defendant, being the owner of a tract of land in the state of Iowa, proposed, by his agent, to exchange it for the house and lot of the plaintiff, in the town of Kenton. Both were well acquainted with the property of the plaintiff; but, being uninformed as to the land in Iowa, the agent of the defendant procured a conveyance, and, at his suggestion, he and the plaintiff went to see one Pugh, though a stranger to both of them, residing in the county where they did, the agent saying that he understood that Pugh was acquainted with the land. On arriving at Pugh's, he informed them that he had seen the land; that he had been on it the year before, and that it was good, dry, tillable land, near the county-seat; that it was worth $10 an acre when he saw it, and would then be worth more. In a few days afterwards, the agreement for the exchange was made, and executed by the plaintiff, conveying his house and lot to the defendant, who conveyed to the plaintiff his land in Iowa containing 80 acres, and also made and delivered to the plaintiff two notes amounting to $700, secured by mortgage on the house and lot conveyed by the plaintiff, as the equivalent of the supposed difference in the value of the lands exchanged. In a few months afterwards, the plaintiff discovered that the land in Iowa was not such as it had been described by Pugh; that it was unfit for cultivation, being wet and marshy, and worth not more than three dollars an acre. The error arose from the fact that Pugh was mistaken in the ownership of the land he had seen; the land he had seen and described to the plaintiff and the agent of the defendant, was such as he had described it to be, but was not the land of the defendant, though he thought it was. The mistake was in the identity of the land seen and described by Pugh. Thereupon the plaintiff offered to rescind, which was refused by the defendant. The refusal is placed, not upon the ground that he cannot be restored to his former condition by the plaintiff, but that, upon the facts as found, there is no ground for rescission; there being, as claimed, no mutual mistake, and no fraud found by the court. While no fraud is found by the court, does it not, however, clearly, if not necessarily, follow from the circumstances under which the exchange was made, that there was a mutual mistake of the parties as to the character and value of the lands in Iowa? We think it does. Both parties were in ignorance as to the true character of the land of the defendant. If it had been otherwise, the court could not have found that there was no fraud. It found that the plaintiff believed and relied on the information given by Pugh; and if the defendant, by his agent, was acting in good faith, he must have done the same thing; for it will hardly be affirmed by any one that, under the circumstances of this case, he could without fraud have concluded the exchange, knowing that the land was not such as it had been described by Pugh, for he must have known, if he knew anything, that the plaintiff believed what was said to him by the person to whom he

had taken him for information. He knew it from the fact that the plaintiff concluded the agreement for an exchange on the basis of that information. So that, under the circumstances, it would be perilous for the defendant to claim that neither he nor his agent believed the statements of Pugh as to the character of the Iowa land; for, if that had been the fact, he could not have concluded the exchange on the basis of the information being true, without perpetrating a fraud on the plaintiff, whether he made any positive representations or not. Pol. Cont. (Wald's Ed.) 429. But his belief or disbelief as to this is not a matter of mere argument, for, while there is no specific finding on the question, it is made certain by the pleadings.

In answering the averments of the petition, the defendant affirms in his pleading that the description given of the land by Pugh was not untrue, and that there was no mistake in the identity of the land seen by him. Therefore, unless we may conclude that he had one belief as to the matter when he concluded the exchange, and another when he filed his answer,—a thing quite impossible if not absurd,—we may safely conclude that, as a fact apparent on the record, he had the same belief as to the accuracy of the statements made by Pugh that the plaintiff had. But the positive findings of the court are that Pugh was mistaken as to the identity of the land, and that that owned by the defendant was not of the description given by him. So that the only question that remains is, not whether there was a mutual mistake in regard to the land, but whether it is such a one as under the circumstances entitles the plaintiff to a rescission. Here we must observe that the mistake arose not from a mistaken opinion of Pugh as to the character of the defendant's lands; for, if he had in fact seen the land, and simply erred in his opinion as to its character and value, a different question might have been presented. It is a matter of common knowledge that opinions will differ in this regard; and the plaintiff, in relying on the statements of P. as to the quality of the defendant's land, might be held as assuming the possibility of a mistake in his judgment as to this. But Pugh did not see the land of defendant; he was mistaken in its identity. Such errors are less frequent than the former; and a fault could hardly be imputed to any one in not anticipating an error of this kind. 2 Pom. Eq. Jur. § 852. It is against mistakes of this character that the courts have been most prompt to relieve; and not only for the reason that they may happen where the greatest caution is observed, but also, that, as a matter of law, where they do occur, no real contract is formed. Thus, in Wheadon v. Olds, 20 Wend. 174, a sale had been made of a quantity of oats in bulk, upon an estimate of the quantity, after a portion had been measured. The estimate of the quantity unmeasured was made by a comparison of the measured with the unmeasured pile, and the purchaser agreed to take them at the estimate, "hit or miss," as to quantity, and paid for them at the estimated quantity. The oats did not hold out within about 300 bushels of the quantity estimated and paid for. It was afterwards discovered that a mistake had been made in regard to the quantity measured, which formed the basis of the estimate, in counting the tallies as bushels, instead of half-bushels, as they were in fact. Upon these facts the plaintiff was allowed to recover back the money paid for the entire quantity which he did not receive. The case was followed in Coon v. Smith, 29 N. Y. 393, where it was cited as showing "the length courts will go in disregard of contracts founded in a mistake of material facts, and in the protection of rights prejudiced thereby." There an agreement between adjoining land-owners, by which a corner had been erroneously fixed by reason of a miscount of the chain-men, was held not to be binding, although it had been acted on by both parties before the mistake was discovered. The error of the chain-men, being unknown to the parties, invalidated the agreement fixing the corner. So in Gardner v. Lane, 9 Allen, 492, W. had agreed to sell G. 135 barrels of No. 1 mackerel. By mistake of the parties in making the delivery, some two months afterwards, part of the barrels marked to indicate delivery were No. 3 mackerel, and part were salt. In replevin by the purchaser against a creditor of the seller who had levied on the property, it was held that no property passed in the barrels so marked by mistake, even as to those containing No. 3 mackerel; the court saying: "They are not included within the contract of sale; the vendor has not agreed to sell, nor the vendee to purchase them; the subject-matter of the contract has been mistaken, and neither party can be held to an execution of the contract to which he has not given his assent. It is a case where, through mutual misapprehension, the contract of sale is incomplete." See, also, the same case, 12 Allen, 39, where the ruling, when it was again brought before the court, was adhered to. The principle of these cases is quite as applicable to contracts for the sale and conveyance of land, induced by the mutual mistake of the parties, as to contracts concerning personalty; and the equitable relief of rescission will be granted, where such mistakes have intervened, quite as readily in the one case as in the other, if not more so. Pol. Cont. (Wald's Ed.) 430, and cases cited in the notes; 2 Pom. Eq. Jur. § 869; Crowe v. Lewin, 95 N. Y. 426; Lawrence v. Staigg, 8 R. I. 256; Gilroy v. Alis, 22 Iowa, 174; Irick v. Fulton, 3 Grat. 193; Barfield v. Price, 40 Cal. 535; Knapp v. Fowler, 30 Hun, 513; Rhode Island v. Massachusetts, 13 Pet. 23; and Mulvey v. King, 39 Ohio St. 491 (Upson, J., 495).

In the case presented by the record before us, the mistake was in the identity of the land that had been seen and described by Pugh. He supposed it to be the land about which the parties were contracting and desired information; the error was in this, and not in the description of the land he had seen; hence the parties, in acting upon his information, acted upon the same error of fact; and, upon principle, the case is not different from what it would have been had they gone to see the land described by P., supposing it to be the land of the defendant; and that such an error would, on the ground of mutual mistake, have avoided the contract, is, we think, too plain to admit of a question. In treating of the subject of mistake, Mr. Pollock, in his work on Contracts, observes: "It may happen that there does exist a common intention, which, however, is founded on an assumption made by both parties as to some matter of fact essential to the agreement. In this case the common intention must stand or fall with the assumption on which it is founded. If the assumption is wrong, the intention of the parties is from the outset incapable of taking effect. But for their common error it would never have been formed, and it is treated as nonexistent. Here there is in some sense an agreement, but it is nullified in its inception by the nullity of the thing agreed upon; and it is hardly too artificial to say that there is no real agreement. The result is the same as if the parties had made an agreement expressly conditional on the existence at the time of the supposed state of facts; which state of facts not existing, the agreement destroys itself." Pol. Cont. 412. See, also, Fonbl. Eq. marg. p. 120; Kerr, Fraud & M. 431. The case of Crist v. Dice, 18 Ohio St. 536, on which much reliance is placed by counsel for defendant in error, is plainly distinguishable from this one. It was an action for rescission on the ground of fraud. The defendant claimed, and introduced evidence that, though he had exhibited to the plaintiff a letter from a stranger, representing the land as favorably situated, and of good quality, and stated to the plaintiff that he had bought the land on the strength of this description he refused to vouch for its truth, and advised the plaintiff to go and see for himself. The plaintiff declined to take the trouble, and agreed to make the exchange at his own risk. There was no finding of facts, and the case was disposed of on the assumption that the court below may have believed the defendant's version; and, adopting it, the plaintiff had, of course, no ground for relief. This sufficiently distinguishes the case from the one presented by this record. We are unable to perceive upon what principle of justice the plaintiff should be denied the relief he asks. The information upon which he acted had not been obtained in a casual meeting with Mr. Pugh. The defendant, by his agent, having suggested that P. was acquainted with the land, and taken the plaintiff to inquire of him about it, is estopped from saying that P. was a stranger, and he had no right to rely on what he said. Moreover, the error did not occur from any bad faith in P., but from a mistake that may happen to the most careful of men. As the mistake arose from an innocent error in all the parties, natural justice forbids that the loss of one arising out of it should be the gain of the other.

Judgment reversed, and judgment rendered for the plaintiff in error, rescinding the exchange made by the parties.

SHERWOOD v. WALKER et al.

(33 N. W. 919, 66 Mich. 568.)

Supreme Court of Michigan. July 7, 1887.

Error to circuit court, Wayne county; Jennison, Judge.

C. J. Reilly, for plaintiff. Wm. Aikman, Jr., (D. C. Holbrook, of counsel,) for defendants and appellants.

MORSE, J. Replevin for a cow. Suit commenced in justice's court; judgment for plaintiff; appealed to circuit court of Wayne county, and verdict and judgment for plaintiff in that court. The defendants bring error, and set out 25 assignments of the same.

The main controversy depends upon the construction of a contract for the sale of the cow. The plaintiff claims that the title passed, and bases his action upon such claim. The defendants contend that the contract was executory, and by its terms no title to the animal was acquired by plaintiff. The defendants reside at Detroit, but are in business at Walkerville, Ontario, and have a farm at Greenfield, in Wayne county, upon which were some blooded cattle supposed to be barren as breeders. The Walkers are importers and breeders of polled Angus cattle. The plaintiff is a banker living at Plymouth, in Wayne county. He called upon the defendants at Walkerville for the purchase of some of their stock, but found none there that suited him. Meeting one of the defendants afterwards, he was informed that they had a few head upon this Greenfield farm. He was asked to go out and look at them, with the statement at the time that they were probably barren, and would not breed. May 5, 1886, plaintiff went out to Greenfield, and saw the cattle. A few days thereafter, he called upon one of the defendants with the view of purchasing a cow, known as "Rose 2d of Aberlone." After considerable talk, it was agreed that defendants would telephone Sherwood at his home in Plymouth in reference to the price. The second morning after this talk he was called up by telephone, and the terms of the sale were finally agreed upon. He was to pay five and one-half cents per pound, live weight, fifty pounds shrinkage. He was asked how he intended to take the cow home, and replied that he might ship her from King's cattle-yard. He requested defendants to confirm the sale in writing, which they did by sending him the following letter: "Walkerville, May 15, 1886. T. C. Sherwood, President. etc.—Dear Sir: We confirm sale to you of the cow Rose 2d of Aberlone, lot 56 of our catalogue, at five and a half cents per pound, less fifty pounds shrink. We inclose herewith order on Mr. Graham for the cow. You might leave check with him, or mail to us here, as you prefer. Yours, truly, Hiram Walker & Sons." The order upon Graham inclosed in the letter read as follows: "Walkerville, May 15, 1886. George Graham: You will please deliver at King's cattle-yard to Mr. T. C. Sherwood, Plymouth, the cow Rose 2d of Aberlone, lot 56 of our catalogue. Send halter with the cow, and have her weighed. Yours, truly, Hiram Walker & Sons." On the twenty-first of the same month the plaintiff went to defendants' farm at Greenfield, and presented the order and letter to Graham, who informed him that the defendants had instructed him not to deliver the cow. Soon after, the plaintiff tendered to Hiram Walker, one of the defendants, $80, and demanded the cow. Walker refused to take the money or deliver the cow. The plaintiff then instituted this suit. After he had secured possession of the cow under the writ of replevin, the plaintiff caused her to be weighed by the constable who served the writ, at a place other than King's cattle-yard. She weighed 1,420 pounds.

When the plaintiff, upon the trial in the circuit court, had submitted his proofs showing the above transaction, defendants moved to strike out and exclude the testimony from the case, for the reason that it was irrelevant and did not tend to show that the title to the cow passed, and that it showed that the contract of sale was merely executory. The court refused the motion, and an exception was taken. The defendants then introduced evidence tending to show that at the time of the alleged sale it was believed by both the plaintiff and themselves that the cow was barren and would not breed; that she cost $850, and if not barren would be worth from $750 to $1,000; that after the date of the letter, and the order to Graham, the defendants were informed by said Graham that in his judgment the cow was with calf, and therefore they instructed him not to deliver her to plaintiff, and on the twentieth of May, 1886, telegraphed to the plaintiff what Graham thought about the cow being with calf, and that consequently they could not sell her The cow had a calf in the month of October following. On the nineteenth of May, the plaintiff wrote Graham as follows: "Plymouth, May 19, 1886. Mr. George Graham, Greenfield—Dear Sir: I have bought Rose or Lucy from Mr. Walker, and will be there for her Friday morning, nine or ten o'clock. Do not water her in the morning. Yours, etc., T. C. Sherwood." Plaintiff explained the mention of the two cows in this letter by testifying that, when he wrote this letter, the order and letter of defendants were at his house, and, writing in a hurry, and being uncertain as to the name of the cow, and not wishing his cow watered, he thought it would do no harm to name them both, as his bill of sale would show which one he had purchased. Plaintiff also testified that he asked defendants to give him a price on the balance of

their herd at Greenfield, as a friend thought of buying some, and received a letter dated May 17, 1886, in which they named the price of five cattle, including Lucy, at $90, and Rose 2d at $80. When he received the letter he called defendants up by telephone, and asked them why they put Rose 2d in the list, as he had already purchased her. They replied that they knew he had, but thought it would make no difference if plaintiff and his friend concluded to take the whole herd.

The foregoing is the substance of all the testimony in the case.

The circuit judge instructed the jury that if they believed the defendants, when they sent the order and letter to plaintiff, meant to pass the title to the cow, and that the cow was intended to be delivered to plaintiff, it did not matter whether the cow was weighed at any particular place, or by any particular person; and if the cow was weighed afterwards, as Sherwood testified, such weighing would be a sufficient compliance with the order. If they believed that defendants intended to pass the title by the writing, it did not matter whether the cow was weighed before or after suit brought, and the plaintiff would be entitled to recover. The defendants submitted a number of requests which were refused. The substance of them was that the cow was never delivered to plaintiff, and the title to her did not pass by the letter and order; and that under the contract, as evidenced by these writings, the title did not pass until the cow was weighed and her price thereby determined; and that, if the defendants only agreed to sell a cow that would not breed, then the barrenness of the cow was a condition precedent to passing title, and plaintiff cannot recover. The court also charged the jury that it was immaterial whether the cow was with calf or not. It will therefore be seen that the defendants claim that, as a matter of law, the title to this cow did not pass, and that the circuit judge erred in submitting the case to the jury, to be determined by them, upon the intent of the parties as to whether or not the title passed with the sending of the letter and order by the defendants to the plaintiff.

This question as to the passing of title is fraught with difficulties, and not always easy of solution. An examination of the multitude of cases bearing upon this subject, with their infinite variety of facts, and at least apparent conflict of law, ofttimes tends to confuse rather than to enlighten the mind of the inquirer. It is best, therefore, to consider always, in cases of this kind, the general principles of the law, and then apply them as best we may to the facts of the case in hand.

The cow being worth over $50, the contract of sale, in order to be valid, must be one where the purchaser has received or accepted a part of the goods, or given something in earnest, or in part payment, or where the seller has signed some note or memorandum in writing. How. St. § 6186. Here there was no actual delivery, nor anything given in payment or in earnest, but there was a sufficient memorandum signed by the defendants to take the case out of the statute, if the matter contained in such memorandum is sufficient to constitute a completed sale. It is evident from the letter that the payment of the purchase price was not intended as a condition precedent to the passing of the title. Mr. Sherwood is given his choice to pay the money to Graham at King's cattle-yards, or to send check by mail.

Nor can there be any trouble about the delivery. The order instructed Graham to deliver the cow, upon presentation of the order, at such cattle-yards. But the price of the cow was not determined upon to a certainty. Before this could be ascertained, from the terms of the contract, the cow had to be weighed; and, by the order inclosed with the letter, Graham was instructed to have her weighed. If the cow had been weighed, and this letter had stated, upon such weight, the express and exact price of the animal, there can be no doubt but the cow would have passed with the sending and receipt of the letter and order by the plaintiff. Payment was not to be a concurrent act with the delivery, and therein this case differs from Case v. Dewey, 55 Mich. 116, 20 N. W. 817, and 21 N. W. 911. Also, in that case, there was no written memorandum of the sale, and a delivery was necessary to pass the title of the sheep; and it was held that such delivery could only be made by a surrender of the possession to the vendee, and an acceptance by him. Delivery by an actual transfer of the property from the vendor to the vendee, in a case like the present, where the article can easily be so transferred by a manual act, is usually the most significant fact in the transaction to show the intent of the parties to pass the title, but it never has been held conclusive. Neither the actual delivery, nor the absence of such delivery, will control the case, where the intent of the parties is clear and manifest that the matter of delivery was not a condition precedent to the passing of the title, or that the delivery did not carry with it the absolute title. The title may pass, if the parties so agree, where the statute of frauds does not interpose without delivery, and property may be delivered with the understanding that the title shall not pass until some condition is performed.

And whether the parties intended the title should pass before delivery or not is generally a question of fact to be determined by the jury. In the case at bar the question of the intent of the parties was submitted to the jury. This submission was right, unless from the reading of the letter

and the order, and all the facts of the oral bargaining of the parties, it is perfectly clear, as a matter of law, that the intent of the parties was that the cow should be weighed, and the price thereby accurately determined, before she should become the property of the plaintiff. I do not think that the intent of the parties in this case is a matter of law, but one of fact. The weighing of the cow was not a matter that needed the presence or any act of the defendants, or any agent of theirs, to be well or accurately done. It could make no difference where or when she was weighed, if the same was done upon correct scales, and by a competent person. There is no pretense but what her weight was fairly ascertained by the plaintiff. The cow was specifically designated by this writing, and her delivery ordered, and it cannot be said, in my opinion, that the defendants intended that the weighing of the animal should be done before the delivery even, or the passing of the title. The order to Graham is to deliver her, and then follows the instruction, not that he shall weigh her himself, or weigh her, or even have her weighed, before delivery, but simply, "Send halter with the cow, and have her weighed."

It is evident to my mind that they had perfect confidence in the integrity and responsibility of the plaintiff, and that they considered the sale perfected and completed when they mailed the letter and order to plaintiff. They did not intend to place any conditions precedent in the way, either of payment of the price, or the weighing of the cow, before the passing of the title. They cared not whether the money was paid to Graham, or sent to them afterwards, or whether the cow was weighed before or after she passed into the actual manual grasp of the plaintiff. The refusal to deliver the cow grew entirely out of the fact that, before the plaintiff called upon Graham for her, they discovered she was not barren, and therefore of greater value than they had sold her for.

The following cases in this court support the instruction of the court below as to the intent of the parties governing and controlling the question of a completed sale, and the passing of title: Lingham v. Eggleston, 27 Mich. 324; Wilkinson v. Holiday, 33 Mich. 386; Grant v. Merchants' & Manufacturers' Bank, 35 Mich. 527; Carpenter v. Graham, 42 Mich. 194, 3 N. W. 974; Brewer v. Salt Ass'n, 47 Mich. 534, 11 N. W. 370; Whitcomb v. Whitney, 24 Mich. 486; Byles v. Colier, 54 Mich. 1, 19 N. W. 565; Scotten v. Sutter, 37 Mich. 527, 532; Ducey Lumber Co. v. Lane, 58 Mich. 520, 525, 25 N. W. 568; Jenkinson v. Monroe, 61 Mich. 454, 28 N. W. 663.

It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder. She was evidently sold and purchased on the relation of her value for beef, unless the plaintiff had learned of her true condition, and concealed such knowledge from the defendants. Before the plaintiff secured possession of the animal, the defendants learned that she was with calf, and therefore of great value, and undertook to rescind the sale by refusing to deliver her. The question arises whether they had a right to do so. The circuit judge ruled that this fact did not avoid the sale and it made no difference whether she was barren or not. I am of the opinion that the court erred in this holding. I know that this is a close question, and the dividing line between the adjudicated cases is not easily discerned. But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact, —such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual. 1 Benj. Sales, §§ 605, 606; Leake, Cont. 339; Story, Sales, (4th Ed.) §§ 377, 148. See, also, Cutts v. Guild, 57 N. Y. 229; Harvey v. Harris, 112 Mass. 32; Gardner v. Lane, 9 Allen, 492, 12 Allen, 44; Huthmacher v. Harris' Adm'rs, 38 Pa. St. 491; Byers v. Chapin, 28 Ohio St. 300; Gibson v. Pelkie, 37 Mich. 380, and cases cited; Allen v. Hammond, 11 Pet. 63–71.

If there is a difference or misapprehension as to the substance of the thing bargained for; if the thing actually delivered or received is different in substance from the thing bargained for, and intended to be sold, —then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding. "The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." Kennedy v. Panama, etc., Mail Co., L. R. 2 Q. B. 580, 587. It has been held, in accordance with the principles above stated, that where a horse is bought under the belief that he is sound, and both vendor and vendee honestly believe him to be sound, the purchaser must stand by his bargain, and pay the full price, unless there was a warranty.

It seems to me, however, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least $750;

if barren, she was worth not over $80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale, but the mistake affected the character of the animal for all time, and for her present and ultimate use. She was not in fact the animal, or the kind of animal the defendants intended to sell or the plaintiff to buy. She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was. The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow, and a valuable one. The court should have instructed the jury that if they found that the cow was sold, or contracted to be sold, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that in fact she was not barren, but capable of breeding, then the defendants had a right to rescind, and to refuse to deliver, and the verdict should be in their favor.

The judgment of the court below must be reversed, and a new trial granted, with costs of this court to defendants.

CAMPBELL, C. J., and CHAMPLIN, J., concurred.

SHERWOOD, J., delivered a dissenting opinion.

OSBURN et al. v. THROCKMORTON.

(18 S. E. 285, 90 Va. 311.)

Supreme Court of Appeals of Virginia. Nov., 1893.

Appeal from circuit court, Loudoun county; James Keith, Judge.

Bill by James B. Throckmorton to enjoin one Osburn, trustee, and others from selling certain property under a deed of trust. From a decree for complainant, defendants appeal. Affirmed.

John M. Orr, for appellants. Ed. Nichols and Alexander & Tibbs, for appellee.

LACY, J. This is an appeal from two decrees of the circuit court of Loudoun county, rendered respectively at the January term, 1891, and the October term, 1891. The bill was filed in this case in December, 1890, to enjoin Osburn, trustee, from selling a tract of land in Loudoun county, conveyed to him as trustee by deed dated March 8, 1876, executed by James B. Throckmorton and Eliza J. Throckmorton, his wife, to secure the payment to Joseph Lodge of the debt therein mentioned of $2,000, due by note executed by the said James B. Throckmorton, dated March 8, 1876. The ground stated in the bill upon which the injunction is sought is as follows: The said Joseph Lodge died in the year 1877, after having made his will, by which said Osburn, trustee, was appointed the executor of the same. That during the first year of said executor's administration of said estate the said $2,000 was fully settled, and was charged in his executorial account as settled and collected, and the account confirmed more than 10 years before, and the said bond evidencing said debt was surrendered to the debtor as paid. But the trust deed executed to secure the same by inadvertence was not released, though discharged in fact, and no trust remained to be executed by said trustee. That, nevertheless, the said Osburn, trustee, had advertised the said land for sale, as was shown by copy of advertisement exhibited with the bill, reciting in the said advertisement that the said debt secured by the said deed was now the property of the appellant Annie E. Throckmorton under the provisions of the said Lodge's will, of which he is the executor. The complainant averred that the will of Lodge contained no such provision, and that, being the executor of the Lodge will, Osburn, trustee, was disqualified from acting as trustee under the deed. The injunction was awarded by the judge of the Loudoun county circuit court in accordance with the prayer of the bill in December, 1890. At the January term, 1891, of the said court, the defendant Osburn, trustee, demurred to the bill for want of equity, and for want of Mrs. Annie E. Throckmorton as a party, she being a proper party, and answered: That he admitted that the debt was due by James B. Throckmorton, and note given and secured by trust deed, as stated in the bill, conveying the said tract of land to him as trustee. That Lodge died, and made his will, and appointed him executor thereof, etc., as charged in the bill; but denied that the said debt had been paid, and the bond delivered as settled to the debtor, stating that he, as trustee, had been required by Annie E. Throckmorton, the owner of the debt secured under the said deed, to execute the same by the sale of the said land. That it is true that the will of Lodge did not mention the said debt, and provide that it should be paid to Annie E. Throckmorton, but that it became her property under the said will, her mother, Mary A. Humphrey, being entitled to a portion of his estate under the will; and that she had died, and left three children, to wit, Abner Edward Humphrey, Virginia, wife of Volney Osburn, and said Annie, then the wife of Mason Throckmorton, son of said James B. Throckmorton, the complainant; and that said Annie E. was entitled to one-third of the said legacy to her mother, which, under the laws of Virginia, in July, 1877, was her separate property. That under the distribution of the estate this bond in question was allotted to the children of Mary C. Humphrey, and was then allotted to Annie E., and received by her husband, Mason Throckmorton, and taken into his possession, and his (Osburn's) connection with the said bond as executor ceased when he assented to this legacy, and he had no further concern with it, and was, therefore, not disqualified by reason of his being executor from acting as trustee to execute the said trust,—and moved the dissolution of the injunction awarded in the case. A decree in the said court, rendered on the 22d day of October, 1890, in a cause in the said court between Mason Throckmorton and his wife, whereby a divorce a vinculo matrimonii was granted the husband against the said Annie, his wife, was exhibited with the said answer; and at the January term, 1891, a decree was rendered in the said cause, whereby the demurrer to the bill was overruled, and on his motion leave was given the plaintiff, James B. Throckmorton, to amend his bill, making Annie E. Throckmorton a party defendant thereto, which was filed accordingly; and it was set forth by way of amendment that the whole of the said $2,000 bond did not pass to said Annie as her share, but that $827.05 was in excess of her share, and was due to the said Abner Edward, and he paid this to him by a new bond for that amount, with security, which was accepted by said Abner, and surrendered on his part. The residue belonged to Annie. The bill then states how, in detail, the debt was paid to Mason, about which Annie was consulted with reference to the payment of the said debt to her husband by a conveyance to him of property and land, and that the said

settlement made December 25, 1878, was with her knowledge, and had her approval and consent, and he (the complainant) had never heard from her a word of dissent or disapproval until about the time the land was advertised for sale. That up to 1885 the relations of Mason and Annie to each other as husbaud and wife were such as are usual between husband and wife. That in 1878 Mason bought a tract of land worth $1,600, and had the deed made to his said wife, without her knowledge until he informed her, which is still hers; and he gave her large sums, stated in the bill, exceeding, with the said land, the amount received in the said Lodge debt by her husband. In 1890, Mason and Annie were divorced, and Annie required to pay the costs. That there had been a complete settlement between him and Mason, with which Annie had remained satisfied until the disagreement between her and her husband. Annie answered, and made general denials of consent on her part to the delivery to her husband of her property in question, and emphasizes her ignorance of her rights under the act of 4th of April, 1877, known as the "Married Woman's Act," and that the said act made this property her separate estate. But in the evidence it is shown that she knew all about it, and was a party to its delivery to her husband, and to the purchase of the Throckmorton place, subject to liens on it, belonging to her husband's mother. And in her deposition she admits that she knew that it was handed to her husband, and on cross-examination that she gave her consent to its investment in the farm, and that she was present at the division of the Lodge estate and delivery of the J. B. Throckmorton note to her husband. In the suit of Throckmorton v. Throckmorton, referred to above, and decided in this court April 10, 1890, which was a suit between the said Mason and Annie, his wife, for divorce a vinculo matrimonii, and reported in 86 Va. 768, 11 S. E. 289, the said Annie asserted her claims against her husband for large sums of money belonging to her, amounting to $10,000, which he had received for her, and which sums included the debt in question here, as she says in her deposition in this case. In that suit her claim was decided against her, and her husband was divorced at her costs.

The first question we are to consider is the effect of this transfer of her rights by the married woman to her husband, and consenting to its investment in a particular manner, or to its use by him. Can the transaction be avoided upon the ground that she was ignorant of the law affecting the subject? If upon the mere ground of ignorance of the law men were admitted to overhaul or extinguish their most solemn contracts, and especially those which have been executed by a complete performance, there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice from the nature and difficulty of the proper proofs. Lyon v. Richmond, 2 Johns. Ch. 51, 60; Shotwell v. Murray, 1 Johns. Ch. 512; Storrs v. Barker, 6 Johns. Ch. 169, 170; Story, Eq. Jur. § 111. The presumption is, that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them; and nothing can be more liable to abuse than to permit a person to reclaim his property upon the mere pretense that at the time of parting with it he was ignorant of the law, acting on his title. Proctor v. Thrall, 22 Vt. 262. Ignorance of the law does not affect agreements in courts of equity, nor excuse from the legal consequences of particular acts. 1 Fonbl. Eq. c. 2, § 7, note 2; 1 Madd. Ch. Pr. 60; Hunt v. Rousmaniere, 1 Pet. 1, 15, 16; 1 Story, Eq. Jur. §§ 112, 113, 115, 116. A married woman possessed of separate property, as to which she has a general right of disposal, may bestow it upon her husband as well as upon a stranger, and courts of equity will sanction such disposition when made by the wife. Story, Eq. Jur. §§ 1395–1397. And, as was said by this court in Beecher v. Wilson, 84 Va. 813, 6 S. E. 209, the married woman's act of April 4, 1877, does not prevent a wife from giving her property to her husband if she pleases; nor does it abrogate the presumption that under circumstances such as obtained in this case she has done so. (Opinion by Fauntleroy, J.)

It is further insisted by the appellee that the decree of the circuit court perpetually enjoining the sale is right for another reason. In the divorce suit of Throckmorton v. Throckmorton, supra, the question as to property rights of the wife was raised, and by the decree in that cause they were disposed of by the decree of absolute divorce, without settling the property rights, and the rights of property were left where they were at the date of the decree. Porter v. Porter, 27 Grat. 599. These rights certainly might have been disposed of in the divorce suit, and so the matter is res adjudicata. Campbell v. Campbell, 22 Grat. 666; Findlay v. Trigg, 83 Va. 543, 3 S. E. 142. The debt in controversy having been fully paid and discharged, the appellee is entitled to hold the land free and released from the lien of the trust deed; and it was the duty of the creditor within 90 days to have entered upon the margin of the book where such deed is recorded a release thereof, under our statute, and for failure to do so he is liable to a fine of $20. Code Va. § 2498. There was no error in the decree of the circuit court complained of, and appealed from here, and the same is affirmed.

FAUNTLEROY, J., dissenting.

PEOPLE'S BANK OF CITY OF NEW YORK v. BOGART.

(81 N. Y. 101.)

Court of Appeals of New York. June 1, 1880.

John Clinton Gray and Luther R. Marsh, for appellant. William Allen Butler, for respondents.

ANDREWS, J. The plaintiff is a banking corporation, organized under the banking laws of this state, carrying on business in the city of New York. The defendants compose the firm of Orlando M. Bogart & Co., note-brokers and dealers in commercial paper, also carrying on business in that city. The action is brought to recover of the defendants $34,453.-83, the sum paid by the plaintiff on the purchase from the defendants on the 20th, 21st and 22d days of July, 1875, of certain acceptances of Duncan, Sherman & Co., a banking and commission firm in the city of New York, of drafts drawn upon them by one Alexander Burgess, dated at New York, July 19, 1875, payable three months after date. Duncan, Sherman & Co. failed on the 27th of July, and the plaintiff, on the day of the maturity of the paper, tendered it back to the defendants and demanded the repayment of the money paid on the purchase, claiming to rescind the contract for the fraud of the defendants. The fraud alleged is that the defendants concealed from the plaintiff the knowledge possessed by them in respect to the paper, viz.: that the drawer was a salaried clerk in the employment of Duncan, Sherman & Co., having no other business relations with the firm than as such clerk, and that the acceptances were purchased by the defendants directly from the acceptors.

The evidence shows that the defendants, for several years prior to the transaction in question, had been accustomed to purchase from Duncan, Sherman & Co., their acceptances of paper drawn by Burgess, and selling it in the market. The transactions of this character were frequent, and the plaintiff purchased large amounts of the paper from the defendants, and also from other brokers. The defendants, on the 19th of July, 1875, purchased of Duncan, Sherman & Co. $70,000 of this paper, paying therefor the nominal amount less their commissions, and interest to the maturity of the paper at the rate of five and one-half per cent. per annum. In pursuance of their custom to notify their customers of what paper they had for sale, they immediately sent a written notice to the plaintiff to the effect that they had for sale acceptances of Duncan, Sherman & Co., and stating the price they had paid, and the price for which they would sell the paper, which was a small advance upon their purchase. The plaintiff's president came to the defendants' office and purchased $15,000 of the paper. The next day he applied to purchase $15,000 more. The defendants having, in the meantime, sold the whole amount of the $70,000 of paper purchased on the 19th, purchased on the 20th, of Duncan, Sherman & Co., $30,000 more of similar paper from which they supplied the additional $15,000 desired by the plaintiff, and on the succeeding day the plaintiff's president purchased another acceptance of the same character for $5,000, which he selected from a large number of securities of other parties which the defendants had for sale. There was no representation of any kind made by the defendants to the plaintiff on the sale of the acceptances beyond what was implied in the offer to sell acceptances of Duncan, Sherman & Co. The plaintiff's president made no inquiry as to their origin, character or consideration. It is to be assumed that the defendants knew that the drafts were not drawn against funds and that they were issued by Duncan, Sherman & Co., as a means of borrowing money (for that is the clear import of the transaction), and that the plaintiff had no knowledge of these circumstances. But there is no evidence whatever that the defendants had any knowledge or information that Duncan, Sherman & Co. were in embarrassed pecuniary circumstances. The evidence is undisputed that for many years, and up to the day of their failure, the firm of Duncan, Sherman & Co. enjoyed the highest financial credit and standing. The confidence of the defendants in their solvency is indicated by their purchasing Duncan, Sherman & Co.'s paper in large amounts on their own account, and although they purchased for sale and not for investment, yet they took the risk of their solvency, between the time of the purchase and the resale. The plaintiff, in purchasing the paper from the defendants, relied upon the credit of the acceptors, as is manifest from the circumstances. The plaintiff's president or officers did not know the drawer, and had purchased the same description of paper on previous occasions, and neither at the time of the transaction in question nor before, did they make any inquiry to ascertain the drawer's identity or responsibility. The plaintiff took the paper without the indorsement of the sellers, and made no inquiry and exacted no warranty. The plaintiff's president was well acquainted with the commercial credit of Duncan, Sherman & Co., and upon that, and that alone, did he rely in purchasing the paper.

We are of opinion that the plaintiff failed to establish a case which would have justified the jury in finding that the defendants committed a fraud in the sale of the paper. The fact that the defendants offered to sell the paper, and did sell it as acceptances of Duncan, Sherman & Co. was not, we think, a representation that it was business paper, drawn against funds or credits of the drawer, in the hands of the drawees, or in the ordinary course of business transactions between them. The paper had all the essential requisites of accepted bills of exchange. The drawer and drawees were different parties, and upon the transfer of the paper by Duncan, Sherman & Co., both became liable to the

holder upon distinct and independent contracts. Prima facie, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor, and of an appropriation of these funds for the use of the drawer (Raborg v. Peyton, 2 Wheat. 385), and upon this presumption remedies are administered. The acceptance is evidence of money had, received by the acceptor for the use of the holder, and an action for money had and received will lie in his favor against the acceptor, and he cannot defeat the action by proof that he accepted without funds. Story, J., in the case cited, referring to the presumption that the bill is drawn against funds, says: "The case may indeed be otherwise, and then the acceptor pays the debt of the drawer, but as between himself and the payee, it is not a collateral but an original and direct undertaking." Acceptances without funds, or accommodation acceptances, are certainly not unusual commercial transactions, and this must be well understood among commercial men. In Re Hammond, 6 De Gex, M. & G. 699, the Lord Justice Knight Bruce says: "Now I do not think that the mere circumstance of a man parting with a bill, without saying this is an accommodation bill amounts to an implied representation that it is not an accommodation bill; I am not aware of any sufficient reason or authority for so extensive a proposition." The law on the sale of commercial paper implies a warranty on the part of the vendor of title and that the instrument is genuine (Littauer v. Goldman, 72 N. Y. 506. See, also, Lobdell v. Baker, 1 Metc. [Mass.] 193); and also as stated by Judge Story, that the vendor "has no knowledge of any facts which prove the instrument if originally valid to be worthless either by failure of the maker, or by its being already paid, or otherwise to have become void or defunct." Story, Prom. Notes, § 118. But no case has been cited supporting the proposition that there is any implied warranty or representation on the part of the vendor of a bill valid in the hands of the indorsee, that it was drawn against funds, or that it was not accommodation paper. The bills in question were acceptances, and in law and fact instruments of the description of these offered for sale by the defendants, and purchased by the plaintiff.

In the absence then of any representation by the defendants in respect to the origin or consideration of the bills, the remaining question is, whether the defendants were under a legal duty to inform the plaintiff at the time of sale, of the circumstances under which they were made. The general proposition is asserted by the learned counsel for the plaintiff, that the holder of negotiable paper who knows a material fact affecting its market value, and who sells it for full value without disclosing such fact, is liable to the purchaser for the amount paid for the paper, if after the discovery of the suppression, the purchaser elects to rescind the sale. But the proposition asserted is broader than the recent authorities warrant. The law requires disclosure to be made only when there is a duty to make it, and this duty is not raised by the mere circumstance that the undisclosed fact is material, and is known to the one party and not to the other, or by the additional circumstance that the party to whom it is known knows that the other party is acting in ignorance of it. It must be assumed on this appeal, that if at the time of the purchase of the paper it had been known in the community that Duncan, Sherman & Co. were selling their own acceptances in the market it would have created suspicion and affected their credit, and that the plaintiff would not have purchased it. But the fact that Duncan. Sherman & Co. were borrowing under disguise would at most be ground of suspicion of pecuniary embarrassment. The borrowing of money by men engaged in large transactions, as Duncan, Sherman & Co. were, as bankers and dealers in cotton on their own account, and on commission, is certainly not unusual, and this although the borrowers may be persons of large means, and the fact that they borrowed by methods which would not disclose that they were borrowers would not necessarily be inconsistent with good faith or solvency. It might be inconsistent with both, and it may have been in this case. But the question is, were the defendants under a duty to communicate the discrediting facts within their knowledge, in the absence of any inquiry in respect to the origin of the paper, and when the means of information were accessible to the purchaser, and was their omission to do this an actionable fraud, they having done nothing to mislead or divert inquiry, and all that they did being to offer the paper for sale? We are of opinion that the law did not cast upon them the duty of such disclosure. The defendants were in the attitude of vendors of paper purchased and owned by them. The plaintiff was seeking investment for its funds, and became the purchaser of the paper in reliance on the judgment of its officers as to its value. There was no relation of trust or confidence between the parties. If the plaintiff's president in buying the paper thought of the subject at all, and believed that the bills were drawn against funds, the mistaken belief was not induced by any act or statement of the defendants, and they were under no legal obligation to volunteer to inform him that the fact was otherwise. Attwood v. Small, 6 Clark & F. 232, 443-447; Smith v. Hughes, L. R. 6 Q. B. 597. It was held in Nichols v. Pinner, 18 N. Y. 295, 23 N. Y. 264, that the mere omission of a purchaser of goods on credit to disclose his insolvency to the vendor, in the absence of any attempt to defraud, is not such a concealment as will avoid the sale; and yet the fact, if known to the seller, would affect his credit. Judge Selden, in his opinion in that case, says: "It has never, that I am aware of, been held that a purchaser is bound when no questions are put to him in regard to it, to disclose his own pecuniary condition and

means of payment. If he makes no false statements, and resorts to no acts or contrivances for the purpose of misleading the vendor, it is not I think a fraud, to say nothing on the subject." See, also, Dambmann v. Schulting, 75 N. Y. 55. "The general rule," says Story, "both of law and equity, in respect to concealments, is that mere silence with regard to a material fact which there is no legal obligation to divulge will not avoid a contract, although it operates to the injury of the party from whom it is concealed." Story, Cont. § 516. See, also. Benj. Sales, 338, and cases cited. The case of Brown v. Montgomery, 20 N. Y. 287, was a case of the sale of a post-dated check of a party whose paper had gone to protest on the day the sale was made, which was known to the vendor's agent who made the sale, but who did not disclose the fact to the purchaser. The paper had become worthless by the sudden failure of the drawers, and the court held that the duty of disclosure rested upon the holder of the check under the circumstances of that case. That case furnishes no support to the claim of the plaintiff in this. Caveat emptor is the rule of the common law, founded upon wise policy, "to induce vigilance and caution, and to prevent opportunities for deceit, which lead to litigation, by casting upon every man the responsibilities of his own contracts, and to burden him with the consequences of his careless mistake." Story, Cont. § 517. We are of opinion that this rule is applicable to this case, and that the plaintiff, neither upon the facts proved, or offered to be proved, was entitled to recover.

The judgment should therefore be affirmed. All concur except RAPALLO, J., not voting. Judgment affirmed.

LOMERSON v. JOHNSTON.

(20 Atl. 675, 47 N. J. Eq. 312.)

Court of Errors and Appeals of New Jersey. Nov. 18, 1890.

Appeal from the court of chancery. The following is the decree of the vice-chancellor: "This cause coming on to be heard before the court, in the presence of Daniel Vliet, solicitor, and J. G. Shipman & Son, of counsel with the complainant, and of William H. Morrow, of counsel with defendant, Margaret Johnston, and the bill of complaint, answer, and replication having been read, and the court having heard the evidence of the witnesses on the part of the complainant, and of said defendant, and heard the argument of the respective counsel, and having considered the same, and it appearing to the court that the said defendant, Margaret Johnston, was at the time of the execution of the mortgage, dated July 7, A. D. 1883, to the complainant, and particularly described in the complainant's bill of complaint, a married woman, and that the said mortgage was given to secure an indebtedness of Levi S. Johnston, her husband, to the said complainant, for moneys which he held in trust, and for the payment of which he, the said complainant, was one of the sureties of the said Levi S. Johnston, and which moneys he, the said Levi S. Johnston, had wasted; and it further appearing that the said complainant, by saying to said defendant, Margaret Johnston, that, in the use of said trust funds, her husband had been guilty of embezzlement, and could be put in jail, therefore he had exercised an undue pressure on her, and had thereby destroyed her free agency, so that, in the execution and acknowledgment of the said mortgage, she did not act according to her own free will; and it also appearing that the lands, upon which it is by the said complainant claimed that the said mortgage is a lien, was and is the property of the said defendant, Margaret Johnston, and that the said complainant is not entitled to the relief by him sought, in and by his said bill of complaint,—it is thereupon on this 2d day of October, A. D. 1888, ordered, adjudged, and decreed by the chancellor of the state of New Jersey that the said mortgage so mentioned and described in the said bill of complaint was procured to be executed and acknowledged by the said Margaret Johnston by such undue pressure exercised upon her by the said complainant aforesaid, as to destroy her free agency of the same, in the execution and acknowledging the same, and the said mortgage is null and void, and that the said complainant is not entitled to the relief by him sought in and by his said bill of complaint; and that the said bill of complaint be and the same is hereby dismissed, with costs."

J. G. Shipman, for appellant. *W. H. Morrow* and *George M. Robeson*, for respondent.

GARRISON, J. We agree with the learned vice-chancellor, who heard this cause, in all of his conclusions upon the testimony. The case shows in the clearest manner that Lomerson, the appellant, being involved with Mr. Johnston, as surety and indorser, visited Mrs. Johnston for the purpose of securing himself against loss through the husband by obtaining from the wife a mortgage upon the house left to her by her father. The case further shows, and the vice-chancellor so finds, that, in attaining this object, Lomerson made to Mrs. Johnston a number of statements, all tending to excite in her mind the liveliest apprehensions that her husband was about to be lodged in jail for debt. The court of chancery by its decree set aside the mortgage thus obtained, considering that it was executed under a species of duress. With the result reached we agree, resting our decision, however, upon the ground that it is inequitable to permit the complainant to retain a security for the husband's debt obtained by allowing a false apprehension as to the husband's danger to affect the mind of the wife. That this apprehension was the sole consideration for the wife's compliance is not more clear than that the efficient element of that apprehension,—namely, the belief in the imminence of the anticipated arrest,—was not only false, but was so to the knowledge of Lomerson.

In order to establish a case of false representation, it is not necessary that something which is false should have been stated as if it was true. If the presentation of that which is true creates an impression which is false it is, as to him, who, seeing the misapprehension, seeks to profit by it, a case of false representation. In the present instance Mrs. Johnston naturally gathered from the statements made to her by Lomerson that her husband had committed crimes for which he not only could and would be imprisoned, but that his arrest was at hand. The imminence of the danger was the sole motive for the execution of the mortgage. In any other view of the transaction her haste is incomprehensible. Notwithstanding the importance of the demand made upon her, she took no time to reflect, held no consultation with her friends, sought no advice. Her one object was to act quickly,—to be beforehand. And yet this notion of the imminence of her husband's arrest was just the one part of the impression produced upon her mind by Lomerson's statements which was false, and which he knew to be false. From this time on, the case becomes one of false representation, not because falsehoods were stated as if they were facts, but because the state of mind produced falsely represented the facts. To take advantage of such a state of mind is to profit by a false representation.

The decree below is affirmed, with costs.

GORDON v. PARMELEE et al. (2 cases).

(2 Allen, 212.)

Supreme Judicial Court of Massachusetts. Berkshire. Sept. Term, 1861.

Two actions of contract, tried and argued together, on promissory notes given by the defendants in payment for a farm and a detached piece of woodland.

At the trial in the superior court, before Rockwell, J., it appeared that the bargain for the land was made upon the premises, and that the defendants had viewed the same with reference to the purchase, and passed over the wood lot at several times before the purchase, in different directions. The defendants offered to show that the treaty for the purchase was made when the land was covered with snow, and that the plaintiffs falsely represented that the farm was of a soil, and a capacity for productiveness and the keeping of stock, greatly superior to what it was in fact; and that they had no means of judging of the same except from the representations of the plaintiffs, on which they relied, and were thereby induced to make the purchase; but the evidence was excluded. They also offered to show that the wood lot was so rough and uneven that its actual extent could not be seen from any point, and that the plaintiffs falsely pointed out boundaries as the true ones which included lands of adjoining owners, and falsely represented that a portion thereof lying under a ledge, and so situated that no judgment as to its quantity approaching correctness could be formed by inspection, contained fifty acres, knowing that in fact it only contained twenty-eight acres. The defendants claimed a right to recoup in damages for all these false representations; but the court ruled that they could recoup only for the value of the land lying between the boundaries pointed out and the true bounds, and not for false representations as to the number of acres, and if no false representations were made as to the boundaries, no deduction should be made from the notes.

The plaintiffs offered in evidence the declaration in an action brought by the defendant Parmelee against the plaintiffs, to recover damages for certain specified false representations alleged to have been made by them in selling this land, and afterwards discontinued, for the purpose of showing that the claim then made by Parmelee was less than the claim now set up by him. This was objected to, unless it should also be shown that Parmelee dictated or had knowledge of the precise allegations contained in the declaration; but the court allowed the evidence to be introduced.

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

J. E. Field, for plaintiffs. I. Sumner & H. L. Dawes, for defendants.

BIGELOW, C. J. The alleged false statements concerning the productiveness of the land and its capacity to furnish support for cattle constituted no defence to the notes. They fall within that class of affirmations which, although known by the party making them to be false, do not, as between vendor and vendee, afford any ground for a claim of damages either in an action on the case for deceit or by way of recoupment in a suit to recover the purchase money. They come within the principle embodied in the maxim of the civil law, "Simplex commendatio non obligat." Assertions concerning the value of property which is the subject of a contract of sale, or in regard to its qualities and characteristics, are the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property. Affirmations concerning the value of land, or its adaptation to a particular mode of culture, or the capacity of the soil to produce crops or support cattle, are, after all, only expressions of opinion or estimates founded on judgment, about which honest men might well differ materially. Although they might turn out to be erroneous or false, they furnish no evidence of any fraudulent intent. They relate to matters which are not peculiarly within the knowledge of the vendor, and do not involve any inquiry into facts which third persons might be unwilling to disclose. They are, strictly speaking, gratis dicta. The vendee cannot safely place any confidence in them; and if he does, he cannot make use of his own want of vigilance and care in omitting to ascertain whether they were true or false as the basis of his claim for damages in reduction of the amount which he agreed to pay for the property.

The representations concerning the quantity of land which formed the subject of the contract come within the same principle. The vendors pointed out to the vendees the true boundaries of the land which they sold. This fact is established by the verdict of the jury under the instructions which were given at the trial. The defendants had therefore the means of ascertaining the precise quantity of land included within the boundaries. They omitted to measure it, or to cause it to be surveyed. By the use of ordinary vigilance and attention, they might have ascertained that the statement concerning the number of acres, on which they placed reliance, was false. They cannot now seek a remedy for placing confidence in affirmations which, at the time they were made, they had the means and opportunity to verify or disprove. Sugd. Vend. 6, 7; Scott v. Hanson, 1 Sim. 13; Medbury v. Watson, 6 Metc. (Mass.) 246; Brown v. Castles, 11 Cush. 348.

The declaration in the former suit was rightly admitted. It was in the nature of an ad-

mission by the defendants of the nature and amount of damages which they claimed of the present plaintiffs in reduction of the amount due on the notes. The declaration was not a mere technical statement of a cause of action by an attorney, but it contained specific averments of the representations which the defendants alleged to be false, and which must have been derived from them. It was therefore the statement of their agent, while employed and acting within the scope of his agency. Currier v. Silloway, 1 Allen, 19.

Exceptions overruled.

SHELDON v. DAVIDSON.

(55 N. W. 161, 85 Wis. 138.)

Supreme Court of Wisconsin. May 2, 1893.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by John H. Sheldon against Agnes Davidson to recover damages for failure to give plaintiff possession of a building standing on premises leased by plaintiff from defendant. There was judgment for defendant on a demurrer to the complaint, and plaintiff appeals. Affirmed.

Austin & Hamilton, for appellant. Miller, Noyes & Miller, for respondent.

ORTON, J. This is an appeal from an order sustaining a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The complaint alleges substantially the following facts: The defendant, on the 16th day of March, 1891, leased to the plaintiff the south half of lot 3, in block 60, in the Fourth ward of the city of Milwaukee, for the term of five years, at a rent of $600 per year, payable in monthly installments the 1st of each month, the first payment to be made on the 1st day of May following. On the front part of said lot there was a brick dwelling house and store, and it was agreed that the plaintiff, the lessee, should expend in improving said buildings the sum of $1,000. It was in said lease agreed that the same should not take effect as to the east 60 feet of said lot until a certain lease then in effect between the defendant, as lessor, and one John Veidt, should terminate, on the 10th day of September, 1891. On said 60 feet there was a barn standing. A copy of the lease is appended to the complaint. It is alleged in the complaint that by the terms of said lease the plaintiff "was to have the use, benefit, and occupation of the said premises, and the aforesaid buildings." There is no such stipulation in said lease. If there had been, it would have embraced the barn on said east 60 feet. The plaintiff made due inquiry of the defendant as to the terms and conditions of said lease between the defendant and said Veidt, and the defendant, with intent to deceive and defraud the plaintiff, and for the purpose of inducing him to sign said lease, falsely and fraudulently concealed from this plaintiff the fact that the barn standing upon the said east 60 feet of said lot was not the property of said defendant, but was the property of said Veidt, and that the plaintiff could not obtain possession thereof on the 10th day of September next ensuing, and falsely represented to the plaintiff, and for the purpose of inducing the plaintiff to execute said lease, that he could have possession of said 60 feet and the stable standing thereon on and after September 10th next ensuing. "The plaintiff, relying upon the said representations, was thereby induced to sign the aforesaid lease, and did so sign it within a few days thereafter." The said representations were false, in that by the terms of said lease from the defendant to the said Veidt, which was to expire on the 10th day of September, 1891, the said barn was to become the property of the said Veidt, and he was to have the privilege of removing the same, which the defendant well knew. At the expiration of said lease between the defendant and said Veidt, said Veidt removed said barn from said premises, and the defendant has refused to restore the same, or compensate the plaintiff therefor. By reason of the premises the plaintiff was damaged $1,000. The gravamen of the complaint is the fraudulent concealment of the fact that the building on the east 60 feet of the lot was not the property of the defendant, but was the property of Veidt, the lessee; and the false representation that the plaintiff could have possession of the said 60 feet, and the stable standing thereon, on and after September 10th next ensuing.

1. As to the concealment as a cause of action. That barn on the 60 feet must have been placed there by the tenant, Veidt, temporarily for his own use, with the privilege of removal at the end of his term, and was never a part of the realty. It could not have been so attached to the soil as to become a part of the realty. If it had been, the plaintiff would have been entitled to it by the terms of his lease, and he could have prevented its removal. We conclude, therefore, that the barn was a tenant's fixture in fact as well as by the terms of the Veidt lease, and removable by him during his term. The Veidt lease is referred to in the plaintiff's lease. The plaintiff does not state that he did not know all about that lease, and all about the character of that building as having been placed there by the tenant, and removable. He states only that he inquired of the defendant about the terms and conditions of that lease, and does not state whether the defendant told him what they were or not. He does not state that the defendant knew, or had reason to know, that he, the plaintiff, was ignorant of the fact that the defendant did not own the barn. The defendant might well have supposed that the plaintiff knew the terms of that lease referred to in his own lease, and the character of the barn as a fixture was open to common observation. But more material than even this is the absence of any averment that the plaintiff was induced to sign the lease by such fraudulent concealment. It states merely that the concealment was for the purpose of inducing him to do so, but fails to state that he was actually induced to do so by it. It is very clear that there are not sufficient allegations in the complaint to make the fraudulent concealment a cause of action.

2. As to the false representation that the plaintiff "could have possession of said east

60 feet, and the stable standing thereon, on and after September 10th next ensuing." The plaintiff did have possession of the 60 feet, so that such part of the representation at least was not false. As to the other part of the representation, it relates to a future event, and is not of an existing fact or of a past event, and therefore is not actionable if such event should not occur. It is a mere opinion, prediction, or promise of a future condition of things, upon which the plaintiff had no right to rely. In Morrison v. Koch, 32 Wis. 254, the representation was that a certain dam "would always in the future continue to furnish the full amount of the power conveyed." Mr. Justice Lyon said in the opinion: "It seems quite clear that no charge of fraud can be predicated upon it. At most there was a mere expression of opinion that in the future the conditions on which the water supply depended would remain favorable to a continuance of the supply. It is wanting in all the essential elements which constitute a fraud." In Patterson v. Wright, 64 Wis. 289, 25 N. W. Rep. 10, the representation was that the party "said or promised that he would pay a certain sum of money as a consideration of and to induce the giving of certain notes, and upon which they were obtained." It was held "that the representation must relate to a present or past state of facts, and that relief as for deceit cannot be obtained for the nonperformance of a promise or other statements looking to the future;" citing the above case; Bigelow, Frauds, 11, 12; and Fenwick v. Grimes, 5 Cranch, C. C. 439. In Maltby v. Austin, 65 Wis. 527, 27 N. W. Rep. 162, the representation was "of the value of a certain tract of land," and in Prince v. Overholser, 75 Wis. 646, 44 N. W. Rep. 775, it was "that a certain bounty land warrant would locate any kind of government land," and neither was held actionable. The principle has become elementary in respect to all representations relating to the future, and as mere expressions of opinion. This representation is not fraudulent or actionable for both reasons. It relates to a future event, and is a mere opinion, viz. "that the plaintiff could have possession of the building on the east 60 feet of the lot on and after September 10th next ensuing." This statement was made before March 16, 1891. This disposes of all the pretended deceit or fraud alleged in the complaint. The demurrer was properly sustained. The order of the superior court is affirmed, and the cause remanded for further proceedings according to law.

STIMSON v. HELPS et al.

(10 Pac. 290, 9 Colo. 33.)

Supreme Court of Colorado. Feb. 26, 1886.

Appeal from county court, Boulder county.

The complaint sets out that on the sixth day of October, 1881, William Stimson leased to the defendants in error the S. W. ¼ of section 21, in township 1, range 70 west, in said county, for the period of four years and six months, for the purpose of mining for coal, under the conditions of said lease; that they had no knowledge of the location of the boundary lines of said tract at the time of the leasing, and that they so informed Stimson, the defendant in the case; that they requested Stimson to go with them and show them the boundary lines; that the defendant, pretending to know the lines bounding said land, and their exact locality, went then and there with plaintiffs, and showed and pointed out to them what he said was the leased land, and the boundary lines thereof, especially the north and south lines thereof; that plaintiffs not then knowing the lines bounding said land, nor the exact location thereof, and relying upon what the defendant then and there pointed out to them as the leased land, and the lines thereof, then and there proceeded to work on the land pointed out, and sank shafts for mining coal thereon, and made sundry improvements thereon,—made buildings, laid track~ etc.; that all the said work was done and labor performed and improvements made on the land pointed out by defendant to plaintiffs as the leased land, and that plaintiffs, relying upon the statements of defendant as aforesaid, and not knowing otherwise, believed they were performing the work, and making all the improvements on the land they had so leased, which they did by direction of the defendant; that while they were working on the said land Stimson was frequently present, and told the plaintiffs they were on his land, and received royalty from ore taken therefrom; that about April 10, 1882, they were notified to quit mining on said ground by the Marshall Coal Mining Company; that the land belonged to said company; that none of the said improvements were put on said leased land; and that they were compelled to quit work and mining thereon; that the improvements made by them were worth $2,000; that Stimson falsely represented to them other and different lines than the true boundaries of said premises, and showed and pointed out to them other and different lands than the lands leased them, and thereby deceived them, and damaged them, in the sum of $2,000. Issue joined, and trial to the court. Motion by defendant's counsel for judgment on the pleadings, and evidence overruled. Judgment for the plaintiffs in the sum of $2,000, and costs.

Wright & Griffin, for appellant. G. Berkley, for appellees.

ELBERT, J. The law holds a contracting party liable as for fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury. Upon such representations so made the contracting party to whom they are made has a right to rely, nor is there any duty of investigation cast upon him. In such a case the law holds a party bound to know the truth of his representations. Bigelow, Fraud, 57, 60, 63, 67, 68, 87; Kerr, Fraud & M. 54 et seq.; 3 Wait, Act. & Def. 436. This is the law of this case, and, on the evidence, warranted the judgment of the court below.

The objection was made below, and is renewed here, that the complaint does not state sufficient facts to constitute a cause of action. Two points are made: (1) That the complaint does not allege that the defendant knew the representations to be false; (2) that it does not allege intent to defraud.

It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false. He who makes a representation as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, is guilty of fraud as much as if he knew it to be untrue. In such a case he acts to his own knowledge falsely, and the law imputes a fraudulent intent. Kerr, Fraud & M. 54 et seq., and cases cited; Bigelow, Fraud, 63, 84, 453; 3 Wait, Act. & Def. 438 et seq.; 2 Estee, Pr. 394 et seq. "Fraud" is a term which the law applies to certain facts, and where, upon the facts, the law adjudges fraud, it is not essential that the complaint should, in terms, allege it. It is sufficient if the facts stated amount to a case of fraud. Kerr, Fraud & M. 366 et seq., and cases cited; 2 Estee, Pl. 423. The complaint in this case states a substantial cause of action, and is fully supported by the evidence.

The action of the county court in refusing to allow the appellant to appeal to the district court after he had given notice of an appeal to this court, and time had been given in which to perfect it, cannot be assigned as error on this record. If it was an error, it was error not before, but after, the final judgment from which this appeal is taken.

The judgment of the court below is affirmed.

[Note from 10 Pac. Rep. 292.]

A contract secured by false and fraudulent representations cannot be enforced. Mills v. Collins, 67 Iowa, 164, 25 N. W. Rep. 109.

A court of equity will decree a rescission of a contract obtained by the fraudulent representations or conduct of one of the parties thereto, on the complaint of the other, when it satisfactorily appears that the party seeking the rescission has been misled in regard to a ma-

terial matter by such representation or conduct, to his injury or prejudice. But when the facts are known to both parties, and each acts on his own judgment, the court will not rescind the contract because it may or does turn out that they, or either of them, were mistaken as to the legal effect of the facts, or the rights or obligations of the parties thereunder, and particularly when such mistake can in no way injuriously affect the right of the party complaining under the contract, or prevent him from obtaining and receiving all the benefit contemplated by it, and to which he is entitled under it. Seeley v. Reed, 25 Fed. Rep. 361.

When, by false representations or misrepresentations, a fraud has been committed, and by it the complainant has been injured, the general principles of equity jurisprudence afford a remedy. Singer Manuf'g Co. v. Yarger, 12 Fed. Rep. 487. See Chandler v. Childs, 42 Mich. 128, 3 N. W. Rep. 297; Cavender v. Roberson, 33 Kan. 626, 7 Pac. Rep. 152.

When no damage, present or prospective, can result from a fraud practiced, or false representations or misrepresentation made, a court of equity will not entertain a petition for relief. Dunn v. Remington, 9 Neb. 82, 2 N. W. Rep. 230.

A person is not at liberty to make positive assertions about facts material to a transaction unless he knows them to be true; and if a statement so made is in fact false, the assertor cannot relieve himself from the imputation of fraud by pleading ignorance, but must respond in damages to any one who has sustained loss by acting in reasonable reliance upon such assertion. Lynch v. Mercantile Trust Co., 18 Fed. Rep. 486.

Equity will not relieve against a misrepresentation, unless it be of some material matter constituting some motive to the contract, something in regard to which reliance is placed by one party on the other, and by which he was actually misled, and not merely a matter of opinion, open to the inquiry and examination of both parties. Buckner v. Street, 15 Fed. Rep. 365.

False representations may be a ground for relief, though the person making them believes them true, if the person to whom they were made relied upon them, and was induced thereby to enter into the contract. Seeberger v. Hobert, 55 Iowa, 756, 8 N. W. Rep. 482.

Fraudulent representations or misrepresentations are not ground for relief, where they are immaterial, even though they be relied upon. Hall v. Johnson, 41 Mich. 286, 2 N. W. Rep. 55. See, to same effect, Lynch v. Mercantile Trust Co., 18 Fed. Rep. 486; Seeberger v. Hobert, 55 Iowa, 756, 8 N. W. Rep. 482.

In fraudulent representation or misrepresentation the injured parties may obtain relief, even though they did not suppose every statement made to them literally true. Heineman v. Steiger, 54 Mich. 232, 19 N. W. Rep. 965.

Where the vendor honestly expresses an incorrect opinion as to the amount, quality, and value of the goods he disposes of in a sale of his business and good-will thereof, and the purchaser sees or knows the property, or has an opportunity to know it, no action for false representations will lie. Collins v. Jackson, 54 Mich. 186, 19 N. W. Rep. 947.

Mere "dealing talk" in the sale of goods, unless accompanied by some artifice to deceive the purchaser or throw him off his guard, or some concealment of intrinsic defects not easily detected by ordinary care and diligence, does not amount to misrepresentation. Reynolds v. Palmer, 21 Fed. Rep. 433.

False statements made at the time of the sale by the vendor of chattels, with the fraudulent intent to induce the purchaser to accept an inferior article as a superior one, or to give an exorbitant and unjust price therefor, will render such purchase voidable; but such false statement must be of some matter affecting the character, quantity, quality, value, or title of such chattel. Bank v. Yocum, 11 Neb. 328, 9 N. W. Rep. 84.

A statement recklessly made, without knowledge of its truth, is a false statement knowingly made, within the settled rule. Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. Rep. 360.

Whether or not omission to communicate known facts will amount to fraudulent representation depends upon the circumstances of the particular case, and the relations of the parties. Britton v. Brewster, 2 Fed. Rep. 160.

Where a vendor conceals a material fact, which is substantially the consideration of the contract, and which is peculiarly within his knowledge, it is fraudulent misrepresentation. Dowling v. Lawrence, 58 Wis. 282, 16 N. W. Rep. 552.

Evidence of fraudulent representations must be clear and convincing. Wickham v. Morehouse, 16 Fed. Rep. 324.

Where a man sells a business, and the contract of sale contained a clause including all right to business done by certain agents, evidence that the seller was willing to engage in the same business with such agents is not proof of fraud in making the contract. Taylor v. Saurman, 110 Pa. St. 3, 1 Atl. Rep. 40.

It was recently held by the supreme court of Indiana, in the case of Cook v. Churchman, 104 Ind. 141, 3 N. E. Rep. 759, that where money is obtained under a contract, any fraudulent representations employed by a party thereto as a means of inducing the loan to be made, if otherwise proper, are not to be excluded because of the statute of frauds; also that where parol representations are made regarding the credit and ability of a third person, with the intent that such third person shall obtain money or credit thereon, the statute of fraud applies, and no action thereon can be maintained, although the party making the representations may have entered into a conspiracy with such person with the expectation of obtaining some incidental benefit for himself.

COBB v. HATFIELD.

(46 N. Y. 533.)

Court of Appeals of New York. 1871.

Action for the recovery of $1,000 and interest paid by the plaintiff to the defendants, upon the purchase of an interest in an oil property in Pennsylvania, upon the ground that the purchase had been induced by the false and fraudulent representations of the defendants as to the character, yield, and value of the property. Judgment for plaintiff reversed.

John H. Reynolds, for appellant. William C. Ruger, for respondents.

ALLEN, J. Under the complaint the plaintiff might have treated the action as in case for the recovery of damages for the alleged fraud; and in such action no return of property received from the defendants, or other act restoring the defendants to the condition they occupied before making the contract, would have been necessary as a condition precedent to maintaining the action. But upon the trial the plaintiff expressly repudiated the contract, and claimed to recover the money advanced and paid, as upon a rescission of the contract, and at the close of the evidence on his part, tendered to the defendants and offered to cancel the assignment and transfer, and claimed to recover in the action the consideration paid and interest, "solely upon the ground of a rescission of the contract" for the alleged fraudulent representations of the defendants. The recovery was had for the money paid and interest thereon. The judge charged the jury that what had been done was sufficient to entitle the plaintiff to maintain the action, that it was a sufficient rescission of the contract. It is somewhat questionable whether the point upon which the supreme court reversed the judgment and granted a new trial was properly taken. No question was made at the trial as to the necessity of an immediate rescission of the contract upon a discovery of the fraud; and the judge at circuit did not rule and was not called upon to rule in respect to the time at which the plaintiff should have rescinded the contract, and restored or tendered to the defendants what he had received. His attention was not called to that question, and non constat, that had the question been directly raised, the plaintiff might not have shown an earlier revocation than was shown at the trial. The judge only passed upon the character and quality of the acts relied upon as a rescission, and not as to their timely and seasonable performance.

But passing this, a fatal error was committed on the trial in the exclusion of evidence offered by the defendants. The assignment and transfer to the plaintiff was of an undivided share or interest in certain property, and entitled him to a proportionate number of shares of the capital stock in the "Collins Oil Company," an incorporated association, when the corporation should be fully organized and prepared to issue stock certificates.

The capital stock of the corporation represented the interests of the proprietors of the property, of whom the plaintiff became one by his purchase of the defendants; and when he should receive his stock certificate, that, rather than the assignment and transfer from the defendants, would represent and evidence his ownership of the property and interests purchased. The corporation was organized and stock certificates were issued to the owners in October, 1865. The defendants offered to show that the plaintiff applied at the office of the company for his stock, and that it was delivered to him in fulfillment of the contract of purchase from the defendants, and that he had accepted it and kept it, and had never returned it or canceled it, or offered so to do. The evidence was excluded upon objection by the plaintiff.

It was said by both counsel, and such would seem to be the fact from the evidence, that the plaintiff received his stock certificate after the commencement of this action. If so, it was necessarily after he had knowledge of the fraud of which he complains; and the act was a ratification and affirmance of the contract. He could not with knowledge of the fraud which had been practiced upon him, take any benefit under the contract, or change the condition of the property, the subject-matter of the contract, and then repudiate the contract. The taking of a benefit is an election to ratify it, and concludes him. He cannot be allowed to deal with the subject-matter of the contract and afterward disaffirm it. The election is with the party defrauded to affirm or disaffirm the contract; but he cannot do both. Masson v. Bovet, 1 Denio, 69. By accepting the stock certificate he elected to abide the purchase. But if the certificate of stock was received before the commencement of the action, and before the plaintiff had knowledge of the fraud, he was bound, upon a rescission of the contract, to restore to the defendants all that he had received from them, and all that he had acquired under it; to place the defendants in statu quo as near as practicable. The law not only requires a disaffirmance of the contract at the earliest practicable moment after discovery of the cheat, but a return of all that has been received under it, and a restoration of the other party to the condition in which he stood before the contract was made.

To retain any part of that which has been received upon the contract, is incompatible with its rescission. Masson v. Bovet, supra; Voorhees v. Earl, 2 Hill, 288; Hogan v. Weyer, 5 Hill, 389.

The contract although fraudulent was not ipso facto void, but only void at the election of the plaintiff, and a return of what he had received under it. Where a party had parted with goods for the note of a third per-

son upon the fraudulent representations of the purchaser as to the solvency of the maker, and had recovered a judgment upon the note, the court held that he could not rescind the sale without tendering an assignment of the judgment. Baker v Robbins, 2 Denio, 136.

The evidence offered was material upon the question of affirmance of the contract, as well as in respect to the acts necessary on the part of the plaintiff to a rescission of it, and upon the right of the plaintiff to recover the money paid, and should have been admitted. If the fact had been proved, as offered, that the plaintiff had received and kept his certificates of stock, a transfer or delivery of these certificates, or a tender to the defendants, was necessary to a complete rescission of the contract, and the evidence offered was competent and material. It follows that the order granting a new trial must be affirmed and judgment absolute given for the defendants.

This is a fit case to allude to the hazardous practice which is becoming so general of risking an appeal to this court from an order granting a new trial, with a stipulation made necessary by statute, that in case the order is affirmed, judgment absolute shall be given against the party appealing. There is but a single class of cases, and the individual cases coming within it are rare, in which this course can prudently be adopted. It is only proper and admissible, when the sole question that can be presented upon the record relates to and will determine the merits of the controversy unembarrassed by incidental questions affecting the trial, but not necessarily decisive of the true merits of the litigation. If every fact that can affect the result has been upon the trial adjudged favorably to the party against whom the new trial has been granted, and no exceptions have been taken to the admission or rejection of evidence, or to the rulings upon minor or incidental questions in the progress of the trial, which, if well taken, will entitle the exceptant to a new trial; in other words, if the objections and exceptions taken at the trial and to the recovery cannot be obviated upon a second trial, but the verdict and judgment must necessarily be adverse to the party against whom the new trial has been granted, if the order and decision stand, an appeal from the order, with the stipulation for judgment absolute in case the order is sustained, may be advisable. But ordinarily, as in this case, there are exceptions, which, if well taken, will entitle the unsuccessful party to a new trial, but the decision of which will not finally or necessarily determine the merits of the action or the rights of the parties; and in such cases the exceptions must be clearly frivolous to justify the hazard of an appeal from the order granting a new trial, with the consent to a judgment absolute upon an affirmance of the order. The decisions of the questions presented by the record in this case were not necessarily fatal to the plaintiff, but they are made so by the appeal from the order and the giving of the ordinary statutory stipulation, and the plaintiff loses the benefit of a second trial.

The order must be affirmed, and judgment absolute for the defendants.

All concur.

Order affirmed.

ROWLEY et al. v. BIGELOW et al.[1]

(12 Pick. 307.)

Supreme Judicial Court of Massachusetts. Suffolk and Nantucket. March 19, 1832.

Trover for 627 bushels of yellow corn, valued at 55 cents a bushel.

At the trial, before Wilde, J., it was proved by the plaintiffs, that on the 24th of May, 1830, the corn belonged to them and was in their possession, in the city of New York, on board the sloop Milan, of which S. Dunning, one of the plaintiffs, was master, and that it was measured and delivered on board the schooner Lion. They alleged that one William N. Martin, a merchant there, fraudulently obtained possession of it by pretending to purchase it for cash; and it was proved that on the 25th of May he shipped it on board the Lion, consigned to the defendants at Boston, and that the vessel sailed in the afternoon of that day for Boston. On the 26th, Dunning, having ineffectually demanded payment for the corn, at Martin's counting-house, proceeded to Boston to reclaim it. He reached Boston before the arrival of the Lion, and on the 29th gave notice to the defendants, to whom by Martin's orders the corn was to be delivered, that Martin had fraudulently obtained it from the plaintiffs, and that they intended to repossess themselves of it. On the 30th, when the Lion had arrived in Boston harbour, Dunning boarded her and demanded of the master possession of the corn, giving him notice that Martin had obtained it fraudulently from the plaintiffs. The master notwithstanding delivered it to the defendants; after which Dunning demanded it of them and tendered them any freight or charges which they had paid. They refused to deliver the corn, and thereupon the suit was commenced.

In order to establish the fraud on the part of Martin, the plaintiffs relied on the depositions of C. A. Jackson and others, merchants in New York, who testified that Martin had made similar purchases of them about the same time, and under circumstances tending to show that he was insolvent, and that he knew it and had no reasonable expectation of paying for the merchandise according to his contract. The defendants objected to the admission of these depositions, but the judge permitted them to be read to the jury.

The defendants, to establish their right to hold the corn against the plaintiffs, offered in evidence a bill of lading, dated May 17th, 1830, signed by the master of the Lion, purporting to be for 2000 bushels of yellow corn shipped by Martin and consigned to the defendants; also an invoice corresponding to the bill of lading and purporting to be for 2000 bushels of corn consigned to the defendants for sale on the shipper's account, and signed by Martin; also a letter from Martin to the defendants dated May 17th (to which the bill of lading and invoice were annexed) advising that he valued on them in favor of Henry Bennett for $1000, at ten days' sight, and directing them, if he had valued too much on this shipment, to charge it to some previous one, there being an existing account between Martin and the defendants. And it was proved that a bill drawn accordingly by Martin, was accepted by the defendants on the 20th of May and paid by them at maturity.

There was no evidence that the defendants had any knowledge of the fraudulent conduct of Martin, but it appeared that they received the bill of lading and invoice and accepted the draft in the usual course of business.

Upon this evidence the judge ruled, that the defendants had a good title to the property notwithstanding the fraudulent conduct of Martin, and notwithstanding the bill of lading had been signed before the corn was shipped; to which the plaintiffs excepted.

A verdict was taken for the defendants by consent; and if the whole court should be of opinion that they had a valid title to the corn, under the invoice and bill of lading, judgment was to be rendered upon the verdict; but if the court should be of opinion that the ruling was wrong, the verdict was to be set aside and the defendants defaulted, unless the court should also be of opinion that the depositions above mentioned were improperly admitted; in which case a new trial was to be granted.

Fletcher and W. J. Hubbard, for plaintiffs. Curtis, for defendants.

SHAW, C. J. The first question arising in this cause is, whether the depositions of Jackson and others, under the circumstances, ought to have been admitted as competent. These were generally persons, of whom Martin had made similar purchases, of like articles, about the same time, and under circumstances tending to show that he was insolvent and had no reasonable expectation of paying for the merchandise according to his contract.

The objection to this evidence is placed on two grounds, first, that these persons having similar claims of their own, some of which are pending here, they have an interest in establishing the fraud which they are called to prove; and secondly, that the transactions being res inter alios, have no tendency to prove the fact in issue in this particular case.

But in our opinion, the objection cannot be sustained upon either ground. As to the first, it is quite clear, that the verdict and judgment in this case would not be evidence in either of theirs; that their interest is in the question and subject matter and not in the event of the suit, and therefore that the objection, such as it is, goes to the credit and not to the competency of the witnesses. As to the other objection, we think this evidence

[1] Irrelevant parts omitted.

has a direct and material bearing upon the fact in issue. It tends to show, that at the time this ostensible purchase was made, Martin was insolvent, that he knew he was insolvent, that he had no reasonable ground to believe that he could pay the cash and did not expect or intend to pay the cash for the merchandise which he purchased, and so that he obtained the goods, by false pretenses. The fact of insolvency, of his knowledge of his insolvency, and that he had no expectation or intention of paying for the corn in question, is a material fact and the principal fact in controversy on which this case rests, and is material to the issue. The evidence bears upon the question quo animo, the intent, the fraudulent purpose.

2. It is next contended on the part of the plaintiffs, that no property passed by the fraudulent purchase of Martin, from the plaintiffs to him, so as to enable him to make a title to the defendants.

The evidence clearly shows that there was a contract of sale and an actual delivery of the goods, by their being placed on board a vessel, pursuant to his order; and this delivery was unconditional, unless there was an implied condition arising from the usage of the trade that the delivery was to be considered revocable, unless the corn should be paid for, pursuant to the contract and to such usage. This contract and delivery were sufficient in law to vest the property in Martin, and make a good title, if not tainted by fraud. But being tainted by fraud, as between the immediate parties, the sale was voidable, and the vendors might avoid it and reclaim their property. But it depended upon them to avoid it or not, at their election. They might treat the sale as a nullity and reclaim their goods; or affirm it and claim the price. And cases may be imagined, where the vendor, notwithstanding such fraud, practised on him, might, in consequence of obtaining security, by attachment or otherwise, prefer to affirm the sale. The consequence therefore is, that such sale is voidable, but not absolutely void. The consent of the vendor is given to the transfer, but that consent being induced by false and fraudulent representations, it is contrary to justice and right, that the vendor should suffer by it, or that the fraudulent purchaser should avail himself of it; and upon this ground, and for the benefit of the vendor alone, the law allows him to avoid it.

The difference between the case of property thus obtained, and property obtained by felony, is obvious. In the latter case, no right either of property or possession is acquired and the felon can convey none.

We take the rule to be well settled, that where there is a contract of sale, and an actual delivery pursuant to it, a title to the property passes, but voidable and defeasible as between the vendor and vendee, if obtained by false and fraudulent representations. The vendor therefore can reclaim his property as against the vendee, or any other person claiming under him and standing upon his title, but not against a bona fide purchaser without notice of the fraud. The ground of exception in favor of the latter is, that he purchased of one having a possession under a contract of sale, and with a title to the property, though defeasible and voidable on the ground of fraud; but as the second purchaser takes without fraud and without notice of the fraud of the first purchaser, he takes a title freed from the taint of fraud. Parker v. Patrick, 5 Term R. 175. The same rule holds in regard to real estate. Somes v. Brewer, 2 Pick. 184.

* * * * * * *

Judgment on the verdict.

MALLORY v. LEACH.

(35 Vt. 156.)

Supreme Court of Vermont. Rutland. Feb. Term, 1862.

Case. The declaration set forth that the plaintiff was the owner of fifty shares of the capital stock of the Franklin *Mining Company, of the true value *157 and situation whereof she was ignorant, and had no means of accurate information, and that the defendant undertook, at her request, to ascertain and communicate to her the value of such stock; that said stock was worth thirteen hundred dollars, which the defendant ascertained, but that he, contriving and intending to defraud the plaintiff, and to obtain said stock from her at much less than its just value, did not communicate to the plaintiff or inform her of its true value or the facts in relation thereto, but fraudulently concealed and suppressed the same, and fraudulently induced the plaintiff to believe that the said stock was of much less value than it really was, and also falsely represented that the same was of much less value than it really was; and also falsely represented that the same was about to be subject to a large assessment, when in fact, and as the defendant well knew, said assessment was only two dollars upon a share; that by means thereof the defendant then and there induced the plaintiff to transfer to him (and for his benefit,) the said stock for the sum of two hundred and seventy-five dollars paid her therefor by him, being much less than its real value as aforesaid; that the plaintiff believed and relied upon said representations, and was wholly ignorant of the facts so concealed and suppressed by the defendant as aforesaid, and of the true value of said stock, and supposed that the defendant had fully communicated to her his knowledge on the subject; and that she therefore did transfer said stock to the defendant, and for his benefit, for said last mentioned sum and no more; and that the defendant received and converted the same to his own use, and immediately sold the same for the sum of thirteen hundred dollars; and that thereby the plaintiff took the whole value of said stock over and above the sum of two hundred and seventy-five dollars, to wit: ten hundred and twenty-five dollars.

Linsley & Prout and E. J. Phelps, for plaintiff. D. Roberts, E. N. Briggs, and D. E. Nicholson, for defendant.

ALDIS, J. I. As to the alleged variance, it may be observed that it consists in averring the injury occasioned by the plaintiff's fraud to be greater than it was proved to be. But in the averment of damages it is not necessary to be exact; and the proof need not sustain the allegations in this respect.

II. The parol evidence was admissible as tending to show the fraud—not as qualifying the written contract. It tended to show a special confidence and relation between the parties, in regard to this business, and, if proved, to the satisfaction of the jury, to have existed in the outset, and to have continued to the time of the re-purchase by the defendant, must materially have given character to both the defendant's words and silence, as intended to induce the plaintiff to act under a delusion. This leads us to the main point, viz.: the testimony on the part of the plaintiff, and the charge of the court in regard to it.

The testimony of the plaintiff tended to show, that the defendant, in advising her to buy the fifty shares of mining stock, professed to act as her friend, from a desire to invest her money so as to make her independent, and in a mode that was to be kept secret from all but her father and mother, and with his own guarantee that she should get back her money and at least twenty per cent. interest. He told her that as he was interested in the stock he would keep her informed as to its situation and value, and that he should go to the mines in June, 1859. This declaration of the defendant is to be considered in connection with the fact that by the written contract she was to decide on the 1st July, 1859, to keep or to sell her stock. That such language would strongly tend to beget confidence and trust in the defendant, and lead the plaintiff to rely *166 upon his advice, and to be *guided by it on his expected return from the mines in June, 1859, is obvious. This must have been the purpose for which he thus advised her; and we think he must have been aware of the effect that it produced on her mind at that time. Now if this relation of trust and confidence continued from December, 1857, when she bought the stock, to July, 1859, when she sold it to the defendant, and he at the time of his purchase knew that she thus trusted in and relied upon his friendship and advice in this matter, it was clearly his duty to tell her of its real value, and it was a fraud to take advantage of her ignorance and buy it at about a quarter of its market price. But if during this period of time this relation of confidence ceased to exist, and alienation and distrust had taken its place, then it is obvious that he could not have supposed she was relying upon his friendship and advice in this business, and was not under obligation to give her information in regard to the value of her stock.

There was testimony on the part of the defendant tending to establish this state of facts. The fraud of the defendant (if any) consisted in taking advantage of the confidence which he knew the plaintiff put in him, and which he had sought to win; but if she had lost her confidence in him, he could no longer take advantage of it.

The court distinctly stated to the jury that no obligation rested upon the defendant by virtue of the contract to inform her of the real value of the stock. To have required that would have been to add a new clause to the contract. The court then proceeded to refer to those circumstances which gave rise to a relation of trust and confidence between the parties in this matter, and made it the duty of the defendant to inform her of what he knew as to the value of the stock, and then said to the jury, "because he had placed him-

self in such a relation it would be a fraud in him to receive back the stock without giving her the knowledge he possessed." This put the case clearly on the ground of fraud in taking advantage of a confidence he had sought, and which he knew was placed in him.

The doubt we have felt, in regard to the correctness of the charge in this respect, is whether the court sufficiently called the attention of the jury to the fact that this relation of confidence *must exist between the parties at the time of the re-purchase by the defendant, and to those circumstances shown on the part of the defendant tending to prove that the relation had ceased to exist. We have carefully examined the exceptions on this point, and can not but regret that the statement in this respect is not more satisfactory. It does not appear that the defendant in his requests to the court called their attention to this part of the defence, or made any request in regard to it. The defendant's evidence was admitted. The court treated the promise of the defendant to inform her of the situation and value of the stock from time to time as a continuing promise, and seem to carry the idea that the plaintiff must have continued to rely on it. As there is no direct request to charge in regard to this part of the defence, and as no exception was taken on the ground of an omission in this respect; and as it would have been the duty of the defendant to have called the attention of the court to this point, if not sufficiently referred to in the charge, and as the general tenor of the charge seems to require that the confidence should have existed at the time of the re-sale, we think we should not be justified in opening the case on this ground.

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The defendant further claims that the charge of the court in regard to the representation made by the defendant, that there was about to be a large assessment made upon the stock, was incorrect. The substance of the charge is,—if the defendant said this with a view to mislead the plaintiff as to the value of the stock—if the fact was calculated to depreciate its value and to induce her to sell at a price less than the value, and she was thereby deceived and induced to sell, he would be liable unless he disclosed his knowledge of facts tending to enhance its value.

1. This does not assume as matter of law, that the fact would depreciate its value and induce her to sell. That question is left to the jury. It is obvious that ordinarily an assessment of 25 per cent. upon stock, unexplained, would lead the holder to suspect something might be wrong; especially if it was not expected by stockholders that such an additional payment was to be made. So if the holder of the stock was a poor person, and unable without trouble and inconvenience to raise the sum assessed, it *would tend to induce such person to sell the stock. We think the evidence admissible as tending to show that the defendant made declarations which he must have been aware would embarrass the plaintiff and lead her to wish to part with her stock.

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It was telling the truth, but not the whole truth. It was telling it in a manner to produce the effect of a falsehood. The defendant must have felt that what he said would depress the plaintiff's estimate of her stock—would lead her to think its value much less than it was; and he knew she was ignorant of its true value. Now he might be silent—might say nothing; but he had no right to produce a delusion by his language, and knowingly take advantage of it for his own benefit. This was not fair dealing, and was very properly characterized in the charge of the court.

III. It is further claimed that the receipt by the plaintiff of the amount of the note given for the stock, after she knew of the fraud, was a ratification of the contract, so that she can not now sue for the deceit.

Let us consider what the rights of the parties were when the defendant had by fraud procured a transfer of the stock to himself.

1. As to the defendant it is obvious that he could not take advantage of his own wrong—he could not rescind the contract, but was bound by it to pay the note.

2. As to the plaintiff, as fraud avoided the contract, she had the right, if she saw fit, upon discovery of the fraud, to treat the contract as wholly at an end—to return to the defendant his note and demand a re-conveyance of the stock. This would been to rescind or disaffirm the contract. If she thought that the stock would continue to advance in value and remain a highly profitable investment, she might have deemed it for her interest to have back the stock; and, in order to accomplish this, she should have given notice immediately to the defendant that she disaffirmed the contract and demanded back her stock. But she was not bound to do this. She might claim what was due her by contract, and also rely upon her right to recover her damages for the amount of which she had been defrauded —which would be the difference between what the defendant had *agreed to pay her for the stock and its true value. In such case she would have ratified the contract, but would not have thereby waived her claim to damages.

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The fallacy of the defendant's claim is this: that it supposes a ratification of the contract to be a waiver of the right to recover damages. Not at all. The plaintiff has the right to hold the defendant to his contract, and, also, to recover of him compensation for the injury occasioned by his fraud. How can the defendant complain of this? It is but making the plaintiff good. It can not injure the defendant, or deprive him of any defence, or impair any right.

If the plaintiff had seen fit to rescind the contract, but had waited an unreasonable time before giving notice,—pondering upon the fluctuations and chances of the market before making a decision—the defendant might perhaps say with justice that such delay tended to deprive him of his reasonable opportunity to sell, and that he might well suppose she had concluded to ratify the sale and ask not for her stock, but only for damages. Her right to her damages was

perfect when the fraud was committed. It is a right not legally to be extinguished but by compensation or by voluntary release. To infer a release of the damage from her receiving payment of the note would be putting an unreasonable construction on the act. She thereby takes what the defendant agreed to pay, and neither claims nor relinquishes her rights growing out of the fraud.

The case cited by the defendant from 9 B. & C. 59, only shows that though the vendor of goods sold through fraud and upon a credit might sue in trover for the goods before the credit expires, yet if he proceed upon the contract of sale he cannot sue till the credit has expired. The principle of that case does not conflict with the plaintiff's right to recover his damages after receiving payment of the note. When he sues upon the contract he must be bound by it, but when damage results from the fraud beyond what he can recover by contract, he can also recover in an action on the case for the deceit.

In 2 Pars. on Contracts 278, in a note, it is said, "If a party defrauded brings an action on the contract to enforce it, he thereby waives the frauds and affirms the contract." The *authorities cited to sustain this are 5 M. & W. 83, and 24 Wendell 74. *170

In Selway v. Fogg, 5 M. & W. 83, the action was assumpsit for work in carting away rubbish. The plaintiff, induced by the fraudulent representations of the defendant as to the depth of the rubbish, agreed to do the work for £15, which had been paid him. He sought by this action to recover for the value of his work above the £15. It appeared that the plaintiff had knowledge of the circumstances indicative of the fraud before the work was finished. Upon the trial, ABINGER, C. B., was of the opinion, that the question of fraud was not open to the plaintiff in the present action, although it might be the subject of complaint in another. Upon hearing in the Exchequer, ABINGER, C. B., said "a party can not be bound by an implied contract when he has made a specific contract which is avoided by fraud. If he repudiate the contract on the ground of fraud, as he may do, he has a remedy by an action for deceit." So far the opinion stands upon solid ground, and was required for the decision of the case. But when the Chief Baron proceeds to say "secondly, the plaintiff had full knowledge of all that constituted the fraud, during the work, and as soon as he knew it he should have discontinued the work and repudiated the contract, or he must be bound by its terms," if he means, that the plaintiff could not in such case recover for the damage he suffered from the fraud in an action for the deceit, he says what was not required for the decision, and what we deem untenable as a rule of law. Consider in what a position the plaintiff is put by the application of such a rule. He proceeds with his work till it is in part done, and then discovers "circumstances indicative of fraud." He may be fully convinced that he has been defrauded, and yet feel great doubt that he can prove it. He says to himself, "If I proceed and finish the work I shall be entitled in any event to the contract price. If I stop and fail to prove fraud, I can not recover for the work I have done. If I proceed and finish the work and still shall be able to prove fraud, why should I not be entitled to recover the full value of all my work; why should I be bound to a contract price to which my consent was procured through fraud? How does my going on with the work *injure the defendant, or purge his fraud? If he has been guilty of fraud he knows it, and needs no notice from me to put him on restitution." If, however, the going on with the contract injures the defendant's rights, or puts him in a worse condition than he would be by rescission, then the plaintiff ought not to go on, but to stop and give notice. But the defendant can not justly claim it as his right, not to have the work done at all unless he can have the advantage of his fraud, and get it done for less than its fair value. When he agreed to have the whole work done, and decided to try to get it done for less than its value through fraud, he should have considered that the plaintiff might not discover the fraud till the whole work was done; or might, if he did discover it, doubt his ability to prove it, and so reasonably go on and finish the work; and yet, in either case, it would be flagrant fraud in him to pay only the contract price. *171

The S. & S. R. R. Co. v. Row, 24 Wend. 74, was where the defendant, before commencing the work, knew of the alleged fraud, and had all the knowledge as to the fact said to be misrepresented that the plaintiff had, and could not have relied on such representation. The court say, "if the truth had not been discovered till after the performance of the contract had been commenced, a different question would have been presented."

In Kimball v. Cunningham, 4 Mass. 502, the question was whether the defrauded party, who had affirmed the contract, could retain in his possession personal property, a part of the consideration, which by the contract was to pass to the other, Held that the contract, if affirmed, was affirmed as a whole, and that the defendant was liable in trover for the property so withheld. It also appeared in the case that the defendant had sued for his damages from the fraud in an action on the case. The court say, by this action it is clear he has made his election to consider the contract as subsisting, and to recover damages for the breach of it.

If so, the fraud was not waived in the sense of waiving the right to recover damages for it.

In Campbell v. Fleming, 1 Ad. & El. 40, the plaintiff sought in an action of *assumpsit* to recover the price he had paid for shares in a mining company which he had been induced to buy *by fraudulent representations. After knowledge of the fraud he consolidated the shares with other property in a new company, and had sold shares in the new company. Held, that such sales of the new shares, after knowledge of the fraud, was an affirmance of the contract, so that he could not sue for and recover back *172

his purchase money. The decision does not touch the point that he could not recover, in an action for the deceit, the damages he suffered by it.

The whole subject is well considered in Whitney v. Allaire, 4 Denio 554; and the court say: "There is no principle or authority showing that where a person has been defrauded by another in making an executory contract, a subsequent performance of it on his part, even with knowledge of the fraud, acquired subsequent to the making and previous to the performance, bars him of any remedy for his damages for the fraud. The party defrauded, by performing his part of the contract with knowledge of the fraud, is deemed to have ratified it, and is precluded thereby from subsequently disaffirming it. That is the extent of the rule. His right of action for the fraud remains unaffected by such performance. But having gone on after discovering the fraud, he cannot afterwards disaffirm the bargain, or sue for the consideration." The principle and its reason apply to this case. Upon this subject see Long on Sales, 219, 240; 2 Kent's Com. 480; 3 Frost. (N.H.) 520; 10 Ind. 430; the remarks of SHERMAN, J., in 14 Conn. 424–425; 5 McLean, 170, Fed. Cas. No. 6,348; 9 Cush. 266.

Judgment affirmed.

BROWN v. PIERCE.[1]

(7 Wall. 205.)

Supreme Court of the United States. Dec., 1868.

Error to the supreme court, Nebraska territory.

Brown filed his bill in September, 1860, in the court below against three persons, Pierce, Morton, and Weston, alleging that in the spring of 1857, he settled upon and improved a tract of land near Omaha; that he erected a house on the tract and continued to occupy it until August 10th, 1857, when he entered the tract under the pre-emption laws of the United States; that Pierce claimed the land by virtue of the laws of an organization known as the Omaha Claim Club; that this organization, consisting of very numerous armed men, sought to, and did to a great extent, control the disposition of the public lands in the vicinity of Omaha in 1857, in defiance of the laws of the United States; that it frequently resorted to personal violence in enforcing its decrees; that the fact was notorious in Omaha, and that he, Brown, was fully advised in the premises; that as soon as he had acquired title to the land, Pierce, together with several other members of the club, came to his house and demanded of him a deed of the land, threatening to take his life by hanging him, or putting him in the Missouri river, if he did not comply with the demand; that the club had posted handbills calling the members together to take action against him; and that knowing all this, and in great fear of his life, he did, on the 10th of August, 1857, convey the land by deed to Pierce; that he, Brown, received no consideration whatever, for the conveyance; that from the date of his settlement upon said land, until the time of filing the bill, he had continued to keep possession either actually or constructively; that Morton claimed an interest in the premises by virtue of a judgment lien, and that Weston also made some claim.

The prayer was, that the deed might be declared void, and Pierce be decreed to reconvey, and for general relief.

The bill was taken pro confesso as to all the defendants, except Morton, who answered.

This answer, stating that he, Morton, was not a resident of the territory, and had no knowledge or information about the facts alleged in the bill, but on the contrary was an utter stranger to them, and therefore could not answer as to any belief concerning them,—set forth that on the 28th August, 1857, Pierce was "the owner and in possession of, and otherwise well seized and entitled to, as of a good and indefeasible estate of inheritance in fee simple," the tract in controversy; that being so, and representing himself to be so, and having need of money in business, he applied to him, Morton, to borrow the same, and that he, Morton, being induced by reason of the representation, and also by the possession, and believing that he, Pierce, was the owner, he was thereby induced to lend, and did lend to him $6,000, on the personal security of him, Pierce; that before the filing of this bill by Brown, he, Morton, had obtained judgment against Pierce for $3400, part of the loan yet unpaid; that this judgment was a lien on the lands; and that as he, Morton, was informed and believed, if he could not obtain his money from this land, he would be wholly defrauded out of it.

The answer further stated that the defendant was informed and believed that Brown, the complainant, entered upon the lands as the tenant of Pierce, and that the suit by the complainant was being prosecuted in violation of the just rights of Pierce, as well as of him, Morton.

There was no replication. Proofs were taken by the complainant, and they showed to the entire satisfaction of the court that all the matters alleged in the bill and not denied by the answers, were true. There thus seemed no doubt as to the truth of all the facts set out in the bill.

The court below declared Brown's deed void, and decreed a reconveyance from Pierce to him, and that neither Morton nor Weston had any lien on the premises. Morton now brought the case here for review.

Carlisle & Woolworth, for appellant. Redick & Briggs, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Representations of the complainant were, that on the tenth of August, 1857, he acquired a complete title to the premises described in the bill of complaint, under the pre-emption laws of the United States, and that thereafter, on the same day, he was compelled, through threats of personal violence and fear of his life, to convey the same, without any consideration, to the principal respondent. Framed on that theory, the bill of complaint alleged that the first-named respondent was at that time a member of an unlawful association in that territory, called the Omaha Claim Club, and that he, accompanied by three or four other persons belonging to that association, came to his house a few days before he perfected his right of pre-emption to the land in question, and told the complainant that if he entered the land under his pre-emption claim, he must agree to deed the same to him, and added, that unless he did so, he, the said respondent and his associates, would take his life; and the complainant further alleged, that the same respondent, accompanied, as before, by certain other members of that association, came again to his house on the day he perfected his pre-emption claim, and repeated those threats of personal violence, and did other acts to in-

[1] Irrelevant parts omitted.

timidate him, and induce him to believe that they would carry out their threats if he refused to execute the deed as required.

Based upon those allegations, the charge is that the complainant was put in duress by those threats and acts of intimidation, and that he signed and executed the deed, and conveyed the land by means of those threats and certain acts of intimidation, and through fear of his life, and without any consideration; and he prayed the court that the conveyance might be decreed to be inoperative and void, and that the grantee might be required to reconvey the same to the complainant.

* * * * * * *

Argument to show that a deed or other written obligation or contract, procured by means of duress, is inoperative and void, is hardly required, as the proposition is not denied by the respondent. Actual violence is not necessary to constitute duress, even at common law, as understood in the parent country, because consent is the very essence of a contract, and, if there be compulsion, there is no actual consent, and moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because, in that state of the case, there is no consent.

Duress, in its more extended sense, means that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness.

Text-writers usually divide the subject into two classes, namely, duress per minas and duress of imprisonment, and that classification was uniformly adopted in the early history of the common law, and is generally preserved in the decisions of the English courts to the present time. 2 Inst. 482; 2 Rolle, Abr. 124.

Where there is an arrest for an improper purpose, without just cause, or where there is an arrest for a just cause, but without lawful authority, or for a just cause, but for an unlawful purpose, even though under proper process, it may be construed as duress of imprisonment; and if the person arrested execute a contract or pay money for his release, he may avoid the contract as one procured by duress, or may recover back the money in an action for money had and received. Richardson v. Duncan, 3 N. H. 508; Watkins v. Baird, 6 Mass. 511; Strong v. Grannis, 26 Barb. 124.

Second class, duress per minas, as defined at common law, is where the party enters into a contract (1) for fear of loss of life; (2) for fear of loss of limb; (3) for fear of mayhem; (4) for fear of imprisonment; and many modern decisions of the courts of that country still restrict the operations of the rule within those limits. 3 Bac. Abr. tit. "Duress," 252.

They deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, and the reason assigned for this qualification of the rule is, that such threats are held not to be of a nature to overcome the mind and will of a firm and prudent man, because it is said that if such an injury is inflicted, sufficient and adequate redress may be obtained in a suit at law.

Cases to the same effect may be found also in the reports of decisions in this country, and some of our text-writers have adopted the rule, that it is only where the threats uttered excite fear of death, or of great bodily harm, or unlawful imprisonment, that a contract, so procured, can be avoided, because, as such courts and authors say, the person threatened with slight injury to the person, or with loss of property, ought to have sufficient resolution to resist such a threat, and to rely upon the law for his remedy.

On the other hand, there are many American decisions, of high authority, which adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or the destruction of property, may be avoided on the ground of duress, because in such a case there is nothing but the form of a contract, without the substance.

But the case under consideration presents no question for decision which requires the court to determine which class of those cases is correct, as they all agree in the rule that a contract procured through fear of loss of life, produced by the threats of the other party to the contract, wants the essential element of consent, and that it may be avoided for duress, which is sufficient to dispose of the present controversy.

* * * * * * *

SPAIDS v. BARRETT et al.[1]

(57 Ill. 289.)

Supreme Court of Illinois. September Term, 1870.

Appeal from the superior court, Cook county; Joseph E. Gary, Judge.

Sleeper & Whiton, for appellant. Henry S. Monroe, for appellees.

THORNTON, J. The question presented in this case, as to the sufficiency of the declaration, will be considered as on motion in arrest of judgment.

The demurrer was properly sustained to the second count. It is nothing more than a count in slander, based upon an alleged libellous affidavit, filed in a legal proceeding. Whatever is said or written in such proceeding, pertinent and material to the matter in controversy, is privileged, and no action can be maintained upon it. 1 Hil. Torts. 344; Warner v. Paine, 2 Sandf. 195; Garr v. Selden, 4 N. Y. 91.

The first count alleges that the plaintiff was a dealer in oysters, and doing a large and lucrative business, and was indebted to appellees for transportation, &c., in the sum of $1,000, which he was able and willing to pay; and that they, maliciously intending to injure him and deprive him of his business, procured Barrett, one of appellees, to make an affidavit, and that he did make an affidavit, that plaintiff was indebted to the express company in the sum of $2,996.30, for transportation, &c., and that he had fraudulently conveyed and assigned his property, and was about fraudulently to conceal, assign, or otherwise dispose of his property, so as to hinder and delay his creditors; and that appellees then filed said affidavit with the clerk of the circuit court of Cook county, and obtained a writ of attachment, and procured the levy thereof upon $5,000 worth of oysters, and deprived the plaintiff of possession, and neglected to take care of them, by reason whereof they became of no value.

The declaration further alleges that it was not true that the plaintiff had fraudulently conveyed or assigned, or intended to conceal and assign, his property, so as to hinder and delay his creditors; that he was not indebted in the amount mentioned in the affidavit; and that the same was false and fraudulent, and well known to be so by appellees; and that they, wickedly and maliciously intending to injure, and extort a large sum of money from, him (nearly $2,000 more than was due upon a fair accounting), refused to permit the oysters to be delivered to him, except on the payment of the sum in the affidavit mentioned; and that he, under protest, and to save his property from utter ruin, paid the same, not knowing that the oysters had sustained serious injury, by reason of the carelessness of appellees.

To this count, the general issue and a special plea of release were filed.

To the special plea the plaintiff replied non est factum, and that the release was obtained by duress of property. A demurrer was interposed to the special replication, which was sustained, and the plaintiff abided.

Three questions are raised by the record, and in the argument: First. Is the special replication a good defense? Second. Is not the plaintiff restricted to his remedy on the attachment bond? Third. Is the count bad, on motion in arrest, for omitting to aver the termination of the suit, and the want of probable cause?

Upon the first question the authorities differ. All promises made and contracts entered into, where there is duress of the person, may be avoided. The reason is, that the person is induced to do the act by restraint of his liberty, or menace of bodily harm. But it has been held that an agreement, made under duress of goods, is not void, and that the person thus circumstanced must exert himself and resist the compulsory influence, when his property is in danger. We cannot appreciate the difference. Liberty and life are justly dear to all men, and so is the exclusive right to possess, dispose of, and protect from destruction, our property. We cannot forget the fact that the desire for property is a strong and predominant characteristic of man, in organized society. An act done, prompted by this desire to preserve, and impelled by fear of the destruction of goods, is not voluntary. It is an act of compulsion. In Fashay v. Ferguson, 5 Hill, 158, Bronson, J., said: "I entertain no doubt that a contract procured by threats, or the destruction of property, may be avoided on the ground of duress. It wants the voluntary assent of the party to be bound by it. Why should the wrong-doer derive advantage from his tortious act?"

Consent is of the essence of all contracts. Without it there may be the shadow, but not the substance. Money paid, as the only means to recover the possession of property to which the party is entitled; or, money paid to obtain possession of goods, where wrongfully taken, may be recovered back. Steph. N. P. 1, 358; Chase v. Dwinal, 7 Me. 134; Oates v. Hudson, 6 Exch. 346; Nelson v. Suddarth, 1 Hen. & M. 350. If money could be recovered back, under the circumstances, why is not the release void? It was not obtained with the consent intended by the law. Property, which required especial care, had been, by fraud, perjury and extortion, wrongfully taken; was of a perishable nature, and rapidly going to destruction. The party having possession refused to surrender on payment of the actual indebtedness, but demands more than double the sum due, and in addition thereto a release for all damages for the

[1] Irrelevant parts omitted.

wrongful acts,—for the malicious violation of right and law. It would be a scandal to a court of justice if a release given under such circumstances could not be avoided. We think the special replication a good answer to the plea, and that the demurrer should have been overruled. Nelson v. Suddarth, 1 Hen. & M. 350; Sasportas v. Jennings, 1 Bay, 470; Collins v. Westberry, 2 Bay, 211; Bane v. Detrick, 52 Ill. 19.

* * * * * *

Judgment reversed.

ROBINSON v. GOULD.[1]

(11 Cush. 55.)

Supreme Judicial Court of Massachusetts. Suffolk and Nantucket. March Term, 1853.

Assumpsit upon a promissory note, dated August 24th, 1851, payable to the plaintiff on demand. The main ground of defence was duress and a want of consideration. At the trial in the court of common pleas, before Wells, C. J., the defendant offered evidence tending to prove that, the present plaintiff having a note against one Greenough, a writ against him was given to a constable, who went to Greenough's house to get security, or to arrest him, and that the note in suit was given to release said Greenough from arrest until the following Tuesday. There was also some evidence tending to show that said note was given as collateral security that said Greenough should pay the plaintiff the amount of his claim, on or before the following Tuesday, and that the proceedings for collecting the same should be suspended until that time, but that said Greenough had not paid said indebtedness. It was admitted that the constable had no legal right to serve said writ against Greenough, and the defendant requested the presiding judge to rule that if said constable having no legal right to serve said writ, imprisoned said Greenough, and threatened to and was about to arrest him, and thereby the defendant was led to give this note, it would be void; and that if said constable did not disclose to the defendant what he knew touching said note first sued on, or misled the defendant, to think he was becoming bail merely, this note would be void. The judge declined so to instruct the jury, but instructed them that the note was prima facie evidence of a debt to the amount specified in the same, and that the burden of proof was on the defendant to impeach it; that it was for the jury to decide, in view of all the evidence, as to the agreement made by the parties, to carry out which the note in suit was given; that if the agreement was, that in consideration of giving the note, the constable should forbear to arrest the said Greenough, or should release him if arrested, or if the note was agreed to be taken as a substitute for a bail bond, in either of these cases as the constable was not authorized to serve the writ, the note would be void; but if the note was given as collateral security, that the said Greenough should pay the first note by the next Tuesday, and that the plaintiff should give credit and forbear asking or attempting to enforce payment on the first mentioned note until the said Tuesday, and the plaintiff did give said credit until said time, and the said Greenough omitted to make payment on that day, then the said note was valid to the extent of the amount of the first-mentioned note, and interest, and that it would not invalidate the note to prove that the same was given in consequence of a threat to arrest the said Greenough, if the first-mentioned note was not secured, or by actually arresting him on said writ, if the plaintiff's agent and the constable supposed the arrest was legal.

The jury were requested to find specially whether any arrest was made, and they found there was not. The verdict was for the plaintiff for the amount of the first note and interest, and the defendant filed his exceptions.

J. W. Richardson, for plaintiff. C. M. Ellis, for defendant.

BIGELOW, J. The general rule of law is well established, on reasons of justice and sound policy, that contracts, in order to be valid and binding, must be the result of the free assent of the parties. Therefore duress, either of actual imprisonment or per minas, constitutes a good defence to an action on a contract in behalf of those from whom contracts have been thus extorted. Duress by menaces, which is deemed sufficient to avoid contracts, includes a threat of imprisonment, inducing a reasonable fear of loss of liberty. 2 Rol. Abr. 124; 2 Inst. 482, 483; Bac. Abr. "Duress," A; 20 Am. Jur. 24; Chit. Cont. 168. It is also well settled that the duress, which will avoid a contract, must be offered to the party who seeks to take advantage of it. This was early adjudged in Mantel v. Gibbs, 1 Brownl. 64, where, to an action of debt, brought on an obligation, the defendant pleaded that a stranger was imprisoned until the defendant, as surety for the stranger, made the bond. This was held a bad plea. The same principle is laid down in Hanscombe v. Standing, Cro. Jac. 187, where it was held that none shall avoid his own bond for the imprisonment or danger of any other than of himself only, and although the bond be avoidable as to the one, yet it is good as to the other. Wayne v. Sands, 1 Freem. 351; Shep. Touch. 62; McClintick v. Cummins, 3 McLean, 158, Fed. Cas. No. 8,699.

And certainly this distinction rests on sound principle. He only should be allowed to avoid his contract, upon whom the unlawful restraint or fear has operated. The contract of a surety, if his own free act, and executed without coercion or illegal menace, should be held binding. The duress of his principal cannot affect his free agency or in any way control his action. It may excite his feelings, awaken his generosity, and induce him to act from motives of charity and benevolence towards his neighbor; but these can furnish no valid ground of defence against his contract, which he has entered into freely and without coercion.

The case at bar falls very clearly within

[1] Irrelevant parts omitted.

this principle. The defendant was put under no restraint; no threats were made to him. His principal may have been coerced to apply to the defendant to be his surety, but there is nothing in the case which tends to show any duress towards the defendant.

* * * * * *

Exceptions overruled.

FAIRBANKS v. SNOW.

(13 N. E. 596, 145 Mass. 153.)

Supreme Judicial Court of Massachusetts. Worcester. October 20, 1887.

W. S. B. Hopkins and Stillman Haynes, for plaintiff. Norcross, Hartwell & Baker, for defendant.

HOLMES, J. This is an action upon a promissory note made by the defendant and her husband to the order of the plaintiff. The defendant alleges that her signature was obtained by duress and threats on the part of her husband. The judge below found for the plaintiff, it would rather seem on the ground that, whether there was duress or not, the defendant had ratified the note, which there seems to have been evidence tending to show that she did. See Morse v. Wheeler, 4 Allen, 570; Rau v Von Zedlitz, 132 Mass. 164. But, as this may not be quite clear, we proceed to consider the only exception taken by the defendant,—the judge's refusal to rule that, if the defendant signed the note under duress, it was immaterial whether the plaintiff knew when he received the note that it was so signed. The exception is to this refusal. No doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, the signature would not have been her act, and if the signature had not been her act, for whatever reason, no contract would have been made, whether the plaintiff knew the facts or not. There still is sometimes shown an inclination to put all cases of duress upon this ground. Barry v. Society, 59 N. Y. 587, 591. But duress, like fraud, only becomes material, as such, on the footing that a contract or conveyance has been made which the party wishes to avoid. It is well settled that when, as usual, the so-called "duress" consists only of threats, and does not go to the height of such bodily compulsion as turns the ostensible party into a mere machine, the contract is only voidable. Foss v. Hildreth, 10 Allen, 26, 80; Vinton v. King, 4 Allen, 561, 565; Lewis v. Bannister, 16 Gray, 500; Fisher v. Shattuck, 17 Pick. 252; Worcester v. Eaton, 13 Mass. 371, 375; Duncan v. Scott, 1 Camp. 100; Whelpdale's Case, 3 Coke, 241; 1 Bl. Comm. 130; Clark v. Pease, 41 N. H. 414. This rule necessarily excludes from the common law the often recurring notion, just referred to, and much debated by the civilians, that an act done under compulsion is not an act, in a legal sense. Tamen Coactus Volui, D 4, 2, 25, § 5. See 1 Windscheid, Pandextien, § 80.

Again, the ground upon which a contract is voidable for duress is the same as in the case of fraud, and is that, whether it springs from a fear or a belief, the party has been subjected to an improper motive for action. See Rodliff v. Dallinger, 141 Mass. 1, 4 N. E. 805; Stiff v. Keith, 143 Mass. 224, 9 N. E. 577. But, if duress and fraud are so far alike, there seems to be no sufficient reason why the limits of their operation should be different. A party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence. It is plain that the unknown fraud of a stranger would not prevent the plaintiff from holding the defendant. Master v. Miller, 4 Term R. 320, 338; Masters v. Ibberson, 8 C. B. 100; Sturge v. Starr, 2 Mylne & K. 195; Pulsford v. Richards, 17 Beav. 87, 95.

The authorities with regard to duress, however, are not quite so clear. It is said in Thoroughgood's Case, 5 Coke, 241, that, "if a stranger menace A. to make a deed to B., A. shall avoid the deed which he made by such threats, as well as if B. himself had threatened him, as it is adjudged, 45, E 3, 6a." Shep. Touch. 61, is to like effect. See, also, Fowler v. Butterly, 78 N. Y. 68. But in 43 Y. B. E 3, 6 pl. 15, which we suppose to be the case referred to, it was alleged that the imprisonment was by the procurement of the plaintiff; and we know of no distinct adjudication of binding authority that threats by a stranger, made without knowledge or privity of the party, are good ground for avoiding a contract induced by them. In Keilway, 154a, pl. 3, "the defendant in debt pleaded that he made the obligation to the plaintiff by duress of imprisonment (on the part) of a stranger, and the opinion of Rede and others was that this is not a plea without making the obligee party to this duress." In Taylor v. Jaques, 106 Mass. 291, 294, it was said that the defendant had to prove that he signed the note "under a reasonable and well-grounded belief, derived from the conduct and declarations of the plaintiffs, that if he did not sign it he would be arrested." See, also, Green v. Scranage, 19 Iowa, 461, 466; Talley v. Robinson's Assignee, 22 Grat. 888; Bazemore v. Freeman, 58 Ga. 276. Loomis v. Ruck, 56 N. Y. 462, was decided on the ground that, if the nonnegotiable note in suit was in the first instance a contract between the plaintiff and the defendant, it was obtained through the agency of the defendant's husband in such a way as to make the plaintiff answerable for his conduct. Moreover, the older writers likened duress to infancy, and took a distinction between feoffments, etc., by the party's own hand, and acts done by letter of attorney, regarding the latter as wholly void. 2 Co. Inst. 483; Finch, Law, 102. It has been held in New York and some other states, as well as in England, that a power of attorney given by an infant is void. Fonda v. Van Horne, 15 Wend. 631; Knox v. Flack, 22 Pa. St. 337; Saunderson v. Marr, 1 H. Bl. 75. And if this analogy were followed the contracts in all the New York cases which we have cited would be void by the law of that state for want of a personal delivery by the defendant to the plaintiff. There may be still other explanations of the decisions.

In the present case it does not appear who delivered the note, and does not clearly ap-

pear that the defendant did not deliver it herself. If any question of authority were open, it would have to be noticed that in Massachusetts the distinction as to power of attorney has been so limited, if not wholly done away with, with regard to infants, that it would be doubtful, at least, if it could have any application to the case at bar. Whitney v. Dutch, 14 Mass. 457, 463; Welch v. Welch, 103 Mass. 562; Moley v. Brine, 120 Mass. 324.

However the law may stand elsewhere, we are of opinion that the ruling requested was wrong upon principle and authority. Exception overruled.

COWEE v. CORNELL.

(75 N. Y. 91.)

Court of Appeals of New York. Nov. 12, 1878.

Appeal from order of the general term of the supreme court in the Third judicial department, reversing a judgment entered upon the report of a referee.

Plaintiff made a claim against the estate of Latham Cornell, of whose will defendants were the executors, for interest upon a promissory note executed by the deceased. This claim was rejected, and was referred by stipulation.

The facts, as stated by the referee, are in substance as follows:

Latham Cornell, the deceased, was the grandfather of Latham C. Strong. He was possessed of large property, consisting of real estate and of personal property invested in stocks, bonds and other securities. He died in 1876 at the age of ninety-five. For four years prior to his death he was partially blind. From July, 1871, until the time of his death, his grandson at his request attended to his affairs, writing his letters, looking after his banking business and his rents, making out his bills, cutting off his coupons, reading to him, and on occasions going away from home to transact other business. In July, 1871, Cornell gave to Strong a deed of two adjoining houses in the city of Troy, valued at about $32,000, in one of which houses the grandfather lived until the time of his death. The grandson moved into the adjoining house in the spring of 1872, and resided there until after his grandfather's death. During the time that the two thus lived in adjoining residences, they were in daily conference upon business matters of the old gentleman, in the house occupied by the grandson. The grandson with his family consisting of five persons, during all this time lived at the sole expense of the grandfather, and claims to have received, in addition to the note in suit, as gifts from his grandfather, $30,000 in government bonds and the assignment of a mortgage for about $1,700. At what particular time it is claimed these gifts were made is not in evidence. Mr. Cornell made his will in 1871, providing a legacy of $15,000 for Mr. Strong. In the fall of 1872, Mr. Strong expressed a desire to go into business for himself and to be independent of his grandfather, and actually was in negotiation with different persons in Troy and New York with a view of forming business associations. Mr. Cornell became uneasy at the prospect of losing the services of his grandson and caused him to be written for to come home. Mr. Strong came back to Troy, and his grandfather said to him then, as he had previously said, that he wanted him to give up his ideas of leaving and to devote his whole time to the business of his grandfather. Mr. Cornell further said that he had no one else to look after his business, and frequently said that there was money enough for all of them. Mr. Strong immediately abandoned his business projects and devoted his whole time and attention to his grandfather's business, until the death of the latter. After this Mr. Cornell sent for his legal advisers and proposed to alter his will so as to make provision to compensate his grandson for having devoted himself to his business. What provision was intended is not disclosed by the evidence. The lawyers advised that his will be left unaltered, and that he take some other way of compensating his grandson. Mr. Cornell gave to Mr. Strong the note in question. It is as follows:

"$20,000. Troy, April 1, 1873. Five years after date I promise to pay Latham L. C. Strong, or order, $20,000, for value received, with interest yearly. L. Cornell."

The note was on a printed form, the name of the payee being printed "Latham Cornell." The note was filled up in the handwriting of the maker, but in striking out with his pen the name of the payee he left the word "Latham" and afterwards interlined the full name, "L. C. Strong." Annexed to the note was a stub with some printed forms, on which Mr. Cornell wrote: "Troy, April 1st, 1873, L. C. Strong, $20,000 at five years, to make the amount the same as Chas. W. Cornell." The stub was on the note when it was delivered to the payee, but was torn off by him before it was transferred to the plaintiff; and there is no evidence that the plaintiff ever knew of the existence of the stub. The stub and note were taken from a blank book which belonged to decedent. No payment of interest was made upon the note during the lifetime of the maker. The referee found that the note was given for a valuable consideration. Mr. Strong sold the note to the plaintiff for $19,000, taking his note, payable in one year after date. What that date was has not been disclosed. Mr. Strong testified at the trial that he still held the note. Mr. Strong was one of the executors.

Further facts are stated in the opinion.

Irving Browne, for appellant. John Thompson, for respondents.

HAND, J. The counsel for respondents suggested at the close of his argument before us that there was no evidence of a delivery of the note to Strong, the payee, and the finding of delivery by the referee was entirely unsupported. He does not however make this a point in his printed brief, and did not present it strenuously or with any emphasis in his oral remarks.

It is true that the evidence in this respect was not very satisfactory. Ordinarily the possession and production of the note by the payee will raise a presumption of delivery to him. But this presumption must be very much weakened when the possession is shown not to precede the possession of all the maker's papers and effects by the payee

as executor, when the note appears to have been all in the handwriting of the maker and to have been taken with a stub attached, also in his handwriting, from a bank book belonging to him, and when installments of interest falling due in the maker's life-time were not paid and although years elapsed after they so became due before his death there is no proof of any demand of them by the payee or recognition of liability by the deceased. I am not prepared to say however that these circumstances absolutely destroy the presumption from possession and production of the instrument. While some evidence on the part of the plaintiff, showing that the note had been delivered to Strong in his grandfather's life-time, or at least negativing the idea that Strong found it in the bank-book or among the papers of the deceased when he took possession of them as executor, could probably have been easily produced if consistent with the fact, yet we cannot hold its absence conclusive against the plaintiff upon this point, upon the record as it stands. No motion for judgment or to dismiss was made on this ground by the respondents although the trial was in other respects treated by the counsel on both sides as one before a referee appointed in the ordinary way to hear and determine and direct judgment as in an action, and we cannot say but that if the plaintiff had been notified of such an objection, the evidence would have been supplied. The finding of the delivery by the referee was not even excepted to, although there were exceptions to the finding of consideration. Under these circumstances we must, I think, assume an acquiescence in the truth of the finding by the respondents for reasons known to them, and which if disclosed would probably be entirely satisfactory.

The majority of the general term put their reversal of the judgment upon the ground that it conclusively appeared from the stub attached that the note was intended as a gift and was without consideration. In this I am unable to concur.

The referee's finding that the note was delivered not as a gift but for a valuable consideration has some evidence to support it, in the proof of the services rendered by Strong to the deceased, and his abandonment of a profession at the request of the deceased, in the intention expressed by the latter to make some compensation for those services, and the conversation had with his counsel not very long before the date of this note, in which he was dissuaded from making this compensation by will and advised to do it while alive, to which he assented. What appears upon the stub is not in my opinion conclusive against this result.

There is perhaps difficulty in giving any entirely satisfactory construction to this memorandum made by the deceased; but the interpretation of the general term seems to my mind inconsistent with the known facts of the case. Strong certainly had had and the deceased knew that he had had property of the value of $32,000 given him before the date of this note, and perhaps $30,000 more in bonds. The $20,000 note could not have been therefore as the general term supposes, a gift to make him equal in gifts with his cousin Charles, to whom only $20,000 had been given in all.

But not only do the circumstances show that the memorandum could not mean that this gift of the $20,000 to Strong would make him equal in gifts to Charles, but the memorandum itself does not say so. Its language is "to make the amount the same as Chas. W. Cornell." While, as has already been said, there is probably insuperable difficulty in discovering precisely all that the deceased meant by this expression, its intrinsic sense is merely that the amount of this note, $20,000, is so fixed to make it the same as an amount possessed in some way by Charles, and this is consistent with both amounts being gifts, or the one being fixed upon in the testator's mind as a fair compensation for Strong's services and at the same time equal to an amount he had given or intended to give to Charles. On the whole I think this memorandum was a piece of evidence to be submitted with the other evidence to be considered by the referee on the question of fact. His decision upon all this evidence cannot be disturbed by this court.

The same may be said of the proof of large gifts to Strong either all before, or some before and some after the date of the note.

The reversal by the general term is not stated to be upon the facts, and on the argument it was conceded by the counsel for the respondents to be upon the law merely. It may be that a finding upon all the evidence that the note was without consideration and a gift would not be disturbed, and would be held by us as not unauthorized by the evidence. On the other hand, we cannot accede to the proposition that a finding to the contrary, such as has been made by the referee here, must by reason of the contents of this stub or other testimony be reversed as erroneous in law.

It follows that except as bearing upon undue influence, and the relations of parties hereafter considered, the inadequacy of the services or the extravagance of the compensation are not material. That was a matter purely of agreement between Strong and the deceased, and with which the court will not interfere under ordinary circumstances. Earl v. Peck, 64 N. Y. 597; Worth v. Case, 42 N. Y. 362; Johnson v. Titus, 2 Hill, 606. Although the consideration of a promissory note is always open to investigation between the original parties (and we agree with the court below that the plaintiff here has no better position than Strong himself), yet as pointed out by the chief judge in Earl v. Peck, supra, mere inadequacy in value of the

thing bought or paid for is never intended by the legal expression, "want or failure of consideration." This only covers either total worthlessness to all parties, or subsequent destruction, partial or complete.

Assuming then, as I think we must, that there was no error as matter of law in the finding of the referee that this note was given for a valuable consideration, and that the adequacy of that consideration is something with which we have no concern if the parties dealt on equal terms, the only point remaining to consider is the relations existing between the deceased and Strong at the date of the note.

It is insisted strenuously by the learned counsel for the respendents that these were such as to call for the application of the doctrine of constructive fraud, and threw upon the plaintiff the burden of proving not only that the deceased fully understood the act, but that he was not induced to it by any undue influence of Strong, and that the latter took no unfair advantage of his superior influence or knowledge.

The court below were hardly correct in the suggestion that the plaintiff conceded this burden to be upon himself, and for that reason, instead of resting upon the statement of consideration in the note, gave evidence in opening his case of an actual consideration; for this may have been done to show in the first instance that the note was not a gift and hence void under the law applicable to gifts. Indeed it appears from the findings and refusals to find, and the opinion of the referee, that such was not the theory upon which the action was tried or decided.

We return then to the question whether this case was one of constructive fraud. It may be stated as universally true that fraud vitiates all contracts, but as a general thing it is not presumed but must be proved by the party seeking to relieve himself from an obligation on that ground. Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood. This doctrine is well settled. Hunt, J., Nesbit v. Lockman, 34 N. Y. 167; Story, Eq. Jur. § 311; Sears v. Shafer, 6 N. Y. 268; Huguenin v. Basely, 13 Ves. 105, 14 Ves. 273, and 15 Ves. 180; Wright v. Proud, 13 Ves. 138; Harris v. Tremenheere, 15 Ves. 40; Edwards v. Myrick, 2 Hare, 60; Hunter v. Atkins, 3 Mylne & K. 113. And this is I think the extent to which the well-considered cases go, and is the scope of "constructive fraud."

The principle referred to, it must be remembered, is distinct from that absolutely forbidding a purchase by a trustee or agent for his own benefit of the subject of a trust, and charging it when so purchased with the trust. That amounts to an incapacity in the fiduciary to purchase of himself. He cannot act for himself at all, however fairly or innocently, in any dealing as to which he has duties as trustee or agent. The reason of this rule is subjective. It removes from the trustee, with the power, all temptation to commit any breach of trust for his own benefit. But the principle with which we are now concerned does not absolutely forbid the dealing, but it presumes it unfair and fraudulent unless the contrary is affirmatively shown.

This doctrine, as has been said, is well settled, but there is often great difficulty in applying it to particular cases.

The law presumes in the case of guardian and ward, trustee and cestui que trust, attorney and client, and perhaps physician and patient, from the relation of the parties itself, that their situation is unequal and of the character I have defined; and that relation appearing itself throws the burden upon the trustee, guardian or attorney of showing the fairness of his dealings.

But while the doctrine is without doubt to be extended to many other relations of trust, confidence or inequality, the trust and confidence, or the superiority on one side and weakness on the other, must be proved in each of these cases; the law does not presume them from the fact for instance that one party is a grandfather and old, and the other a grandson and young, or that one is an employer and the other an employé. The question as to parties so situated is a question of fact dependent upon the circumstances in each case. There is no presumption of inequality either way from these relations merely.

In the present case it cannot be said that the fact that the deceased employed Strong as his clerk to read and answer his letters and cut off his coupons, and make out his bills, or as his bailiff to collect his rents, or that at this time he was old and of defective vision, or that Strong lived near him and was his grandson, taken separately or together raise a conclusive presumption of law that their situation was unequal, and that dealings between them as to compensation for these services were between a stronger and a weaker party, a fiduciary in hac re and the party reposing confidence. These relations as a matter of fact may have led to or been consistent with controlling influence on the part of the grandson, or childish weakness and confidence on the part of the grandfather, but this was to be shown, and is not necessarily derivable or presumable

from the relations themselves, as in the case of trustee, attorney or guardian.

From these relations and the large gifts shown from the deceased to Strong, and from the extravagant amount of the compensation in the note, it is very possible the referee might have found as a fact the existence of weakness on the one side, or undue strength on the other, which rendered applicable the doctrine of constructive fraud, and threw upon the plaintiff the burden of disproving such fraud. These circumstances may have well been of a character, if not sufficient to shift the presumption, at least to authorize a setting aside of a contract without any decisive proof of fraud, but upon the slightest proof that advantage was taken of the relation, or of the use of "any arts or stratagems or any undue means or the least speck of imposition." Whelan v. Whelan, 3 Cow. 538, Lord Eldon, L. C.; Harris v. Tremenheere, 15 Ves. 40, Lord Brougham; Hunter v. Atkins, 3 Mylne & K. 135.

But the referee not only has not found as fact any inequality in the situation of the deceased and Strong, but refused to find as a matter of law its existence, and there is really no evidence whatever of any arts or stratagems or "speck of imposition" on the part of Strong as to this note.

We are not permitted to supply these findings even if we thought them proper for the referee to make, nor can we sustain a reversal of the original judgment upon facts not found and not necessarily inferable from uncontradicted evidence in the case, the general term not having in any way interfered with the findings of the referee.

On the whole therefore we reach the conclusion that there was no good reason for disturbing the judgment of the referee. This large claim upon the estate of the deceased is not so clearly justified and explained in the evidence as we could have wished, and the circumstances are such as to compel this court to look upon the case, if not with suspicion, certainly with anxiety, yet after careful examination we can find no material error in the original decision.

The order granting a new trial must be reversed and judgment for plaintiff affirmed, with costs.

All concur, except MILLER and EARL, JJ., absent.

Judgment accordingly.

McPARLAND et al. v. LARKIN.

(39 N. E. 609, 155 Ill. 84.)

Supreme Court of Illinois. Jan. 15, 1895.

Appeal from circuit court, Cook county; Lorin C. Collins, Judge.

Bill by Margaret Larkin against James McParland and others to set aside a deed. Complainant obtained a decree. Defendants appeal. Affirmed.

M. J. Dunne, for appellants. W. J. English, for appellee.

PER CURIAM. In March, 1880, James Fitzgerald died, seised in fee of lots 72, 73, 74, and 75, of sublot or block 42, in Canal Trustees' subdivision of section 33, township 40 N., range 14 E. of the third P. M., in Cook county, Ill., which lots, with the cottage thereon, constituted the family homestead, and left, surviving him, as his children and heirs at law, Edward Fitzgerald, Mary Ann McParland, and Margaret Fitzgerald, the latter then a minor of 16 years, who, after attaining majority, married one Larkin, and is the complainant (appellee) in this case. The decedent also left, as his widow, Bridget Fitzgerald, stepmother of said children. And, in addition to said realty, he also left $2,000, life insurance, payable to his children. James McParland, husband of the daughter Mary Ann, was duly appointed administrator of the estate and guardian of the person and property of said minor child. In consideration of $1,100, the widow relinquished her award, dower, and homestead rights, the money for this purpose being advanced, it seems, by the children Edward and Mary Ann out of their share of the insurance money, who were to be reimbursed for the proportion thereof falling upon Margaret, out of the latter's one-third interest in the estate. The estate being somewhat involved in debt, means were devised for paying the indebtedness without sale of the realty. Edward and Mary Ann each advanced a third, the other third being advanced out of said minor's estate, by order of the probate court. In 1880, Edward sold and conveyed his one-third interest in the realty to his sister Mary Ann for the sum of $980. The minor, Margaret, until her marriage to Larkin, in June, 1882, made her home with her sister, Mrs. McParland, and her husband, who occupied the premises. They, it would seem, stood in loco parentis to the minor. They cared for her as though she was their child, sending her to school, etc.; no charges for board, clothing, and other necessaries, at the times they were furnished, being made. On February 24, 1882, six days after attaining her majority, Margaret executed a deed purporting to convey to her sister, Mary Ann McParland, her one-third interest in said real estate, at which time she was paid a small sum of money. This deed, as alleged in the bill, was procured by deception and undue influence exerted by her guardian, James McParland, over her, and without knowledge on her part of her rights in the premises, or of what was due her out of the estate of her father; and that said deed was executed solely relying upon her guardian, in whom she had great confidence; and that, in fact, she was not aware of having conveyed away her interest until a short time before the filing of her bill. The sister, Mrs. McParland, testified that she tried to take her mother's place towards complainant, and that the latter looked up to her as such, and the evidence tends strongly to show that complainant looked to her guardian as taking the place of her father. The guardian did not make his final report until the 25th of May, following the making of said deed; so that, in effect, the guardianship continued until long after the making thereof. Gilbert v. Guptill, 43 Ill. 112; Schouler, Dom. Rel. § 382.

It is, however, contended that the deed was made with full knowledge of all the facts, six days after complainant had arrived at her majority, without undue influence, and for a good and sufficient consideration, and its validity is not therefore to be questioned. It will be readily admitted that, if the parties were dealing at arm's length, fraud must be shown to justify setting aside the deed. Baird v. Jackson, 98 Ill. 78; Warrick v. Hull, 102 Ill. 280. And it may be generally said that where the guardianship had terminated, and the influence of the guardian upon the ward has ceased, so that they can be said to stand upon an equality, transactions between them will be regarded as binding. Schouler, Dom. Rel. § 389. "But such transactions are always to be regarded with suspicion. And where the influence still continues, as if the ward be a female or a person of weak understanding, and the guardian continues to control the property or to furnish a home, the court is strongly disposed to set aside the bargain altogether." But these observations have but little, if any, bearing here, as in this case the relation of the guardian and ward had not been legally dissolved. In such case, as said by Mr. Pomeroy (2 Eq. Jur. 961), "the relation is so intimate, the dependence so complete, the influence so great, that any transactions between the two parties, or by the guardian alone, through which the guardian obtains a benefit, entered into while the relation exists, are in the highest degree suspicious. The presumption against them is so strong that it is hardly possible for them to be sustained." So, in Gillett v. Wiley, 126 Ill. 325, 19 N. E. 287, where the guardian procured his ward, after the latter (a young man) had attained his majority, to sign a receipt in full for all money which came into his hands as guardian, the ward not reading the paper or acquainting himself with its contents, but relying solely on the statement of his guardian as to its character and purport, it was held that the transaction was void, even as against a surety upon such guardian's bond, who had taken a mortgage on the lat-

ter's land as indemnity against loss as surety. And it was there said: "Ordinarily, one having the means of information as to the contents of a paper executed by him will * * * be held to have known the contents, and will not be permitted to assert his ignorance of its contents to avoid responsibility according to its real import. Here, however, the signing of this receipt was the act and will of the guardian, rather than that of appellee. Courts will watch settlements of guardians with their wards, or any act or transaction between them affecting the estate of the ward, with great jealousy. From the confidential relation between the parties it will be presumed that the ward was acting under the influence of the guardian, and all transactions between them prejudicially affecting the interests of the ward will be held to be constructively fraudulent. Carter v. Tice, 120 Ill. 277, 11 N. E. 529. The doctrine is thus stated in 1 Story, Eq. Jur. § 317: Where the guardianship has, in fact, ceased by the majority of the ward, the courts 'will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the term, the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian; for, in all such cases, the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attaching to the situation have not ceased; as if the accounts between the parties have not been fully settled, or if the estate still remains, in some sort, under the control of the guardian.' "

Here the ward was a female, barely past the age of 18 years, practically without knowledge or experience in business affairs. The peculiar interests of the guardian were opposed to her own. His wife then owned the other two-thirds of the realty in question, and by this deed was acquiring the third belonging to the ward. The ward was induced to execute a deed, prepared by the guardian for her signature, for an inadequate consideration, greatly less than the real value of her interest, unless there be taken into consideration her prior support and maintenance in her sister's family. True, the presumption of undue influence of the guardian is attempted to be overthrown by proof. But as said in the case just quoted from: "The presumption of influence on the part of the guardian, and the dependence of the ward, continues after the legal condition of guardianship has ended; and transactions between them during the continuance of the presumed influence of the guardian will be set aside, unless shown to have been the deliberate act of the ward, after full knowledge of her rights. In all such cases the burden rests heavily upon the guardian to prove the circumstances of knowledge, and free consent on the part of the ward, good faith, and absence of influence, which alone can overcome the presumption." It is not necessary in such cases that actual and intentional fraud be established. It is sufficient, when the parties sustained the relation of guardian and ward, that the former has gained some advantage by the transaction with his ward, to throw the burden of proving good faith and absence of influence, and of knowledge and free consent of the ward, upon the guardian. This we are not prepared, after the most careful consideration of the evidence, to say has been done, and the decree of the chancellor setting aside the deed must be affirmed. Nor can it make the slightest difference that the conveyance was made to the wife of the guardian, under whom he subsequently acquired title. As already seen, both the husband and wife stood in the relation of parents to complainant, while the husband was guardian. The relations precluded their deriving advantage from the ward, and it was his duty to protect her estate from spoliation from whatever source.

It is next insisted that in respect of the $860, which constituted the consideration for the deed, the court should, by its decree, have required return by the ward of the amount, or a sale of the ward's interest in the premises to pay it, as a condition upon which the deed should be canceled. This contention is without merit. It is true that in case of sale and conveyance of land by the ward to the guardian, where the ward afterwards elects to repudiate the transaction, and seeks in equity to have the deed set aside, he must do equity, and pay back to the guardian the amount received, or else suffer a decree charging his land with sale to satisfy the same. Wickiser v. Cook, 85 Ill. 68. But such is not the case here. By the findings of the master, approved by the court, large sums of money were found due the ward from the guardian, and in the settlement of which the court, by its decree, credited the guardian with the above amount, which was equivalent to a payment in money. It would be useless for the court to make the consideration paid a charge on the ward's land when, by an adjustment of the amounts due between them, it could, and in fact should, be deducted. There was no occasion for such an order when the guardian could be paid by simply deducting it from the amount owing to the ward.

It is further insisted that appellee should take her interest in the property as it was at the date of the deed; that all improvement made thereon belonged to the appellants, subject to the right of appellee to obtain title thereto by contribution of her share of the cost or present value thereof; and the doctrine in respect of tenants in common—that, where one tenant makes improvements on the premises held by them in common, the court, in making partition, should require due compensation therefor, from the other tenants to be made—is invoked in support of this view.

The court found that Mary Ann McParland, grantee in the deed, "was not an innocent purchaser of said real estate, but was charged with and had full knowledge of the fiduciary relation existing, at the time of said contract and sale of said real estate, between the complainant and the guardian, her husband." This finding is unquestionably sustained by the proof. The grantee was bound to know that her husband, the guardian, had no authority, except by order of the probate court, to do otherwise than protect, care for, and preserve the estate for the benefit of his ward, until the latter attained majority or he was legally discharged from his office. She was bound to know the fallibility of her title, and that, under the circumstances, it was defeasible on attainment of the ward's majority, at the latter's election, and to know, as above shown, that the transactions between the guardian and ward culminating in the making of said deed by the latter to her were liable to be declared fraudulent and void. She was bound to know that it was the guardian's duty to keep the premises in good repair, and render them available as a means of revenue for the benefit of the ward, and to this end, with the sanction of the court, to use the ward's cash in his hands for that purpose within reasonable limits. These principles are familiar. But she was also bound to know that he could not, by virtue of guardianship, and without any order from any competent tribunal, erect buildings upon the land or make expensive permanent improvements thereon. And it has been held that where the guardian makes advancement of money for such purpose, without any order of court, he is remediless. Schouler, Dom. Rel. § 351; Hassard v. Rowe, 11 Barb. 22; Bellinger v. Shafer, 2 Sandf. Ch. 293. Such, however, has not been as yet the holding of this court in such case. But by section 24, c. 64, Rev. St., it is provided: "The guardian may, by leave of the county court, mortgage the real estate of the ward for a term of years not exceeding the minority of the ward, or in fee; but the time of the maturity of the indebtedness secured by such mortgage shall not be extended beyond the time of minority of the ward." In passing upon this section (then section 134 of the statute of wills), this court, in Merritt v. Simpson, 41 Ill. 391, where the guardian had mortgaged land of his ward in fee, beyond the period of minority, for money which was used in erecting a brick store on the premises, which brought a large rental, held that such mortgage was nugatory and void as far as the interests of the ward were involved. And it seems to be generally held that the guardian cannot ordinarily execute a mortgage which will be operative as a lien on the ward's land beyond the term of minority, and the ward, on reaching majority, elects to disaffirm it, and that the only safe course for the guardian to pursue is to first secure the order of court authorizing the mortgage, if there be some statutory provision permitting it. 1 Jones, Mortg. 102b; Schouler, Dom. Rel. § 352; and cases in notes.

It would therefore necessarily follow that Mary Ann McParland, not being an innocent purchaser, but having taken her deed with full knowledge of the guardianship and infirmity of her title, was bound to know that the mortgaging of said property for the purpose of making improvements thereon was, as to the interest of the ward, wholly unauthorized, and done at her peril. She is entitled to no more protection in equity than the guardian himself would be had he taken the deed in his own name instead of his wife's. The legal and logical effects are the same. With such knowledge, she cannot be permitted to take advantage of that which, in legal contemplation, is her own wrong, to burden the estate of the ward. And no good reason exists why the ward might not, after attaining majority, demand, as in case where the guardian himself has placed unauthorized burdens and improvements upon the estate, to be placed in statu quo. Schouler, Dom. Rel. § 348. But the court may, in the exercise of its equity powers, protect indebtedness incurred for improvements upon the ward's estate, upon the theory that the estate has been benefited and the ward received an advantage thereby. Id. § 351; Hood v. Bridport, 11 Eng. Law & Eq. 271; Jackson v. Jackson, 1 Grat. 143; 1 Atk. 489. And this the court did by finding the appellee to be entitled to a one-third interest in the premises, subject to the lien of the trust deeds thereon, which had been given to make said improvements, after the execution of the deed.

As to the improvements made upon the old house during appellee's minority, and without any authority from the probate court, appellee electing to repudiate all liability therefor, the court held rightfully, we think, that the interest of the ward should not be incumbered or chargeable therewith, but that appellant and his wife, having placed such improvements in violation of the trust, were not, in equity, entitled to recompense for the same. The court, however, decreed that appellants should be allowed to remove the old cottage, which had been remodeled and improved, from the premises within four months, and, in default thereof, that the same should become part thereof. Of this ruling we think appellants have no right to complain. These improvements were placed upon said premises, and the interest of appellee wrongfully burdened to pay for the same. Appellants took the risk, and made such improvements with knowledge that they were doing so wrongfully, and without the shadow of authority from any competent source.

Numerous objections are made to the master's report and the decree of the court, as to various amounts charged to appellant as guardian, etc. An extended review and discussion here of the account as made out by the master, and the items thereof, would be a useless task. The principal objection seems to be that the court erred in charging the de-

fendant James McParland with the rental value of that part of the premises upon which the old house was situated and occupied by said Mary Ann McParland, as a homestead for herself and family. And the doctrine of compensation between tenants in common is again invoked, and the claim made that, for use and occupation of the premises, one tenant in common is not liable to account to his cotenants. As we have just seen, counsel contended that one cotenant should be recompensed, by proper contribution from the others, for improvements made upon the estate. And yet the contention is in effect made that, though such tenant may have compensation for improvements, he will not be chargeable by his cotenant with the rents or rental value of the premises occupied by him, to the exclusion of the others. The English rule is that the tenant shall be liable to account to his cotenants in common only for what he receives, not what he takes, more than comes to his just share. In the leading case on this subject, of Henderson v. Eason, 17 Adol. & E. (N. S.) 701, 718, Lord Cottenham held that he was not liable to account for issues and profits derived by such exclusive occupancy. Such, however, is not the law of this state. By section 1, c. 2, Rev. St., it is provided that, where a tenant "shall take and use the profits or benefits" of the estate in greater proportion than his or her interest, such tenant shall account therefor to his cotenants, etc. And this court, in Woolley v. Schrader, 116 Ill. 39, 4 N. E. 658, in passing upon this question and construing the statute, after commenting upon the English case above cited, admitted the doctrine of that case to be the prevailing rule of decision in this country, but said: "Yet, by the express terms of our own act, the tenant is required to account to his cotenants for benefits, as well as profits; and we fail to perceive any difficulty in giving effect to this provision of the statute that may not arise in any case where the value of anything is to be ascertained from opinions of witnesses or extrinsic circumstances, particularly in a case like the one before us. The farm in question belonged to four children, 'share and share alike.' It would, as shown by the proofs, have readily rented to others at $315 per annum. * * * Appellant, instead of letting the place to others, and collecting annually that amount of money as rental, and paying over to his brothers and sisters their respective shares, appropriated the entire farm to himself. To the extent of their interest, it was, in effect, appropriating to his own use that amount of money belonging to them; and the question is, shall he account for it? We have no hesitancy in saying he shall." So, here, appellant and his wife, from the date of making his final account as guardian, have been in the exclusive possession and control of said homestead premises, as a family home, until the death of said Mary Ann McParland and her daughter Catharine, after which the husband and father, appellant James McParland, continued in such possession and control; and there can be no question that the court held correctly in charging appellant with what was found to be the reasonable rental value thereof.

It is also insisted that the report of the master and finding of the court as to the value of the premises, of the improvements, rents, etc., were contrary to the clear preponderance of the evidence. After a careful examination of this testimony, and a consideration of the business, experience, character, and means of knowledge of witnesses, we are unable to concur with this view. The witnesses produced on each side were numerous, and very many of them upon the part of the defendants were experts, real-estate agents, some of them knowing nothing personally of the particular location, surroundings, and appearance of the premises, and who based their opinions on transfers and sales of property theretofore made along the street or in the neighborhood of the premises in question. Complainant's witnesses were mainly real-estate agents having their places of business not far distant from the premises, and owners of property in the neighborhood, whose transactions in the sales and exchange of realty had made them familiar with the market value of land in that vicinity. And, as is not unusual in such cases, there are, in some particulars, considerable contradictory estimates and opinions; but upon the whole we are not prepared to say that the court was not, upon the whole of the evidence, fully warranted in finding as it did. Indeed, as against the testimony of those witnesses produced on behalf of defendants who were merely experts, having no personal knowledge or observation respecting the locus in quo, but basing their value solely on the records as to sales made along the street, the court would be amply justified in relying upon the testimony of witnesses for the complainant, who were all, it seems, not without some personal knowledge of the premises, and many of them familiar with them for many years; and this upon the clearest principles of expediency and sound policy.

Other objections were made, a discussion of which would not be profitable here. They have all been practically disposed of in what has been said. While the accounting before the master is somewhat complicated, and the findings by him and the court thereon not as clear as might be, yet a careful and studious examination of the record has convinced us that substantial justice has been done; and while we are not entirely satisfied that the court was warranted in entering the decree against complainant for $95.25, and making the same a charge against the complainant's interest in the premises, yet such error, if error it was, we do not feel justified in estimating of sufficient magnitude of itself, in a case of this importance, to command a reversal. The decree of the circuit court will be affirmed. Affirmed.

WOOLEY v. DREW et al.

(13 N. W. 594, 49 Mich. 290.)

Supreme Court of Michigan. Oct. 18, 1882.

Appeal from Jackson.

Grove H. Walcott, for complainant and appellant. Gibson, Parkinson & Ashley, for defendants.

MARSTON, J. Complainant comes into court to compel the defendant Elizabeth P. Drew to convey a certain 80 acres of land, which complainant conveyed to her in 1879 under an alleged promise to reconvey in two years thereafter.

The complainant's theory is that a certain slander suit was pending against her husband; that he had previously conveyed the farm to her; that defendant John F. Drew "excited complainant into the belief that she would lose her homestead, unless she made a conveyance of it to Mr. Drew;" and that in consequence thereof the conveyance was made. The defendants deny all this and claim that the sale made was in good faith for a valuable consideration, and made at the earnest solicitation of complainant and her husband. The case was heard upon the pleadings, and proofs taken in open court, and the bill dismissed. The complainant appealed.

If the complainant's theory is sustained, the case comes within Barns v. Brown, 32 Mich. 146, and she is entitled to relief. Where the witnesses have been examined in open court, and the case is one that must be governed by the credibility of the witnesses for the respective parties and the weight to be given their testimony, the conclusion arrived at by the court below should not, upon what might seem to the court a mere preponderance of testimony, be overturned. This case does not however come within that class, where the appearances of the witnesses upon the stand can be given any decisive effect, as the transaction, when reviewed upon the defendants' testimony, shows that it was one so fraudulent and barefaced that it could not be permitted to stand. The complainant and her husband were uneducated, and they seemed to have had a good deal of trouble with their neighbors, while the defendant John F. Drew seems to have had, or claimed to have, considerable knowledge pertaining to legal matters. The complainant and her husband at the time the conveyance was made, evidently were afraid, that because of the slander suit they were in some danger of losing this farm, and that the plaintiff in that suit and other parties were conspiring against them to cheat them out of their property. Whether these ideas were suggested to them for the first time by John F. Drew as complainant claims or not we do not deem it necessary to determine. It is certain that defendants did not make any effort to allay these fears, or to assure complainants that their property could not be attached in the slander suit, or they be enjoined from transferring their farm because of the pendency thereof. On the contrary these impressions were strengthened and the trade consummated within a very short time, a few days after being first mentioned or thought of between the parties.

The complainant's farm contained 80 acres, with suitable buildings and improvements thereon of the value of $3,200, upon which there was an incumbrance of $100, and it had also been leased for one year, from April, 1879, the rent to be paid in a share of the crops.

When the complainant and her husband at the house of defendants talked of selling, the defendant John F. offered to give them for their farm a mortgage held by his wife upon a certain house and lot in the city of Jackson which defendants say the complainant and her husband were ready and willing to accept, and wished to have the necessary papers executed at once, but which defendants put off for a couple of days to enable them to make an examination of complainant's title to the farm. On making this examination the next day, they for the first time ascertained that there was an outstanding mortgage thereon for $100, and they also, before the trade was consummated, learned that the farm had been leased for one year with the privilege of an additional year.

The parties met the following day, and defendants say they did not then wish to make the exchange, yet the defendant John F. had procured the necessary blank form of conveyance, and after some little talk defendants then agreed to assign the mortgage referred to, and accept a conveyance of the farm subject to the mortgage thereon and give complainant a two years' lease of the same, although no such favorable terms were asked for by complainant, and the trade was so made, defendant John F. drawing all the papers and taking all the acknowledgements, his wife assigning the mortgage and acknowledging the execution thereof before him. This mortgage bore date March 1, 1872, was given by Julia A. Knowles to Sylvester McMichael to secure the payment of $951.49 in three years from the date thereof, with 10 per cent. interest payable semi-annually, according to a certain bond bearing even date therewith. Defendant John F. Drew had a second mortgage upon this same property which he foreclosed and bid in at the sale, and afterwards his wife, at his request, took an assignment of the Knowles-McMichael mortgage, the assignment bearing date December 17, 1873.

At the time of the assignment to Mrs. Drew, nothing had been paid upon this mortgage, and no payment of either principal or interest was made thereafter up to the time of the assignment to complainant. John F. Drew was the owner under his foreclosure proceedings of the mortgaged premises, re-

ceiving the rents and profits thereof. At the time of the assignment thereof to complainant, defendants represented the amount due thereon at about $1,900. We suppose the computation was made under the act of 1869, which allows interest on installments after due. Whatever the fact may have been however as to the amount claimed to be due and collectible thereon, the mortgaged premises were not considered by the defendants as sufficient to pay the mortgage; they were not indeed worth more than $1,600, and would not bring near that at a public sale. It was the assignment of this mortgage that complainant received for her farm, with a two years' lease thereof.

There are some other peculiarities worth noting. Complainant's farm was about seven miles from the residence of defendants. Some 10 or 12 years previous to this trade, defendant John F. Drew "went down hunting on the marsh across that farm," and at this time he did not know who was living on it. He had not been to the farm after that, until a few days before the trade, when he went down to complainant's house to see about hiring a girl, and did not then look over the farm, as he then had no thought of purchasing it. At the time he examined the title he inquired of the register of deeds what kind of land this was, and says "I thought that his recommend and my memory corresponded." This was the extent of defendant's knowledge as to the kind or quality of the soil, or the improvements thereon or value thereof.

The mortgage which he assigned to complainant had been acquired by his wife after he became the owner of the mortgaged premises, and another peculiarity, although according to the recitals in the mortgage, a bond purported to have accompanied it, and to have been assigned to complainant according to the written assignment, yet neither complainant nor Mrs. Drew seems to have ever seen or possessed this bond. True it is, that complainant did not receive or have any personal obligation for the amount represented by the mortgage assigned her or any part thereof. And if the transaction was an honest one, why the defendants should not have conveyed the premises to complainant, they being of far less value than the mortgage, instead of the latter, it is difficult to conjecture, thus putting her to the trouble and expense of foreclosing the same before she could realize a dollar thereon, unless it was to enable John F. Drew, as owner of the mortgaged premises, to receive the rents and profits thereof to his own use. This he did, but was not generous enough to pay any part thereof to complainant, as she did not receive anything, either principal or interest, upon the mortgage. The assumption that this course was taken to prevent the collection of any judgment that might have been received in the slander suit, is not satisfactory, as the mortgage could have been reached just as easily as could the premises had they been conveyed to the complainant.

It is indeed much more probable that this mortgage was transferred to Elizabeth P. Drew at the request, and for the use and benefit, of her husband, the owner of the premises, and that it was not at any time thereafter considered as an existing incumbrance, or the bond accompanying the same, if assigned, an existing obligation against the mortgagor, as no effort seems to have at any time been made to collect principal or interest thereon although long past due. The defendants claimed and took the crop of wheat growing on complainant's land at the time the exchange was made, although it was far from clear what right they had thereto, under the lease given by them to complainant. Indeed the whole case shows that however fair the transaction may have seemed to be on the part of defendants, yet it was fair upon the surface only, and would not bear investigation; it was much like a subsequent agreement made between complainant and Elizabeth P. Drew, in reference to the latter not taking any further steps to obtain possession, which as given by one of defendants' witnesses is worth quoting. When asked to state a conversation he heard between the parties after this difficulty arose, the witness testified:

"I think about the first that was said after Mr. and Mrs. Wooley came in, Mrs. Drew says, I promised you this morning I would do nothing further in this matter in relation to the farm until I saw you again; I have seen you now, she says; that cancels the agreement; or something like that."

A careful examination of the entire record leaves no doubt in our minds as to the substantial correctness of the complainant's version, and the transaction on the part of defendants has been so clearly unconscionable, and their course in endeavoring to take advantage of the complainant's fears to obtain a conveyance of a valuable farm, for a very questionable security of doubtful value, was so clearly fraudulent that a court of equity cannot sanction the same by permitting them to enjoy fruits thereof.

The parties must therefore be restored to their original positions. The decree below will be reversed with costs of both courts and the complainant will have a decree in this court in accordance herewith.

The other justices concurred.

ATKINS v. JOHNSON.

(43 Vt. 78.)

Supreme Court of Vermont. Washington. Aug. Term, 1870.

Assumpsit as per declaration, which is et out in the opinion of the court. Trial n general demurrer to the declaration, at he March term, 1870, PECK, J., presiding. 'he court, pro forma, adjudged the declaation insufficient, and rendered judgment or the defendant to recover his costs. Exeptions by the plaintiff.

C. J. Gleason, for plaintiff. Mr. Carpener, for defendant.

PIERPOINT, C. J. The case comes into his court upon a general demurrer to the laintiff's declaration.

The declaration alleges that "on the 22d lay of July, 1867, the defendant, by his greement in writing of that date, underook and promised the plaintiff that, in onsideration that the plaintiff would rint and publish an article in the ARGUS & PATRIOT, a *weekly newspaper published in Montpelier by the *80 laintiff, entitled 'A Jack at all Trades Exposed,' that said article was all true, hat there was enough to back it up, &c., nd that he, the said defendant, would deend and save harmless the plaintiff from ll damage and harm that might accrue o the plaintiff in consequence of publishing aid article. That said article, if untrue, vas a libel upon the character of one John Gregory; that relying upon the said promses of the defendant he published the aricle; that after said publication the said Gregory called upon the plaintiff for the ame of the writer of the article; that hereupon the defendant requested the laintiff not to give the said Gregory the ame of the writer, and, in consideration hereof, promised the plaintiff that he vould save him from all harm; that if said Gregory sued the plaintiff, that he, the lefendant, would defend the suit, prove he charges, and save the plaintiff from ll trouble and expense in the premises. The plaintiff, relying thereon, withheld the ame of the defendant as the author of aid article; that the said Gregory sued he plaintiff; that the defendant failed to lefend the said suit, and the said Gregory ecovered a judgment against the plainiff, which he has been compelled to pay, nd the defendant refuses to indemnify him."

The plaintiff is here seeking to compel he defendant to indemnify him for the lamage which he has sustained, in conseuence of publishing a libel, at the request f the defendant, and from the consequences of which the defendant agreed to ave him harmless.

The question is, whether such an agreenent as the plaintiff sets out in his declaation can be legally enforced.

The general principle, that there can be o contribution or indemnity, as between oint wrong-doers, is too well settled to equire either argument or authority.

To this rule there are many exceptions, nd prominent among them is the class of cases where questions arise between different parties as to the ownership of property, and a third person, supposing one party to be in the right, upon the request and under the authority of such party, does acts that are legal in themselves, but which prove in the end to be in violation of the rights of the *other party, *81 and he, in consequence thereof, is made liable in damages. If in such case there was a promise of indemnity, the law will enforce it, and if there was not, if the circumstances will warrant it, the law will imply a promise of indemnity, and enforce that. Of this class are most of the cases cited and relied upon by the counsel for the plaintiff, such as, Betts v. Gibbins; Adamson v. Jarvis; Wooley v. Batte; Avery v. Halsey, &c. But we apprehend that no exception has ever been recognized broad enough to embrace a case like the present; indeed such an exception would be a virtual abrogation of the rule.

In this case, these parties in the outset conspired to do a wrong to one of their neighbors, by publishing a libel upon his character. The publication of a libel is an illegal act upon its face. This, both parties are presumed to have known. The publication not only subjects the party publishing to a prosecution by the person injured for damages, but also to a public prosecution by indictment. In either case, all that would be required of the prosecutor would be to prove the publication by the party charged. The law in such case presumes malice and damage, and the prosecutor would be entitled to a judgment, unless the party charged could introduce something by way of defense that would have the effect to discharge him from legal liability; failing in that, the party would be made liable upon a simple state of facts, all of which he perfectly understood at the time he commenced his unjustifiable attack.

In this case, both these parties knew that they were arranging for and consummating an illegal act, one that subjects them to legal liability, hoping, to be sure, that they might defend it; but the plaintiff, fearing they might not be able to do so, sought to protect himself from the consequences, by taking a contract of indemnity from the defendant. To say under such circumstances that these parties were not joint wrong-doers, within the full spirit and meaning of the general rule, would be an entire perversion of the plainest and simplest proposition. This being so, the law will not interfere in aid of either. It will not inquire which of the two are most in the wrong, with a view of adjusting the equities between them, but regarding both as having been *82 understandingly *engaged in a violation of the law, it will leave them as it finds them, to adjust their differences between themselves, as they best may.

But it is said in argument, that to apply this rule in a case like the present is an encroachment upon the "freedom of the press." We do not so regard it. The freedom of the press does not consist in lawlessness, or in freedom from wholesome legal restraint. The publisher of a newspaper has no more right to publish a libel

upon an individual, that he or any other man has to make a slanderous proclamation by word of mouth.

It is also said that the publisher of a newspaper, in his desire to furnish the public with information of what is transpiring in the community, is liable to be misled and deceived in regard to what he publishes. This is undoubtedly true, and it is equally true that he often is deceived; but in such case he ordinarily has ample means of relieving himself, either by correcting the error, or giving up the name of the author of the objectionable communication. Had the plaintiff in this case given the name of the author of the article to Gregory when he asked for it, he would undoubtedly have cast the responsibility upon the shoulders of him who ought to bear it. By refusing to do this, he put himself in the gap, and voluntarily assumed the whole responsibility, relying on the defendant's guaranty to indemnify him.

But it is further insisted, that what is alleged to have transpired between the plaintiff and defendant after Gregory had called on the plaintiff for the name of the author, constituted a new and independent contract, based upon a new and legal consideration. This proposition we think is not tenable. What passed between the parties on that occasion is a mere reiteration of the original agreement, and based substantially upon the same consideration. It was evidently so regarded by the pleader when he drew the declaration. It is all incorporated in the same count, being a simple narration of the events as they transpired. The promise on that occasion was to save the plaintiff from all harm, trouble and expense in the premises, in case the said Gregory should sue him.

This question was fully considered in the case of Shackell v. Rosier, 29 Eng. Com. L., 695. In that case the plaintiff, Shackell, was *the publisher of a newspaper. *83 The defendant applied to him to publish an article that was libelous on its face, but which the defendant assured him was true. After the publication, the party aggrieved brought his action against the plaintiff for the libel. The defendant thereupon promised the plaintiff, that if he would defend said suit, he, the defendant, would save harmless and indemnify the plaintiff from all payments, costs, charges and expenses, &c.' On trial, there was a verdict for the plaintiff. This was arrested and set aside. PARK, J., says it is impossible to look at this declaration, without seeing that the publication of the libelous matter formed part of the consideration for the defendant's promise. "It would be productive of great evil, if the courts were to encourage such an engagement as this, and thereby hold out inducement to the propagation of illegal and unfounded charges;" and then quotes from Lord Lyndhurst as follows: "I know of no case in which a person, who has committed an act, declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the offense." VAUGHAN, J., says: "In this case the court itself would become accessory to the publication of libels, if it was to enforce such a contract as the present." BOSANQUET, J., says: "I am of opinion that the promise and consideration both appear on the record to be illegal. The promise is to save harmless and indemnify the plaintiff, &c. It appears that the publication was made at the solicitation of the defendant, a publication manifestly illegal, and open to indictment; at once the subject of an action at the suit of the party offended, and an offense against the public. The case does not therefore fall within the principle laid down by Lord Kenyon, in Merryweather v. Nixan, as the act done by the plaintiff here was unlawful within his own knowledge." The principles recognized and promulgated in this decision cover substantially the whole case now before us.

The position, in which the facts confessed upon the record place the defendant, is not an enviable one. He seems to have originated the mischief—to have induced the plaintiff to aid him in carrying it into effect, by assurance of the truth of the statements, and a promise of indemnity, and after standing by and seeing *84 the *plaintiff amerced in damages, takes advantage of a strictly legal defense, and throws the whole responsibility upon the plaintiff. Personally, it would have given me satisfaction to have decided the case for the plaintiff, if it could have been done without violating well-established and salutary rules of law.

Judgment of the county court is affirmed.

JEWETT PUB. CO. v. BUTLER.

(34 N. E. 1087, 159 Mass. 517.)

Supreme Judicial Court of Massachusetts. Suffolk. Oct. 19, 1893.

Report from supreme judicial court, Suffolk county; Oliver W. Holmes, Jr., Judge.

Action by C. F. Jewett Publishing Company against Benjamin F. Butler for breach of contract. The court reported the case to the supreme judicial court. Judgment for plaintiff.

The contract between the parties recited that the defendant "is minded and intending to write and have published two volumes in the nature of autobiography or reminiscences of his life, and the acts and doings of other public men, so far as they may seem to him to elucidate the history of the country or public affairs," and it was stipulated that the plaintiff should do the publishing. The declaration alleged that, after defendant had written the work, he permitted it to be published by other parties, and that plaintiff had suffered damages in having prepared for the publication, and in the loss of profits which it would have made from the sale.

E. C. Bumpus, Samuel J. Elder, and William Cushing Wait, for plaintiff. John Lowell and E. M. Johnson, for defendant.

MORTON, J. The first question is whether the contract is, as the defendant contends, illegal on its face. The words relied on to show that it is are as follows: "The party of the first part agrees to accept full responsibility of all matter contained in said work, and to defend at his own cost any suits which may be brought against the party of the second part for publishing any statements contained in said work, and to pay all costs and damages arising from said suit." The presiding justice found that "the contract was made without illegal intent, unless and except so far as the words used import one as matter of law." Do the words used, as quoted above, import one as matter of law? We think not. The parties were contracting respecting a book which was not in existence, but was to be written. There was nothing in the character of the proposed work which naturally or necessarily involved the publication of scandalous or libelous matter, as was the case, for instance, in Shackell v. Rosier, 2 Bing. N. C. 634, referred to by the defendant. At the same time it was not impossible that, in spite of due care and good faith on the part of the author and publisher, the proposed book might contain matter which others perhaps would deem libelous. In such a case it would be no more unlawful for the parties to provide that the author should save the publisher harmless from all costs and damages to which he might be subjected by reason of the publication of the book than it would be for a patentee to agree with his licensee that he would protect him against all costs and damages to which he might be subjected in consequence of using the patent to which the license applied. The case stands on grounds entirely different from those on which it would stand if it appeared that the parties intended to publish or contemplated the publication of libelous matter. There is nothing in the agreement fairly to show that such was their purpose. The most that can be said is that, though there was no intention to write or publish, nor any contemplation of writing or publishing, libelous matter on the part of the author or publisher, it might turn out, after the book was published, that it did contain libelous matter. But that is very far from saying that the parties had in view an illegal purpose in publishing the book. We see nothing unlawful in a contract which provides, without anything more, that the author shall indemnify the publisher for costs and damages to which he may be subjected by reason of the publication of a book to be written by the author. Moreover, it was possible in this case that the book might not contain libelous matter, although libel suits against the publisher might grow out of it. It would be hard to say, in such event, that the publisher, who might have published the book without any libelous purpose, and in the full belief that it contained nothing libelous, could not recover of the author under this clause in the contract the costs and damages to which he had been put by such suits. In order, we think, to render the contract unlawful, it should appear that there was an intention on the part of the author and publisher to write and publish libelous matter, or that the author proposed, with the knowledge and acquiescence of the publisher, to write libelous matter, or that the contract on its face provided for or promoted an illegal act. We do not think the clause in question is fairly susceptible of either construction. Fletcher v. Harcot, Hut. 55; Battersey's Case, Winch, 49; Betts v. Gibbins, 2 Adol. & E. 57; Adamson v. Jarvis, 4 Bing. 66; Waugh v. Morris, L. R. 8 Q. B. 202; Pearce v. Brooks, L. R. 1 Exch. 213; Cannan v. Bryce, 3 Barn. & Ald. 179; Graves v. Johnson, 156 Mass. 211, 30 N. E. Rep. 818.

The defendant contends, in the next place, that he was justified in his refusal to go on with the contract because of his doubts as to the solvency of the plaintiff corporation, and because of the disgrace attaching to its name in consequence of the conduct of Jewett. The first ground thus taken would seem to be disposed of by the recent case of Hobbs v. Brick Co. (Mass.) 31 N. E. Rep. 756, and need not, therefore, be further considered. As to the second ground, it is to be observed that the contract was not made with Jewett personally, but with the corporation which bore his name. Moreover, Jewett has fled, and it fairly may be presumed that his place as president and manager has been filled by the election of another person, so that the defendant cannot and will not be obliged to come into further association with him. It

is well known that corporations are frequently organized which bear as part of their corporate name the name of some individual. The contention of the defendant would require us to hold that in all such cases a party making a contract with such a corporation would be justified in refusing to go on with it if the person whose name the corporation bore committed an act rendering him liable to punishment as a criminal, or bringing him into disgrace and rendering further association with him unprofitable and injurious to the other party to the contract. But a corporation does not in such a case impliedly guaranty as an element of the contract entered into with it that the person whose name it bears shall continue to be a reputable member of society. The corporation is distinct from the person whose name it bears. Its interests and those of its stockholders in contracts made by it with other parties are not to be affected by the disgraceful or criminal conduct of the person whose name it bears, and for which it is in no way responsible. A majority of the court think the entry should be, judgment for plaintiff for $2,500 and interest from June 9, 1890, and it is so ordered.

LATHROP, J. (dissenting). I am unable to concur in the opinion of the majority of the court that the contract sought to be enforced is a valid contract. The contract provides for the publication of a work to contain the author's autobiography "or reminiscences of his life, and the acts and doings of other public men, so far as they may seem to him to elucidate the history of the country or public affairs." It is in reference to a work of this character that the defendant agrees to do three things: First, "to accept full responsibility of all matters contained in said work;" secondly, "to defend at his own cost any suits which may be brought against the party of the second part for publishing any statements contained in said work;" thirdly, "to pay all costs and damages arising from such suits." The obligation of the defendant is not limited to paying legal expenses, but includes costs and damages recovered against the publisher "for publishing any statements contained in said work." While it is found that the parties acted without illegal intent, yet if the legal effect of the language used is to make the contract against the policy of the law, this court ought not to enforce it. It seems to me to be impossible to say that the language used applies only to groundless suits, and that it should so be construed. What the parties contemplated, and what they intended to provide for, was that actions might be brought against the publisher for libelous matter contained in the work; that these actions might be successfully maintained against the publisher, who would then be compelled to pay damages and costs. In this event the writer agreed to indemnify the publisher. Could such an agreement have been enforced? In my opinion, it could not, and this view is sustained by the authorities. Shackell v. Rosier, 2 Bing. N. C. 634; Colburn v. Patmore, 1 Cromp. M. & R. 73; Gale v. Leckie, 2 Starkie, 107; Clay v. Yates, 1 Hurl. & N. 73; Arnold v. Clifford, 2 Sum. 238;[1] Odgers, Sland. & L. (2d Ed.) 8. See, also, Bradlaugh v. Newdegate, 11 Q. B. Div. 1, 12; Babcock v. Terry, 97 Mass. 482. It follows that the whole contract was tainted with illegality, and neither party was bound to go on with it. Robinson v. Green, 3 Metc. (Mass.) 159, 161; Perkins v. Cummings, 2 Gray, 258; Woodruff v. Wentworth, 133 Mass. 309; Bishop v. Palmer, 146 Mass. 469, 16 N. E. Rep. 299; Lound v. Grimwade, 39 Ch. Div. 605, 613.

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[1] Fed. Cas. No. 555.

GRIFFITH v. WELLS.

(3 Denio, 226.)

Supreme Court of New York. July, 1846.

Error to Oneida C. P. Griffith sued Wells before a justice of the peace in December, 1843, and declared in assumpsit for two half gallons of whiskey and two glasses of beer, sold and delivered to the defendant, of the value of three shillings and six pence. The plaintiff, who was a grocer, proved his declaration. The defence was, that the plaintiff sold the liquor without having a license to sell spirituous liquors. The justice gave judgment for the plaintiff for 44 cents damages, besides costs. On certiorari, the C. P. reversed the judgment, on the ground that the plaintiff did not show a license to sell spirituous liquors. The plaintiff brings error.

J. Benedict, for plaintiff in error. S. H. Stafford, for defendant in error.

BRONSON, C. J. Our excise law does not, in terms, prohibit the sale of strong or spirituous liquors without a license, nor declare the act illegal; but only inflicts a penalty upon the offender. 2 Rev. St. 680, §§ 15, 16. From this it is argued, that although the seller without a license incurs a penalty, the contract of sale is valid, and may be enforced by action. But it was laid down long ago, that "where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful; for it cannot be intended that a statute would inflict a penalty for a lawful act." Bartlett v. Viner, Skin. 322. In the report of the same case in Carthew (page 252), Holt, C. J., said: "A penalty implies a prohibition, though there are no prohibitory words in the statute." Although this was but a dictum, the doctrine has been fully approved. De Begnis v. Armistead, 10 Bing. 107; Foster v. Taylor, 3 Nev. & M. 244, 5 Barn. & Adol. 887; Cope v. Rowlands, 2 Mees. & W. 149; Mitchell v. Smith, 1 Bin. 110, 4 Dall. 269; Leidenbender v. Charles, 4 Serg. & R. 159, per Tilghman, C. J.; Bank v. Merrick, 14 Mass. 322. When a license to carry on a particular trade is required for the sole purpose of raising revenue, and the statute only inflicts a penalty by way of securing payment of the license money, it may be that a sale without a license would be valid. Johnson v. Hudson, 11 East, 180; Brown v. Duncan, 10 Barn. & C. 93; Chit. Cont. (Ed. 1842) 419, 697. But if the statute looks beyond the question of revenue, and has in view the protection of the public health or morals, or the prevention of frauds by the seller, then, though there be nothing but a penalty, a contract which infringes the statute cannot be supported. Law v. Hodgson, 2 Camp. 147; Brown v. Duncan, 10 Barn. & C. 93; Foster v. Taylor, 3 Nev. & M. 244, 5 Barn. & Adol. 887; Little v. Poole, 9 Barn. & C. 192; Tyson v. Thomas, McClel. & Y. 119; Wheeler v. Russell, 17 Mass. 258; Bensley v. Bignold, 5 Barn. & Ald. 335; Drury v. Defontaine, 1 Taunt. 136, per Mansfield, C. J.; Cope v. Rowlands, 2 Mees. & W. 149; Houston v. Mills, 1 Moody & R. 325. Now I think it quite clear, that in the enactment of our excise law the legislature looked beyond the mere question of revenue, and intended to prevent some of the evils which are so likely to flow from the traffic in spirituous liquors. If revenue alone had been the object, licenses would have been allowed indiscriminately to all. But the statute forbids a license to any one, whether tavern-keeper or grocer, who is not of good moral character; and he must moreover give bond, with sureties, that his house or grocery shall not become disorderly. Sections 6, 7, 13. These regulations were evidently intended to protect the public, in some degree, against the consequences which might be expected to follow from allowing all persons, at their pleasure, to deal in strong liquors. And although the statute only inflicts a penalty for selling without a license, the contract is illegal, and no action will lie to enforce it. The justice was wrong; and his judgment has been properly reversed by the common pleas.

Judgment affirmed.

LYON v. STRONG.

(6 Vt. 219.)

Supreme Court of Vermont. Rutland. Jan., 1834.

This was an action of *assumpsit* brought on the warranty of a mare. Plea, *non-assumpsit*. On trial the plaintiff offered evidence to prove the contract of sale and warranty. It appeared that the sale was made on the —— day of October, 1830, on the Sabbath. Evidence was given by the plaintiff to prove the sale and warranty, by which it appeared that the plaintiff and defendant were making their bargain and trading during the course of the day, conversing about the terms of the trade, and had rode and tried the mare;—that defendant said he would warrant her sound every way, except gravel; and that at or towards evening they finished their trade, by which the plaintiff gave an ox and a cow and three dollars in money for the mare:—that plaintiff then urged, as a reason why he wanted a warranty, that it was so dark that he could not determine whether she had been gravelled or not. After the evidence of the plaintiff in relation to the sale and warranty was finished, the defendant contended that such a contract made on the Sabbath, was void. The court decided that a sale or exchange of horses, and a contract or warranty thereon, made on the Sabbath, was void, and that no action could be maintained thereon. Thereupon the plaintiff became nonsuit, with liberty to move to set it aside if the decision of the court was wrong. The court refused to set aside the nonsuit. The case comes here upon exceptions taken by the plaintiff to this decision.

Mr. Thrall, for plaintiff. Mr. Royce, for defendant.

WILLIAMS, C. J.—From the case it is evident that several questions might have arisen in the course of the trial. 1. The *220 *one decided by the county court, whether a contract for the sale and exchange of horses, and a warranty thereon, made on the Sabbath, in the usual way, and attended with all the circumstances which ordinarily attend those exchanges, is so far void that it cannot be enforced in a court of justice. 2. Whether a contract of this kind, made after the setting of the sun on the Sabbath is against the statute. 3. Whether such a contract, commenced and carried on as this was, though not finally closed until after the setting of the sun, can be enforced.

Our attention is necessarily confined to the first of these questions as being the only one decided by the county court. After the evidence for the plaintiff was finished, the defendant contended and submitted to the court, that such a contract, made on the Sabbath, was void. After the decision on this question was pronounced, the plaintiff, without introducing any further testimony, or requiring the defendant to introduce any testimony to determine whether the case would be subject to the decision which might be made on the second and third questions above mentioned, submitted to a nonsuit and excepted to the opinion of the court. Whether the evidence did or would have presented a case to be determined by the opinion which the court might have formed on either of those questions, cannot now be ascertained, as the plaintiff elected to become nonsuit on the decision of the first; probably considering that his chance with a jury on the whole evidence, as to bringing his case out of the rule of law laid down by the court, was not such as would justify him in proceeding further with the evidence. As it is presented, we can only consider the question which the county court determined; and if their decision is erroneous, the nonsuit will be set aside—if otherwise, it must be affirmed.

This I apprehend is purely a question of law, to be decided by the constitution and statute of this state, and by the application of those principles of law which have been known, acknowledged, and never controverted, and I think the cases which have been decided will be found to be so very similar and like to the one under consideration, that the decision on them must govern this; and further, that the question now presented has received so many determinations, that we must have departed not only from the known and familiar principles of law, but from determinations made under a law precisely similar to the statute of this *221 state, so far as applicable to this *case, if we had come to a different result than the one we have made.

We are aware, however, that the subject under consideration is one which is liable to be viewed too much on either side through the medium of feeling; and any judicial investigation of it may be regarded as treading upon forbidden ground. A decision one way may be regarded as promoting irreligion, licentiousness and immorality; and a decision the other way be considered as encroaching upon religious freedom. We shall endeavor, however, to inquire what the legislature have done, and give effect to their doings so far as we understand their requirements. The constitution of this state, (and herein it is a transcript from the first constitution of government established in this state) while it carefully protects and guards religious freedom, and asserts that the conscience of no one can be controlled, declares, "that every sect or denomination of christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God." To carry into effect the spirit of this constitution, to enable each religious sect to keep up religious worship on the Sabbath, and to enable all to enjoy the benefits to be derived from a day of religious retirement and rest, the legislature, among their first laws, made provision for the prohibition of secular labor on that day; and in the statute which they passed in 1779, and which has in substance been continued to this time, embraced all the provisions which are contained in the English statutes of the first and second Charles. Aware of the benefits to be derived from stated periods of rest from manual labor, of the importance of having the same day observed by all, and recognizing that every denomination of christians among them regarded the Sabbath as a day set apart for moral and religious duties, they determined that every one should be protected in the enjoyment of his religious privileges and in the performance of his religious duties, and have made provision that those who are thus disposed may on that day perform those great and necessary duties which they believe are required of them, without disturbance from the secular labor of others; and further, that all, whether high or low, prisoner or free, master or servant, shall be permitted to rest, and that none shall compel them to labor on that day; and lest through avarice or cupidity, any one should be disposed so to do, they have enacted that the day shall be observed as a day of rest from secular labor and employment, except such as *necessity and acts *222 of charity shall require. Statute, p. 603.

It may here be remarked, that wherever a statute inflicts a penalty for doing any thing, the penalty implies a prohibition, though there are no prohibitory words in the statute. This statute not only inflicts a penalty on those who violate it, by labor or recreation, but expressly prohibits all secular labor or employment, so that there is both an implied and express prohibition. The question will then arise, whether the employment of these parties, as detailed in the bill of exceptions, the sale, exchange, and contract of warranty, is a secular labor or employment, within the meaning of the statute, subjecting them to a penalty; and secondly, if it is, whether courts of justice are to lend their aid to carry into effect a contract made in violation of a positive statute, and for the making of which they would inflict a penalty or fine on the parties thereto?

On the first question there can be no doubt. All will readily answer in the affirmative. It was not only a secular labor or employment, but one directly calculated, from the nature of the business, to disturb the devotion of others, and to interrupt the rest and quietness which all have a right to enjoy on that day. On the second question, it is apprehended that the law, as established in analogous cases, and under statutes similar in their provisions, furnishes as ready an answer in the negative. It is an acknowledged principle of law, that a court will not lend its aid to carry into effect a contract made in contravention of a positive statute, particularly if the statute was made for the purpose of protecting the public, for promoting peace, good order, or good morals. The reason for this is sufficiently obvious without recurrence to authorities. There would be a great inconsistency in a court of justice, to inflict a punishment on persons for making a contract, which disturbed the public peace and contravened a statute, and in the next cause settle the terms of that contract between the same parties, inquiring whether it had been fulfilled, and giving damages to the one or the other for not fulfilling it. It would be altogether more consonant to propriety to tell the parties to such an illegal transaction, that they are not to come into a court of justice on any question in relation to such a transaction, except to receive judgment for the penalty they have incurred by disregarding the law.

The authorities to this effect are numerous, both in England and in this country. A few of them only will be noticed. In the case of Bartlett vs. Vinor, Carth. 252, and also Skinner *223 *322, it was said that in case of simony, although the law only inflicted a penalty, and does not mention any avoiding of the simonical contract, yet it has always been held that such contracts, being against law, were void. By a statute in England, it is illegal for any candidate at an election to furnish provisions to voters, and it was held that an action could not be maintained by an innkeeper against a candidate for provisions furnished for that purpose at his request. Ribbans vs. Crickett and al. 1 Bos. & Pull. 264. By a statute in that country all bricks made for sale shall be of certain dimensions, and a sale is prohibited under a penalty. It was held that if bricks be sold under that size, the seller could not recover the the value. Law vs. Hodgson, 2 Camp. 147, and also 11 East, 300. Brewers are prohibited by a statute from using any thing but malt and hops in the brewing of beer. A druggist was not permitted to recover the price of certain drugs, sold to a brewer, knowing they were to be used in a brewery. 1 Maule & Selwyn, 593, Langton and others vs. Hughes and others. A printer was not permitted to recover, either for his labors in printing a pamphlet or for materials found, when he omitted to affix his name and the place of his abode, in pursuance of the directions of the statute. 39 G. 3 c. 79 and 27. One of the judges (Bayley) observed that the omission was a direct violation of the law, that the public have an interest that the thing shall not be done, that the objection against the plaintiff's recovery must prevail, not for the sake of the defendant, but for that of the public. Bensley and another vs. Bignold, 5 Barn. & Ald. 335. In Pennsylvania a penalty is inflicted on any one who sells lands under the Connecticut title, but the statute contained no prohibitory clause; yet it was held that a contract for the sale of lands in that state under that title was unlawful and void. 1 Binn. 110, Mitchell vs. Smith. In New York a statute prohibited, under a penalty, the sale or purchase of tickets in any lottery not authorized by the legislature and it was there held that no action could be maintained on a contract for the sale of tickets in a lottery not there authorized. Hunt and others vs. Knickerbacker, 5 Johnson, 327. In Massachusetts a statute prohibits the sale of shingles under certain dimensions, or if not surveyed, and makes both the buyer and seller liable to a pecuniary penalty for a violation of the statute. Under this statute it was held that no action could be maintained on a note the consideration whereof was a quantity of *224 shingles sold not *of the size prescribed by the statute. Wheeler vs. Russell, 17 Mass. Rep. 258. In the case of May & Co. vs. Brownell, 3 Vt. Rep. 463, the same principle was recognized. These cases, which are selected from a multitude of others, are sufficient to establish the general principle, and it may not be out of place to notice the strong and emphatic language made use of by the different judges on this subject, to show how clearly the principle is recognized and established. Lord Mansfield says, "No court will lend its aid to a man who founds his cause of action upon an illegal or immoral act. If the cause of action appears to arise from the transgression of a positive law of this country, the plaintiff has no right to be assisted. It is upon this ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." Cowper, 343. "The court will not interfere to assist either party, according to the well known rule that, *in pari delicto, &c.*—not that defendant's right is better than plaintiff's, but they must draw their remedy from pure fountains." Douglass, 468. Eyre, chief justice, in the case before cited from 1 Bos. & Pull, says, "How shall an action be maintained on that which is a direct violation of the public law? The contract is bottomed in *malum prohibitum* of a very serious nature, as appears by the preamble of 7 and 8 W. 3, c. 4. How then can we enforce a contract to do that very thing which is so much reprobated by the act? Persons who engage in this kind of transaction must not bring their case before a court of law." 1 Bos. & Pull, 266, Lord Alvanley says, "No man can come into a British court of justice to ask the assistance of the law, who founds his claim upon a contravention of the British laws." 3 Bos. and Pull, 38.

In Law vs. Hodgson, 2 Camp. 148, Lord Ellenborough says, "The plaintiff, in making the brick in question, was guilty of an absolute breach of the law, and he shall not be permitted to maintain an action for their value." And again: "The best way to enforce an observance of the statute was to prevent the violation of it from being profitable." Ashhurst, J.: "No

right of action can spring out of an illegal contract." 8 Term Rep. 89. Lord Ellenborough: "It may be taken as a received rule of law—that which is done in contravention of the provisions of an act of parliament cannot be made the subject of an action." Best, J.—"There is no illegal contract on which an action can be founded, inasmuch as the thing was done in *direct violation of the law;" and in the *225 same case he says, "It is equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interests of the state."

From the principle of law thus clearly defined, and too often mentioned without any expression of doubt to induce us to believe it has ever been questioned, it would follow that if the contract under consideration was made in violation of the statute, and subjected the parties to a penalty, it could not be the subject of an action at law; that although both parties may be equally culpable, yet the maxim, *in pari delicto*, should prevail, and the court should refuse to aid the plaintiff, not for the sake of the defendant, but because his claim grows out of a transaction prohibited by law. On the question itself in relation to contracts of this kind, made on the Sabbath and under a similar statute, the authorities are clear and decisive. The statutes which have been passed in this state are very similar to the English statutes. Yet the terms made use of are more extensive and embrace a greater number of cases. The statute of Car. 1st, like our statute, prohibits all sports, pastimes, games or plays, although it does not prohibit labor. The statute of Car. 2nd contains all the provisions of the former statute, and further provides that no tradesman, artificer, &c. shall do any worldly labor, or works of their ordinary calling, upon the Lord's day. Our statute is, that no person shall exercise any secular labor, business or employment. Statute, p. 603. By the statute of Charles, it is to be observed, it is the labor or work of the ordinary calling of the person which is prohibited. Hence the attention of the courts in that country has often been called to the question, whether a contract or sale was made in the ordinary calling of the vendor, and doubts have been expressed at times whether the statute extended to private sales as well as public. These doubts, however, all vanished when the subject was fully investigated. The first case which I shall notice was that of Drury vs. Defontaine, 1 Taun. 131. The plaintiff had sent his horse to an auctioneer, who sold him on Sunday to the defendant by private contract. In an action for the price of this horse the court held that the auctioneer was not in the exercise of his ordinary calling when he sold the horse by private contract; and there- *226 fore, as neither the plaintiff *nor his agent were in the exercise of their ordinary calling, the sale was not void by common law or by the statute, the court say it is to be lamented that the sale must be held good, and say expressly, that if any man in the exercise of his ordinary calling should make a contract on Sunday, that contract would be void; that is, as was afterwards explained, void so far as to prevent a party privy to it from sueing it in a court of law.

The next case in which the subject was considered, was Bloxsome vs. Williams, 3 Barnwell & Cres. 232. This case went off, on the ground that the contract was not made on Sunday. Justice Bayley, however, intimates an opinion that the statute only applied to work visibly laborious, and did not extend to private sales. He says, however, that if it was within the statute, the plaintiff might be deprived of any right to sue upon a contract so illegally made. In the case of Fennell vs. Ridler, 5 Barn. & Cres. 406, which was an action on the warranty of a horse, the court decided that the purchase of a horse, by a horse dealer, was in the exercise of the business of his ordinary calling; that the statute extends to private as well as public sales, and that the plaintiff could not maintain any action upon a contract for the sale and warranty of a horse, made by him upon Sunday; and Mr. Justice Bayley observed, that though he expressed doubts in the case of Bloxsome vs. Williams, whether the statute extended to private sales, he was satisfied upon further consideration that it would be a narrow construction of the act, and a construction contrary to its spirit, to give it such a restriction. During the same summer, a case came before Chief Justice Best, at *nisi prius*, in an action on a breach of a contract for the purchase of nutmegs. The same questions were made in that case, which had been urged before in other cases—to wit, that the sale was not complete, and that it was not in the exercise of his calling. The Chief Justice, after intimating his opinion that these questions had been decided too narrowly, decided that the contract was void, having been made on the Sabbath.—2 Car. & Payne, 544. The cause was carried up to the court of common pleas in Hilary term, 1827, and the decision was confirmed by all the members of the court. Park, J., said that he did not think the decision of the court in Drury vs. Defontaine, 1 Taun. 131, was right; that the construction put upon the statute was too narrow; and Ch. J. Best, with that promptness, firmness and energy, which is always to be admired in his opinions, says, *"I do not say that the *227 mere inception of a contract on Sunday will avoid it, if completed the next day; but if most of the terms are settled on Sunday, and the mere signatures deferred to the next day, such a contract could scarcely be supported." This point, however, was not decided; for he says, "Here the whole was in effect complete on the Sunday, and unless it be permitted to a party to profit by a contract in defiance of the law of the country, the plaintiff cannot recover."—Smith vs. Sparrow, 4 Bing. 84.

In Connecticut it is said by Judge Gould, that the execution of written instruments on Sunday, between sunrise and sunset, have always been holden as falling within the description of secular business and been adjudged void under the statutes of that state.—2 Conn. Rep. 560. There is a case reported in Croke Eliz. 485, Comyns vs. Boyer, where it is said that a fair holden upon Sunday is well enough, although by the 27 Hen. 6, c. 5, there is a penalty inflicted upon the party that sells upon that day, but it makes it not void. Upon that case, however, if it had not been overruled, it might be remarked, it was not a decision under the statute of Charles the second. The statute of Henry the sixth only prohibited fairs or markets on certain Sundays, (the four Sundays in harvest excepted,) "on pain to forfeit the wares so showed, to the lord of the franchise." Before the establishment of the Protestant religion in England, fairs, markets, sports and public sales, were usual on the Sabbath, and fairs being held by prescription, could only be held on the usual days, according to the calendar, whether Sunday or not. For that reason the statute of Henry the sixth has been called a very singular statute, as altering the course of prescription. Moreover, it has been decided

that the case from Croke. Eliz. is not now law, that the law has been since changed, that now if any act is forbidden under a penalty, a contract to do it is now held void.—1 Taun. 136. In the case of Geer vs. Putnam, 10 Mass. Rep. 312, it was decided that a note dated on Sunday might be recovered. It is very evident, however, that the question was not much considered, so as to entitle it to great weight as an authority, if it should be found to conflict with other cases decided. The counsel for the party who made the defence gave it up in argument, and the decision was made on the authority of a case which had been decided in another county but not reported. Possibly, however, the decision may stand without conflicting with the cases which *have been mentioned. A *228 note dated on the Lord's day might be for a consideration recognized as valid, as for acts of necessity or charity, and the party who would avoid it might be required to furnish some other evidence of its being a contract contrary to the statute than what might be inferred from the date of the note alone.

The whole current of authorities being in favor of the decision made by the county court in this case—and I confess I have always been satisfied with the reasons given in the cases reported, and think that the consequence follows irresistibly from the statute, that no action can be maintained on a contract made in violation of the statute—it becomes our duty to declare the law as we find it, without regard to consequences. We have not, however, kept out of view the arguments which might be urged against this view of the statute. It is said that it will enable a party to take advantage of his own wrong. It is so in all cases of the violation of a statute, when the maxim, *in pari delicto*, is applicable. It is also said that it is difficult to decide what cases come within the statute, that there will always be doubts upon the construction of the statute, as to what are works of necessity or charity. To this it may be answered, that if the statute is not sufficiently explicit, it is competent for the legislature to make it more so; but surely it is no reason why we should not apply it to a case plainly within its letter and spirit, because a case may arise of which there may be some difficulty in determining upon its extent. I cannot, however, apprehend the least danger on this head. It is a law as easily observed as any in the statute book, and those who do not violate its precepts will suffer no inconvenience from its provisions; while those who do, have only to blame themselves. They cannot call on a court to disregard a positive statute for the accommodation of those who are disposed to violate it. It is not for us to endeavor to anticipate all the consequences to result from an adherence to the statute. In a case of Williams vs. Paul, 6 Bing. 653, decided after the causes before mentioned, it was determined that where a drover sold some cows on Sunday, at a stipulated price, and the purchaser afterwards promised to settle, he might recover on a *quantum meruit* for the value of the cows, though not for the stipulated sum, on the ground of the after promise. Possibly in a similar case the parties abiding by a sale or exchange might be considered as so far ratifying it as to furnish ground of recov- *229 ery on an **indebitatus assumpsit*, if the court would not have to enforce the contract made on the Sabbath. This, however, is not now before us. People must observe and obey the laws and statutes of the state, and in cases which may arise hereafter, the courts of justice will undoubtedly decide according to the circumstances of each case, so as to carry into effect the statute and see that it is not made an instrument of fraud or injustice. It is to be remarked, that we do not decide that a contract or proceeding of this kind, made wholly after the setting of the sun on Sunday, would be void. A contract at that time is not prohibited by the statute. Nor do we decide that a horse trade or any other of a similar character, commenced on Sunday and continued until after the setting of the sun before completed, would be valid. My present opinion is, that if a trade of this kind was commenced during the day, attended with the usual circumstances, riding about, jockeying, chaffering about terms, and thus continued until it ended in a trade, and was one continuous dealing, that it would not be out of the statute, because it was completed a few minutes after sundown. This, however, it is not necessary to decide in this case. We only determine, that when there is a sale or exchange of horses made on Sunday, and a contract of warranty thereon, no action can be maintained on such warranty, it being a violation of the statute of this state.

I have examined this subject more at length than I otherwise should, as the court are not all agreed in the result. Judge Mattocks dissents. The judgment of the county court is affirmed, and as the plaintiff became nonsuit, he can commence another suit, if he can by his testimony take the case out of the statute.

LLOYD v. SCOTT.

(4 Pet. 205.)

Supreme Court of the United States. 1830.

Error to the circuit court of the United States for the District of Columbia.

E. J. Lee and Mr. Swann, for plaintiff. Taylor & Jones, contra.

M'LEAN, J. This is an action of replevin, brought to replevy certain goods and chattels which the defendant, as bailiff of William S. Moore, had taken upon a distress for rent claimed to be due upon certain houses and lots in Alexandria, owned and possessed by the plaintiff. The sum for which the distress was made is $500.

The declaration is in the usual form, and the damages are laid at $1,000. The defendant filed his cognizance, in which he acknowledges the taking of the goods specified in the declaration, and states that a certain Jonathan Scholfield, being seised in fee of four brick tenements and a lot of ground in the town of Alexandria, by his indenture, dated the 11th of June, 1814, in consideration, of $5,000, granted, bargained, and sold to William S. Moore one certain annuity or yearly rent of $500, to be issuing out of and charged upon the said houses and ground, and paid to the said Moore, his heirs and assigns, by equal yearly payments of $250, on the 10th of December and on the 10th of June in each year forever thereafter, to have and to hold the said annuity or rent charged and payable as aforesaid, to the said William S. Moore, his heirs and assigns forever. It also states that the said Scholfield, for himself and his heirs and assigns, did, by the said indenture, among other things, covenant well and truly to pay to the said Moore, his heirs and assigns, the said annual rent of $500, by equal half yearly payments, forever. And if the rent should not be paid as it became due, it should be lawful for the said Moore, his heirs and assigns, to make distress for it; that Moore was seised of the rent on the 11th of December, 1814, and has since remained seised thereof.

The cognizance further states that, on the 29th of October, 1816, the said Jonathan Scholfield, by his deed of bargain and sale, conveyed to Lloyd, the plaintiff, forever, certain tenements and lots of ground in the town of Alexandria, whereof the said four brick tenements and lot of ground were parcel, and subject to the rent-charge stated; that Lloyd has been seised ever since and possessed of the same; and that on the 10th of June, 1824, $250, a part of the rent, was due, and on the 10th of December following, $250, the balance of the annual rent, was due and unpaid, for which sums the defendant, as bailiff, levied a distress.

The cognizance is concluded by praying a judgment for $1,000, being double the amount of the rent in arrear.

Moore covenants in the deed that if Scholfield, his heirs or assigns, "shall, at any time after the expiration of five years from the date of the deed, pay to the said Moore, his heirs or assigns, the sum of $5,000, together with all arrears of rent, and a ratable dividend of the rent for the time which shall have elapsed between the half year day then next preceding and the day on which such payment shall be made, he, the said Moore, his heirs and assigns, will execute and deliver any deeds or instruments which may be necessary for releasing and extinguishing the rent or annuity hereby created, which, on such payment being made, shall forever after cease to be payable."

Scholfield covenanted for himself, his heirs and assigns, that he would keep the buildings in repair, have them fully insured against fire, and would assign the policies of insurance to such trustee as Moore, his heirs or assigns, might appoint, that the money may be applied to the rebuilding of the houses destroyed by fire, or repairing any damage which they might suffer.

To this cognizance, the plaintiff filed a special demurrer, which in the argument he abandoned, and relies upon the special pleas of usury. To each of the four pleas the defendant demurs specially, and assigns for causes of demurrer—

1. That the said pleas do not set forth with any reasonable certainty the pretended contract which is alleged to have been usurious, and do not show an usurious contract.

2. That they do not state the time the said pretended loan was made.

3. That they do not state the amount of interest reserved or intended to be reserved on the said pretended contract.

4. That they do not set forth any loan or forbearance of any debt.

5. That they neither admit nor deny the sale and conveyance of the premises charged with the annuity or rent to have been made by Scholfield to the plaintiff below.

Upon these demurrers, the circuit court rendered judgment for $1,000, the double rent claimed in the cognizance.

The plaintiff here prays a reversal of this judgment.

1. Because the deed which forms a part of the cognizance, on its face, shows an usurious contract.

2. Because the pleas set forth, with sufficient certainty, an usurious contract.

The statute of Virginia against usury was passed in 1793, and provides that no person shall take, directly or indirectly, more than six dollars for the forbearance of one hundred dollars per annum; and it declares that all bonds and other instruments for a greater amount of interest shall be utterly void.

In support of the demurrer, it is argued that the pleas are defective, as they do not contain any allegation of facts which amount to usury, and that the decision must turn on the construction of the contract between

Scholfield and Moore. And it is contended that, although usury appears upon the face of a deed, yet advantage can only be taken of it by plea; that the obligee may explain the contract by showing a mistake in the scrivener, or a miscalculation of the parties.

In Comyn on Usury (page 201) it is laid down that, in an action on a specialty, though it appear on the face of the declaration that the bond, &c., is usurious, still, no advantage can be taken of this, unless the statute be specially pleaded. 3 Salk. 291; 5 Coke, 119; Chit. Cont. 240; 1 Sid. 285; 1 Saund. 295a. The decision of this point is not necessarily involved in the case.

The requisites to form an usurious transaction are three:—

1. A loan, either express or implied.
2. An understanding that the money lent shall or may be returned.
3. That a greater rate of interest than is allowed by the statute shall be paid.

The intent with which the act is done is an important ingredient to constitute this offence. An ignorance of the law will not protect a party from the penalties of usury, where it is committed; but where there was no intention to evade the law, and the facts which amount to usury, whether they appear upon the face of the contract or by other proof, can be shown to have been the result of mistake or accident, no penalty attaches.

At an early period in the history of English jurisprudence, usury, or, as it was then called, the loaning of money at interest, was deemed a very high offence. But since the days of Henry VIII. the taking of interest has been sanctioned by statute.

In this country, some of the states have no laws against taking any amount of interest which may be fixed by the contract.

The act of usury has long since lost that deep moral stain which was formerly attached to it, and is now generally considered only as an illegal or immoral act because it is prohibited by law. Assuming the position that the pleas contain no averments which extend beyond the terms of the contract, the counsel in support of the demurrers have contended that no fair construction of the deed will authorize the inference that it was given on an usurious consideration.

It was the purchase of an annuity, it is contended; and though the annuity may produce a higher rate of interest than six per cent. upon the consideration paid for it, yet this does not taint the transaction with usury.

If the court were limited by the pleas to the words of the contract, and it purported to be a purchase of an annuity, and no evidence were adduced giving a different character to the transaction, this argument would be unanswerable. An annuity may be purchased like a tract of land or other property, and the inequality of price will not, of itself, make the contract usurious. If the inadequacy of consideration be great, in any purchase, it may lead to suspicion; and, connected with other circumstances, may induce a court of chancery to relieve against the contract.

In the case under consideration, $5,000 were paid for a ground-rent of $500 per annum. This circumstance, although ten per cent. be received on the money paid, does not make the contract unlawful. If it were a bona fide purchase of an annuity, there is an end to the question; and the condition which gives the option to the vendor to repurchase the rent, by paying the $5,000 after the lapse of five years, would not invalidate the contract. 1 Brown, Ch. 7, 93. The right to repurchase, as also the inadequacy of price, would be circumstances for the consideration of a jury.

The case reported in 2 Coke, 252, is strongly relied on by the counsel for the defendant. In that case, an action of debt was brought upon an obligation of £300, conditioned for the payment of £20 per annum, during the lives of the plaintiff's wife and son. The defendant pleaded the statute of usury, and that he applied to the defendant to borrow of him £120, at the lawful rate of interest; but that he corruptly offered to deliver £120 to him, if he would be obliged to pay £20 per annum.

The court considered this as an absolute contract for the payment of £20 per annum during two lives; and no agreement being made for the return of the principal, it was not considered usury. But, they stated, if there had been any provision for the repayment of the principal, although not expressed in the bond, the contract would have been usurious.

This is a leading case, and the principle on which it rests has not been controverted by modern decisions.

Scholfield, it appears, was under no obligation to repurchase the annuity, but he had the option of doing so after the lapse of five years, which is a strong circumstance to show the nature of the transaction.

The purchase of an annuity, or any other device used to cover an usurious transaction, will be unavailing. If the contract be infected with usury, it cannot be enforced.

Where an annuity is raised with the design of covering a loan, the lender will not be exempted by it from the penalties of usury. 3 Bos. & P. 159. On this point there is no contradiction in the authorities.

If a party agree to pay a specific sum exceeding the lawful interest, provided he do not pay the principal by a day certain, it is not usury. By a punctual payment of the principal he may avoid the payment of the sum stated, which is considered as a penalty.

Where a loan is made to be returned at a fixed day with more than the legal rate of interest, depending upon a casualty which hazards both principal and interest, the contract is not usurious; but where the interest only is hazarded, it is usury.

Does the decision in this case, as has been

contended, depend upon a construction of the contract? Are there no averments in the pleas which place before the court material facts to constitute usury, that do not appear on the face of the deed?

If the court were limited to a mere construction of the contract, they would have no difficulty in deciding that the case was not strictly embraced by the statute.

In the second plea, the plaintiff below prays oyer of the deed of indenture, and among other statements alleges, "that it was corruptly agreed between the said Scholfield and the said Moore, that the said Moore should lend to him the sum of $5,000, and in consideration thereof, that he should execute the said deed, &c." And in another part of the same plea, it is stated "that the said Moore did corruptly agree, that he would in the said indenture covenant, &c., that if the said Scholfield, his heirs and assigns, should, at any time after the expiration of five years from the date of said indenture, pay to the said Moore, his heirs and assigns, the sum of $5,000, together with all arrears of rent, he, the said Moore, would release to him the said annuity."

And it is further alleged, "that the said Moore, in pursuance and in prosecution of the said corrupt agreement, did advance to the said Scholfield the said sum of $5,000." And again, "that the said deed of indenture was made, in consideration of money lent upon and for usury; and that, by the said indenture, there has been reserved and taken above the rate of $6 per annum in the hundred, for the forbearance of the said sum of $5,000 so lent as aforesaid."

The fourth plea contains, substantially, the allegations as to the lending, &c., that are found in the second plea.

The facts stated in the pleas are admitted by the demurrers, and the question of usury arises on these facts, connected as they are with the contract.

Although the second and fourth pleas may not contain every proper averment with technical accuracy, yet they are substantially good. All the material facts to constitute usury are found in the second plea.

It states a corrupt agreement to loan the money, at a higher rate of interest than the law allows. That the money was advanced and the contract executed, in pursuance of such agreement. That on the return of the principal, with a full payment of the rent, after the lapse of five years, the annuity was to be released. The amount agreed to be paid above the legal interest, for the forbearance, is not expressly averred, but the facts are so stated in the plea as to show the amount with certainty. $500, under cover of the annuity, were to be paid, annually, for the forbearance of the $5,000, making an annual interest of ten per cent. Do not these facts, uncontradicted as they are, amount to usury? Is it not evident, from this statement of the case, that the annuity was created as a means for paying the interest, until the principal should be returned, and as a disguise to the transaction? Such is the legitimate inference which arises from the facts stated in the plea.

At this point in the case an important question is raised, whether Lloyd, the plaintiff in the replevin, being the assignee of Scholfield, can set up this plea of usury in his defence. It is strongly contended that he cannot. He purchased this property, it is alleged, subject to the annuity, and paid for it a proportionably less consideration. That knowing of the charge before he made the purchase, it would be unjust for him now to evade the payment. And the inquiry is made, whether Lloyd could plead usury in this contract, if the annuity had been purchased by Scholfield. He would be estopped from doing so, it is urged, by the obligations of his own contract, as he is now estopped from resisting the claim of Moore.

As to the injustice of the defence, it may be remarked that the objection would apply with still greater force against Scholfield, if he were to attempt, by a similar defence, to evade the payment of the annuity. He received the money after assenting to the contract; but he is at liberty to evade the payment of the annuity by the plea of usury. Is the position correctly taken, that no person can avail himself of this plea, but a party to the original contract?

The principle seems to be settled, that usurious securities are not only void, as between the original parties, but the illegality of their inception affects them even in the hands of third persons who are entire strangers to the transaction. Comyn, Usury, 169. A stranger must "take heed to his assurance, at his peril;" and cannot insist on his ignorance of the contract, in support of his claim to recover upon a security which originated in usury.

In the case of Lowe v. Waller, Doug. 735, the plaintiff was the indorser of a bill originally made upon an usurious contract: though he had received it for a valuable consideration, and was entirely ignorant of its vice, the court of king's bench, after great consideration, determined that the words of the statute were too strong; and that, after what had been held in a case on the statute against gaming, the plaintiff could not recover.

If a bill of exchange be drawn in consequence of an usurious agreement for discounting it, although the drawer to whose order it was payable was not privy to this agreement, still, it is void in the hands of a bona fide indorser. 2 Camp. 599. In Holt, N. P. 256, Lord Ellenborough lays down the law that a bona fide holder cannot recover upon a bill founded in usury; so neither can he recover upon a note where the payee's indorsement, through which he must claim, has been made by an usurious agreement. But, if the first indorsement be valid, a subsequent usurious indorsement will not affect him; because such

intermediate indorsement is not necessary to his title to sue the original parties to the note.

If a note be usurious in its inception, and it pass into the hands of a bona fide holder who has no notice of the usury, and the drawer give to the holder a bond for the amount of the note, the bond would not be affected by the usury. 8 Term R. 390.

In the case of Jackson v. Henry, reported in 10 Johns. 185, a plea of usury was set up to invalidate the title of a purchaser at a sale of mortgaged premises. This sale, under the statute of New York, is equivalent to a foreclosure by a decree in chancery; and the court decided that the title of the purchaser was not affected by usury in the debt for which the mortgage was given. The statute of New York declares all bonds, bills, contracts, and assurances, infected with usury, "utterly void." And so say the court on the adjudged cases, when the suit at law is between the original parties, or upon the very instrument infected.

The case of D'Wolf v. Johnson, reported in 10 Wall. 367, is relied on by the counsel for the defendant, as a decision in point.

In that case, it will be observed that the first mortgage being executed in Rhode Island in 1815, was not usurious by the laws of that state; and the second one, executed in Kentucky, in 1817, being a new contract, was not tainted with usury. The question, therefore, whether the purchaser of an equity of redemption can show usury in the mortgage to defeat a foreclosure, was not involved in that case.

The Virginia statute makes void every usurious contract; and the second plea contains allegations which, uncontradicted, show that the contract between Moore and Scholfield was usurious in its origin.

This contract, thus declared to be void, is sought to be enforced against Lloyd, the purchaser of the property charged with the annuity. Between Scholfield and Lloyd there is a privity; and if the contract for the annuity be infected with usury, is it not void as against Lloyd?

In this contract, a summary remedy is given to enter on the premises, and levy by distress and sale of the goods and chattels there found, for the rent in arrear; and if the distress should be insufficient to satisfy the rent, and it should remain unpaid for thirty days, Moore is authorized to enter upon the premises, and to expel Scholfield, his heirs and assigns, and hold the estate. Lloyd, as the assignee of Scholfield, comes within the terms of the contract, and is liable, being in possession of the premises, to have his property distrained for the rent, and, if it be not paid, himself expelled from the possession. Under such circumstances, may he not avail himself of the plea of usury, and show that the contract which so materially affects his rights is invalid? Moore seeks his remedy under this contract, and if it be usurious and consequently void, can it be enforced?

If usury may be shown in the inception of a bill to defeat a recovery by an indorsee, who paid for it a valuable consideration without notice of the usury, may not the same offence be set up where, in a case like the present, the party to the usurious contract claims by virtue of its provisions, a summary mode of redress?

The court entertain no doubt on this subject. They think a case of usury is made out by the facts stated in the second plea, and that Lloyd may avail himself of such a defence.

The judgment of the circuit court must be reversed, and the cause remanded, with instructions to overrule the demurrers to the second and fourth pleas, and permit the defendant to plead.

BLISS v. LAWRENCE.

SAME v. GARDNER.

(58 N. Y. 442.)

Court of Appeals of New York. 1874.

Appeals from judgments dismissing the complaint. Defendant was a clerk in the United States treasury department, in New York City, and sold and assigned to plaintiff a month's salary in advance at a discount of ten per cent, and when the salary became due, he collected and converted it to his own use.

James Emott and Samuel Hand, for appellant. L. I. Lansing and Moses Ely, for respondent.

JOHNSON, J. The controlling question in these cases is that of the lawfulness of an assignment, by way of anticipation, of the salary to become due to a public officer. The particular cases presented are of assignments of a month's salary in advance. But if these can be sustained in law, then such assignments may cover the whole period of possible service. In the particular cases before us the claims to a month's salary seem to have been sold at a discount of about ten per cent. While this presents no question of usury (since it was a sale and not a loan for which the parties were dealing), it does present a quite glaring instance and example of the consequences likely to follow the establishment of the validity of such transfers, and thus illustrates one at least of the grounds on which the alleged rule of public policy rests, by which such transfers are forbidden. The public service is protected by protecting those engaged in performing public duties; and this not upon the ground of their private interest, but upon that of the necessity of securing the efficiency of the public service by seeing to it that the funds provided for its maintenance should be received by those who are to perform the work at such periods as the law has appointed for their payment.

It is argued that a public officer may better submit to a loss in order to get his pay into his hands in advance, than deal on credit for his necessary expenses. This may be true in fact, in individual instances, and yet may in general not be in accordance with the fact. Salaries are by law payable after work is performed and not before, and while this remains the law, it must be presumed to be a wise regulation, and necessary in the view of the law-makers to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries. It is true that in respect to officers removable at will, this evil could in some measure be limited by their removal when they were found assigning their salaries; but this is only a partial remedy, for there would still be no means of preventing the continued recurrence of the same difficulty. If such assignments are allowed, then the assignees by notice to the government, would on ordinary principles be entitled to receive pay directly and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service.

Some misapprehension as to the doctrine involved seems to have arisen from the fact that the modern adjudged cases have often related to the pay of half-pay army officers, which in part is given as a compensation for past services and in part with a view to future services. Upon a review of the English cases, it will appear that the general proposition is upon authority unquestionable, that salary for continuing services could not be assigned; while a pension or compensation for past services might be assigned. The doubt, and the only doubt in the case of half-pay officers was to which class they were to be taken to belong. It was decided that inasmuch as their pay was in part in view of future service, it was unassignable. Similar questions have arisen in respect to persons not strictly public officers, but the principle before stated has in the courts of England been adhered to firmly. Flarty v. Odlum, 3 Term R. 681; Stone v. Lidderdale, 2 Anst. 533; Davis v. Marlboro, 1 Swanst. 79; Lidderdale v. Duke of Montrose, 4 Term R. 248; Barwick v. Read, 1 H. Bl. 627; Arbuckle v. Cowhan, 3 Bos. & P. 328; Wells v. Foster, 8 Mees. & W. 149; Story, Eq. Jur. § 1040d; 1 Pars. Cont. 194. These cases and writers sustain the proposition above set forth and show the settled state of the English law upon the subject. Some other cases are so pertinent to the general discussion as to deserve to be stated more at length, especially as they are not so accessible as those before referred to. Among them the judgment of Lord Brougham, in the house of lords, in Hunter v. Gardner, 6 Wils. & S. 618, decided in 1831, gives an admirable summary of the state of the English law upon the subject. The case was a Scotch appeal, in which the Scotch court had approved, under the law of that country, a partial transfer of the salary of a public officer. The particular judgment was affirmed without deciding what the law of Scotland was upon the subject. In his judgment Lord Brougham said: "The court seem not to have scrutinized very nicely whether from the nature of the subject-matter, namely, the half-pay or the full pay of an officer or a minister's stipend, or in the present case, the salary of an officer employed under government and in the execution of an important public trust, an assignment can validly operate upon and affect those particular rights; but they have nevertheless assumed to deal with them and have directed that a certain proportion of

them shall be assigned on the condition of granting the benefit of the cessio bonorum. Those cases undoubtedly could not have occurred in this country. I may refer to the well-known case of Flarty v. Odlum, 3 Term R. 681, which from its importance was the subject of much discussion, it being the first case in which it was held that the half-pay of an officer was not the subject of assignment; and it was followed in Lidderdale v. Duke of Montrose, in 4 Term R., where the doctrine laid down was made the subject of further discussion, and the court adhered to their former view, that the half-pay was free from attachment; so that neither is a man bound to put it into the schedule of his assets, nor does the general assignment to the provisional assignee transfer it, nor would a bargain and sale to the assignees under a commission of bankruptcy pass it out of the bankrupt; it is unassignable and incapable of being affected by any of those modes of proceeding. The same doctrine was laid down with respect to the profits of a living in the case of Arbuckle v. Cowhan, the judgment in which has been very much considered in Westminster Hall, and like most of the judgments of that most able and learned lawyer, Lord Alvanley, has given great satisfaction to the courts and the profession. In the report of that case, your lordships will find laid down the general principle, though, perhaps, not worked out in these words, that all such profits as a man receives in respect to the performance of a public duty are, from their very nature, exempt from attachment and incapable of assignment, inasmucn as it would be inconsistent with the nature of those profits that he who had not been trusted, or he who had not been employed to do the duty, should nevertheless receive the emolument and reward. Lord Alvanley quotes Flarty v. Odlum and Lidderdale v. Duke of Montrose, and in illustrating the principle on which a parson's emoluments are not assignable, he does not confine his observations to the particular case of half-pay officers or the case of a parson's emoluments, but he makes the observation in all its generality, as applicable to every case of a public office and the emoluments of that office. The first case (1 H. Bl. 627), decided by the court of common pleas (the case of Barwick v. Read), clearly recognizes the principle. * * * In this case as well as the other case of Arbuckle v. Cowhan, it was perfectly clearly held by the court that in all such cases, one man could not claim to receive, by assignment or attachment, emoluments which belonged to another deemed to be capable of performing the duties appended to those emoluments, but which duties could not be performed by the assignee; and there was an old case referred to in Barwick v. Read, and a curious case in Dyer, in which so long ago as the reign of Elizabeth, the question appears to have been disposed of by a decision now undisputed, and now referred to in Westminster Hall. * * * All these cases laid down this principle, which is perfectly undeniable, that neither attachment nor assignment is applicable to such a case."

Other cases to the same effect, of later date, are likewise noteworthy.

In Hill v. Paul, 8 Clark & F. 307, decided in 1842, Lord Chancellor Lyndhurst, speaking of the legality of assigning the future emoluments of an office in Scotland, says: "That such an assignment would be illegal in England there can be no doubt. Palmer v. Bate, 2 Brod. & B. 673, is directly applicable to this case. And in Davis v. Marlboro, 1 Swanst. 79, there is the observation of Lord Eldon already cited, which seems to me quite in point and which lays down the true rule and the distinction to be observed in these cases, and to which for that reason I refer as showing what is the law of England on this subject." What Lord Eldon said in the case referred to was: "A pension for past services may be aliened; but a pension for supporting the grantee in the performance of future duties is inalienable." And in Flarty v. Odlum, 4 Term R. 248, the court say: "It might as well be contended that the salaries of the judges which are granted to support the dignity of the state and the administration of justice may be assigned."

In Arbuthnot v. Norton (1846) 5 Moore, P. C. 230, the question was whether an Indian judge could assign a contingent sum to which on his death within six months after his arrival in India his representative would be entitled by law, and it was held that such an assignment was not against public policy and would in equity transfer the right to the fund. In the course of the judgment given by Dr. Lushington, he says: "We do not in the slightest degree controvert any of the doctrines whereupon the decisions have been founded against the assignment of salaries by persons filling public offices; on the contrary, we acknowledge the soundness of the principles which govern those cases but we think that this case does not fall within any of these principles; and we think so because this is not a sum of money which at any time during the life of Sir John Norton could possibly have been appropriated to his use or for his benefit, for the purpose of sustaining with decorum and propriety the high rank in life in which he was placed in India. We do not see how any of the evils which are generally supposed would result from the assignment of salary, could in the slightest degree have resulted from the assignment of this sum, inasmuch as during his life-time his personal means would in no respect whatever have been diminished, but remain exactly in the same state as they were."

In Liverpool v. Wright, 28 L. J. (N. S.) Ch. 871, A. D. 1859, in which the question related to the alienability of the fees of the office of a clerk of the peace, Wood, V. C., after disposing of another question, says:

"Then there is a second ground of public policy, for which the case of Palmer v. Vaughn, 3 Swanst. 173, is the leading authority, which is this: That independently of any corrupt bargain with the appointor, nobody can deal with the fees of a person who holds an office of this description, because the law presumes, with reference to an office of trust, that he requires the payment which the law has assigned to him for the purpose of upholding the dignity and performing properly the duties of that office, and therefore it will not allow him to part with any portion of those fees either to the appointor or to anybody else. He is not allowed to charge or incumber them. That was the case of Parsons v. Thompson, 1 H. Bl. 322. Any attempt to assign any portion of the fees of his office is illegal on the ground of public policy, and held therefore to be void."

In respect to American authority we have been referred to Brackett v. Blake, 7 Metc. (Mass.) 335, Mulhall v. Quinn, 1 Gray, 105, and Macomber v. Doane, 2 Allen, 541, as conflicting with the views we have expressed. An examination of these cases shows that the point of public policy was not considered by the court in either of them, but that the question was regarded as entirely relating to the sufficiency of the interest of the assignor in the future salary to distinguish the cases from those of attempted assignments of mere expectation, such as those of an expectant heir. The court held that in the cases cited, the expectation of future salary being founded on existing engagements, was capable of assignment and that the existing interest sufficed to support the transfer of the future expectation. The only other case to which we have been referred is a decision of the supreme court of Wisconsin.

In State Bank v. Hastings, 15 Wis. 78, the question being as to the assignability of a judge's salary, the court say: "We were referred to some English cases which hold that the assignment of the pay of officers in the public service, judges' salaries, pensions, etc., was void as being against public policy, but it was not contended that the doctrine of those cases was applicable to the condition of society or to the principles of law or of public policy in this country. For certainly we can see no possible objection to permitting a judge to assign his salary before it becomes due, if he can find any person willing to take the risk of his living and being entitled to it when it becomes payable."

We do not understand that the English decisions really rest on any grounds peculiar to that country, although sometimes expressed in terms which we might not select to express our views of the true foundation of the doctrine in question. The substance of it all is the necessity of maintaining the efficiency of the public service by seeing to it that public salaries really go to those who perform the public service. To this extent we think the public policy of every country must go to secure the end in view.

The judgments must be affirmed.

All concur.

Judgments affirmed.

PROVIDENCE TOOL CO. v. NORRIS.

(2 Wall. 45.)

Supreme Court of the United States. Dec., 1864.

In July, 1861, the Providence Tool Company, a corporation created under the laws of Rhode Island, entered into a contract with the government, through the secretary of war, to deliver to officers of the United States, within certain stated periods, twenty-five thousand muskets, of a specified pattern, at the rate of twenty dollars a musket. This contract was procured through the exertions of Norris, the plaintiff in the court below, and the defendant in error in this court, upon a previous agreement with the corporation, through its managing agent, that in case he obtained a contract of this kind he should receive compensation for his services proportionate to its extent.

Norris himself, it appeared, — though not having any imputation on his moral character, —was a person who had led a somewhat miscellaneous sort of a life, in Europe and America. Soon after the rebellion broke out, he found himself in Washington. He was there without any special purpose, but, as he stated, with a view of "making business—anything generally;" "soliciting acquaintances;" "getting letters;" "getting an office," &c. Finding that the government was in need of arms to suppress the rebellion, which had now become organized, he applied to the Providence Tool Company, already mentioned, to see if they wanted a job, and made the contingent sort of contract with them just referred to. He then set himself to work at what he called, "concentrating influence at the war department;" that is to say, to getting letters from people who might be supposed to have influence with Mr. Cameron, at that time secretary of war, recommending him and his objects. Among other means, he applied to the Rhode Island senators, Messrs. Anthony and Simmons, with whom he had got acquainted, to go with him to the war office. Mr. Anthony declined to go; stating that since he had been senator he had been applied to some hundred times, in like manner, and had invariably declined; thinking it discreditable to any senator to intermeddle with the business of the departments. "You will certainly not decline to go with me, and introduce me to the secretary, and to state that the Providence Tool Company is a responsible corporation." "I will give you a note," said Mr. Anthony. "I do not want a note," was the reply; "I want the weight of your presence with me. I want the influence of a senator." "Well," said Mr. Anthony, "go to Simmons." By one means and another, Norris got influential introduction to Mr. Secretary Cameron, and got the contract, a very profitable one; the secretary, whom on leaving he warmly thanked, "hoping that he would make a great deal of money out of it."

But a dispute now arose between Norris and the tool company, as to the amount of compensation to be paid. Norris insisted that by the agreement with him he was to receive $75,000; the difference between the contract price and seventeen dollars a musket; whilst the corporation, on the other hand, contended, that it had only promised "a liberal compensation" in case of success. Some negotiation on the subject was had between them; but it failed to produce a settlement, and Norris instituted the present action to recover the full amount claimed by him.

The declaration contained several counts; the first and second ones, special; the third, fourth, and fifth, general. The special ones set forth specifically a contract, that if he, Norris, procured the government to give the order to the company, the company would pay to him, Norris, "for his services, in obtaining, or causing and procuring to be obtained, such order, all that the government might, by the terms of their arrangement with the company, agree to pay above $17 for each musket." The general counts were in the usual form of quantum meruit, &c.; but in these counts, as in the special ones, a contract was set forth on the basis of a compensation, contingent upon Norris's procuring an order from the government for muskets for the tool company; reliance on this contingent sort of contract running through all the counts of the declaration. There was no pretence that the plaintiff had rendered any other service than that which resulted in the contract for the muskets.

On the trial in the circuit court for the Rhode Island district, the counsel of the tool company requested the court to instruct the jury, that a contract like that declared on in the first and second counts was against public policy, and void; which instruction the court refused to give. The same counsel requested the court to charge, "that upon the quantum meruit count the plaintiff was not entitled in law to recover any other sum of money, for services rendered to the tool company in procuring a contract for making arms, than a fair and reasonable compensation for the time, speech, labor performed, and expenses incurred in performing such services, to be computed at a price for *which similar services could have been obtained from others.*" The court gave this instruction, with the exception of the last nine words in italics. The jury found for the defendant on the first and second—that is to say, upon the special—counts, and for the plaintiff on the others, and judgment was entered on $13,500 for the plaintiff. The case came, by writ of error, here.

Payne & Thurston, for plaintiff in error. Mr. Blake, contra.

Mr. Justice FIELD delivered the opinion of the court.

Several grounds were taken, in the court below, in defence of this action; and, among others, the corporation relied upon the propo-

sition of law, that an agreement of the character stated,—that is, an agreement for compensation to procure a contract from the government to furnish its supplies,—is against public policy, and void. This proposition is the question for the consideration of the court. It arises upon the refusal of the court below to give one of the instructions asked.

A suggestion was made on the argument, though not much pressed, that the instruction involving the proposition cannot properly be regarded, inasmuch as it was directed in terms to the agreement set forth in the special counts of the declaration, upon which the jury found for the defendants. There would be much force in this suggestion, if the general counts, upon which the verdict passed for the plaintiff, did not also aver that his services were rendered in procuring the same contract from the government. The instruction was directed especially to the legality of a contract of that kind, which having been once refused with reference to some of the counts, it was not necessary for counsel to renew with reference to the other counts to which it was equally applicable. The subsequent instructions were, therefore, directed to other matters.

It was not claimed, on the trial, that the plaintiff had rendered any other services than those which resulted in the procurement of the contract for the muskets. We are of opinion, therefore, that the proposition of law is fairly presented by the record, and is before us for consideration.

The question, then, is this: Can an agreement for compensation to procure a contract from the government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds.

The principle which determines the invalidity of the agreement in question has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation to procure legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question, whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. Legislation should be prompted solely from considerations of the public good, and the best means of advancing it. Whatever tends to divert the attention of legislators from their high duties, to mislead their judgments, or to substitute other motives for their conduct than the advancement of the public interests, must necessarily and directly tend to impair the integrity of our political institutions. Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.

There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both, is the direct and inevitable result of all such arrangements. Marshal v. Railroad Co., 16 How. 314; Harris v. Roof's Ex'rs, 10 Barb. 489; Fuller v. Dame, 18 Pick. 472.

The same principle has also been applied, in numerous instances, to agreements for compensation to procure appointments to public offices. These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power, must necessarily lower the character of the appointments, to the great detriment of the public. Agreements for compensation to procure these appointments tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone, adjudges these agreements inconsistent with sound morals and public policy. Gray v. Hook, 4 N. Y. 449.

Other agreements of an analogous character might be mentioned, which the courts, for the same or similar reasons, refuse to uphold. It is unnecessary to state them particularly; it is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.

It follows that the judgment of the court below must be reversed, and the cause remanded for a new trial; and it is so ordered.

TRIST v. CHILD.

(21 Wall. 441.)

Supreme Court of the United States. 1874.

Appeal from the supreme court of the District of Columbia; the case being thus:

N. P. Trist having a claim against the United States for his services, rendered in 1848, touching the treaty of Guadalupe Hidalgo—a claim which the government had not recognized—resolved, in 1866–7 to submit it to congress and to ask payment of it. And he made an agreement with Linus Child, of Boston, that Child should take charge of the claim and prosecute it before congress as his agent and attorney. As a compensation for his services it was agreed that Child should receive 25 per cent. of whatever sum congress might allow in payment of the claim. If nothing was allowed, Child was to receive nothing. His compensation depended wholly upon the contingency of success. Child prepared a petition and presented the claim to congress. Before final action was taken upon it by that body Child died. His son and personal representative, L. M. Child, who was his partner when the agreement between him and Trist was entered into, and down to the time of his death, continued the prosecution of the claim. By an act of the 20th of April, 1871, congress appropriated the sum of $14,559 to pay it. The son thereupon applied to Trist for payment of the 25 per cent. stipulated for in the agreement between Trist and his father. Trist declined to pay. Hereupon Child applied to the treasury department to suspend the payment of the money to Trist. Payment was suspended accordingly, and the money was still in the treasury.

Child, the son, now filed his bill against Trist, praying that Trist might be enjoined from withdrawing the $14,559 from the treasury until he had complied with his agreement about the compensation, and that a decree might pass commanding him to pay to the complainant $5000, and for general relief.

The defendant answered the bill, asserting, with other defences going to the merits, that all the services as set forth in their bill were "of such a nature as to give no cause of action in any court either of common law or equity."

The case was heard upon the pleadings and much evidence. A part of the evidence consisted of correspondence between the parties. It tended to prove that the Childs, father and son, had been to see various members of congress, soliciting their influence in behalf of a bill introduced for the benefit of Mr. Trist, and in several instances obtaining a promise of it. There was no attempt to prove that any kind of bribe had been offered or ever contemplated; but the following letter, one in the correspondence put in evidence, was referred to as showing the effects of contracts such as the one in this case: "From Child, Jr., to Trist. House of Representatives, Washington, D. C., Feb. 20th, 1871. Mr. Trist: Everything looks very favorable. I found that my father has spoken to C—— and B——, and other members of the House. Mr. B—— says he will try hard to get it before the House. He has two more chances, or rather 'morning hours,' before Congress adjourns. A—— will go in for it. D—— promises to go for it. I have sent your letter and report to Mr. W——, of Pennsylvania. It may not be reached till next week. Please write to your friends to write immediately to any member of Congress. Every vote tells; and a simple request to a member may secure his vote, he not caring anything about it. Set every man you know at work, even if he knows a page, for a page often gets a vote. The most I fear is indifference. Yours, &c., L. M. Child."

The court below decreed:

1st. That Trist should pay to the complainant $3639, with interest from April 20th, 1871.

2d. That until he did so, he should be enjoined from receiving at the treasury "any of the moneys appropriated to him" by the above act of congress, of April 20th, 1871.

From this decree the case was brought here.

The good character of the Messrs. Child, father and son, was not denied.

Durant & Horner, for appellants, upon the main point of the case (the validity of the contract between Child and Trist), relied upon Marshall v. Railroad, 16 How. 314, in this court, and upon the principles there enunciated in behalf of the court by Grier, J. They relied also on Tool Co. v. Norris, 2 Wall. 54.

B. F. Butler and R. D. Mussey, contra.

The case relied on by opposing counsel is widely different from this one.

There, Marshall entered—as the report of the case shows—into a contract with the Baltimore and Ohio Railroad Company, to obtain certain favorable legislation in Virginia for the contingent compensation of fifty thousand dollars by the use of personal, secret, and sinister influences upon the legislators. He expressly stated that his plan required "absolute secrecy," and "that he could allege 'an ostensible reason' for his presence in Richmond and his active interference without disclosing his real character and object." He spoke of using "outdoor influence" to affect the legislators through their "kind and social dispositions," and pictured them as "careless and good-natured," "engaged in idle pleasures," capable of being "moulded like wax" by the most "pressing influences." The company authorized him to use these means. The question in that case, therefore, was, whether a contract for contingent compensation for obtaining legislation by the use of secret, sinister and personal influences upon legislators was or was not contrary to the policy of the law. And the decision of that question was the decision of the case.

In Marshall's Case, the plaintiff and defendant combined together to perpetrate a fraud

upon the servants of the public engaged in legislating for the public good, and it was this fact which made the contract infamous and disgraceful and incapable of enforcement in the courts; not that the action sought was that of a legislature.

The case at bar differs from that of Marshall, toto cœlo. Here both father and son were openly and avowedly attorneys for their client, Trist. They never presented themselves to anybody in any different or other respect. Every act of theirs was open, fair. and honorable.

Will it be denied that any man having a claim on the government, may appear in person before a committee of congress, if they allow him, or speak to members of congress, if they incline to hear him; point out to them the justice of his claim, and put before them any and all honorable considerations which may make them see that the case ought to be decided in his favor? This, we assume, will not be denied. But suppose that he is an old man. or a man infirm and sick; one, withal, living away from the seat of government; a case, it may be stated, in passing, the exact case of Mr. Trist; for he was old, infirm, sick, and lived at Alexandria. Now, if Mr. Trist being well had the right to call upon committees or members of congress, and (if they invited him or were willing to listen to him) to show to them that he negotiated, as he asserted that he did, the treaty of Guadalupe Hidalgo, and should be paid for doing so, what principle of either morals or policy, public or private, was there to prevent him (being thus old, infirm, sick, and away from Washington) from employing an honorable member of the Massachusetts bar to do the same thing for him? What principle to prevent him from doing by attorney that which he had himself the right, but from the visitation of God, had not himself, and at that time, the physical ability to do?

We are not here asking the court to open the door to corrupt influences upon congress, or to give aid to that which is popularly known as "lobbying," and is properly denounced as dishonorable. But we are asking that by giving the sanction of the law to an open and honorable advocacy by counsel of private rights before legislative bodies, the court shall aid in doing away with the employment of agencies which work secretly and dishonorably.

The records of congress show that with honorable motives and dishonorable stimulants both combined and acting upon the two classes of persons—upright and avowed, the Childs; or dishonest and secret, the Marshalls—who urge claims upon congress, out of fifteen thousand private claims put before it since the government was organized, not more than one-half have been acted upon in any way. Are all private claims—claims in which the public has no interest—to be left absolutely to the action of congress itself, moving only sua sponte? If so, they will never be acted upon. They can come before the body only through the action of private parties.

There will, therefore, always be solicitation before legislatures so long as legislatures have the power and exercise it of passing private laws. For the gift, or the art, of statement and persuasion is not the common property of mankind.

And if solicitation of some sort there must be, shall it come from the mouths of such men as Linus Child and his son—lawyers both, of unquestioned integrity—and be an open and upright solicitation of the intellect and the reason of the legislator; or shall it be made, by outlawry, a secret, sinister and personal solicitation of his passions, his prejudices, and his vices?

If you shall decide that the pledged word of his client as to compensation avails the congressional practitioner nothing; that a man who in his poverty makes a contract may repudiate it when the fruit of the contract is attained; then will you remit all work before such bodies to men devoid of honor, irresponsible both in character and property; preying alike upon the misfortunes of claimants and the weaknesses of legislators.

[A good deal was said in the argument on both sides about contingent fees, but in view of the grounds on which the court based its judgment, a report of that part of the argument would be of no pertinence.]

Mr. Justice SWAYNE, delivered the opinion of the court.

The court below decreed to the appellee the amount of his claim, and enjoined Trist from receiving from the treasury "any of the money appropriated to him" by congress, until he should have paid the demand of the appellee.

This decree, as regards that portion of the fund not claimed by the appellee, is an anomaly. Why the claim should affect that part of the fund to which it had no relation, is not easy to be imagined. This feature of the decree was doubtless the result of oversight and inadvertence. The bill proceeds upon the grounds of the validity of the original contract, and a consequent lien in favor of the complainant upon the fund appropriated. We shall examine the latter ground first. Was there, in any view of the case, a lien?

It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. Yeates v. Groves, 1 Ves. Jr. 280; Lett v. Morris, 4 Sim. 607; Bradley v. Root, 5 Paige, 632; 2 Story, Eq. Jur. § 1047. A part of the particular fund may be assigned by an order, and the payee may enforce payment of the amount against the drawee. Field v. Mayor, 6 N. Y. 179. But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an ap-

propriation of the fund pro tanto, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor. Wright v. Ellison, 1 Wall. 16; Hoyt v. Story, 3 Barb. 264; Malcolm v. Scott, 3 Hare, 39; Rogers v. Hosack, 18 Wend. 319.

Viewing the subject in the light of these authorities, we are brought to the conclusion that the appellee had no lien upon the fund here in question. The understanding between the elder Child and Trist was a personal agreement. It could in nowise produce the effect insisted upon. For a breach of the agreement, the remedy was at law, not in equity, and the defendant had a constitutional right to a trial by jury. Wright v. Ellison, 1 Wall. 16. If there was no lien, there was no jurisdiction in equity.

There is another consideration fatally adverse to the claim of a lien. The first section of the act of congress of February 26th, 1853, declares that all transfers of any part of any claim against the United States, "or of any interest therein, whether absolute or conditional, shall be absolutely null and void, unless executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant therefor." That the claim set up in the bill to a specific part of the money appropriated is within this statute is too clear to admit of doubt. It would be a waste of time to discuss the subject.

But there is an objection of still greater gravity to the appellee's case.

Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim. The aid asked by the younger Child of Trist, which indicated what he considered needful, and doubtless proposed to do and did do himself, is thus vividly pictured in his letter to Trist of the 20th February, 1871. After giving the names of several members of congress, from whom he had received favorable assurances, he proceeds: "Please write to your friends to write to any member of congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know at work. Even if he knows a page, for a page often gets a vote."

In the Roman law it was declared that "a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding." Just. Inst. lib. 3, tit. 19, par. 24. In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals. Lord Mansfield said (Jones v. Randall, 1 Cowp. 39): "Many contracts which are not against morality, are still void as being against the maxims of sound policy."

It is a rule of the common law of universal application, that where a contract express or implied is tainted with either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice.

Before considering the contract here in question, it may be well, by way of illustration, to advert to some of the cases presenting the subject in other phases, in which the principle has been adversely applied.

Within the condemned category are: An agreement to pay for supporting for election a candidate for sheriff, Swayze v. Hull, 8 N. J. Law, 54; to pay for resigning a public position to make room for another, Eddy v. Capron, 4 R. I. 395; Parsons v. Thompson, 1 H. Bl. 322; to pay for not bidding at a sheriff's sale of real property, Jones v. Caswell, 3 Johns. Cas. 29; to pay for not bidding for articles to be sold by the government at auction, Doolin v. Ward, 6 Johns, 194; to pay for not bidding for a contract to carry the mail on a specified route, Gulick v. Bailey, 10 N. J. Law, 87; to pay a person for his aid and influence in procuring an office, and for not being a candidate himself, Gray v. Hook, 4 N. Y. 449; to pay for procuring a contract from the government, Tool Co. v. Norris, 2 Wall. 45; to pay for procuring signatures to a petition to the governor for a pardon, Hatzfield v. Gulden, 7 Watts, 152; to sell land to a particular person when the surrogate's order to sell should have been obtained, Overseers of Bridgewater v. Overseers of Brookfield, 3 Cow. 299; to pay for suppressing evidence and compounding a felony, Collins v. Blantern, 2 Wils. 347; to convey and assign a part of what should come from an ancestor by descent, devise, or distribution, Boynton v. Hubbard, 7 Mass. 112; to pay for promoting a marriage, Scribblehill v. Brett, 4 Brown Parl. Cas. 144; Arundel v. Trevillian, 1 Ch. Rep. 47; to influence the disposition of property by will in a particular way, Debenham v. Ox, 1 Ves. 276. See, also, Add. Cont. 91; 1 Story, Eq. c. 7; Collins v. Blantern, 1 Smith Lead. Cas. 676, Am. note.

The question now before us has been decided in four American cases. They were all ably considered, and in all of them the contract was held to be against public policy, and void. Clippinger v. Hepbaugh, 5 Watts & S. 315; Harris v. Roof's Ex'r, 10 Barb. 489; Rose & Hawley v. Truax, 21 Barb. 361; Marshall v. Railroad Co., 16 How. 314. We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But

such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. 1 Montesq. Spirit of Laws, 17. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

If the instances were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority.

We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void.

We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, protior conditio defendentis. Where there is turpitude, the law will help neither party.

The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons.

Decree reversed, and the case remanded, with directions to dismiss the bill.

GOODRICH v. TENNEY et al.

(32 N. E. 44, 144 Ill. 422.)

Supreme Court of Illinois. Jan. 19, 1893.

Appeal from appellate court, first district. Bill by Alphonso Goodrich against Daniel K. Tenney, Robert M. Bashford, Horace K. Tenney, and George A. Hawley. The bill was dismissed on demurrer, and this decree was affirmed by the appellate court. Complainant appeals. Affirmed.

The other facts fully appear in the following statement by SHOPE, J.:

"This was a proceeding on the equity side of the court. Only such parts of the bill need be given as will raise the single point decided. It is alleged that one Smith, a merchant at Omaha, Neb., had become indebted to divers persons, banks, and firms in sums aggregating $275,000, and transferred his business, stock of goods, "and all that apparently pertained to the same," to one Lowey, and immediately absconded to Canada, leaving his debts unpaid. Suits had been brought by certain Nebraska creditors; and in one, at least, affecting the validity of such transfer, a verdict or finding had been rendered adversely to the creditors, and was at the time of making the contract referred to pending on motion for new trial. That it was desired by the creditors concerned in such litigation, "and in which was involved the question of the fraudulent character of the transfer of said property, * * * that said Smith should give his testimony in said cause, and should furnish affidavits showing the alleged fraudulent character of said transfer by said Smith to said Lowey." Appellees, a firm of Chicago lawyers, were employed by and represented certain Chicago, and other, creditors; and they, representing such creditors, also desired "that the testimony and co-operation of said Smith should be secured in their behalf, for the purpose of sustaining the litigation as to the fraudulent transfer of said property by said Smith to said Lowey." The bill then alleges the business and friendly relations existing between appellant and said Smith, and the fact that correspondence had been maintained between them since his absconding, which led appellees to confer with appellant, to interest him to induce Smith to return to the United States, and give such affidavits and testimony in the Omaha litigation, and in such other suits as might be instituted by or on behalf of the creditors of Smith to reach said property, or the avails thereof, in the hands of Lowey, or others. As a result appellant twice visited Smith, in Canada, on the last visit being accompanied by appellee D. K. Tenney. The proposals were laid before Smith, and such negotiations had that on the last visit the affidavit of Smith was obtained, brought to Chicago, and delivered by appellant to said Tenney. Thereupon the contract, the terms of which had been previously agreed upon, was drawn up and signed, a copy of which purports to be attached to the bill as an exhibit. It is alleged to bear date, and to have been executed, May 5, 1886, and provides that appellees or said Tenney should endeavor to get control of all of the claims against said Smith, with power to compromise the same as follows: "The claim of J. V. Farwell & Co. and A. S. Gage & Co. at par; the claims of the Omaha banks at 50 cents on the dollar; claims of other attaching creditors, up to the amount of $78,000, at thirty cents on the dollar, and all other claims at twenty cents on the dollar." And appellant undertook and agreed on his part, as alleged, "to furnish the affidavits of L. L. Smith, Fred W. Fuller, alias Pullen, and Frank C. Moies, of the facts of the sale by Smith to Lowey, showing clearly that no consideration was paid by Lowey, and that he knew of Smith's insolvency, to be used on motion for new trial in the case of Cole v. Miller; and that the testimony of said witnesses, either in person or by depositions, should be given, of like tenor, to be used upon the next trial, or any other legal proceedings instituted by said Tenney against said Lowey." And "that for such consideration it was agreed that your orator [said Goodrich] should have one quarter of all money realized upon their said claims out of the property transferred by said Smith to said Lowey, or in any litigation with said Lowey or Cole, in respect to the same, and the same should be paid to said Goodrich [appellant] as fast as the money should be collected; two thousand dollars thereof to be retained by said Tenney on account of costs and expenses; Smith to be released by the consenting creditors from any right they might have to arrest him, and from their claims entirely, when such evidence should be procured and given," etc. The bill alleges that appellant obtained the affidavits of said Fuller and Moies, and the further affidavit of Smith, and delivered them to said Tenney, "and which were accepted and approved by said Tenney, as in all respects according to the wishes and purposes of said defendants, [appellees,] and a satisfactory compliance with the terms and conditions of said agreement." And that appellees, by means of a circular letter addressed to Smith's creditors, etc., had by the 17th day of May, 1886, obtained control of claims to the amount of $125,000; that Smith, under an arrangement procured by appellant with certain of his creditors, that they would procure persons to go bail for him if he should be arrested by other creditors, had returned to Chicago, and on said day executed and delivered to said D. K. Tenney, as trustee for creditors, his judgment note for the sum of $125,500, the sum of $500 being added as an attorney's fee; that judgment was entered up thereon, and, an execution being returned nulla bona, a creditor's bill was filed against said Smith, Lowey, and others to subject said property transferred by Smith to Lowey,

and the avails thereof, to the payment of said judgment, upon the ground that said transfer was without consideration, and fraudulent as against creditors. It is further alleged that appellant "gave diligent attention to the securing of the testimony of the said Smith and said Fuller, alias Pullen, and the said Moies, to be used on the hearing of said cause, and in the progress thereof, and all such affidavits as were called for or required by said defendants [appellees] during the progress of said cause, and did and performed, to the satisfaction of said defendants, all that was required by them * * * under and pursuant to the terms of * * * said agreement." It is alleged that Smith, Fuller, and Moies each attended, and gave testimony and affidavits in said cause, when required to do so, etc. The result is alleged to have been a decree on the 28th of May, 1888, two years after filing the bill, in favor of Tenney, etc., and against Lowey, for the sum of $117,416.66, and which was, on the 6th day of December, 1888, received by said Tenney, amounting at that date, principal and interest, to $120,500, "or thereabout." Thirty thousand dollars, or one fourth of the sum collected, less $500, presumably the attorney fee included in the note, is alleged to have become immediately due and payable to appellant under said contract; and it is to enforce an accounting and payment of this sum, under said contract alone, that this bill is filed. There is no pretense in the bill of any other or different agreement by which said money, or any part of it, would become payable to appellant, or any consideration, other than performing said agreement on his part, moving to appellant for its payment. Other parts of the bill are sufficiently noticed in the opinion of the court. A demurrer was interposed and sustained, and decree entered dismissing the bill. On appeal to the appellate court this decree was affirmed, and the complainant prosecutes this further appeal.

H. T. & L. Helm, for appellant. Tenny, Church & Coffeen, (William E. Church, of counsel,) for appellees.

SHOPE, J., (after stating the facts.) It is probable that the demurrer was properly sustained upon the ground that, if the complainant had a right of recovery, his remedy was complete at law, and possibly, also, upon the ground of laches; but we will consider the single question of the validity of the contract sought to be enforced. No good purpose can be served by a consideration of the allegations of this bill setting up the confederacy and fraud by which appellant was induced to surrender the written contract to Tenney. It is alleged that it was expressly agreed that the surrender of the writing should not abrogate the contract, or make any difference as to the rights of appellant thereunder, but that his interest should remain the same. If the allegations of the bill are true, the surrender was made to destroy the written evidence of appellant's interest, because of the pretended fear that his interest under such a contract, if known, would prejudice Tenney's case against Lowey, and to enable the attorney to more safely, but falsely, testify, if called therein, that no such contract existed. So with those allegations which are explanatory of why appellant himself falsely denied that there was any such contract, or that he had any interest in the litigation against Lowey, as it is alleged he did, when called and examined in said creditors' bill proceeding. And the same is true of the allegations setting up the fraudulent and oppressive acts and conduct by which, after the rendition of the decree against Lowey, appellant was induced to execute and deliver to Tenney an absolute release and acquittance of all claim or right soever to the money derived under said decree. If the interest that can be claimed in respect of such allegations be conceded, they amount to no more than that, because of the fraud practiced, the surrender was ineffectual to abrogate or destroy the contract; that appellant should not be estopped from now asserting his rights under said contract by his false denial of its existence; and that said release is, as between appellant and appellees, fraudulent, and should be set aside, and the contract, as originally made, be held to be in full force and effect. The specific prayer of this bill is "that the said contract so delivered to said defendants may be restored to your orator, and the rights in and under the same may be established and confirmed, and the said release, so fraudulently extorted from your orator, be canceled and annulled, and for naught held, and the said defendants may be required to pay to your orator the amount that shall be found due and owing * * * under and in pursuant to the terms of said agreement," etc. The right of recovery, if it exists, is therefore predicated solely upon, and involves the enforcement of, the contract set up in the bill. It is under and by virtue of that contract, alone, that it is sought to establish appellant's right to the money; and there is nothing, except said agreement, that would give him any right, either at law or in equity, to demand the payment of the 25 per cent. of the amount collected of Lowey.

The English reports, as well as American, abound with cases holding that contracts are illegal when founded upon a consideration, contra bonos mores, or against the principles of sound public policy, or founded in fraud, or in contravention of the provisions of some statute, (2 Kent, Comm. p. 466;) and we need not review the cases illustrating the application of the rule. Thus, contracts to pay money to influence legislation, (Marshall v. Railroad Co., 16 How. 314; Mills v. Mills, 40 N. Y. 543; McBratney v. Chandler, 22 Kan. 692; Bryan v. Reynolds,

5 Wis. 200; Powers v. Skinner, 34 Vt. 276;) agreements founded upon violations of public trust or confidence, (Cooth v. Jackson, 6 Ves. 12–35;) contracts to pay public officers for the performance of official duty, (Odineal v. Barry, 24 Miss. 9;) contracts for the buying, selling, or procuring of public office, (Earl of Chesterfield v. Janssen, 1 Atk. 352; Boynton v. Hubbard, 7 Mass. 119; Waldo v. Martin, 4 Barn. & C. 319;) agreements for the purpose of stifling criminal prosecutions, (Gorham v. Keyes, 137 Mass. 583; Henderson v. Palmer, 71 Ill. 579; Ricketts v. Harvey, 106 Ind. 564, 6 N. E. 325; McMahon v. Smith, 47 Conn. 221; Roll v. Raguet, 4 Ohio, 400;) agreements relating to civil proceedings involving anything inconsistent with the full and impartial course of justice therein, (Dawkins v. Gill, 10 Ala. 206,) or that tend to pervert the course of justice, or its pure administration by the courts, (Gillett v. Logan Co., 67 Ill. 256; Patterson v. Donner, 48 Cal. 369,)—and many others, are justly deemed contracts of turpitude, contrary to sound public policy, and void. 1 Story, Eq. Jur. §§ 293–300; 3 Am. & Eng. Enc. Law, 875–881, and notes. In Gillett v. Logan Co., supra, the contracts were to pay for procuring testimony showing that a certain number of votes cast at an election were illegal, and we said that, "on account of their corrupting tendency, we must hold them to be void, as inconsistent with public policy." It was also there said, in effect, that such contracts created a powerful inducement to make use of improper means to procure the testimony contracted for, to secure the desired result; that they led to the subornation of witnesses, to taint with corruption the atmosphere of courts, and to pervert the course of justice. In Patterson v. Donner, supra, it was agreed, among other things, that a certain sum of money should be paid, etc., provided the party procured "two witnesses to testify that they had seen what purported to be a genuine grant" of the land mentioned, etc.; and it was held that the stipulation was immoral, against public policy, and void. Courts of justice will not enforce the execution of illegal contracts, nor aid in the division of the profits of an illegal transaction between associates. Neustadt v. Hall, 58 Ill. 172. It is there said: "In the language of Lord Ellenborough in Edgar v. Fowler, 3 East, 222, we will not assist in illegal transaction, in any respect. We leave the matter as we find it, and then the maxim applies, 'melior est conditio possidentis.'" It may be insisted that it is unjust, as between the parties, for Tenney to raise the question, and very dishonest, towards appellant, for him to take advantage of it; but, the contract being illegal, no rights can be enforced under it. As said by Lord Mansfield in Holman v. Johnson, Cowp. 341, "no court will lend its aid to a man who founds his cause of action upon an illegal or immoral act." The maxim, "ex turpi contractu non oritur actio," applies in all such cases; and neither party, if in pari delicto, can have assistance from courts of justice in enforcing the contract. And the objection may be made by a party in pari delicto, for the defense is not allowed because the party raising the objection is entitled to the relief, but upon principles of public policy, and to conserve the public welfare.

No better illustration can perhaps be found of the soundness and wisdom of the rule, and the danger to be apprehended from its relaxation, than is shown in this case. It is apparent that Lowey was in equal peril of recovery against him, whether he had paid full and honest value upon purchase of the goods from Smith, or had taken them in fraud of the rights of the creditors. Smith, a dishonest debtor, after cheating his creditors, absconded. The appellant, as alleged, in consideration of the agreement of Tenney to pay him 25 per cent., practically, of whatever should be collected from Lowey, undertook and agreed to procure the affidavits of said Smith, of one Fuller, with an alias, and one Moies, "of the facts of the sale by Smith to Lowey, showing clearly that no consideration was paid by Lowey, and that he knew of Smith's insolvency," "and that the testimony of said witnesses, either in person or by deposition, should be given, of like tenor," etc. Copies of the affidavits alleged to have been furnished, and which it is alleged were received as a satisfactory fulfillment of appellant's contract in that regard, are attached to the bill as exhibits, and show that the witnesses testified up to the high mark set by the contract. Smith was brought back from Canada, secured immunity from arrest for his fraud, his debts canceled, if he would testify as required; and it is apparent from the bill that he at least claimed a portion of the money, and was actually paid $14,000. And this under the direction and control, if the bill be true, of an attorney, who deliberately laid the foundation for the commission of perjury with safety by himself, if called to testify, and advised the commission of perjury by appellant, and framed the language in which he should commit it; and the testimony was procured by appellant, who, after planning with the attorney as to the wording of his false testimony, deliberately gave it, for no other reasons than that he was led to believe that his telling the truth would endanger the chances of success in the litigation against Lowey. If transactions of this kind should receive sanction, and contracts based upon them be enforced, the suborner of perjury would become a potent, if not a necessary, factor in litigation. The fact that the purchase was made in good faith would be no protection to the buyer. Premium would be offered to the dishonest and unscrupulous, and result in the perversion of justice, and bringing its administration into deserved disrepute. It is not enough that the parties may have in-

tended no wrong, or that the testimony produced in the case may have been true. It is the tendency of such contracts to the perversion of justice that renders them illegal. It is perhaps a singular fact, however, though unimportant, that this bill nowhere alleges that either the attorney or appellant believed, or had any reason to believe, the testimony of Smith was in fact true. That, so far as this bill goes, seems to have been a matter not considered. That this contract falls directly within the maxim before quoted is unquestionable, and by all the authorities the court can do nothing to enforce it by either party.

But it is said that Tenney, having received the money, must account for it to appellant; and we are referred by counsel to a line of cases holding that, although the money may have been realized in an illegal transaction, yet where the liability of the defendant to pay it to the plaintiff arises upon some new or independent consideration, unaffected with illegality, and the enforcement of the illegal contract is not involved, there may be a recovery. None of the cases referred to have any application to the case at bar. As said in Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13, in commenting upon this line of cases: "In all those cases the court was careful to distinguish and sever the new contract from the original illegal contract. Whether in the application of this principle some of them do not trench upon the line which separates the cases of contracts void in consequence of their illegality from new and subsequent contracts, arising out of the accomplishment of the illegal object, is not the subject of inquiry here." It is to be remembered the contract was, as alleged, with the defendant D. K. Tenney, and signed by him, and, as alleged, the money collected by him as trustee for the creditors of Smith. If the money had been paid to a third person for the use of appellant, or there were collateral circumstances, disconnected with the illegal contract, out of which an implied promise to pay the money to appellant would arise, the cases referred to would apply. But the fact that Tenney received the money upon the decree against Lowey would, independently of the contract, raise no implied assumpsit in appellant's favor. The controversy here arises between the parties to the illegal agreement, and appellant must, if at all, assert his claim to the money in Tenney's hands through and under that contract. Treat that as void, as if never made, and there is nothing upon which appellant can base a claim to the money. The case principally relied upon by appellant as sustaining his contention is McBlair v. Gibbes, 17 How. 232. In that case one Goodwin had an interest in a claim held by the Baltimore Company for supplies furnished in fitting out a military expedition against dominions of the Spanish government, under a contract in violation of the neutrality laws of the United States, and therefore illegal. Gill v. Oliver's Ex'rs, 11 How. 529. In 1829 Goodwin, for an independent, valuable consideration, assigned his right and interest in the claim to one Oliver. Under the convention of 1839, "for the adjustment of claims of citizens of the United States against the Mexican republic," the illegality of the contract was waived, and the claim paid. The question at issue was whether the assignment to Oliver was valid. The court found that in determining the question the illegality of the contract with the Mexican general, Mina, upon which the claim against Mexico was based, was not involved. Its illegality had been waived by the Mexican government, and payment of the claim made. The court, finding that the assignment was made for a valuable consideration paid by Oliver, and was in itself untainted with illegality, after review of the authorities, held that it passed whatever rights Goodwin had, which might be nothing, if the illegality of the contract was interposed, or all that was claimed, if the promisor saw fit to waive it, passed by the assignment to Oliver. It seems clear that this case, in principle, can have no application to the case at bar, and is clearly distinguishable from a case where it is sought to enforce the illegal contract, or to enforce one made in aid or furtherance of a contract so infected. Appellant also relies upon Willson v. Owen, 30 Mich. 474. There the defendant received money as treasurer of a horse-fair association, for entrance fees, stock subscriptions, and commissions on pools sold, which he refused to pay over. It was conceded that the business in which the money was earned was unlawful. The plaintiffs, who had organized the association, brought an action for money had and received. It was held that the defendant having in fact received the money for the plaintiffs' use, he could not appropriate it to himself, but must account for it. The plaintiffs' case was made out when they showed that the defendant had received the money for their use. And the court distinguished the case from that of Breeders' Ass'n v. Ramsdell, 24 Mich. 441, where the attempt was to collect money earned by illegal means, and where the recovery must be had, if at all, in furtherance of the illegal transaction. In Tenant v. Elliott, 1 Bos. & P. 3, a broker procured illegal insurance. Upon loss, the insurance company paid the money to the broker, who refused to pay it over to the insured, setting up the illegality of the insurance. The plaintiff was held entitled to recover, upon the ground that the implied promise of the defendant, arising from the receipt by him of the money, was a new undertaking, unaffected by the illegality of the insurance. So in Sharp v. Taylor, 2 Phil. Ch. 801, a bill was filed to recover a moiety of freight money earned by a vessel engaged in trade in violation of the navigation laws, and illegal, which money had

come into the hands of one of the joint owners. The illegality of the trade was set up as a defense, but it was answered by the lord chancellor that the plaintiff was not seeking the enforcement of an illegal agreement, or compensation for the performance of an illegal voyage, but was seeking his share of the profits realized, and in the hands of the defendant joint owner. It there required no enforcement of an illegal contract or agreement to hold the defendant liable to account to the other joint owner. The liability arose from the receipt of the money as the agent of the plaintiff, in respect of his moiety. The cases of Tenant v. Elliott, supra, and Farmer v. Russell, 1 Bos. & P. 296, are referred to as sustaining the distinction in this case. A further reference to this line of cases will not be necessary. The distinction between the enforcement of the illegal contract, and asserting title to money arising from it, where there is an express contract to pay, upon sufficient consideration, or where the collateral circumstances are such as to raise an implied promise to pay to the plaintiff, is recognized, and carefully made, in practically all of the cases. In the case of Thompson v. Thompson, 7 Ves. 470, Sir William Grant, master of the rolls, drew the distinction with great clearness. A sale of the command of an East India Company ship was made to the defendant, who agreed to pay therefor an annuity of £200. Under regulations adopted by the company to prevent such sales, the defendant subsequently relinquished the command, and was allowed £3,500. £2,040 of which was delivered to an agent of the defendant. A bill was filed by the annuitant for the purpose of procuring a decree declaring the value of the annuity, and enforcing its payment out of the allowance to the defendant. The master of the rolls found the agreement for the payment of the annuity to be illegal, and, admitting there existed an equity against the fund, if it could be reached through a legal agreement, said: "You have no claim to this money, except through the medium of an illegal agreement, which, according to the determinations, you cannot support. I should have no difficulty in following the fund, provided you could recover against the party himself." And after citing Tenant v. Elliott, supra, as authority for the position that, if the company had paid the money into the hands of a third person for the use of the plaintiff, he might have recovered, further observed: "But in this instance it is paid to the party, for there can be no difference as to the payment to his agent. Then how are you to get at it, except through this agreement? There is nothing collateral, in respect of which, the agreement being out of the question, a collateral demand arises. Here you cannot stir a step but through the illegal agreement, and it is impossible for the court to enforce it." So here the right of appellant to recover of appellees depends solely upon the contract, the provisions of which cannot be enforced in a court of justice.

The unfortunate delay of appellant in disclosing the facts alleged, for more than three years after the facts occurred, will probably prevent their investigation where they could receive that attention their merit demands; and the bill, not being verified, forms no basis for further investigation in this court. The bill was properly dismissed, and the judgment of the appellate court will be affirmed.

JONES v. RICE.

(18 Pick. 440.)

Supreme Judicial Court of Massachusetts. Middlesex. Jan. 21, 1837.

Assumpsit on a promissory note, dated January 1st, 1835, made by the defendant to the plaintiff, for $147.

At the trial, before Shaw, C. J., it appeared that on the night of December 31st, 1834, a ball was given at the house of Joel Jones, in Sudbury; that an attempt was made by the defendant and others, to interrupt the ball by violence; that a riot ensued, in which some injury was done to J. Jones and others, assembled at the ball; that a complaint was filed before a justice of the peace and a warrant issued by him against some of the rioters; that the persons assembled at the ball chose a committee to report on the terms which should be proposed to the accused, for a settlement of the difficulty; that the committee reported that the accused should pay the sum of $184; that of this amount the sum of $40 was for damages sustained by three individuals, $10 for the services of the officer, and $2 for the services of the magistrate, and that the balance was for the purpose of stopping that and other prosecutions; that it was thereupon voted by those assembled at the ball, that if the accused would pay the sum proposed or give security for it, the other party would do nothing more about the matter; that the accused agreed to the terms and paid about $40, and the defendant, at their request, gave the note in suit for the balance; that J. Jones and others, including the plaintiff, then signed a receipt "in full for all damages sustained by the ball party assembled, &c. and all other demands of any name or nature of said ball party"; and that in consequence of this arrangement the officer made no return of the warrant, and no further proceedings were had upon the complaint.

The Chief Justice was of opinion, that the plaintiff was not entitled to recover, because the evidence proved a want of consideration or a bad consideration for the note; and the plaintiff consented to a nonsuit, subject to the opinion of the whole court.

Mr. Hoar, for plaintiff. S. H. Mann, for defendant.

PUTNAM, J. delivered the opinion of the court. The facts reported disclose, that divers persons committed an aggravated riot and assault upon the plaintiff and others, and that the note was given partly for the damages and expenses which the plaintiff and others had sustained, and partly for their agreement no further to prosecute for the offence against the public. The sum of $52 was given for the damages and expenses, and $132 for the compounding of the misdemeanor; part was paid in money, and the balance was secured by the note now sued.

Cases have been cited from the English authorities which sustain the distinction between considerations arising from the compounding of felonies, which is admitted to be illegal, and the compounding of misdemeanors, which is alleged to be lawful; but it appears that there is a conflict in the decisions upon this matter. In Drage v. Ibberson, 2 Esp. 643, Lord Kenyon held, that the consideration for settling a misdemeanor was good in law. And the case of Fallowes v. Taylor, 7 Term R. 745, proceeds upon the same principle. It was there held by Lord Kenyon and the rest of the court, that a bond given to the plaintiff (who was clerk of the quarter sessions and who was directed to prosecute the defendant for a public nuisance,) conditioned to remove the nuisance, was valid, notwithstanding it was taken by the plaintiff for his own use, he agreeing not to prosecute for the nuisance.

We do not think, that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a direct tendency to obstruct the course of the administration of justice; and the mischief extends, we think, as well to misdemeanors as to felonies. 1 Russ. Crimes, 210; Edgcombe v. Rodd, 5 East, 301.

The power to stop prosecutions is vested in the law officers of the commonwealth, who use it with prudence and discretion. If it were given to the party injured, who might be the only witness who could prove the offence, he might extort for his own use, money which properly should be levied as a fine upon the criminal party for the use of the commonwealth. The case at bar furnishes a strong illustration of the illegality of such a proceeding. The plaintiff claimed and got the note to secure to his own use four times as much as in his own estimation his individual damage amounted to. Now the sum thus secured might be more or less than the rioters would have been fined; but whether more or less is altogether immaterial; for no part of it belonged to the party. He might settle for his own damage from the riot; but it would enable the party to barter away the public right for his own emolument, if we were to hold that the consideration of this note was lawful.

We are all of opinion, that the nonsuit must stand.

THOMPSON et al. v. REYNOLDS.

(73 Ill. 11.)

Supreme Court of Illinois. Sept. Term, 1874.

Appeal from circuit court, Cook county; John G. Rogers, Judge.

Merriam & Alexander, for appellants. John C. Richberg, for appellee.

WALKER, J. Some time in the latter part of the year 1868, appellee and his partner were consulted by appellants as to whether they should execute a release, without consideration, of certain property mentioned in the deed. The partner advised that they had no interest, and could do so without prejudice to their rights; but, subsequently, another quitclaim deed was, in like manner, presented for a large amount of property. Appellee was then applied to for further advice, when he, with appellant Charles Thompson, consulted with one James Dunne, also an attorney, who occupied the same office with appellee. They investigated the matter, and arrived at the conclusion that appellants had an interest in the property.

An agreement was soon after entered into between appellants and appellee, by which appellee was to institute all necessary proceedings to ascertain and fix the rights of appellants; that he should pay all necessary expenses, and receive one-half of whatever should be realized. Appellants agreed that they would do no act to interfere with the proceedings. It is claimed that, with the consent of the parties, appellee agreed with Dunne he should assist in prosecuting the claims, for which he was to receive one-half of appellee's moiety, being one-fourth of what should be recovered.

Soon after, proceedings were commenced in the circuit, the superior and the county courts by these attorneys. During the continuance of these proceedings, it is claimed that about $10,000 was realized by appellants executing the releases, by way of compromise, with several defendants to the various suits, and it is claimed that these proceeds were divided according to the terms of the agreement.

About the month of May, 1871, appellants, it is claimed, without the consent of appellee or of Dunne, terminated the several proceedings and conveyed the lands in litigation, in consideration of $7,500 actually paid to them, and to recover one-half of that sum this action was brought. A trial by the court and a jury was had, resulting in a verdict of $1,500 in favor of plaintiff, on which a judgment was rendered, and this appeal prosecuted.

A number of errors are assigned on the record, but in the view we take of the case, we shall only consider whether the judgment is against the law. The court was asked to instruct the jury that the agreement entered into was champertous and void, but the court below refused to give the instruction. Blackstone defines champerty (volume 4, p. 135) as "species of maintenance, and punished in the same manner, being a bargain with a plaintiff or defendant compum partire, to divide the land or other matter sued for between them, if they prevail at law, whereupon the champerter is to carry on the party's suit at his own expense." The same author informs us that the punishment, if a common person, for champerty, was by fine and imprisonment; and this was a misdemeanor, punishable at the common law. See 1 Hawk. P. C. p. 463. It was also prohibited by various ancient statutes, commencing as early as the Statute of Westm. I. c. 25, all of which enact heavy penalties for their violation.

It thus appears, that champerty was an offense at the common law, and our general assembly having adopted the common law of England as the rule of decision, so far as applicable to our condition, until modified or repealed this must be regarded as in force in this state, as affecting all such contracts, and as being opposed to sound public policy. It is certainly applicable to our condition so far as it relates to attorney and client, and contracts with intermeddlers and speculators in apparently defective titles to property. If allowed to be practiced by attorneys, it would give them an immense advantage over a client. The superior knowledge of the attorney of the rights of the client would give him the means of oppression and acquiring great and dishonest advantages over the ignorant and unsuspecting owner of property. By giving false advice, the attorney, owing to the confidence his client reposes in him, and to his superior knowledge, would have the client completely at his mercy, and would thus be enabled to acquire the client's property in the most dishonorable manner. To allow champerty would be to permit temptation to the avaricious and unscrupulous in the profession, that would, from the very nature of things, lead to great abuse and oppression.

Whilst the great body of the profession are honest, and understand and act on the duties devolving upon them, there necessarily must be, in this as in all ages of the past, some who gain admission that have neither the integrity nor sense of duty necessary to restrain them from dishonorable means in practice. Usually a person will not employ an attorney unless he feels assured of his honesty as a man as well as his ability as an attorney. Having this confidence, all must see at a glance that it would give the attorney immense power over the client, and with this power all must see that to permit him to make champertous contracts would be to place the client in the power of the attorney. Professional duty requires that advice given should be honest, fair and unreserved; but where the weak in morals or the vicious are consulted, and they see and determine to embrace the opportunity to make a champertous contract, how can we expect them to give fair, honest and unreserved advice at the commencement, or in conducting the litigation? The just, the good and upright require

no restraints, but the vicious or immoral should be freed from temptation.

At all times, in the past, champerty has been found a source of oppression and wrong to the property owner, and a great annoyance to the community. To allow it to attorneys, with a portion, but it is believed the number would be small, there would be strong temptation to annoy others by the commencement of suits without just claim or right, merely to extort money from the defendant in buying his peace. Such practices have been denominated as a crime malum in se. And such extortion from others, or by the oppression of a client, is unquestionably a great moral delinquency, that no government regardful of the rights of its citizens should ever tolerate. We see that it is as liable now to abuse as it ever was, and would be as injurious to our community as to other communities in the past. And this court has repeatedly held that common law misdemeanors may be punished in this state, unless abrogated by statutory enactment.

Then, has this common law offense been repealed? We think not. The general assembly has defined the offenses of barratry and maintenance, but the offense of champerty is not named; and as, at common law, all three of these offenses were regarded as separate and distinct, and as the British parliament enacted separate laws in reference to each, and as they were enforced by distinct proceedings, we may regard them as different offenses, although champerty is said to be a species of maintenance. Then, if the 108th section of the Criminal Code would not embrace this offense, it is in force as a common law misdemeanor, and we do not see that it does.

But, it is said that the case of Newkirk v. Cone, 18 Ill. 449, has determined that there is no law in this state against champerty, but this is manifestly a mistake. In that case there seems, at first, to have been a champertous agreement, but it was abandoned by the parties by mutual consent. Cone then went on and rendered services, and sued for professional services in prosecuting and defending causes, also for examining records in public offices, abstracting title to lands, drawing, copying and engrossing conveyances, deeds and writings, for journeys and purchasing lands, and for work and labor. Thus, it will be seen, that, although it may have been argued, the question of maintenance or champerty was not before the court, but simply whether an attorney may recover a fair compensation for professional services and labor performed as an agent, and it was held that a contract of hiring, for the purpose of investigating title, and making purchases, and rendering legal services in settling titles to land thus purchased, was legal, and the person employed could recover for such services. It is true that the court refer to the ancient common law and British statutes to show that the contract of the parties then before the court was not affected by them. It was also shown that our statute against maintenance did not embrace that contract. There, a person desiring to purchase lands employed an attorney to examine title, to give him an opinion as to its validity, and when purchased to litigate against conflicting titles, which was held not to be maintenance. That case is essentially different from this, both in its facts and on principle, and for these reasons it cannot be regarded as an authority in favor of appellee in this case.

This court has held in Gilbert v. Holmes, 64 Ill. 548, and Walsh v. Shumway, 65 Ill. 471, that similar contracts were tainted with champerty, and could not be enforced.

According to the doctrine of the case of Scoley v. Ross, 13 Ind. 117, there can be no question that this contract is champertous, according to the doctrine of the courts of this country. That case refers to and reviews a large number of American decisions on this question, and carries the doctrine to the full extent of the English rule.

It was the policy of the common law to protect persons from harassing and vexatious litigation. Hence, it would not permit a person having no interest in the subject matter of the litigation to intermeddle or to become interested in the suit of another, unless it was an attorney, who could only have and demand a fee for his services, and that not in a portion of the thing in dispute. In the absence of such a rule, great wrong would necessarily be inflicted on community.

On a consideration of all the authorities, we are clearly of opinion that this contract, however honestly entered into and carried out, was void, and that the judgment of the court below should be reversed, and the cause remanded.

Judgment reversed.

FOWLER v. CALLAN.

(7 N. E. 169, 102 N. Y. 395.)

Court of Appeals of New York. June 1, 1886.

Appeal from general term, New York common pleas.

Scott Lord, for appellant. J. A. Kamping, for respondent.

FINCH, J. It does not affect the validity of the contract between the attorney and his client that, measured by the old rules relating to champerty and maintenance, it would have fallen under their condemnation; for neither doctrine now prevails except so far as preserved by our statutes. Sedgwick v. Stanton, 14 N. Y. 289. The attorney may agree upon his compensation; and it may be contingent upon his success, and payable out of the proceeds of the litigation. Such contracts are of common occurrence, and, while their propriety has been vehemently debated, they are not illegal, and, when fairly made, are steadily enforced. In substance, that was the contract here made, and there would be no question about it had it not contained a provision by the terms of which the attorney not only agreed to rely upon success for his compensation, but also to assume all costs and expenses of the litigation, and indemnify his client against them. It is this feature of the contract which raises the question necessary to be determined.

The facts of the case are not very fully developed, but appear to be that the defendant, as devisee under a will, was entitled to certain real estate; his right dependent upon the validity of the will, and in some manner threatened by proceedings before the surrogate, which put his interest in peril, and made a defense essential to its protection. In this emergency he sought the aid and professional service of the plaintiff, and retained him as attorney. The latter neither sought the retainer, nor did anything to induce it. So far as appears, it was not occasioned by any offer or solicitation of his, but originated in the free and unbribed choice of the client. The evidence does not show whether the latter had gained possession of the land devised, or was out of possession, but he gave to the attorney a deed of the one undivided half part of the property, taking back his covenant to conduct the defense to its close, paying all costs and expenses of the litigation, and indemnifying the devisee against all such liability.

The agreement appears to have been purely one for compensation. If the client had given to the attorney money instead of land, the contract would have differed in no respect except the contingent character of the compensation. The arrangement contemplated success in the litigation, in which event the land would pay the costs and expenses and the attorney's reward, and both would be discharged out of the property of the client placed in the hands of the attorney for that precise purpose. The contract in no respect induced the litigation. That was already begun, and existed independently of the agreement, and originated in other causes. It did not tend to prolong the litigation. It made it to the interest of the attorney to close it as briefly and promptly as possible, and at as little cost and expense as prudence would permit. The plaintiff, therefore, stirred up no strife, induced no litigation, but merely agreed to take for his compensation so much of the value of the land conveyed to him as might remain after, out of that value, the costs and expenses had been paid.

We do not think the statute condemns such an agreement. 3 Rev. St. (6th Ed.) p. 449, §§ 59, 60; Code, §§ 73, 74. The Code revision changed somewhat the language of the prohibition, but nevertheless must be deemed a substantial re-enactment of the earlier sections. Browning v. Marvin, 100 N. Y. 148, 2 N. E. 635. They forbid—First, the purchase of obligations named by an attorney for the purpose and with the intent of bringing a suit thereon; and, second, any loan or advance, or agreement to loan or advance, "as an inducement to the placing, or in consideration of having placed, in the hands of such attorney" any demand for collection. The statute presupposes the existence of some right of action, valueless unless prosecuted to judgment, which the owner might or might not prosecute on his own behalf, but which he is induced to place in the hands of a particular attorney by reason of his agreement to loan or advance money to the client. It contemplates a case in which the action might never have been brought but for the inducement of a loan or advance offered by the attorney; and in which the latter, by officious interference, procures the suit to be brought, and obtains a retainer in it. The statute speaks of a "demand" which, by enforcement, will end in a "collection;" phrases which have no aptness to the situation of one simply defending a good title to land against the efforts of others seeking to destroy the devise under which he claims. The plaintiff made no "loan or advance," in any proper sense of those words. They imply a liability on the part of the client to repay what was thus lent or advanced. The attorney loaned nothing, and he advanced nothing to the client which the latter was bound to reimburse. Simply, he was paid in advance an agreed price, taken in land instead of money, and out of which he was first to pay costs and expenses.

The facts before us are not within the terms of the statutes, as it respects a "demand" which is the subject of "collection;" but our conclusion rests more strongly upon the conviction that the agreement made was one for compensation merely, and had in it no vicious element of inducing litigation or holding out bribes for a retainer.

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

All concur.

COURTRIGHT v. BURNES.[1]

(13 Fed. 317.)

Circuit Court, W. D. Missouri, W. D. Nov., 1881.

The case was tried before the court by agreement of parties, a jury being waived.

Botsford & Williams and G. W. De Camp, for plaintiff. Willard P. Hall, Silas Woodson, Benj. F. Stringfellow, and L. H. Waters, for defendant.

McCRARY, C. J. The answer alleges that this suit is being prosecuted by one of the attorneys for plaintiff upon a champertous contract by which he is to pay the expenses of the litigation and receive as his compensation 40 per cent. of the sum realized, and the defendant moves to dismiss the suit for that reason. The proof sustains the allegation of champerty, the testimony of the defendant himself being quite conclusive upon that point. This makes it necessary for the court to decide the important question whether the plaintiff can be defeated in his action upon the note by the proof that he has made a champertous contract with his attorney. In other words, can the defendant, the maker of a promissory note, avoid payment thereof or prevent a recovery thereon upon the ground that the holder of the note has made a void and unlawful agreement with an attorney for the prosecution of a suit upon it.

The authorities upon this question are in conflict. Some courts have ruled that if the fact that a suit is being prosecuted upon a champertous contract comes to the knowledge of the court in any proper manner it should refuse longer to entertain the proceedings. Barker v. Barker, 14 Wis. 142; Webb v. Armstrong, 5 Humph. 379; Morrison v. Deaderick, 10 Humph. 342; Greenman v. Cohee, 61 Ind. 201.

Other courts have held that the fact that there is an illegal and champertous contract for the prosecution of a cause of action is no ground of defense thereto, and can only be set up by the client against the attorney when the champertous agreement itself is sought to be enforced. Hilton v. Woods, L. R. 4 Eq. Cas. 432; Elborough v. Ayres, L. R. 10 Eq. Cas. 367; Whitney v. Kirtland, 27 N. J. Eq. 333; Robinson v. Beall, 26 Ga. 17; Allison v. Railroad Co. 42 Iowa, 274; Small v. Railroad Co. 8 N. W. 437.

This latter view is in my judgment supported by the better reason. It is not necessary for the full protection of the client to go so far as to dismiss the suit, for he is in no manner bound by the champertous agreement; nor are there any reasons founded on public policy that should require such dismissal. If all champertous agreements shall be held void, and the courts firmly refuse to enforce them, they will thereby be discouraged and discountenanced to the same extent and in the same manner as are all other unlawful, fraudulent, or void contracts. If, on the other hand, the defendant in an action upon a valid and binding contract may avoid liability or prevent a recovery by proving a champertous agreement for the prosecution of the suit between the plaintiff and his attorney, an effect would thus be given to the champertous agreement reaching very far beyond that which attaches to any other illegal contract. The defendant in such case is no party to the champerty; he is not interested in it, nor in anywise injured by it. If the contract upon which he is sued is a bona fide contract, upon which a sum of money is due from him to the plaintiff, and he has no defense upon that contract, I can see no good reason for holding that he may be released by showing that the plaintiff has made a void and unlawful agreement with his attorney concerning the fee and expenses of the suit.

The tendency in the courts of this country is stronger in the direction of relaxing the common-law doctrine concerning champerty and maintenance, so as to permit greater liberty of contracting between attorney and client than was formerly allowed, and this for the reason that the peculiar condition of society which gave rise to the doctrine has in a great measure passed away. In some of the states the common-law rule is altogether repudiated, and it is held that no such contract is now invalid unless it contravenes some existing statute of the state. Sedgwick v. Stanton, 14 N. Y. 289; Voorhees v. Darr, 51 Barb. 580; Richardson v. Rowland, 40 Conn. 572; Mathewson v. Fitch, 22 Cal. 86; Hoffman v. Vallejo, 45 Cal. 564; Lytle v. State, 17 Ark. 609.

The common-law doctrine, however, prevails in Missouri, according to the decision of the supreme court of the state in Duke v. Harper, 66 Mo. 55. While following that ruling, I am disposed, in view of the general tendency of American courts, to relax somewhat the rigor of the English rule, to apply it only to the champertous contract itself, and not to allow debtors to make use of it to avoid the payment of their honest obligations.

It follows that the defense of champerty in this case cannot be maintained, and that the motion to dismiss must be overruled.

[1] Irrelevant parts omitted.

SAXON v. WOOD.

(30 N. E. 797, 4 Ind. App. 242.)

Appellate Court of Indiana. March 16, 1892.

Appeal from circuit court, Fayette county; N. S. Gavin, Special Judge.

Action by Addie Wood against Walter Saxon for the breach of a promise of marriage. Judgment for plaintiff. Defendant appeals. Reversed.

J. I. Little and D. W. McKee, for appellant. Reuben Conner and H. L. Frost, for appellee.

BLACK, J. The appellee, a minor, by her next friend, sued the appellant. Upon the appellant's motion, the next friend was removed. The appellee was permitted to prosecute her suit as a poor person. She recovered judgment for $250. A demurrer to the complaint for want of sufficient facts was overruled. This ruling alone is assigned as error. The complaint, filed in September, 1889, omitting the title of the cause, was as follows: "Addie Wood, plaintiff, by Emma L. Disborough, her next friend, complains of Walter Saxon, defendant, and says that plaintiff was a minor of the age of twenty years on the —— day of May, 1889; that, for a period of one year prior to the time of the promise hereinafter alleged, the defendant kept company with, and paid his attentions to, plaintiff as her suitor; that on the —— day of September, 1888, while so keeping company and paying his attentions, defendant solicited plaintiff to have sexual intercourse with him, which she refused to do; that thereupon defendant agreed with and promised her that if she would have sexual intercourse with him, and she should become pregnant from such intercourse, he would at once marry her; that in consideration of such promise and agreement so to marry in case of pregnancy, to which promise and agreement she assented, plaintiff yielded to defendant's solicitations, and did, on four or five occasions, then and on days following, have sexual intercourse with defendant, from which pregnancy resulted, and from which a child was born to plaintiff; that plaintiff was at the time of such promise and intercourse, and still is, unmarried; that, immediately upon the discovery of such pregnancy, plaintiff, who was then willing to marry defendant, requested defendant to fulfill his said promise of marriage, which defendant refused, and still refuses, to do, to plaintiff's damage in the sum of five thousand dollars. Wherefore," etc.

In an action for a breach of a promise to marry, a consideration for the promise must be shown. There must have been mutual promises to marry. Unless there has been a promise on the part of the plaintiff, the promise of the defendant is void for want of consideration. Adams v. Byerly, 123 Ind. 368, 24 N. E. 130. In the case before us the agreement of the parties did not consist merely of mutual promises to marry. The promise and agreement to which it was alleged the appellee assented was to marry in case of pregnancy resulting from her future intercourse with the appellant. It is alleged that he solicited her, not to marry him, but to have sexual intercourse with him, and offered marriage as a consideration for such intercourse and consequent pregnancy. Her acceptance of his offer implied her agreement to marry if their intercourse should result in her pregnancy. The consideration of his promise to marry was alleged to be that she should have sexual intercourse with him, and should thereby become pregnant. The marriage which they agreed about was not to take place until she should have so paid for it. A woman cannot maintain an action for her own seduction, when the yielding of her person has been induced by the promise of a pecuniary reward, (Wilson v. Ensworth, 85 Ind. 399;) but she may maintain such an action where she has been prevailed upon to surrender her chastity under the promise of the seducer to marry her, (Lee v. Hefley, 21 Ind. 98; Shewalter v. Bergman, 123 Ind. 155, 23 N. E. 686, and cases cited.) Her action for seduction is an action of tort provided by statute, whereby she obtains damages for the defendant's wrong, notwithstanding her consent to the act which injures her. An action for a breach of promise to marry is a common-law action founded upon a contract. An action will not lie for the breach of a contract based upon an illegal or immoral consideration. In 2 Kent, Comm. 466, it is said: "The consideration must not only be valuable, but it must be a lawful consideration, and not repugnant to law or sound policy or good morals, ex turpi contractu actio non oritur, and no person, even so far back as the feudal ages, was permitted by law to stipulate for iniquity. * * * If the contract grows immediately out of, or is connected with, an illegal or immoral act, a court of justice will not enforce it." See, also, 2 Chit. Cont. (11th Am. Ed.) 979; 1 Pars. Cont. 456; Bish. Cont. § 494; 1 Whart. Cont. §§ 370-373. The validity of a man's promise to marry a woman is dependent upon the consideration existing for such promise. Felger v. Etzell, 75 Ind. 417-419. In Hanks v. Naglee, 54 Cal. 51, which was an action for a breach of promise to marry, the plaintiff testified, in substance, that the agreement between the parties was that the plaintiff should then presently surrender her person to the defendant, and that in consideration of such surrender the defendant would afterwards marry her. It was held that, upon well-settled principles, the plaintiff could not recover upon such a contract; that, being a contract for illicit cohabitation, it was tainted with immorality. See, also, Boigneres v. Boulon, 54 Cal. 146; Baldy v. Stratton, 11 Pa. St. 316; Goodal v. Thurman, 1 Head, 208; Steinfield v. Levy, 16 Abb. Prac. (N. S.) 26. If it be said that the complaint showed by implication a promise of the appellee to marry the appellant, yet she is not shown to have made any promise which

could serve as a consideration for his promise. Her implied promise was so united with the immoral part of the consideration, and so dependent upon the consequences of the immoral conduct proposed, that it cannot be separated and made to serve as a valid consideration. Steinfield v. Levy, supra; James v. Jellison, 94 Ind. 292; Lodge v. Crary, 98 Ind. 238; Ricketts v. Harvey, 106 Ind. 564, 6 N. E. 325. The appellee relies in argument upon Kurtz v. Frank, 76 Ind. 594; Wilson v. Ensworth, 85 Ind. 399; and Kenyon v. People, 26 N. Y. 203. Kurtz v. Frank, supra, was an action for breach of marriage contract. The questions presented on appeal arose upon a motion for a new trial. It is said in the opinion of the court: "The plaintiff testified that the defendant promised to marry her in September or October, (1878;) that he said he would marry her in the fall, if they could agree and get along and be true to each other; but, if she became pregnant from their intercourse, he would marry her immediately. She did become pregnant about the middle of July, 1878, and informed the defendant of the fact as soon as aware of it. Upon this evidence it is insisted that the agreement to marry immediately, in case of the plaintiff's pregnancy, is void, because immoral, and that, aside from this part of the agreement, the defendant had until the 1st of December within which to fulfill his engagement, and consequently that the suit, begun as it was before that date, was prematurely brought. It does not appear that the illicit intercourse entered into the consideration of the marriage contract, but the appellant, having agreed to marry the appellee at a time then in the future, obtained the intercourse upon an assurance that, if pregnancy resulted, the contract already made should be performed at once. This did not supersede the original agreement, but fixed the time of its performance. Clark v. Pendleton, 20 Conn. 495. We are not prepared to lend judicial sanction and protection to the seducer by declaring that he may escape the obligation of his contract, so made, on the plea that it is immoral. But if this were otherwise, and if, by its terms, the contract was not to be performed until at a time subsequent to the commencement of the suit, yet if, before the suit was brought, the appellant had renounced the contract, and declared his purpose not to keep it, that constituted a breach for which the appellee had an immediate right of action."

The appellee relies upon the sentence, "We are not prepared," etc. This sentence, and the portion of the opinion following it, as above quoted, had reference to the question whether the action was prematurely brought. The case lends no aid to the contention of the appellee. The court, in effect, held that if the time of performance fixed by the contract, into which no immorality entered, could not be changed and fixed by the assurance on the part of the defendant that, if pregnancy should result, the contract already made should be performed at once, then his renunciation of the contract to marry constituted a breach of that contract, and gave the plaintiff an immediate right of action on that contract, and therefore it was not necessary that the commencement of the action should have been delayed until the time fixed for the marriage in the original contract. Wilson v. Ensworth, supra, was an action for the plaintiff's own seduction. It was said in the opinion of the court: "In this case the promise was pecuniary aid. Reliance upon such a promise did not make the act seduction. A promise to marry would be different, and constitute a sufficient inducement. The yielding of the woman to the solicitations of the man, under such a promise, would imply a promise on the part of the woman to marry the man. The contract would be legal, and for its breach the law would give the injured party a remedy. Kenyon v. People, 26 N. Y. 203; Kurtz v. Frank, 76 Ind. 594." The injured party in such case might have a remedy by action for seduction, but illicit intercourse could not form a valid consideration for the contract to marry. The statements that the contract would be legal, and that an action would lie for its breach, were not necessary to the decision of the case. Kenyon v. People, supra, was a criminal prosecution for seduction. The judge of the trial court charged the jury that, "if they were fully satisfied from the evidence that the defendant promised to marry the prosecutrix if she would have carnal connection with him, and she, believing and confiding in such promise, and intending on her part to accept such offer of marriage, did have such carnal connection, it is a sufficient promise of marriage under the statute." The statute thus referred to was: "Any man who shall, under promise of marriage, seduce and have illicit intercourse with any unmarried female of previous chaste character, shall be guilty of a misdemeanor," etc. In the opinion of Wright, J., it was said of this instruction: "This seems to me unobjectionable. It is not necessary that the promise should be a valid and binding one between the parties. The offense consists in seducing and having illicit connection with an unmarried female under promise of marriage. It is enough that a promise is made which is a consideration for or inducement to the intercourse." Having thus given a sufficient reason for upholding the instruction, the judge proceeded: "But if the statute required the promise to be a valid one, the charge was correct. A mutual promise on the part of the female seduced is implied if she yields to the solicitations of the seducer, made under his promise to marry." This suggestion that such implied promise, together with the seducer's express promise, made in consideration of or dependent upon solicited carnal intercourse, could constitute a valid contract to marry, is contrary to principle and authority. It appears from the report of the case that Bal-

com, J., "concurred with Judge Wright in the conclusion that it was unnecessary for the district attorney to prove there was a valid contract of marriage between the prosecutrix and prisoner prior to the illicit connection, and said, among other things, that, before the statute could be construed as contended for by the prisoner's counsel, it should read that any man who shall, under 'contract' of marriage, seduce, etc., and not any man who shall, under 'promise' of marriage, seduce, etc., as it now is." The judgment is reversed, and the cause is remanded, with instruction to sustain the demurrer to the complaint.

COLLAMER v. DAY.

(2 Vt. 144.)

Supreme Court of Vermont. Windsor. Feb., 1829.

This was an action of trover, brought up from the County Court for the revision of their decision presented in the following case, agreed to by the parties, to wit:

"In this action, plaintiff offered to prove, at the trial, that, on the day mentioned in the declaration, the plaintiff and defendant were together in the office of Jacob Collamer, at *145 Royalton—that *while there, a gentleman passed in a chaise: when defendant asked, whose chaise is that? Plaintiff answered, Dr. Denison's. Defendant said no, it is not Denison's chaise: I will bet my watch against yours that it is not Denison's chaise—That to this proposal plaintiff agreed—That each of the parties then took out his watch, and laid it upon the table: and it was then mutually agreed by the parties, that they would go together, and ascertain whether the said chaise was the said Denison's chaise; and that, if it was, plaintiff should take both watches; and, if not, defendant should take both, as and for his own—That they did proceed and examine, and found it to be said Denison's chaise—That the parties then returned to the said office, and the defendant immediately took up his watch, and carried it away—That, on the same day, plaintiff demanded said watch of defendant, who refused to deliver it, but converted it to his own use. This evidence was objected to by the defendant's counsel, and excluded by the Court. To which decision the plaintiff excepted, and the exception was allowed, and the cause ordered to pass to the Supreme Court.

Mr. Marsh, for plaintiff, contended, That by the common law, a wager in general, is legal, if it be not an excitement to a breach of the peace, or to immorality; or if it do not affect the feelings or interests of a third person, or expose him to ridicule, or libel him; or if it be not against sound policy;—and that the wager in question could not lead to any of those consequences. He cited, among other authorities, 2 T. Rep. 693.—Cowp. 37. The counsel, also, contended, that actual delivery of the property, in this case, was not necessary in order to vest the property in the plaintiff, and to enable him to maintain trover; and cited Loft, 219.—Cro. Eliz. 866.—1 T. Rep. 56.—7 id. 9.—1 Salk. 113. —1 Strange, 165, Atkin vs. Barwick.

The Court declined hearing *Mr. Everett*, for the defendant.

The opinion of the Court was delivered by

HUTCHINSON, J.—Nothing appears in this case, but that the action would be maintainable by the common law of England. The common law is adopted by our statute, so far, and so far only, as the same is applicable to our local situation and circumstances, and is not repugnant to the constitution, or to any act of the legislature, of this state. Whether applicable, or not, must necessarily be a question of judicial decision: and this is, probably, the first action, that has ever called upon a court in this state to sanction such a contract of betting. The Judges of the Courts in *England *146 have expressed their regret, of late years, that such transactions ever received the sanction of a court of justice: but, they yield to the force of the law, which they consider settled by a train of decisions, extending down from remote antiquity. We feel no such embarrassment, nor are we willing to transmit any such embarrassment to our successors; nor diffuse into society the influence of a rule so demoralizing, as would be the sanction of such a contract. It is honorable to this state, that the industrious and moral habits of our citizens have furnished no occasion to litigate questions of this nature. It is honorable to the legislature, that they have interposed checks to such games and sports as they supposed were creeping into use. By the Statute of 1821, page 268, penalties are affixed to the winning or losing, or betting, in money, goods or chattels, on any game, or on any horse-race, or other sport, within this state. And said statute makes void any contracts and securities made and given for money won on such games. The species of betting now in question may not come within that statute, giving it the strict construction of a penal statute: yet the good morals of society require, that no encouragement should be afforded to the acquisition of property, otherwise than by honest industry. Time might be occupied in seeking occasions to take advantage of the unwary, and acquiring a skill to take such advantage, which ought to be devoted to better purposes.

In this case, according to the terms of the bet, the plaintiff had acquired a right to the possession of the watch, which the defendant had laid down in the bet, but the plaintiff had not acquired the actual possession, when the defendant resumed his possession. The plaintiff, therefore, had no complete right to the watch, without the sanction of such a contract of betting. That sanction is now withheld, and

The judgment of the County Court is affirmed.

BEADLES et al. v. McELRATH et al.

SAME v. LEET et al.

(3 S. W. 152, 85 Ky. 230.)

Court of Appeals of Kentucky. February 19, 1887.

W. W. Tice and Wm. Lindsay, for appellant. Robertson & Robbins, Hargis & Eastin, and C. L. Baudle, for appellees.

PRYOR, C. J. These two cases were argued and will be considered as one case. The appellants, Beadles, Wood & Co., were cotton brokers, engaged in buying and selling cotton on commission, as they allege, in the city of New Orleans. They instituted these actions in the court below against the appellees for large sums of money said to have been advanced by them for the appellees in the purchase and sale of cotton on the cotton exchange in the city of New Orleans. The appellees, by way of defense, allege, in substance, that the claim set up by the appellants originated by reason of certain transactions between them and appellants in the purchase and sale of cotton on speculation, and under contracts that were not to be performed for the delivery of the cotton, and the payment therefor, at the maturity of the contracts; that they were dealing in futures, by which they were to pay in money the difference by reason of wagering bargains by which no cotton was sold or delivered, and none intended to be delivered, when the contracts were executed. They also allege that Beadles, Wood & Co. were dealing largely in cotton on their own account or for others, and that, having made contracts in which the appellees had no interest, similar to those made with the appellees, they were unable to meet their obligations with members of the cotton exchange, with whom they contracted, and, under the rules of the exchange, those contracts were all declared forfeited, including the contracts said to have been made for the appellees; that the forfeiture took place before their contracts matured, and in that manner they were deprived of any right to recover, without fault on the part of either the appellants, or of those with whom they contracted for their benefit. A jury, by special findings, determined the issue in the case of McElrath & Co., and the judge, on a submission of the law and facts to him, determined the case of Leet & Meadows.

The one case, that against McElrath & Co., was decided for the defendants because of its vicious consideration, it being a gambling transaction; and the other, that of Leet & Meadows, on the ground that the forfeiture of the contracts was caused by the insolvency of the appellants, who were unable to comply with their contracts, and caused the loss to the defendants,—the judge further holding that the contract was not a wagering contract, or against public policy. The cases were determined in different jurisdictions, but were heard together in this court. The judgment in each case was rendered for the appellees. The appellants, having denied that the contracts were invalid, relied on certain rules of the cotton exchange, from which it appears that such contracts can be enforced for the delivery of the cotton, and further established by the testimony that the contracts were made subject to the rules of the cotton exchange, and should not, therefore, be regarded as wagering contracts. The contracts being in writing, it is further maintained that parol proof is inadmissible to vary their terms. By the rules of the cotton exchange, the delivery of the cotton may be exacted, and the testimony conduces to show that the appellees entered into the contracts with the knowledge that by its terms those rules were to determine its legal effect. In fact, the jury trying this case, in response to special interrogatories, have so said by their verdict.

In this case it, then, plainly appears that contracts legitimate on their face, containing stipulations plain and easily understood, by which the cotton purchased is required to be delivered, have been declared vicious, in the one case at least, upon parol testimony showing that such was not the real purpose and intention of either party to the contract; the real purpose being, in fact, to speculate only on the rise and fall of prices, as has been determined by the special findings of the jury in the particular case. If the written contract and the rules of the cotton exchange are to control the decision of this case, then the facts and circumstances by which the real nature of the various transactions were brought to light should have been excluded from the jury, and a judgment rendered for the appellants, the plaintiffs below. The question simply is whether a contract, legal and proper in form, can be avoided by a proper pleading, and shown to be in fact a contract vicious in its character, and contrary to public policy; a contract legal on its face, but when explained by the facts and circumstances connected with its performance, only a gambling transaction. The rule is well established that parol evidence is not admissible to restrict, enlarge, or contradict the terms of a written contract where there is no ambiguity in its meaning; but when facts are alleged showing the existence of fraud, or that the contract was entered into as a device to avoid what would otherwise be a vicious consideration, as is in substance alleged in this case, this rule has no application.

The rule, says Mr. Greenleaf, "is not infringed by the admission of parol evidence showing that the instrument is altogether void, or that it never had any legal existence, either by reason of fraud, or for want of due execution and delivery, or for the illegality of the subject-matter." Again: "Parol evidence may be offered to show that the

contract was made for the furtherance of objects forbidden by law, whether it be by statute, or by an express rule of the common law, or by the general policy of the law," etc. 1 Greenl. Ev. (14th Ed.) 360, 361. So, in this case, although by the rules of the cotton exchange the cotton was to be delivered, and the contract made with the appellees expressly stipulated the delivery at a particular day in the future, still, if this was a mere device to avoid the effect of a contract that the parties really made, and if expressed in terms would have been vicious, and without consideration, we perceive no reason why such facts may not be pleaded and proven, and the recovery on that account denied. That a contract of sale may be made for the future delivery of produce, or any article of personal property, will not be controverted; and that such a contract, by the agreement of parties, or by the regulations connected with the boards of trade in the country, may be transferable from one to the other, will be conceded; but when entered into for the sole purpose of speculating in futures, and with no intention to deliver the cotton purchased, but to pay the difference between the contract price of the cotton and its market price on the day, if a contract in good faith, the cotton was to be delivered, then the contract becomes a mere wager, and neither party to it can recover. If a contract in good faith, it is binding; but when assailed as having been entered into to cover up the real intention of the parties, by making that appear legitimate which is really a gaming transaction, the defendant will be permitted to introduce parol proof to establish his defense.

Such a contract will be presumed to be valid when unexplained, because it shows by its terms an actual purchase and sale, and the burden is on the defense to show the illegal intention of the parties. As said by Agnew, J., in the case of Kirkpatrick v. Bonsall, "the law does not condemn such transactions, providing the intention really is that the commodity shall be actually delivered and received when the time for delivery arrives." 72 Pa. St. 155. In Barnard v. Backhaus, 52 Wis. 593, 6 N. W. 252, and 9 N. W. 595, that court went further, and held "that, for the sale and delivery at a future day of grain for a fixed price, it must affirmatively and satisfactorily appear that it was made with an actual view to the delivery of the grain, and not as a cover for a gambling transaction."

It seems to us that the terms of the written contract imply good faith, and the burden should rest on the defense to show the illegal purpose. It becomes necessary, therefore, to examine the nature of the transactions between these parties, in the light of the testimony before us, with a view of determining the validity of those contracts. By the rules of the cotton exchange, no one but a member can make contracts for the purchase and future delivery of cotton. Therefore the broker, being a member when purchasing, must necessarily purchase of a member of the exchange; and in this manner they make large contracts by either purchasing or selling cotton for future delivery, and assign so much of the contract to each customer as the broker may have received orders to purchase or sell. He receives orders to purchase from A., B., C., and D., living in Kentucky, to purchase 2,000 bales for each, and a like number of orders from A., B., C., and D., living in Tennessee. The broker enters the exchange, and purchases of one or more members 16,000 bales of cotton in his (the broker's) own name, and then on his books assigns, or by contract passes, to each one of his eight customers, 2,000 bales of cotton, at the price for which he purchased; the purchasers depositing such a margin as is required by the rules of the exchange. If the broker should receive a telegram from one of the parties in Kentucky to sell his 2,000 bales before the time of delivery, and one of his customers from Tennessee should want to purchase an additional 2,000 bales, he then transfers on his books the cotton of the Kentucky customer as sold to the Tennessee customer, at that day's prices. All dealers are to keep up their margins as the fluctuations in prices demand, as this is determined by the rules of the exchange. The speculator in futures from this mode of dealing, whether for actual delivery or not, has in fact made a purchase of cotton, but can never ascertain with whom the contract was made. The broker may inform the exchange for whom he is purchasing, but this gives no right of action against any one but the broker. The broker is insisting that he is the mere agent of the purchaser, and entitled to his commission, and, when told by the purchaser that the 2,000 bales of cotton must be delivered at the maturity of his contract, it is then ascertained that the broker has purchased 16,000 bales of cotton of one or more members of the exchange in his own name, and, the margin not being kept up, the entire contract is forfeited, and the moneys already advanced on the margin gone to the vendor of the cotton.

In February, 1882, the appellants, being purchasers of near 60,000 bales of cotton, notified the exchange that they were unable to comply with their contracts. The forfeiture took place, and this was before the maturity of the contracts with the appellees; but it is now insisted that, if the margins had been kept up, the contracts would have remained in force. Suppose the margins had been forwarded to the appellants: from the testimony in this case, the appellants have purchased cotton exceeding in value more than $200,000, and the margin being called for, and not deposited, the whole contract went with the insolvency of the firm that took place in February, 1882. These appellants

were in fact selling to the appellees, and were not their agents. They purchased large quantities of cotton in the exchange on their individual account, and afterward distributed those purchases between their customers, leaving them without any remedy except against the broker for the delivery of the cotton, if such had in good faith been the contract between them. With the prices of cotton favoring the appellees, their claim as purchasers might have been enforced through their broker, in his name; but with an insolvent commission merchant, whose credit alone enabled him in the first place to enter the exchange, and make these large purchases, the remedy was necessarily worthless, because the party in fact liable had become insolvent.

It is shown that within less than a year prior to these contracts with the appellees, that appellants contracted for 300,000 bales of cotton, and on the eighth of February, 1882, the day they failed, the contracts they had on hand compelled them to receive and pay for near 60,000 bales of cotton, a portion of which, they say, was the cotton of these appellees. The appellants were not worth exceeding $75,000, if that much, and yet it is argued that such contracts were valid business transactions, and the parties expected to comply with the terms of each contract; or, if not, that the prime object was not to speculate merely on the rise and fall of cotton, but to receive or deliver the cotton purchased or sold. It is evident that if the margin had been forwarded by the appellees, that all would have gone in the financial wreck that followed the reckless ventures of men who were doubtless enterprising merchants, but who had speculated to such an extent, either for themselves or others, as to involve all in financial ruin. This would constitute a complete defense to each action, regardless of the other questions raised, and the judgment in the case of Leet & Meadows was therefore proper. It is claimed that McElrath, one of the firm, was in New Orleans, and on the exchange, when some of this cotton was purchased. He was not a member of the exchange, and therefore made no purchases, but the cotton was purchased in the manner and as all other cotton was purchased for their customers by these appellants. They were simply paying the appellants a bonus for the privilege of trading with them, and were, in fact, the vendors, and the appellees the vendees, of the cotton. These appellees were men of limited means, living in this state, and contracting by telegrams and letters for futures in cotton, with no intention or expectation of receiving a single bale, either from the appellants or any one else, and this was the intention and purpose of the contracts,—a fact known to the appellants as well as the appellees. The testimony of the appellants leaves no doubt on this subject, and neither the rules of the cotton exchange, nor the letter of the contract, will be allowed to give validity to such agreements.

The opinion in the case of Sawyer v. Taggart, reported in 14 Bush, 727, was based on the ideà that no evidence was offered by the defense showing that the contracts were to be settled by the payment of differences; but, on the contrary, the plaintiffs had assumed the burden, or rather established, that the contracts were to be executed in good faith, with no evidence conflicting with such a conclusion. Here the character of the business transactions conducted by the appellants, from their own statements, both with the appellees and others, conduce to show that there was a tacit, if not an express, agreement that no cotton was to be delivered, and, with the testimony for the defense, there can be no doubt on the subject.

But it is argued that a mere tacit agreement, or one necessarily inferred from the circumstances surrounding the various transactions connected with the positive statements of the defendants, cannot supplant that which the parties have reduced to writing, and the contracts must be enforced because they purport to be valid contracts, and the rules of the cotton exchange have so determined. In discussing a similar question, the supreme court, through Mr. Justice Matthews, said: "We do not doubt that the question whether the transaction came within the definition of wagers is one that may be determined upon the circumstances, the jury drawing all proper inferences as to the real intent and meaning of the parties; for, as was properly said in the charge, 'it makes no difference that a bet or wager is made to assume the form of a contract.' Gambling is none the less such because it is carried on in the form or guise of legitimate trade. It might therefore be the case that a series of transactions might present a succession of contracts perfectly valid in form, but which on the face of the whole, taken together, in connection with all the attendant circumstances, might disclose indubitable evidence that they were mere wagers." Irwin v. Williar, 110 U. S. 511, 4 Sup. Ct. 160.

The bulk of the transactions in the exchange by the appellants were in the department known as the "margin," as distinguished from the other departments. The amount of cotton delivered in all the sales and purchases did not exceed 4,000 bales, and the proof conduces to show that the cotton was on consignment; but, whether so or not, it is unreasonable to suppose that the appellees, with their limited means, had undertaken to receive and pay for cotton exceeding in value greatly more than they were worth, and that appellants induced them to speculate through him as their agent with such an understanding or agreement. There are so many facts and circumstances leading to the opposite conclusion as to the intention of both parties when these trades were made as leave no doubt as to the correctness of the judg-

ment below. We are aware that the business of the cotton exchange involves the greater part of the trade in the country's greatest staple, and that leading merchants and business men engage in such transactions; but this in no manner relieves the case from the vicious features of this class of contracts. Men, no doubt, of both personal and commercial integrity enter into such contracts. They are nevertheless pirates upon the legitimate trade, and consumers of the country. Fictitious values, created by a speculation that causes the fluctuation in prices from day to day of all the leading products of the country, based upon a species of gambling more ruinous to the people than any other, result from such contracts as were made in this case. They will not be enforced by the courts of this state.

There are many questions raised as to the pleadings and evidence not necessary to be considered, as from the testimony of the plaintiffs alone these judgments were proper. Judgment affirmed.

SPINKS v. DAVIS.

(32 Miss. 152.)

Court of Errors and Appeals of Mississippi. Oct. Term, 1856.

Error from circuit court, Tallahatchie county; W. L. Harris, Judge.

This was a suit brought by W. P. Spinks against A. W. Davis, upon an agreement entered into between Spinks and Davis, whereby Davis, for a consideration, undertakes, as attorney, to assume the administration of a certain estate, and collect a debt due to Spinks. The defendant demurs and sets forth several causes, the principal of which is that the agreement is illegal, contrary to public policy, and therefore void, in support of which position a number of cases are cited, none of which I think are in point. The case cited from 4 Wash. C. C. R. 279, differs very widely from the one at bar. In that case absolute fraud and corruption was charged; the others are of similar character. I cannot see how the agreement is contrary to public policy. It is clear that a person, when he is immediately interested, or a creditor, can take out letters of administration, but it is equally clear, that what he is authorized to do himself, he may authorize another to do for him. "Qui facit per alium, facit per se."

The position of the attorney is not more inconsistent than would be the position of the principal; they are identically the same. See Hutch. Code, 665, § 54.

W. B. Helm, for plaintiff in error. Daniel Mayes, for defendant in error.

HANDY, J. The declaration in this case states, in substance, that the plaintiff contracted with and retained the defendant as an attorney-at-law, to collect certain claims to a large amount, due him from the estate of one John Carson, deceased, who resided in Alabama, and died insolvent, but was entitled to a distributive share of the estate of his father William Carson, who had previously died in Tallahatchie county, in this state; that the said estate having been fully administered and distribution made, and no distributive share set apart or allowed to John Carson, and the plaintiff being advised, that in order to reach John's interest in his father's estate, it would be necessary to take out letters of administration of John's estate, and proceed against the administrators of the father's estate, contracted with and retained the defendant as an attorney, to take out letters of administration upon John's estate, and to collect his debt, for certain reasonable fees and reward to be paid to him; that the defendant accordingly took out letters of administration in the Tallahatchie probate court, at June term, 1856, and, in conjunction with other counsel retained with the defendant, the defendant, as such administrator, filed a bill in chancery against the distributees of William Carson's estate, and obtained a decree in his favor at October term, 1850, from which an appeal was taken by the adverse parties, to this court; that pending that appeal, the defendant, without notice to the plaintiff or his associate attorney, fraudulently stated to this court, that the suit was commenced and prosecuted without his knowledge or consent, whereupon this court, considering that admission as a confession of errors, and without examining the merits of the case, reversed the decree; and the same statement being afterwards made to the chancery court, the bill was finally dismissed by that court, at April term, 1853. The declaration avers, that the plaintiff's debt could have been collected, but that it was prevented by the fraudulent conduct of the defendant; wherefore, he prays judgment against the defendant in his individual capacity for his debt, &c.

The defendant demurred to this declaration upon many grounds, and judgment was rendered thereupon for the defendant; and for this alleged error, the case is brought here.

We will proceed to consider the correctness of the judgment upon the most essential point of the demurrer.

The first objection to the declaration is, that the contract set up is contrary to public policy, and, therefore, illegal and void.

This agreement as stated is, in substance, that the defendant who was thus retained as the attorney of the plaintiff, to collect his debt, for compensation, should also become administrator of the debtor's estate, and thereby accomplish the object of his original engagement and collect the debt. The question is, do not these respective duties involve incompatible obligations, or, does not the faithful performance of one of them tend necessarily to the violation of the other?

It was the duty of the attorney diligently to prosecute the claim according to law, and to collect it if it could be done by legal means. It was the duty of the administrator to scrutinize the claim rigidly, and to refuse payment if there was any doubt about its justness in fact, or its validity according to strict legal rules; to defend, upon the ground of the statute of limitations, the illegality or want of consideration of the claim, or any other bar which was a sufficient defence to it in law. And all such defences it was the plain duty of the attorney to resist. In short, the attorney was bound to protect the interest of his client, and the administrator was primarily bound to protect the legal interests of the estate. Under such circumstances, the attorney could not have performed his duty to prosecute the claim, if its validity had been doubtful, consistently with his duty to defend the estate against its collection. Hence, a strong temptation would necessarily arise to violate his duty in the latter capacity, and to pay the claim; because the attorney would thereby make a profit by his retainer in addition to the commission which he would at all events receive as administrator; and instead of acting as a faithful and impartial adminis-

trator, he stands under a strong temptation to abuse his trust to his own private gain. If the claim should be of such doubtful validity as to make it the duty of the administrator to resist its payment and to render a suit necessary, what is his attitude? He must either become the plaintiff's attorney in the suit against himself as administrator, or he must procure some one else to bring the suit against him. In this, there would be an almost irresistible inducement to malpractice and collusion; for, considering the infirmities of human nature, it is scarcely to be supposed, that he would make a very vigorous defence to a suit in which he was directly interested that the plaintiff should recover.

But in this case, the main object of the arrangement was the collection of the plaintiff's claim, and to that the defendant was primarily bound by his agreement. The administration was to be undertaken merely as a means to that end. How, then, could the attorney properly perform his contract to collect the plaintiff's claim, when it might become his duty as administrator to resist it? Either by the force of his contract, and in furtherance of the object of the undertaking, or by the temptation to do wrong which his situation would render almost irresistible, he must act as administrator, so as to facilitate the end for which the whole arrangement was entered into, and thereby violate his duty in that capacity.

The obligations are, therefore, manifestly inconsistent, and are calculated to induce a violation of one of two high public duties; and the agreement must therefore be condemned as illegal and against public policy, so far as it charged the attorney, upon his individual undertaking, to collect the claim by means of the administration.

It is no answer to this view of the case to say, that the defendant might properly have performed his duty generally, as administrator, as well to others interested as to the plaintiff, and yet have properly paid the claim of the plaintiff; and that it is to be presumed that the arrangement was intended to be carried out by legal means, and not by those which were illegal. It is a sufficient objection to a contract, on the ground of public policy, that it has a direct tendency to induce fraud and malpractice upon the rights of others, or the violation or neglect of high public duties. Upon this principle, contracts to procure the making of a will in favor of a particular party, or to bring about a marriage between certain parties, and the like, are held to be illegal as being against public policy. For although the act contracted to be done may be just and beneficial as between the parties immediately concerned in it, and though it be accomplished in good faith and without undue means, yet the contract to procure it to be done is held to be against public policy, because its natural effect is to cause the party to abuse the confidence placed in him by those upon whom the influence is to be exerted, and thereby prejudicially to affect the rights of others. Fuller v. Dame, 18 Pick. 472; Collins v. Blantern, 2 Wils. 347; 1 Story, Eq. Jur. §§ 265, 266; Chit. Cont. 525, 526; 1 Lead. Cas. Eq. 150–169, and cases there cited.

It is urged, in support of this action, that by our laws a creditor has the right to take out letters of administration upon his debtor's estate, if parties having the prior right fail to do so; and that there can be no impropriety in the attorney's doing that which his client, who had the same temptation to do wrong as the attorney, is allowed to do.

But the question is, not whether the attorney had the right to administer, but whether a contract by which he was either bound, or under a strong and direct temptation, to use his trust for the purpose of paying the claim of the plaintiff, is proper and legal. The creditor-administrator is under no contract to induce him to abuse his trust; and being known as a creditor, his acts will, in all probability, be closely examined by those interested in the estate. But the attorney appears as a disinterested person, in whom the parties may confide for the faithful performance of all his duties, and especially for the protection of the rights and interests of the estate. He is supposed not to be acting in his own right, but for the benefit of others, and impartially; and from the confidence that may well be presumed to be reposed in him, he will have much greater power to make underhand arrangements than would the creditor himself, who was known to be acting mainly for his personal interest. The policy of the statute allowing a creditor to administer upon his debtor's estate, proceeds on the ground of enabling the creditor to collect his debt, and that from necessity, because no one else will administer. But it is not to be extended to justify agreements made by third persons who may become administrators, the performance of which will have a direct tendency to cause malpractice and fraud in the administration.

Nor is this agreement of the same character as a contract to indemnify a party for becoming administrator of an estate. In such a case, the administrator is bound to do nothing which at all conflicts with his duty as such. He undertakes the trust for no ulterior collateral purpose, and the object is merely to have the estate administered in due course of law. The indemnity or compensation is only to induce him to take upon himself the trust to be performed according to law, and there is no continuing inducement to malpractice after the trust is undertaken.

If these views of the case be correct, it follows that however the conduct of the defendant, as stated in the declaration, may be condemned in point of morals, or whether he be liable or not for his fraudulent conduct as administrator, no action against him individually can be maintained upon the agreement made by him; and the judgment sustaining the demurrer must be affirmed.

LOWE v. PEERS.

(4 Burrows, 2225.)

King's Bench. 1768.

This was an action of covenant, upon a marriage contract; being a promise under the defendant's hand and seal, and in his own handwriting, to the effect following—"I do hereby promise Mrs. Catherine Lowe, that I will not marry with any person besides herself: If I do, I agree to pay to the said Catherine Lowe £1,000 within three months next after I shall marry any body else. Witness my hand Newsham Peers and seal &c." This deed was executed in 1757. And in 1767, Peers married another woman. Whereupon this action was brought.

The plaintiff avers, in her declaration, "that she had remained single, and was always willing and ready to marry him, whilst he continued single: but he married Elizabeth Gardiner." The breach was assigned in nonpayment of the £1,000, though demanded. The defendant pleaded "non est factum."

The question turned upon the second count only: for, it was admitted, that no sufficient evidence was given to support the first count.

The cause was tried before Lord MANSFIELD. It appeared in evidence, by letters that were read, that there had been a long courtship; and that this obligation was fairly and voluntarily given by the defendant to the plaintiff: the defendant pulled the stampt paper out of his own pocket; and wrote, signed, sealed, and executed it, in the presence of one witness. And a witness who saw it executed, attested it, after the defendant was gone. There was no intercourse between the plaintiff and defendant afterwards. The witness to prove this deed swore that the defendant sealed it before he wrote his name "Newsham Peers." Evidence was called, on the other side, to prove the contrary.

His lordship directed the jury to find for the plaintiff, with damages £1,000 if they thought the deed to be a good deed. If this direction was wrong, he gave the defendant leave to move for a new trial, without costs.

Accordingly, on Thursday, 21st April last, Mr. Dunning, solicitor general, moved for a new trial, with liberty also to move afterwards in arrest of judgment.

Rule to shew cause.

Upon shewing cause on Monday last, (the 9th instant,) a question was proposed to be debated, "Whether the jury could give any more or less damages than the £1,000, the specific sum mentioned in the deed;" as well as "whether this instrument is good enough in law, to support any action whatsoever?"

It was then agreed that both motions, (viz. for a new trial, and in arrest of judgment,) should come on to be argued together.

Pursuant to which agreement, the case was, yesterday and to-day, argued by Sir Fletcher Norton, Mr. Cust and Mr. Wallace for the plaintiff; and by Mr. Dunning, solicitor general, and Mr. Mansfield for the defendant: but the court, in giving their opinions upon the two motions, entered so fully into the grounds and reasons upon which they founded their determination, and discussed the objections and cases cited so particularly, as may render the arguments of the counsel unnecessary to be given here at all; or at least, more than a slight sketch of them. The general tendency of them was shortly this:

The motion for a new trial was founded upon an objection to the direction given to the jury, "to find the whole sum of £1,000 in damages, in case they should find for the plaintiff:" the counsel for the defendant insisting that the jury ought to have been left at liberty to give a less sum, if they had thought proper; the jury being judges of the damages, as well in covenant as in assumpsit. They cited James v. Morgan, 1 Lev. 111, where the jury were directed to give only the value of the horse in damages, upon an assumpsit "to pay a barley-corn a nail, doubling it every nail." They also cited and much relied upon Sir Baptist Hixt's Case, in 1 Rolle, Abr. p. 703, tit. "Trial," pl. 9, where a finding of less was holden to be good; and the jury are said to be chancellors, and may give such damages as the case requires in equity.

It was answered, that where a particular sum is liquidated and fixed by the agreement of the parties, and the breach of covenant assigned in non-payment of that money, that fixed sum alone is the measure of the damages.

The motion in arrest of judgment was founded upon the following reasons—That all engagements in restraint of marriage are void. —That this engagement is of that sort—That there is no consideration for this contract. It is not reciprocal: here is no mutuality; which is essential to the validity of a contract.

It was answered, that this whole transaction amounts to a mutual promise "to marry each other." The plaintiff's acceptance of this deed is sufficient evidence of her making such a promise. So that there were mutual promises; and both were bound to perform them. Therefore there was a consideration for the defendant's promise. However, this promise is by a deed: and a deed carries its own consideration.

And this is not an engagement in restraint of marriage generally: it is only a restraint from marrying any body else but each other. Therefore it is not like the case of Baker v. White, 2 Vern. 215, or that of Woodhouse and Shepley, in 2 Atk. 535.

Lord Mansfield stated the deed particularly, and the declaration upon it. The words are— "I do hereby promise Mrs. Catherine Lowe that I will not marry with any person besides herself: if I do, I agree to pay the said Catherine Lowe £1,000 within three months &c." The defendant was single, at the time; and so was the plaintiff.

The second count avers that the plaintiff

was ready to marry him; and that after the making the deed, he did marry another woman, namely, one Elizabeth Gardiner: yet he, the defendant, did not, when requested by the plaintiff, pay the £1,000 which he had agreed to pay; and so (though often requested) hath not kept the covenant made between them as aforesaid. So that the breach is assigned in the not paying the £1,000.

To this declaration "non est factum" was pleaded, by the defendant: but the jury found "that it was his deed;" and have given £1,000 damages. And by law and in justice, he ought to pay the £1,000. Money is the measure of value. Therefore what else could the jury find but this £1,000 (unless they had also given interest after the three months?)

This is not an action brought against him for not marrying her, or for his marrying any one else: the non-payment of the £1,000 is the ground of this action—"That he did not, when requested, pay the £1,000."

The money was payable upon a contingency: and the contingency has happened. Therefore it ought to be paid.

There is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election. He may either bring an action of debt for the penalty, and recover the penalty; (after which recovery of the penalty, he can not resort to the covenant; because the penalty is to be a satisfaction for the whole:) or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, toties quoties.

And upon this distinction they proceed in courts of equity. They will relieve against a penalty, upon a compensation: but where the covenant is "to pay a particular liquidated sum," a court of equity can not make a new covenant for a man; nor is there any room for compensation or relief. As in leases containing a covenant against plowing up a meadow; if the covenant be "not to plow;" and there be a penalty; a court of equity will relieve against the penalty, or will even go further than that (to preserve the substance of the agreement:) but if it is worded—"to pay £5 an acre for every acre plowed up;" there is no alternative, no room for any relief against it; no compensation; it is the substance of the agreement. Here, the specified sum of £1,000 is found in damages: it is the particular liquidated sum fixed and agreed upon between the parties, and is therefore the proper quantum of the damages.

The same reason answers to the motion for a new trial in the present case.

As to the case mentioned by Mr. Mansfield, from 2 Rolle, Abr. 703.—It is impossible to support it: for it can not be, that a man should be obliged to take less than the liquidated sum. And the writ of error in that case was plainly brought by the (Cro. Jac. 390) defendant. Besides, the damages could never be taken advantage of upon a writ of error. How could the quantum of damages found by the jury be the subject of a writ of error?

'Tis therefore clear, that where the precise sum is not the essence of the agreement, the quantum of the damages may be assessed by the jury: but, where the precise sum is fixed and agreed upon between the parties, that very sum is the ascertained damage, and the jury are confined to it.

This brings the matter to the validity of the deed.

Whatever grounds existed at that time, that could avail the defendant to avoid the deed, should have come on his part, by a proper plea, if it would in reality have been a good defence for him. And therefore if any such ground had existed in this case, as did exist in Shepley's Case (2 Atk. 535); or any other ground not appearing upon the face of the deed; it ought to have been avoided by a proper plea. Here, we are upon the face of the deed; the plea is "non est factum."

It is objected, that this is an engagement in restraint of marriage.

It is answered, that this construction is directly contrary to the words and intention of the deed; which amounts to a mutual agreement between these two persons "to marry each other;" and that the plaintiff's acceptance of the deed proves that; and that what the jury have found, is a sufficient reason to have it supposed that there was such a mutual agreement "to marry each other:" that, however, this is, at the utmost, only a contract "that he would not marry any other woman; and that if he should marry any other woman, he would pay the plaintiff £1,000 within three months after he should so marry any other woman;" but it is very far from restraining his marrying at all.

This is a point of very considerable importance.

All these contracts ought to be looked upon (as Lord Hardwicke said in the case of Woodhouse v. Shepley) with a jealous eye; even supposing them clear of any direct fraud. In that case, Lord Hardwicke did not proceed on any circumstances of particular actual fraud; but on public and general considerations: and therefore he gave no costs.

These engagements are liable to many mischiefs; to many dangerous consequences.

When persons of different sexes, attached to each other, and thus contracting to marry each other, do not marry immediately, there is always some reason or other against it; as disapprobation of friends and relations, inequality of circumstances, or the like. Both sides ought to continue free: otherwise, such contracts may be greatly abused; as, by putting women's virtue in danger, by too much confidence in men; or, by young men living with women without being married. Therefore these contracts are not to be extended by implication.

But here is not the least ground to say that this man has "engaged to marry this woman." Much less does any thing appear, of her engaging to marry him.

There is a great difference between promising to marry a particular person; and promising not to marry any one else. There is no colour for either of these constructions that have been offered by the plaintiff's counsel.

This is only a restraint upon him against marrying any one else, besides the plaintiff: not a reciprocal engagement "to marry each other;" or any thing like it.

This penalty is set up against the defendant, after ten years have passed without any intercourse between the plaintiff and him.

Another reason why we should not strain in favour of this contract, is because if there was really any mutual contract under fair and equal circumstances, the plaintiff will still be at liberty to bring her action: for, a void bond can never stand in her way.

Therefore I think, that what passed at the trial was perfectly right; that the measure of damages was the £1,000 and that this was such a contract as ought not to be carried into execution.

The case of Baker v. White, 2 Vern. 215, was not near so strong as the present case. That was in restraint of Elizabeth Baker's marrying again. There is a difference between a restraint of a first marriage, and a restraint of a second marriage: the plaintiff there was a widow, when she gave the bond. And the transaction was, in effect, a mere wager, and nothing at all unfair in it: and yet, in that case, the bond was decreed to be delivered up to be cancelled.

Mr. Justice Yates was of the same opinion, on both points.

In actions of debt, it is fatal to the plaintiff, if he mistakes his demand; because the demand is not divisible. In covenant, it is divisible.

This deed was the only evidence upon which damages could be given. It is a covenant "to pay a stipulated sum upon a particular event." The event has happened: the action is brought upon it. On a writ of inquiry, the inquisition would have been set aside, if less than the sum specified had been found.

As to Sir Baptist Hixt's Case, 2 Rolle, Abr. 703.—What Lord Mansfield has said, is an answer to it. The jury ought to have allowed the stipulated sum for every acre that was wanting. For, according to that rate the purchase-money was paid, or agreed to be paid; and according to that rate it ought to have been allowed or refunded: part of the money might have been actually paid. And on a writ of error, (as Lord Mansfield has observed,) the finding of damages by the jury could not come in question.

So far, I am of opinion for the plaintiff: for, I think the £1,000 is the proper quantum of damages which the jury were bound to find.

But on the motion in arrest of judgment, upon the invalidity of the deed—I am of opinion for the defendant.

For, this agreement is in restraint of marriage. It is not a covenant to "marry the plaintiff;" but "not to marry any one else:" and yet she was under no obligation to marry him. So that it restrained him from marrying at all, in case she had chosen not to permit him to marry her.

An action of covenant must be founded on the covenant, and the breach assigned within the words of it.

Now if she had requested him to marry her, and been refused by him; how must she have assigned the breach?—Why—"That he being requested by her to marry her, he had refused to do so."

But what obligation was he under, "to marry her?" Or where was the breach of his covenant? This covenant says no such thing, as "that he would marry her." Tender and refusal must apply to the thing stipulated: but he has not stipulated "that he would marry her."

As to mutuality of contract—The deed does not import that she shall marry him: neither doth her acceptance of it import any such thing. It does not follow from her acceptance of the deed, that she either understood he meant to bind himself to marry her; or that she engaged to marry him.

Possibly, he might not at all mean to marry her, though he bound himself not to marry any one else. They are two quite different things: one does not follow from the other.

This covenant is illegal, and will support no action: and therefore the plaintiff ought to recover nothing upon it.

Mr. Justice ASTON concurred, upon both points.

As to the quantum of damages—That is expressly stipulated and agreed. He took notice of what is said in the case of Edgcomb v. Dee, Vaughan, 101, and applied it to the present case.

As to the great point—he said, he had had doubt: but now he clearly concurred.

If this had been a covenant "to marry her," all the consequences which have been mentioned would have followed.

But it is not a covenant "to marry her." The words import no such thing: and the court can not suppose fraud. It is only a covenant to pay a sum of money, in case he shall marry any one else, "any person besides herself."

This is in restraint of marriage, and is illegal and void.

The case of Baker v. White, 2 Vern. 215, was a bond given by a widow, conditioned to pay the defendant White £100 if she should afterwards marry again: and White, at the same time, gave her a like bond, conditioned to pay the like sum to her executors, if she should not marry again before she died. She married again, to Baker: and he and she brought their bill, to have her bond delivered

up. And the bond was decreed to be delivered up, to be cancelled. He observed, that there is a difference between a first and a second marriage. The restraint of a first marriage is contrary to the general policy of the law, the public good, and the interests of society: but the frequent customs of copyholds intimate that the restraint of a second is not so. Yet there the bond was decreed to be delivered up.

We can not make a covenant for the man: and he himself has only covenanted "not to marry any other person, besides the plaintiff."

Mr. Justice WILLES also concurred.

1st. No new trial ought to be had. The direction of my Lord Chief Justice was right. For here the deed itself liquidated the certain sum: it was ascertained and fixed, between the parties themselves; and was therefore the true and proper quantum of the damages.

2d. As to the motion in arrest of judgment—I should not think it a proper motion, if this was a covenant "to marry her." But this is only, "not to marry another."

The words are plain and manifest: and the intention seems to have been agreeable to them. The deed was executed in 1757: and the defendant did not marry till 1767. The plaintiff lay by, and never made a requisition to him "to marry her:" but when he married another, she brought her action of covenant.

It seems to me, to have been understood between the parties themselves, and even by the plaintiff herself, in the same sense as we understand it now.

If so, 'tis a restraint upon matrimony, and is illegal, and stronger than the case of Woodhouse v. Shepley.

Lord MANSFIELD—Let the rule for a new trial be discharged: but the judgment must be arrested.

This rule was drawn up, for the plaintiff to shew cause why the verdict should not be set aside, and a new trial had between the parties: and in case the court, upon hearing counsel on both sides, should be of opinion to discharge the rule, that then the defendant should be at liberty to move in arrest of judgment.

Memorandum—This judgment was affirmed in the exchequer-chamber, on 26th May, 1770.

HERRESHOFF v. BOUTINEAU.

(19 Atl. 712, 17 R. I. 3.)

Supreme Court of Rhode Island. April 14, 1890.

On demurrer to bill.

Bill for injunction by Julian L. Herreshoff against A. Boutineau. Defendant demurs to the bill.

Amasa M. Eaton, for complainant. *Albert A. Baker*, for respondent.

STINESS, J. The complainant, director of a school of languages in Providence, employed the respondent to teach French from January 7, 1889, to July 1, 1889. The contract, in writing, provided that the respondent would not, during the year after the end of his service, "teach the French or German language, or any part thereof, nor aid to teach them, nor advertise to teach them, nor be in any way connected with any person or persons or institutions that teach them, in the said state of Rhode Island." The respondent's service ended July 1, 1889, after which time he gave lessons in French, in Providence. This suit is brought to restrain him from so doing within the time covered by this contract. The respondent demurs to the bill, contending—*First*, that the contract is void on the ground of public policy, because it imposed a general restraint throughout the state; and, *secondly*, because it is unreasonable. Is the contract void? For a long time, beginning with the Year Books, contracts limiting the exercise of one's ordinary trade or calling met with much disfavor in the courts. Any limitation whatever was considered, in the first reported case, (Y. B. fol. 5, 2 Hen. V. p. 26,) so far contrary to law that a plaintiff suing thereon was sworn at by the judge, and threatened with a fine. But it was soon found that, to some extent at least, such contracts help, rather than harm, both public interests and private welfare; that they are necessary to trade itself, in order to secure the sale, at fair value, of an established business, by protecting it against the immediate competition of the seller; also to enable one to learn a trade or to get employment from another, free from the risk of having the knowledge and influence thus gained used to the employer's damage; to encourage investment in business enterprises, under reasonable safeguards; and for other equally evident reasons. Accordingly, exceptions to the early doctrine were recognized from time to time, until the leading case of Mitchel v. Reynolds, 1 P. Wms. 181, when the court established the rule that a contract in restraint of trade, upon consideration which shows it was reasonable for the parties to enter into it, is good, "that wherever a sufficient consideration appears to make it a proper and an useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz., where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive." It is to be observed that the contract in this case was limited in time to five years, the term of the lease of a bakehouse, which the plaintiff had bought of the defendant, and also limited in space to the parish of St. Andrew's, Holborn. The case, therefore, did not call for decision upon a contract running throughout the kingdom. Nevertheless it has since been commonly assumed, as the settled rule of law, that such a restraint is contrary to public policy, and void. The principle upon which this rule is put is that the public have the right to demand that every person should carry on his trade freely, both for the prevention of monopoly and of unprofitable idleness. The argument is, if the restraint is general throughout the realm, the public interest is interfered with, since the party restrained can only resort to his trade for a livelihood by expatriation. But, if the restraint be local and partial, the party and the public may still have the benefit of his services in his own land, in some other place. While this distinction has frequently been recognized, the cases in which it has had the sanction of a decision have been few. In Rousillon v. Rousillon, 14 Ch. Div. 351, FRY, J., mentions only two, and these, he says, seem to have been decided upon the ground of unreasonableness, rather than upon the ground of universality. In other words, the universality was held to be unreasonable. This case, following Whitaker v. Howe, 3 Beav. 383; Jones v. Lees, 1 Hurl. & N. 189; and Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345,—expressly holds that there is no absolute rule that a covenant in restraint of trade is void, if it is unlimited in regard to space.

The respondent urges that Rousillon v. Rousillon has been overruled by the recent case of Davies v. Davies, 36 Ch. Div. 359; but we do not think this is so. While COTTON, L. J., showing great willingness, if not anxiety, to overrule it, based his opinion upon the ground that the restriction was void, because unlimited in space, BOWEN, L. J., did not put his decision on that ground, and FRY, L. J., adhered to his opinion in Rousillon v. Rousillon. That Davies v. Davies was not received in England as overruling the last-named case, see note to this case in Law Quarterly Review, vol. 4, p. 240. In view of these cases, we do not think it is now the rule in England that restraint throughout the kingdom is absolutely void.

In this country the cases have been quite similar to those in England. In the recent case of Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. Rep. 419, ANDREWS, J., says: "It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before

the court was limited or partial. The same is generally true of the American cases." In that case the defendant covenanted, for the period of 99 years, not to engage in the manufacture or sale of friction matches, within any of the states or territories of the United States, except Nevada and Montana. The complainant sought to restrain a breach of that covenant in New York, the respondent claiming that the covenant, being general as to New York, was void. But the court declared it to be valid, in a strong and thorough opinion, showing the history of litigation, and the tendency of recent judicial decisions upon this subject. Taking this case in connection with Navigation Co. v. Winsor, 20 Wall. 64, we think it cannot be said here, any more than in England, that a restraint is absolutely void, upon grounds of public policy, because it extends throughout a state. Public policy is a variable test. In the days of the early English cases, one who could not work at his trade could hardly work at all. The avenues to occupation were not as open nor as numerous as now, and one rarely got out of the path he started in. Contracting not to follow one's trade was about the same as contracting to be idle, or to go abroad for employment. But this is not so now. It is an every-day occurrence to see men busy and prosperous in other pursuits than those to which they were trained in youth, as well as to see them change places and occupations without depriving themselves of the means of livelihood, or the state of the benefit of their industry. It would therefore be absurd, in the light of this common experience now, to say that a man shuts himself up to idleness or to expatriation, and thus injures the public, when he agrees, for a sufficient consideration, not to follow some one calling within the limits of a particular state. There is no expatriation in moving from one state to another, and from such removals a state would be likely to gain as many as it would lose. We do not think public policy demands an agreement of the kind in question to be declared void, and we do not think such a rule is established upon authority. We therefore hold that the agreement set out in the bill is not void simply because it runs throughout the state.

Is the contract unreasonable? Courts should be slow to set aside as unreasonable a restriction which has formed a part of the consideration of a contract; yet, when it is a restriction upon individual and common rights, which only oppresses one party without benefiting the other, all courts agree that it should not be enforced. In determining the reasonableness of a contract, regard must be had to the nature and circumstances of the transaction. For example, if one has sold the good-will of a mercantile enterprise, receiving pay for it, upon an agreement not to engage in the same business in the same state, for a certain time, such a stipulation would stand upon quite a different footing from the similar stipulation of a mere servant in an ordinary local business. In many undertakings, with modern methods of advertising and facilities for ordering by telegraph or mail, and sending goods by railroad or express, it would matter little whether one was located at Providence or Boston or some other place. In such cases a restriction embracing the state, or even a larger territory, could not be said on that account to be unreasonable; for without it the seller might immediately destroy the value of what he sold and was paid for. But it is unreasonable to ask courts to enforce a greater restriction than is needed. So it has been uniformly held that restrictions which go too far are void. As was said in the note of the Law Quarterly Review, above cited: "Covenantees desiring the maximum of protection have, no doubt, a difficult task. When they fail, it is commonly because, like the dog in the fable, they grasp at too much, and so lose all."

Besides the matter of protection, the hardship of the restriction upon the party and the public should also be considered. In the present case, we think the restriction is unreasonable. Not as a rule of law because it extends throughout the state, but because it extends beyond any apparently necessary protection which the complainant might reasonably require, and thus, without benefiting him, it oppresses the respondent, and deprives people in other places of the chance which might be offered them to learn the French and German languages of the respondent. The complainant urges that he has established a school in Providence, at great expense, to teach languages by a new method, where scholars come from all parts of the state, and that by reason of the small extent of the state, and the ease of passing to and fro within it, such a restriction is reasonable and necessary to keep teachers from setting up similar schools, and enticing away his scholars. All this may be true with reference to Providence and its vicinity. But while, as is averred, many pupils from all parts of the state may come to Providence, as a center, for the same reason few would go to other places. For example, a school in Westerly or Newport would not be likely to draw scholars from Providence, or places from which Providence is more easily reached. Indeed, the complainant says he offered, after the contract was made, and now offers, to allow the respondent to teach in Newport; thereby admitting that the restriction is greater than the necessity. The people of Newport, Westerly, and other places have the right to provide for education in languages without coming to Providence. It is hard to believe, and the bill does not aver, that losing the few, if any, from some such place who might leave the complainant, if the respondent were to teach there, would seriously affect the complainant's school. Teaching in Providence, or in any place from which the complainant receives a considerable number of pupils, might affect it, and a restriction limited accordingly might be reasonable; but we think

it is unreasonable to go further. The complainant bought nothing of the respondent whose value he now seeks to destroy. He hired the latter as a teacher at no more than fair wages. He needs and has the right only to be secured against injury to his school, from teachers who may entice away his scholars, after leaving his employ. The contract clearly goes beyond this. The demurrer must be sustained.

DIAMOND MATCH CO. v. ROEBER.[1]

(13 N. E. 419, 106 N. Y. 473.)

Court of Appeals of New York. October 4, 1887.

Robt. Sewell, for appellant. Noah Davis, for respondent.

ANDREWS, J. Two questions are presented—First, whether the covenant of the defendant contained in the bill of sale executed by him to the Swift & Courtney & Beecher Company on the twenty-seventh day of August, 1880, that he shall and will not at any time or times within 99 years, directly or indirectly engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employé of the said Swift & Courtney & Beecher Company) within any of the several states of the United States of America, or in the territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the state of Nevada, and in the territory of Montana, is void as being a covenant in restraint of trade; and, second, as to the right of the plaintiff, under the special circumstances, to the equitable remedy by injunction to enforce the performance of the covenant.

There is no real controversy as to the essential facts. The consideration of the covenant was the purchase by the Swift & Courtney & Beecher Company, a Connecticut corporation, of the manufactory No. 528 West Fiftieth street, in the city of New York, belonging to the defendant, in which he had, for several years prior to entering into the covenant, carried on the business of manufacturing friction matches, and of the stock and materials on hand, together with the trade, trade-marks, and good-will of the business, for the aggregate sum (excluding a mortgage of $5,000 on the property assumed by the company) of $46,724.05, of which $13,000 was the price of the real estate. By the preliminary agreement of July 27, 1880, $28,000 of the purchase price was to be paid in the stock of the Swift & Courtney & Beecher Company. This was modified when the property was transferred, August 27, 1880, by giving to the defendant the option to receive the $28,000 in the notes of the company or in its stock, the option to be exercised on or before January 1, 1881. The remainder of the purchase price, $18,724.05, was paid down in cash, and subsequently, March 1, 1881, the defendant accepted from the plaintiff, the Diamond Match Company, in full payment of the $28,000, the sum of $8,000 in cash and notes, and $20,000 in the stock of the plaintiff; the plaintiff company having prior to said payment purchased the property of the Swift & Courtney & Beecher Company, and become the assignee of the defendant's covenant. It is admitted by the pleadings that in August, 1880, (when the covenant in question was made,) the Swift & Courtney & Beecher Company carried on the business of manufacturing friction matches in the states of Connecticut, Delaware, and Illinois, and of selling the matches which it manufactured "in the several states and territories of the United States, and in the District of Columbia;" and the complaint alleges and the defendant in his answer admits that he was at the same time also engaged in the manufacture of friction matches in the city of New York, and in selling them in the same territory. The proof tends to support the admission in the pleadings. It was shown that the defendant employed traveling salesmen, and that his matches were found in the hands of dealers in 10 states. The Swift & Courtney & Beecher Company also sent their matches throughout the country wherever they could find a market. When the bargain was consummated, on the twenty-seventh of August, 1880, the defendant entered into the employment of the Swift & Courtney & Beecher Company, and remained in its employment until January, 1881, at a salary of $1,500 a year. He then entered into the employment of the plaintiff, and remained with it during the year 1881, at a salary of $2,500 a year, and from January 1, 1882, at a salary of $3,600 a year, when, a disagreement arising as to the salary he should thereafter receive, the plaintiff declining to pay a salary of more than $2,500 a year, the defendant voluntarily left its service. Subsequently he became superintendent of a rival match manufacturing company in New Jersey, at a salary of $5,000, and he also opened a store in New York for the sale of matches other than those manufactured by the plaintiff.

The contention by the defendant that the plaintiff has no equitable remedy to enforce the covenant, rests mainly on the fact that contemporaneously with the execution of the covenant of August 27, 1880, the defendant also executed to the Swift & Courtney & Beecher Company a bond in the penalty of $15,000, conditioned to pay that sum to the company as liquidated damages in case of a breach of his covenant.

The defendant for his main defense relies upon the ancient doctrine of the common law, first definitely declared, so far as I can discover, by Chief Justice Parker (Lord Macclesfield) in the leading case of Mitchel v. Reynolds, 1 P. Wms. 181, and which has been repeated many times by judges in England and America, that a bond in general restraint of trade is void. There are several decisions in the English courts of an earlier date, in which the question of the validity of contracts restraining the obligor from pursuing his occupation within a particular locality was considered. The cases are chronologically arranged and stated by Mr. Parsons in his work on Contracts (volume 2, p. 748, note.) The ear-

[1] Irrelevant parts omitted.

liest reported case, decided in the time of Henry V., was a suit on a bond given by the defendant, a dyer, not to use his craft within a certain city for the space of half a year. The judge before whom the case came indignantly denounced the plaintiff for procuring such a contract, and turned him out of court. This was followed by cases arising on contracts of a similar character, restraining the obligors from pursuing their trade within a certain place for a certain time, which apparently presented the same question which had been decided in the dyer's case, but the courts sustained the contracts, and gave judgment for the plaintiffs; and before the case of Mitchel v. Reynolds it had become settled that an obligation of this character, limited as to time and space, if reasonable under the circumstance, and supported by a good consideration, was valid. The case in the Year Books went against all contracts in restraint of trade, whether limited or general. The other cases prior to Mitchel v. Reynolds sustained contracts for a particular restraint, upon special grounds, and by inference decided against the validity of general restraints. The case of Mitchel v. Reynolds was a case of partial restraint, and the contract was sustained. It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before the court was limited or partial. The same is generally true of the American cases. The principal cases in this state are of that character, and in all of them the particular contract before the court was sustained. Nobles v. Bates, 7 Cow. 307; Chappel v. Brockway, 21 Wend. 157; Dunlop v. Gregory, 10 N. Y. 241. In Alger v. Thacher, 19 Pick. 51, the case was one of general restraint, and the court, construing the rule as inflexible that all contracts in general restraint of trade are void, gave judgment for the defendant. In Mitchel v. Reynolds the court, in assigning the reason for the distinction between a contract for the general restraint of trade and one limited to a particular place, says: "for the former of these must be void, being of no benefit to either party, and only oppressive;" and later on, "because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does in Newcastle, and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." He refers to other reasons, viz., the mischief which may arise (1) to the party by the loss by the obligor of his livelihood and the substance of his family, and (2) to the public by depriving it of a useful member, and by enabling corporations to gain control of the trade of the kingdom. It is quite obvious that some of these reasons are much less forcible now than when Mitchel v. Reynolds was decided. Steam and electricity have for the purposes of trade and commerce almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth, and the restless activity of mankind striving to better their condition, have greatly enlarged the field of human enterprise, and created a vast number of new industries, which gives scope to ingenuity and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and to a great extent business corporations are practically partnerships, and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire for the same or similar purposes to clothe themselves with a corporate character. The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England. Rousillon v. Rousillon, 14 Ch. Div. 351. The law has for centuries permitted contracts in partial restraint of trade, when reasonable; and in Horner v. Graves, 7 Bing. 735, Chief Justice Tindal considered a true test to be "whether the restraint 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." When the restraint is general, but at the same time is co-extensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one, and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good-will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than a man who, having built up a local trade only sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case, and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business trans-

actions should not be trammeled by unnecessary restrictions. "If," said Sir George Jessell in Printing Co. v. Sampson, L. R. 19 Eq. 462, "there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice."

It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void, is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the king under claim of royal prerogative led to conflicts memorable in English history. But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee. We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combinations between producers to limit production, and to enhance prices, are or may be unlawful, but they stand on a different footing.

We cite some of the cases showing the tendency of recent judicial opinion on the general subject: Whittaker v. Howe, 3 Beav. 383; Jones v. Lees, 1 Hurl. & N. 189; Rousillon v. Rousillon, supra; Leather Co. v. Lorsont, L. R. 9 Eq. 345; Collins v. Locke, 4 App. Cas. 674; Steam Co. v. Winsor, 20 Wall. 64; Morse, etc., Co. v. Morse, 103 Mass. 73. In Whittaker v. Howe, a contract made by a solicitor not to practice as a solicitor "in any part of Great Britain," was held valid. In Rousillon v. Rousillon a general contract not to engage in the sale of champagne, without limit as to space, was enforced as being under the circumstances a reasonable contract. In Jones v. Lees, a covenant by the defendant, a licensee under a patent, that he would not during the license make or sell any slubbing machines without the invention of the plaintiff applied to them, was held valid. Bramwell, J., said: "It is objected that the restraint extends to all England, but so does the privilege." In Steam Co. v. Winsor the court enforced a covenant by the defendant made on the purchase of a steam-ship, that it should not be run or employed in the freight or passenger business upon any waters in the state of California for the period of 10 years.

In the present state of the authorities, we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed. The covenant in the present case is partial, and not general. It is practically unlimited as to time, but this under the authorities is not an objection, if the contract is otherwise good. Ward v. Byrne, 5 Mees. & W. 548; Mumford v. Gething, 7 C. B. (N. S.) 317. It is limited as to space since it excepts the state of Nevada and the territory of Montana from its operation, and therefore is a partial, and not a general, restraint, unless, as claimed by the defendant, the fact that the covenant applies to the whole of the state of New York constitutes a general restraint within the authorities. In Chappel v. Brockway, supra, Bronson, J., in stating the general doctrine as to contracts in restraint of trade, remarked that "contracts which go to the total restraint of trade, as that a man will not pursue his occupation anywhere in the state, are void." The contract under consideration in that case was one by which the defendant agreed not to run or be interested in a line of packet-boats on the canal between Rochester and Buffalo. The attention of the court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in the state of New York, but excepted other states from its operation. The remark relied upon was obiter, and in reason cannot be considered a decision upon the point suggested. We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the states are not those of trade and commerce, and business is restrained within no such limit. The country as a whole is that of which we are citizens, and our duty and allegiance are due both to the state and nation. Nor is it true as a general rule that a business established here cannot extend beyond the state, or that it may not be successfully established outside of the state. There are trades and employments which from their nature are localized, but this is not true of

manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon state lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such construction upon this contract as will make it a contract in general restraint of trade, when upon its fact it is only partial. The case of Steam Co. v. Winsor, supra, supports the view that a restraint is not necessarily general which embraces an entire state. In this case the defendant entered into the covenant as a consideration in part of the purchase of his property by the Swift & Courtney & Beecher Company, presumably because he considered it for his advantage to make the sale. He realized a large sum in money, and on the completion of the transaction became interested as a stockholder in the very business which he had sold. We are of opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void.

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CARLL v. SNYDER et al.

(26 Atl. 977.)

Court of Chancery of New Jersey. July 13, 1893.

Suit by Charles W. Carll against John F. Snyder and others for injunction.

Barton & Dawes, for complainant. William M. Lanning, for defendants.

BIRD, V. C. On the filing of this bill, an order was advised, directing the defendants to show cause why an injunction should not be granted restraining them from engaging in and carrying on, within the limits of the city of Trenton, a certain business called the "galvanized iron cornice, tin, and sheet-iron business." This application rests upon an agreement, in writing, entered into between the complainant and the defendants, in the month of January, 1892, in and by which, for the consideration of $6,275, paid to them by the complainant, the defendants agreed to sell to him all their interest in the business in which the complainant and the defendants were then engaged as partners. They also agreed not to engage in or carry on such business within the limits of said city. Such business included the said galvanized iron cornice, tin, and sheet-iron business. The granting of the injunction is resisted by the defendants upon two grounds: First, because the proofs contained in the affidavit annexed to the bill are sufficient; and, second, that the restraint expressed in the stipulation is unlawful, because unreasonable, since it is indefinite as to time.

I am satisfied that the proof is sufficiently clear and definite to justify the court in awarding a perpetual injunction upon final hearing, in case it should stand, as it now does, unimpeached. I am equally well satisfied that the insistment that the restraint is indefinite as to time, and therefore unreasonable, ought not to prevail. I think a careful study of the case of Mitchel v. Reynolds, reported in 1 Smith, Lead. Cas. (9th Ed.) 694 et seq., with the various annotations both by the English and American editors, will satisfy the mind as to the principle upon which contracts of this nature, not only may well be, but really ought to be, supported, when indefinite as to time. The purchaser of such good will may fairly be supposed to purchase, not only for his own immediate use or benefit, but for the use of his personal representatives, in the same sense that he purchases personal property or real estate. I can see no just reason for his not being able in the law to make such an investment which shall pass to his assigns, executors, or administrators. It cannot be said, when it is limited to a particular district, that this in any manner interferes with sound public policy. It would not be a violation of the rule which required such contracts to be in harmony with the interests of the community at large in case the stipulation were to be that the covenantee should not carry on the trade in question for 20 or 30 years; and, if not for that period of time, then certainly it would not be if the covenant extended to a lifetime. With this in mind, when the object of the prohibition put upon such contracts, in view of a sound public policy, is considered, it will be still more apparent that this contract ought to be upheld. Sound public policy requires that every individual shall be employed. The community is entitled to his honest toil, whether manual, mechanical, or purely intellectual. This being so, and such policy upholding contracts for a definite period of time, it is not to be presumed that the covenantee, in any such case, will spend the time, which the law regards, (supposing that there must be a period limited in the contract,) in idleness, or in indifference to the demands of such public policy, waiting the time when the period fixed by the contract shall have expired, in order that he may engage once more in the employment which he had agreed to abandon. In such matters the public welfare, which the law regards, is an essential element of consideration; but the interest of the individual in his own welfare is infinitely more efficacious and potential in securing the public good, although that may not be in his mind. He who has energy and integrity enough to establish a business which is worthy of the name, and for which others will bid a fair price, will not wait for the protection of the paternal hand to make his footprints in other quarters. In the following cases there was no limit as to time, and it will be observed that in many of them resistance was made to their enforcement on this account, but without success: Richardson v. Peacock, 26 N. J. Eq. 40, 28 N. J. Eq. 151, and 33 N. J. Eq. 597; Hitchcock v. Coker, 6 Adol. & E. 439; Hastings v. Whitley, 2 Exch. 611; Mallan v. May, 11 Mees. & W. 653; Bowser v. Bliss, 7 Blackf. 344; Pierce v. Fuller, 8 Mass. 223; Palmer v. Stebbins, 3 Pick. 188; Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 423.

Counsel for defendants urged that this was not a case for a preliminary injunction, since the right of the complainant had not been established at law. I have given this branch of the case not a little attention. It seems to me that, if a plain breach of contract will ever justify a preliminary injunction, this is such. The rights of the parties are thoroughly well defined by their agreement. While they might be more securely fixed by a judgment at law, they could not be more certainly defined,—more securely fixed by a judgment at law because that is final, but that could only rest upon the undisputed evidence upon which this court is called upon to pronounce its judgment preliminarily. A preliminary injunction was awarded in the case of Richardson v. Peacock, supra, and, al-

though that case went to the court of errors and appeals, the action of this court in that behalf was not questioned. 33 N. J. Eq., supra; Match Co. v. Roeber, supra. I think the order to show cause should be made absolute.

TODE et al. v. GROSS.

(28 N. E. 469, 127 N. Y. 480.)

Court of Appeals of New York, Second Division. Oct. 6, 1891.

Appeal by defendant from a judgment of the general term of the supreme court in the second judicial department, affirming a judgment entered upon the decision of the court after a trial without a jury. Affirmed.

Action for breach of covenant to recover the sum of $5,000 as stipulated damages. On the 15th of October, 1884, the defendant owned a cheese factory situate in the town of Monroe, Orange county, comprising two parcels of land, with the buildings thereon, and a quantity of fixtures, machinery, and tools connected therewith. For some time prior, with the assistance of her husband, Conrad Gross, her brother-in-law, August Gross, and her father, John Hoffman, she had been engaged in the business of manufacturing cheeses at said factory known as "Fromage de Brie," "Fromage d'Isigny," and "Neufchatel." Such cheeses were made by a secret process known only to herself and her said agents. On the day last named, she entered into a sealed agreement with the plaintiffs, whereby she agreed to sell and transfer to them the said factory and all its belongings, together with the "good-will, custom, trade-marks, and names used in and belonging to the said business," for the sum of $25,000, to be paid and secured March 1, 1885, when possession was to be given. Said instrument contained a covenant on her part that she would "communicate after the first day of March, 1885, or cause to be communicated, to" said plaintiffs, "by Conrad Gross, John Hoffman, and August Gross, or one or other of them, the secret of the manufacture of the cheeses known as 'Fromage de Brie,' 'Neufchatel,' and 'D'Isigny,' and the recipe therefor, and for each of them, and will instruct or cause to be instructed them, and each of them, in the manufacture thereof. And that she and the said Conrad Gross, John Hoffman, and August Gross will refrain from communicating the secret recipe and instructions for the manufacture of said cheeses, or either of them, to any and all persons other than the above-named parties of the second part, [plaintiffs,] and will also, after the first day of April, 1885, refrain from engaging in the business of making, manufacturing, or vending of said cheeses, or either of them, and from the use of the trade-marks or names, or either of them, hereby agreed to be transferred in connection with said cheeses, or either of them, or with any similar product, under the penalty of five thousand dollars, which is hereby named as stipulated damages to be paid by the party of the first part, [defendant,] or her heirs, executors, administrators, or assigns, in case of a violation by the party of the first part [defendant] of this covenant, of this contract, or any part thereof, within five years from the date hereof." She further covenanted that she herself, as well as "said Conrad Gross, John Hoffman, and August Gross, during and up to and until the first day of May, 1885, shall continue and remain in said county of Orange, and from time to time, and at all reasonable times during said period, by herself, or by said Conrad Gross, John Hoffman, and August Gross, whenever so requested by the said parties of the second part, [plaintiffs,] impart to them, or either of them, the secret of making such cheeses, and each of them, and instruct them, and each of them, in the process of manufacturing the same, and each of them, as fully as she or the said Conrad Gross, John Hoffman, or August Gross, or either of them, are informed concerning the same." Both parties appear to have duly kept and performed the agreement, except that, as the trial court found, "subsequently to the 1st day of May, 1885, Conrad Gross, the husband of defendant, went to New York city, and engaged in the business of selling 'foreign and domestic fruits, and all kinds of cheese and sausages, &c.,' * * * and while so engaged * * * sold and personally delivered from his place of business to one John Wassung three boxes of cheese marked and named 'Fromage d'Isigny,' and having substantially the same trade-marks thereon as that sold by defendant to plaintiffs, and having stamped thereon the name 'Fromage d'Isigny,' and that said cheese so sold by him to said Wassung was a similar product to that formerly manufactured by defendant." Also, that "said August Gross, the brother-in-law of defendant, subsequent to the 1st day of May, 1885, engaged in the business of retailing fancy groceries in the city of New York, and in and during the fall of 1887, and prior to the commencement of this action, kept for sale at his place of business in New York city boxes of cheese marked or stamped 'Fromage d'Isigny.'" The court further found that the cheese so sold by Conrad Gross under the name of "Fromage d'Isigny," "was never sold by plaintiffs, nor made or manufactured by them, or either of them, but that the same was a similar product." The court found as conclusions of law that said agreement was a reasonable one, and was founded upon a good and sufficient consideration; that said sale by Conrad and said keeping for sale by August Gross was a direct violation of the covenant in question; that the restriction imposed was no more than the interests of the parties required, and that it was not in restraint of trade or against public policy. Judgment was ordered for the plaintiffs for the sum of $5,000 as stipulated damages.

John Fennel, for appellant. Henry Bacon, for respondents.

VANN, J. (after stating the facts). The business carried on by the defendant was founded on a secret process known only to herself and her agents. She had the right to continue the business, and by keeping her secret to enjoy its benefits to any practicable extent. She also had the right to sell the business, including as an essential part thereof the secret process, and, in order to place the purchasers in the same position that she

occupied, to promise to divulge the secret to them alone, and to keep it from every one else. In no other way could she sell what she had, and get what it was worth. Having the right to make this promise, she also had the right to make it good to her vendees, and to protect them by covenants with proper safeguards against the consequences of any violation. Such a contract simply left matters substantially as they were before the sale, except that the seller of the secret had agreed that she would not destroy its value after she had received full value for it. The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what they paid for. It imposed no restriction upon either that was not beneficial to the other, by enhancing the price to the seller, or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory. Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. Rep. 419; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. Rep. 335; Leslie v. Lorillard, 110 N. Y. 519, 534, 18 N. E. Rep. 363; Thermometer Co. v. Pool, (Sup.) 4 N. Y. Supp. 861. The restriction under consideration, however, was not unlimited as to time.

The chief reliance of the defendant in this court, where the point seems to have been raised for the first time, is that the covenant, so far as stipulated damages are concerned, is confined to the personal acts of Mrs. Gross, and does not embrace the acts of her agents. A careful reading of the agreement, however, in the light of the circumstances surrounding the parties when it was made, shows that no such result was intended. What was the object of the covenant? It was to keep secret, at all hazards, the process upon which the success of the business depended. On no other basis could the plaintiffs safely buy, or the defendant sell, for what her property was worth. Who had the power to keep the process secret? Clearly the defendant, if any one, as she had confided it to no one except her trusted agents, who were nearly related to her by blood or marriage. But could she covenant against the acts of those over whom she had no control? She had the right to so covenant, by assuming the risk of their actions; and, unless she had done so, presumptively she could not have sold her factory for so large a sum. It was safer for her to sell with such a covenant than it was for the plaintiffs to buy without it. She could exercise some power over her own husband and her father and her husband's brother, all of whom had been associated with her in carrying on the business, and whose actions in certain other respects she assumed to control for a limited time, whereas the plaintiffs were powerless, unless they had her promise to keep the process secret at the peril of paying heavily if she did not. It is not surprising, therefore, to find that the restrictive part of the covenant applies with the same force to her agents that it does to herself; for she undertakes that neither she nor they will disclose the secret, or engage in making or selling either kind of cheese, or use the trade-marks or names connected with the business. We do not think that a personal act of the defendant is essential to a violation of this covenant by her; for if she permits, or even does not prevent, her agents from doing the prohibited acts, the promise is broken. While it is her exclusive covenant, it relates to the action of others; and, if they do what she agreed that they would not do, it is a breach by her, although not her own act. She violated her agreement, not by selling herself, but by not preventing others from selling. This construction of the restrictive part of the covenant would hardly be open to question, were it not that in the same sentence occurs the reparative or compensatory part designed to make the plaintiffs whole if the defendant either could not or did not keep her agreement. While this provides that any violation involves the penalty of $5,000, it adds, "which sum is hereby named as stipulated damages to be paid" by the defendant in case of a violation by her of the covenant in question. What kind of violation is thus referred to? The defendant says a personal violation by her only, but we think, for the reasons already given, that the spirit of the agreement includes both a violation by her own act and by the act of those whom she did not prevent from selling, although she had agreed that they would not sell. As no one not a party to a contract can violate it, every act of defendant's former agents contrary to her covenant was a violation thereof by her, whether she knew of it or assented to it or not. Whenever that was done which she agreed should not be done, it was a breach of a covenant by her, even if the act was contrary to her wishes, and in spite of her efforts to prevent it. Her covenant was against a certain act by any one of four persons, including herself. Two of those persons separately did the act which she had agreed that neither of them should do, and thus there was a violation of the covenant by her, the same as if she had done the act in person. The argument of the learned counsel for the defendant that the contract fixed a sum to be paid in case of a violation by the defendant, but not in case of a violation "by the other parties," while plausible, is unsound, for there were no "other parties" who could break the covenant. She was the sole covenantor, and unless she kept the covenant she broke it; and she did not keep it. As the actual damages for a breach of the covenant would necessarily be "wholly uncertain, and incapable of being ascertained except by conjecture," we think that the parties intended to liquidate them when they provided that the sum named should be "as stipulated damages." The use of the word "penalty" under the circumstances is not controlling. Bagley v Peddie, 16 N. Y. 469; Dakin v. Williams, 17 Wend. 448, affirmed 22 Wend. 201; Wooster v. Kisch, 26 Hun, 61. As there is no other question that requires discussion, the judgment should be affirmed, with costs. All concur, except BROWN J., not sitting.

MORRIS RUN COAL CO. v. BARCLAY COAL CO.

(68 Pa. St. 173.)

Supreme Court of Pennsylvania. March 15, 1871.

Error to court of common pleas, Bradford county.

U. Mercur and E. Overton, Jr., for plaintiff in error. J. De Witt, for defendant in error.

AGNEW, J. This was an action on a bill drawn upon one party in favor of another party to a contract between five coal companies, for a sum found due in the equalization of prices under the contract. It raises a question of great importance to the citizens of this state and the state of New York, where the contract was made, and was in part to be executed, to wit, whether the contract was illegal, as being contrary to the statute of New York, or at common law, or against public policy. The instrument bears date the 15th day of February, 1866. The parties are five coal companies, incorporated under the laws of Pennsylvania, to wit, the Fall Brook Coal Company and Morris Run Coal Company, of the Blossburg coal region; and the Barclay Coal Company, Fall Creek Bituminous Coal Company, and Towanda Coal Company, of the Barclay coal region. By the agreement, the market for the bituminous coal from these two regions is divided among these parties in certain proportions. A committee of three is appointed to take charge and control of the business of all these companies, to decide all questions by a certain vote, and to appoint a general sales agent to be stationed at Watkins, New York. Provision is made for the mining and delivery of coal, their kinds, and for its sale through the agent, subject, however, to this important restriction, that each party shall, at its own costs and expense, deliver its proportion of the different kinds of coal in the different markets at such times and to such parties as the committee shall from time to time direct. The committee is authorized to adjust the prices of coal in the different markets and the rates of freight, and also to enter into such an agreement with the anthracite coal companies as will promote the interest of these parties. Then comes an important provision that the companies may sell their coal themselves, but only to the extent of their proportion, and only at the prices adjusted by the committee. It is also provided that the general sales agent shall direct a suspension of shipment or deliveries of coal by any party making sales or deliveries beyond its proportion, and therenpon such party shall suspend shipments until the committee shall direct a resumption. Detailed reports of the business are to be made by the companies to the general sales agent at fixed and short intervals, and settlements are to be made by the committee monthly, prices averaged, and payments made by the companies in excess to those in arrear; and finally, each party binds itself not to cause or permit any coal to be shipped or sold otherwise than as the same has been agreed upon, and that all rules and regulations by the executive committee in relation to the business shall be faithfully carried out.

In regard to the relation these companies hold to the public, the field of their mining operations, the markets they supply, the extent of their coal-fields, and the general supply of coal, the distinguished referee, Judge Elwell, finds as follows: "The Barclay and Blossburg coal-mines are the only coal mines furnishing the kind of coal mined and shipped by these companies, except the Cumberland coal, which latter, in order to reach the same markets, north, would have to be shipped by tidewater. There was some of the same kind of coal mined in McKean and Elk counties, in this state, but in quantities so small that it was not considered by these companies as coming into competition with them. The coal of the Blossburg and Barclay regions is adapted to mechanical purposes and for generating steam. Wherever sold, it comes into competition with anthracite coal, and also with the Cumberland coal sent by tidewater to Troy, New York, to which point both kinds of bituminous coal are shipped."

During the season of 1866 these companies made sales of coal at Oswego and Buffalo, to parties who shipped to Chicago, Milwaukee, and other Western cities. It there came into competition to some extent with Pittsburgh coal. The latter is used for making gas, but the coal of these companies cannot be used for that purpose.

The referee found that the statute of New York is, "if two or more persons shall conspire," first, "to commit any offence;" second, "to commit any act injurious to the public health, to public morals, or to trade or commerce, they shall be deemed guilty of a misdemeanor."

The referee found, as his conclusion upon the whole case, that the contract was void by the statute, and void at common law, as against public policy. The restraint of the contract upon trade and its injury to the public is thus clearly set forth by the referee: "These corporations [he says] represented almost the entire body of bituminous coal in the northern part of the state. By combination between themselves, they had the power to control the entire market in that district. And they did control it by a contract not to ship and sell coal otherwise than as therein provided. And in order to destroy competition, they provided for an arrangement with dealers and shippers of anthracite coal. They were thereby prohibited from selling under prices to be fixed by a committee representing each company. And they were obliged to suspend shipments upon notice from an agent that their allotted share of the market had

been forwarded or sold. Instead of regulating the business by the natural laws of trade, to wit, those of demand and supply, these companies entered into a league, by which they could limit the supply below the demand in order to enhance the price. Or if the supply was greater than the demand, they could nevertheless compel the payment of the price arbitrarily fixed by the joint committee. The restraint on the trade in bituminous coal was by this contract as wide and extensive as the market for the article. It already embraced the state of New York, and was intended and no doubt did affect the market in the Western states. It is expressly stipulated that the parties to this contract shall not be considered as partners. The agreement was not entered into for the purpose of aggregating the capital of the several companies, nor for greater facilities for the transaction of their business, nor for the protection of themselves by a reasonable restraint, as to a limited time and space upon others who might interfere with their business."

The plaintiff in error's reply to this vigorous statement of the purpose of the contract and its effect upon the public interest, alleges that its true object was to lessen expenses, to advance the quality of the coal, and to deliver it in the markets it was to supply, in the best order, to the consumer. This is denied by the defendant; but it seems to us it is immaterial whether these positions are sustained or not. Admitting their correctness, it does not follow that these advantages redeem the contract from the obnoxious effects so strikingly presented by the referee. The important fact is that these companies control this immense coal-field; that it is the great source of supply of bituminous coal to the state of New York and large territories westward; that by this contract they control the price of coal in this extensive market, and make it bring sums it would not command if left to the natural laws of trade; that it concerns an article of prime necessity for many uses; that its operation is general in this large region, and affects all who use coal as a fuel; and this is accomplished by a combination of all the companies engaged in this branch of business in the large region where they operate. The combination is wide in scope, general in its influence, and injurious in effects. These being its features, the contract is against public policy, illegal, and therefore void.

The illegality of contracts affecting public trade appears in the books under many forms. The most frequent is that of contracts between individuals to restrain one of them from performing a business or employment. The subject was elaborately discussed in the leading case of Mitchel v. Reynolds, 1 P. Wms. 181, to be found also in 1 Smith, Lead. Cas. 172. The distinction is there taken which now marks the current of judicial decision everywhere; that a restraint upon a trade or employment which is general, is void, being contrary to public interest, really beneficial to neither party, and oppressive at least to one. "General restraints (says Parker, J.) are all void, whether by bond, covenant or promise, with or without consideration, and whether it be of the party's own trade or not;" citing Cro. Jac. 596; 2 Bulst. 136; Allen, 67. To obtain, he says, the sole exercise of any known trade throughout England, is a complete monopoly, and against the policy of the law. A reason given is "the great abuses these voluntary restraints are liable to, as, for instance, from corporations, who were perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible." In reference to a contract not to trade in any part of England, it is said, there is something more than a presumption against it, because it never can be useful to any man to restrain another from trading in all places, though it may be to restrain him from trading in some, unless he intends a monopoly, which is a crime. These principles have been sustained in many cases which need not be cited, as most of them will be found in Mr. Smith's note to the leading case. The result of those in which particular restraints upon trade have been held to be valid between individuals is, that the restraint must be partial only, the consideration adequate and not colorable, and the restriction reasonable. Upon the last requisite, Tindal, C. J., remarks, in Horner v. Graves, 7 Bing. 743: "We do not see how a better test can be applied to the question whether reasonable or not than by considering whether the restraint is such only as to afford a fair protection as 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. Whatsoever 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. What is injurious to the public interest is void on the ground of public policy."

Many cases have been decided as to what is a reasonable restriction and what is not, and is therefore void, but two only may be referred to as illustrations. In Mallan v. May, 11 Mees. & W. 653, a covenant not to practice as a dentist in London, or in any of the places in England or Scotland, where the plaintiff might have been practicing before the expiration of the term of service with them was held to be reasonable as to the limit of London, but unreasonable and void as to the remainder of the restriction. So, in Green v. Price, 13 Mees. & W. 695, a covenant not to follow the perfumery business in the cities of London and Westminster, or within the distance of 600 miles therefrom, was good as to the cities, and void as to the limit of 600 miles. See, also, Pierce v. Fuller, 8 Mass. 223, and Chappel v. Brockway, 21 Wend. 158. An important principle stated in these cases is that, as to contracts for a

limited restraint, the courts start with a presumption that they are illegal unless shown to have been made upon adequate consideration, and upon circumstances both reasonable and useful. This presumption is a necessary consequence of the general principle, that the public interest is superior to private, and that all restraints on trade are injurious to the public in some degree. The general rule (said Woodward, C. J.) is that all restraints of trade, if nothing more appear, are bad. Keeler v. Taylor, 3 P. F. Smith, 468. That case may be instanced as a strong illustration of the rule as to what is not a reasonable restriction; and the principles I have been stating are recognized in the opinion. Keeler agreed to instruct Taylor in the art of making platform scales, and to employ him in that business at $1.75 per day. Taylor engaged to pay Keeler or his legal representatives $50 for each and every scale he should thereafter make for any other person than Keeler, or which should be made by imparting his information to others. This was held to be an unreasonable restriction upon Taylor's labor, and therefore void, as in restraint of trade. Testing the present contracts by these principles, the restrictions laid upon the production and price of coal cannot be sanctioned as reasonable, in view of their intimate relation to the public interests. The field of operation is too wide, and the influence too general.

The effects produced on the public interests lead to the consideration of another feature of great weight in determining the illegality of the contract, to wit, the combination resorted to by these five companies. Singly each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer, all feel the restraint, while many dependent hands are paralyzed, and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offence. "I take it," said Gibson, J., "a combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purpose of the latter, whether of extortion or of mischief." Com. v. Carlisle, Brightly, N. P. 40. In all such combinations, where the purpose is injurious or unlawful, the gist of the offence is the conspiracy. Men can often do by the combination of many what severally no one could accomplish, and even what when done by one would be innocent. It was held in Com. v. Eberle, 3 Serg. & R. 9, that it was an indictable conspiracy for a portion of a German Lutheran congregation to combine and agree together to prevent another portion of the congregation, by force of arms, from using the English language in the worship of God among the congregation. So a confederacy to assist a female infant to escape from her father's control, with a view to marry her against his will, is indictable as a conspiracy at common law, while it would have been no criminal offence if one alone had induced her to elope with and marry him. Mifflin v. Commonwealth, 5 Watts & S. 461. One man or many may hiss an actor; but if they conspire to do it, they may be punished. Per Gibson, C. J., Hood v. Palm, 8 Pa. St. 238; 2 Russ. Crimes, 556. And an action for conspiracy to defame will be supported though the words be not actionable if spoken by one. Hood v. Palm, supra. "Defamation by the outcry of numbers," says Gibson, C. J., "is as resistless as defamation by the written act of an individual." And says Coulter, J.: "The concentrated energy of several combined wills, operating simultaneously and by concert upon one individual, is dangerous even to the cautious and circumspect, but when brought to bear upon the unwary and unsuspecting, it is fatal." Twitchell v. Com., 9 Pa. St. 211. There is a potency in numbers when combined which the law cannot overlook, where injury is the consequence. If the conspiracy be to commit a crime or unlawful act, it is easy to determine its indictable character. It is more difficult when the act to be done or purpose to be accomplished is innocent in itself. Then the offence takes its hue from the motives, the means or the consequences. If the motives of the confederates be to oppress, the means they use unlawful, or the consequences to others injurious, their confederation will become a conspiracy. Instances are given in Com. v. Carlisle, Brightly, N. P. 40. Among those mentioned as criminal is a combination of employers to depress the wages of journeymen below what they would be if there were no

resort to artificial means; and a combination of the bakers of a town to hold up the article of bread, and by means of the scarcity thus produced to extort an exorbitant price for it. The latter instance is precisely parallel with the present case. It is the effect of the act upon the public which gives that case and this its evil aspect as the result of confederation; for any baker might choose to hold up his own bread, or coal operator his coal, rather than to sell at ruling prices; but when he destroys competition by a combination with others, the public can buy of no one.

In Rex v. De Berenquetal, 3 Maule & S. 67, it was held to be a conspiracy to combine to raise the public funds on a particular day by false rumors. "The purpose itself," said Lord Ellenborough, "is mischievous; it strikes at the prices of a valuable commodity in the market, and if it gives a fictitious price by means of false rumors, it is a fraud levelled against the public, for it is against all such as may possibly have anything to do with the funds on that particular day." Every "corner," in the language of the day, whether it be to affect the price of articles of commerce, such as breadstuffs, or the price of vendible stocks, when accomplished by confederation to raise or depress the price and operate on the markets, is a conspiracy. The ruin often spread abroad by these heartless conspiracies is indescribable, frequently filling the land with starvation, poverty and woe. Every association is criminal whose object is to raise or depress the price of labor beyond what it would bring if it were left without artificial aid or stimulus. Rex v. Byerdike, 1 Maule & S. 179. In the case of such associations the illegality consists most frequently in the means employed to carry out the object. To fix a standard of prices among men in the same employment, as a fee bill, is not in itself criminal, but may become so when the parties resort to coercion, restraint or penalties upon the employed or employers, or, what is worse, to force of arms. If the means be unlawful the combination is indictable. Com. v. Hunt, 4 Metc. (Mass.) 111. A conspiracy of journeymen of any trade or handicraft to raise the wages by entering into combination to coerce journeymen and master workmen employed in the same branch of industry to conform to rules adopted by such combination for the purpose of regulating the price of labor, and carrying such rules into effect by overt acts, is indictable as a misdemeanor. 3 Whart. Cr. Law, § 1366, citing People v. Fisher, 14 Wend. 9. Without multiplying examples, these are sufficient to illustrate the true aspect of the case before us, and to show that a combination such as these companies entered into to control the supply and price of the Blossburg and Barclay regions is illegal, and the contract therefore void.

A second question is, whether the bill drawn in this case by the general sales agent on the Barclay Coal Company in favor of the Morris Coal Company to equalize prices upon a settlement under the contract, is such an independent cause of action as will support the suit. When a bill, note or bond is but an instrument to execute an illegal contract, it is tainted by the illegality, and cannot be recovered. The illegal consideration enters directly into the instrument, and is followed up because the law will not permit itself to be violated by mere indirection. This is the principle mentioned in the cases of Stears v. Lashley, 6 Term R. 61; Swan v. Scott, 11 Serg. & R. 164; Stanton v. Allen, 5 Denio, 434; Fisher v. Bridges, 3 El. & Bl. 642; Lestapies v. Ingraham, 5 Pa. St. 82. In the last case, Gibson, C. J., says: "The solemnity of the security would not preclude an inquiry into the consideration of it had it been illegal;" and in Swan v. Scott, Duncan, J., said of a bond, the consideration of which grew out of an illegal transaction, "there the illegal consideration is the sole basis of the bond, and there can be no recovery." In the present case the bill itself refers directly to the equalization account, and was given in immediate execution of the contract. This being the case, it is distinguishable from Fackney v. Reynous, 4 Burrows, 2065; Petrie v. Hannay, 3 Term R. 418; Warner v. Russell, 1 Bos. & P. 295; Lestapies v. Ingraham, supra; Thomas v. Bracey, 10 Pa. St. 164,—cases where the action was not upon the illegal contract, or upon an instrument in execution of it, but was founded upon a new consideration. The distinction is well stated by Judge Washington, in Toler v. Armstrong, 3 Wash. C. C. 297, Fed. Cas. No. 14,078, affirmed in the United States supreme court, 11 Wheat. 258. The present case is free of difficulty, the money represented by the bill arising directly upon the contract to be paid by one party to another party to the contract in execution of its terms. The bill itself is therefore tainted by the illegality, and no recovery can be had upon it.

The judgment is therefore affirmed.

CENTRAL SHADE-ROLLER CO. v. CUSHMAN.

(9 N. E. 629, 143 Mass. 353.)

Supreme Judicial Court of Massachusetts. Suffolk. Jan. 11, 1887.

Bill in equity for an account, and for an injunction to restrain the defendant from violating an agreement made by him with the plaintiff. Hearing in the supreme court on the demurrer of the defendant, before Devens, J., who sustained the demurrer, and the plaintiff appealed. The facts are stated in the opinion.

J. B. Warner, for plaintiff. Moorfield Storey, for respondent.

ALLEN, J. The contract which is sought to be enforced by this bill (and the validity of which is the only question presented by the demurrer and argued by the parties) was made between the plaintiff, of the first part, and three manufacturers, under several patents of certain curtain fixtures known as "Wood Balance Shade-rollers," of the second part, in pursuance of an arrangement between the persons forming the party of the second part that the plaintiff corporation should be created for the purpose of becoming a party to the combination, was to prevent, or rather to regulate, competition between the parties to it in the sale of the particular commodity which they made. This is a lawful purpose, but it is argued that the means employed to carry it out—the creation of the plaintiff corporation and the terms of the contract with it—are against public policy and invalid. The fact that the parties to the combination formed themselves into a corporation of which they were the stockholders, that they might contract with it, instead of with each other, and carry out their scheme through its agency, instead of that of a pre-existing person, is obviously immaterial, and the only ground upon which it can be argued that the contract is invalid is the restraint it puts upon the parties to it.

Does the contract impose a restraint as to the manufacture on the sale of balance and shade-rollers which is void as against public policy? The contract certainly puts no restraint upon the production of the commodity to which it relates. It puts no obligation upon and offers no inducement to any person to produce less than to the full extent of his capacity. On the contrary, its apparent purpose is, by making prices more uniform and regular, to stimulate and increase production. The contract does not restrict the sale of the commodity. It does not look towards withholding a supply from the market in order to enhance the price, as in Craft v. McConoughy, 79 Ill. 346, and other cases cited by the defendant. On the contrary, the contract intends that the parties shall make sales, and gives them full power to do so; the only restrictions being that sales not at retail or for export shall be in the name of the plaintiff, and reported to it, and the accounts of them kept by it; and the provision that, when any party shall establish an agency in any city or town for the sale of a roller made exclusively for that purpose, no other party shall take orders for the same roller in the same place. To these restrictions, clearly valid, there is added the one which affords an argument for the invalidity of the contract,—the restriction as to price. That restriction is, in substance, that the prices for rollers of the same grade, made by different parties, shall be the same, and shall be, according to a schedule contained in the contract, subject to changes which may be made by the plaintiff upon recommendation of three-fourths of its stockholders. In effect, it is an agreement between three makers of a commodity that for three years they will sell it at a uniform price fixed at the outset, and to be changed only by consent of a majority of them. The agreement does not refer to an article of prime necessity, nor to a staple of commerce, nor to merchandise to be bought and sold in the market, but to a particular curtain fixture of the parties' own manufacture. It does not look to affecting competition from outside,—the parties have a monopoly by their patents,—but only to restrict competition in price between themselves. Even if such an agreement tends to raise the price of the commodity, it is one which the parties have a right to make. To hold otherwise would be to impair the right of persons to make contracts, and to put a price on the products of their own industry.

But we cannot assume that the purpose and effect of the combination is to unduly raise the price of the commodity. A natural purpose and a natural effect is to maintain a fair and uniform price, and to prevent the injurious effects, both to producers and consumers, of fluctuating prices caused by undue competitition. When it appears that the combination is used to the public detriment, a different question will be presented from that now before us. The contract is apparently beneficial to the parties to the combination, and not necessarily injurious to the public, and we know of no authority or reason for holding it to be invalid as in restraint of trade or against public policy. We have not overlooked other provisions of the contract, which were adverted to in the argument, but we do not find anything which renders it invalid, or calls for special consideration.

In the opinion of a majority of the court, the entry must be, demurrer overruled.

GOOD v. DALAND.

(24 N. E. 15, 121 N. Y. 1.)

Court of Appeals of New York. April 15, 1890.

Appeal from supreme court, general term, second department.

The case came before the court on appeal from the decision of the general term, (6 N. Y. Supp. 204,) sustaining the trial court in overruling the defendants' demurrer to the complaint. The demurrer was based upon two grounds: (1) That there was a misjoinder of causes of action; and (2) that the complaint did not state facts sufficient to constitute a cause of action. The complaint alleged, in substance, that the Tucker & Carter Cordage Company, being a member of the United States Cordage Manufacturing Association of the City and County of New York, together with other members of said association, authorized William S. Daland, as trustee of said association, to make a certain contract with the plaintiff, John Good, which he did. Said contract, which is set out in full, recites that "the members" of said association, in consideration of Good's agreement to allow them the exclusive use and sale on the western continent of certain inventions patented by him, and to warrant and protect them therein, agree to pay him one-eighth of one cent per pound on all manilla and sisal fibers worked by them into cords, twine, and rope, and sold by them in the United States, during the time they shall have the exclusive use and sale of said inventions; and, further, that "the members of said association shall respectively submit to said Good monthly sworn statements of the quantities of such fibers so worked and sold" by them during the preceding month. Daland is then empowered by Good to bring suit in his name, and at his expense, for infringements of said patents; and agrees, on his part, that if said association, or any of its members, make default in submitting a monthly sworn statement, or in paying the amount due as provided, he will bring suit against such defaulting member for the collection thereof, and, if he fail to do so, that Good may bring suit in his name, and at his expense. The complaint then alleges that the plaintiff has performed his agreements; but that the defendant company made and sold large quantities of such goods during the months of March, April, May, June, and July, 1887, of which it neglected to make him any statement; and that the defendant Daland, though requested, neglected to bring suit against said company. Plaintiff asks judgment that the rights and liabilities under the agreement may be declared; that an accounting may be had against the defendant company of fibers so worked and sold; and for damages against Daland for the amount of the agreed percentage thereon, or for such portion thereof as he could by due diligence have collected.

Calvin Frost, for appellants. *Albert C. McDonald*, for respondent.

PECKHAM, J. Although, perhaps, Daland was not a necessary party defendant to this action upon the agreement stated in the complaint, yet we think he was a proper party. As trustee for the various companies represented in the agreement, it was by that instrument made his duty to bring an action against any defaulting member, and to use all diligence in prosecuting it. The plaintiff claims that the corporation defendant was a defaulting member, and that it was the duty of Daland to prosecute it, but that he, upon request to bring an action for that purpose, refused so to do. If the corporation defendant were in fact as described in the agreement, a defaulting member, it was the duty of Daland to bring suit against it; and his refusal was a breach of that duty and of his agreement. It is true the agreement provided that, in case Daland failed to bring such suit. the plaintiff might, at his election. bring it in Daland's name, and at his expense. But the plaintiff was not confined to bringing an action in Daland's name. He could bring it in his own name, and join Daland as defendant, and charge him with costs, because of this breach of duty. In this light, there is no misjoinder of causes of action. No cause of action is stated against Daland for damages in consequence of his failure to bring suit to collect the percentage due from the corporation defendant, when requested by the plaintiff. The damages which the plaintiff had sustained by such failure cannot be ascertained from any allegation in the complaint; nor can it be said, as matter of law arising from the facts stated, that plaintiff sustained any damage. As there are not facts enough alleged upon which a good cause of action against Daland could be predicated on the ground of his failure to prosecute, it cannot be urged that the two causes of action have been improperly united.

As other grounds for sustaining the demurrer, the defendants say that the unincorporated association of which the corporation defendant is alleged to be a member is a partnership, and the agreement alleged is *ultra vires* the corporation. It is also stated that the agreement is void as in restraint of trade, and as tending to create a monopoly. The complaint gives no information as to the character of the association known as the "United States Cordage Manufacturing Association of the City of New York." There is nothing in that pleading which shows that the association is a partnership, and no inference to that effect can be drawn from the allegations which are therein set forth. All that can be learned from the complaint is that certain corporations have, for some purpose which is undiscovered, associated themselves in some way together under a certain name. This is no allegation either of partnership, or, indeed, of any illegal action whatever. The agreement which is there set up is one which each member of the association authorized the individual defendant to make, as trustee for the association, with the plaintiff. That agreement shows no partnership, but is an agreement that each member of the association will pay the plaintiff a certain price

on each pound of manilla and sisal fibers worked by such member and offered for sale. No member is responsible for anything but its own work; and its liability is based entirely upon the amount worked and offered for sale by itself. There is no community of profits or of losses provided for in the agreement; and no one member has any right to speak for or to bind any other member in regard to the subject-matter of the agreement. We can see nothing of a partnership nature set forth in the complaint.

The last objection urged, viz., that the contract set forth in the complaint is in restraint of trade, cannot be supported. It appears from the complaint that the plaintiff had invented and patented certain machinery, and parts thereof, for dressing fibers, spinning yarns, and making twines and cordage from manilla and sisal fibers, for which he had obtained letters patent from the United States. He agreed with the defendant Daland, as trustee for and representing the association already referred to, that he would, in North and South America, confine the sale and use of all his methods and machinery, then or thereafter to be invented and patented, to the members of the association; who, on their part, covenanted through Daland to pay plaintiff a certain sum on all manilla and sisal fibers worked by them into cords, twine, or rope, and offered for sale and use in the United States, and sold or delivered, during the time they should have the sole and exclusive use of the machinery above mentioned, provided they were fully protected in such use by the plaintiff. It is true the members of the association do not agree to themselves use this machinery at all; nor do they agree as to any special amount of twine or rope which shall by each or all of them be offered for sale; and the practical result is to take the machinery out of use, unless these members themselves use or permit others to use it. This is a peculiarity of a patented article. The owner does not possess his patent upon the condition that he shall make or vend the article patented, or allow others to do so for a fair and reasonable compensation. When he has once secured his patent, he may, if he choose, remain absolutely quiet, and not only neglect and refuse to make the patented article, but he may likewise refuse to permit any one else to do so on any terms. If the patent be a valuable one, self-interest may be relied upon as a strong enough motive to induce the owner either to take himself, or to permit others to take, some steps towards introducing his invention into use. How far it will go depends upon the owner; and his right to decide that question is not in the least circumscribed by the interests of the public in obtaining such machinery or invention, or a right to its use. He may keep such right himself, or make the machinery or manufacture the patented article alone, or he may permit others to share such right with him, or he may allow them an exclusive right, and retain none himself. It all follows and is founded upon the absolute and exclusive right which the owner of the patent has in the article patented. Having such right, he must plainly be permitted to sell to another the right itself, or to agree with him that he will permit none other than such person to use it. That person need not agree to make the patented article, or to sell it. It is a question solely for the parties interested. This right is necessary, in order that the owner of the patent shall have the largest measure of protection under it. Considerations which might obtain if the agreement were in regard to other articles cannot be of any weight in the decision of a question arising upon an agreement as to patented articles. If an owner of a patent should choose to refuse to manufacture the article covered by his patent, could any one else claim such right? His simple neglect or refusal to manufacture would stand as a conclusive reason why it was not manufactured. An owner might sometimes make more money by not manufacturing than by doing so; but of that question he is the sole and absolute judge.

There is nothing in this agreement which can be regarded as illegal, within the principles above stated, which are not in the least new or unknown. The plaintiff probably thought his inventions would prove sufficiently remunerative to him if he sold the exclusive right to use them to the members of this association even though they did not themselves agree to use the same in the process of the manufacture of cord or twine. His compensation was measured by the amount of cord and twine worked, sold, and delivered by these members; and whether they should use his inventions, or keep them unemployed, was not thereafter a question of interest to him, so long as the agreement remained in force. We think the demurrers were not well taken. The judgment overruling them should be affirmed, with costs, with leave to answer on payment of costs. All concur.

MORE et al. v. BENNETT et al.

(29 N. E. 888, 140 Ill. 69.)

Supreme Court of Illinois. Jan. 18, 1892.

Appeal from appellate court, first district.

Action by R. Wilson More and others against J. L. Bennett and others for damages for violation of rules of an association of which both parties were members. Judgment sustaining a demurrer to the complaint was affirmed by the appellate court. Plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by BAILEY, J.:

This was a suit in *assumpsit*, brought by R. Wilson More and others, composing the firm of More & Dundas, against J. L. Bennett and others, composing the firm of Bennett, Edwards & Pettit, to recover damages resulting from an alleged breach of certain rules and by-laws of the Chicago Law Stenographers' Association, of which both the plaintiffs and defendants are members. To the declaration, which consists of two special counts, a demurrer was sustained, and, the plaintiffs electing to abide by their declaration, judgment was rendered in favor of the defendants for costs. Said judgment has been affirmed by the appellate court on appeal, and the present appeal is from said judgment of affirmance.

The first count of the declaration alleges, in substance, that the plaintiffs and defendants are all stenographers by profession, and have, from the time of its organization, been members of said association, an association formed to promote the interest of its members by all proper methods, and to establish and maintain reasonable, proper, and uniform rates for stenographic work done by the members of said association, and to secure to judges, lawyers, and citizens of Chicago efficient, competent, and reliable law reporting, at reasonable, proper, and uniform rates, and to furnish them with the means of obtaining efficient and competent reporters, and to increase the efficiency of law reporting in the county of Cook. That, in accordance with its constitution and by-laws, said association had adopted a schedule of rates which were and are fair and reasonable, and had for more than 15 years prior to the organization of said association been the established rates among law stenographers, and had been and are still recognized as reasonable and established rates by judges and members of the legal fraternity, and by law stenographers of the city of Chicago, there having been during said time no material variation from said rates among law stenographers, said rates being less than those established in certain other large cities of the United States for the same class of work. Said count further alleges that, in consideration of like promises and agreements on the part of the plaintiffs, and like payment of the membership fee of $5 by each of the plaintiffs to become members of said association, the defendants promised and agreed with the plaintiffs that they would be bound in their charges for work by the schedule of rates adopted by said association. That the defendants might cut rates against persons not members of said association, provided such cutting was in good faith and the rights of the plaintiffs were respected. That in no case where the defendants had any knowledge of the existence of a contract or reporting arrangement between the plaintiffs and any lawyer, corporation, or any other person would they attempt, by underbidding the rate established by said association or other unfair means, to secure such reporting. That the rates established by said association were as follows: Not less than 20 cents per folio for single copy; not less than 25 cents per folio for two copies; not less than 28 cents per folio for three copies; and the rate of $10 per day for attendance, with the qualification that, if a reporter was engaged by one of the parties to a suit, he or any other reporter, knowing of such engagement, might take the other side of the case for $5 per day; but in no case should the reporter make any offer to any attorney after being informed by such attorney that he had engaged a reporter. That while said association was in existence, and the plaintiffs and defendants were members thereof, the plaintiffs entered into a contract or reporting arrangement with the county of Cook, by which said county employed the plaintiffs to report the proceedings and furnish transcripts thereof, as said county should require, in a certain celebrated murder case then pending in the criminal court of Cook county, to-wit, the case of People v. O'Sullivan and others, known as the "Cronin Trial," said employment by said county being on the following terms, to-wit, $10 per day for attendance, and the regular rates for transcripts as established by said association, the plaintiffs agreeing with said county to do said work, if the county should demand it, at as low a rate as any reputable and established stenographer or firm of stenographers should in good faith bid for said work. That the plaintiffs entered upon the performance of said contract, and were engaged in reporting the proceedings at said trial at said regular rates, yet the defendants, well knowing the premises, and the aforesaid contract or reporting arrangement between the plaintiffs and said county, and after the plaintiffs had been engaged on said case for, to-wit, seven weeks, and at a time when defendants well knew that the plaintiff had performed the most unprofitable part of said contract, and not regarding their said promise so made to the plaintiffs, did not respect the rights of the plaintiffs and the schedule rates so adopted by said association, and the fact that they knew that there was a reporting arrangement or contract between the plaintiffs and said county, but solicited said county, and endeavored to secure from said county, by underbidding and other unfair means, employment as law stenographers to report and furnish transcripts of the proceedings at said trial, and made a certain bid to said county, by which they offered to do said work at a less rate than that established by said association to-wit, $5 per day for attend-

ance, 20 cents per folio for a single copy, 22 cents per folio for two copies, and all copies above two free of charge. That thereupon the plaintiffs, because of said bid of the defendants, were required by said county to meet said bid, or to cease their employment on said trial, as by the terms of said employment said county had a right to do; and that the plaintiffs, for the purpose of remaining in employment on said trial, did meet the said bid of the defendants, and afterwards reported and furnished transcripts of the proceedings on said trial at the rates offered by the defendants; by means whereof they were deprived of divers gains and profits which would have accrued to them from the reporting and furnishing transcripts on said trial under the regular rates of said association, and in accordance with their original bid, and have suffered great loss and damage through the wrongful conduct of the defendants, to the damage of the plaintiffs in the sum of $3,000; and therefore they bring their suit, etc.

The second count contains substantially the same allegations as the first, and also the following: That said association numbers among its members only a small portion of the law stenographers of the city of Chicago, and that said association was formed because a system of ruinous competition had sprung up among the stenographers of said city, by which the prices of stenographic work were depressed below reasonable rates, and also because a discreditable and dishonorable system of solicitation for business had sprung up, by which efforts were made on the part of stenographers to induce attorneys, corporations, and other persons to break their contracts already made with other stenographers, and that the objects of said association were to prevent said discreditable and dishonorable solicitation, and to promote the interests of the members thereof by all proper methods, and to establish and maintain proper and uniform rates for stenographic work done by its members. Said second count also set out, *in extenso*, the constitution, by-laws, and schedule of rates of said association, said constitution containing, among other things, the following provisions: "The object of this association shall be to promote the interests of the members thereof by all proper methods, particularly to establish and maintain proper rates for stenographic work done by members of the association. Any reputable stenographer, regularly engaged in law reporting in Cook county, shall be eligible to membership under the rules hereinafter provided. The association may adopt a schedule of rates to be charged by the members for stenographic work done by them, which schedule shall be binding upon every member." Among the by-laws adopted by said association were the following: "The membership fee shall be $5. The expenses of the association, above amount received for membership fees, shall be paid out of a fund to be collected by assessment, to be levied by the board of directors from time to time, as may be necessary. The members of this association shall respect each other's rights, and in no case where a member has knowledge of the existence of a contract or reporting arrangement between a fellow-member and a lawyer, corporation, or any other person shall he attempt, by underbidding or other unfair means, to secure such reporting; but members of this association may cut rates against outsiders, if they choose; such cutting, however, must be done in good faith, or the member will be liable to fine, as provided for other violations of the constitution and by-laws." Said by-laws also provide, in case of any violation of the rules of said association by any of its members, for a trial of the member accused of such violation by a special arbitration committee, and the imposition of a fine, in case of conviction, of not less than $10, nor more than $25, to be paid into the treasury of the association, with the right on the part of the accused to an appeal to a meeting of the entire association to be called for that purpose; and it is further provided that, "in cases where the differences between members require financial adjustment, the said arbitration committee shall decide between the parties," with right of appeal from the decision of said committee to any regular or special meeting of the association, whose decision in the matter is final. The assignments of error call in question the decision of the circuit court sustaining the demurrer to said declaration.

Matz & Fisher, for appellants. *J. L. Bennett*, for appellees.

BAILEY, J., (after stating the facts.) The question is raised by counsel, and discussed at some length, whether membership in the Chicago Law Stenographic Association established a contractual relation between the plaintiffs and defendants which gives to the plaintiffs a right of action against the defendants for a violation of any of the rules of said association, as for a breach of contract; and also whether the only remedy for a violation of said rules is not that provided by the by-laws of the association, viz., a fine, to be imposed upon the offender, after a trial and conviction before an arbitration committee, duly appointed for that purpose. But, as we view the case, it will be unnecessary for us to consider these questions; since, admitting that the constitution and by-laws of the association were in the nature of a contract as between the members *inter se*, we are of the opinion that the contract thus established is so far obnoxious to well-settled rules of public policy as to render it improper for the courts to lend their aid to its enforcement. Whatever may be the professed objects of the association, it clearly appears, both from its constitution and by-laws, and from the averments of the declaration, that one of its objects, if not its leading object, is to control the prices to be charged by its members for stenographic work, by restraining all competition between them. Power is given to the association to fix a schedule of prices which shall be binding upon all its members, and not only do the

members, by assenting to the constitution and by-laws, agree to be bound by the schedule thus fixed, but their competition with each other, either by taking or offering to take a less price, is punishable by the imposition of fines, as well as by such other disciplinary measures as associations of this character may adopt for the enforcement of their rules. The rule of public policy here involved is closely analogous to that which declares illegal and void contracts in general restraint of trade, if it is not, indeed, a subordinate application of the same rule. As said by Mr. Tiedeman: "Following the reason of the rule which prohibits contracts in restraint of trade, we find that it is made to prohibit all contracts which in any way restrain the freedom of trade or diminish competition, or regulate the prices of commodities or services. All combinations of capitalists or of workmen for the purpose of influencing trade in their especial favor, by raising or reducing prices, are so far illegal that agreements to combine cannot be enforced by the courts." Tied. Com. Paper, § 190. Many cases may be found in which the doctrine here stated has been laid down and enforced. Thus in Stanton v. Allen, 5 Denio, 434, where an association among the whole or a large part of the proprietors of boats on the Erie and Oswego canals was formed upon an agreement to regulate the price of freight and passage by a uniform scale to be fixed by a committee chosen by themselves, and to divide the profits of their business according to the number of boats employed by each, with provisions prohibiting the members from engaging in similar business out of the association, it was held that, as the tendency of such agreement was to increase prices and to prevent wholesome competition, as well as diminish the public revenue, it was against public policy and void, by the principles of the common law. In Hooker v. Vandewater, 4 Denio, 349, the proprietors of five several lines of boats engaged in the business of transporting persons and freight on the Erie and Oswego canals entered into an agreement in which, "for the purpose of establishing and maintaining fair and uniform rates of freight, and equalizing the business among themselves, and to avoid all unnecessary expense in doing the same," they agreed to run for the residue of the season of navigation at certain rates of freight and passage then fixed upon, but which should be changed whenever the parties should deem expedient, and to divide the net earnings among themselves according to certain fixed proportions; and it was held, in a suit on the agreement against a party who failed to make payment according to its terms, that the agreement was a conspiracy to commit an act injurious to trade, and was illegal and void. In Morris Run Coal Co v. Barclay Coal Co., 68 Pa. St. 173, five coal companies in Pennsylvania entered into an agreement in New York to divide two coal regions of which they had control; to appoint a committee to take charge of their interests, and decide all questions; and appoint a general agent at a certain point in the state of New York, the coal mined to be delivered through him, each company to deliver its proportion at its own cost at the different markets, at such time and to such persons as the committee should direct, the committee to adjust all prices, rates of freight, etc., and settlements to be made between the several companies monthly; and it was held, in a suit brought by one of said companies against another, to enforce a liability arising under said contract, that the contract was in violation of a statute of New York making it a misdemeanor to conspire to commit any act injurious to trade or commerce, and was also against public policy, and therefore illegal and void; the court laying down the rule, among other things, that every association formed to raise or depress prices beyond what they would be, if left without aid or stimulus, was criminal. In Craft v. McConoughy, 79 Ill. 346, a contract was entered into by all the grain dealers in a certain town which, on its face, indicated that they had formed a partnership for the purpose of dealing in grain, but the true object of which was to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, costs of storage, and expense of shipment at such town; and it was held, on bill filed for an accounting and distribution of profits, that such contract was in restraint of trade, and consequently void on grounds of public policy. In discussing the principles involved, this court said: "While these parties were in business in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper, and as they could make contracts for with the producer. So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, were all the guaranty the public required; but the secret combination created by the contract destroyed all competition, and created a monopoly against which the public interest had no protection."

The doctrine of the foregoing decisions may, in our opinion, be fairly applied to the facts in the present case. While some of the cases cited involve elements not present here, the determining circumstance in all of them seems to have been a combination or conspiracy among a number of persons, engaged in a particular business, to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would have been if left to the influence of unrestricted competition. All such combinations are held to be contrary to public policy, and the courts, therefore, will refuse to lend their aid to the enforcement of the contracts by which such combinations are sought to be effected. Counsel seek to distinguish this case from those cited by the circumstance, alleged in the second count of the declaration, that but a small portion of the law stenographers of Chi

cago belong to said association. An analogy is thereby sought to be raised between the contract in this case and those contracts in partial restraint of trade, which the law upholds. We think the analogy thus sought to be raised does not exist. Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its good-will with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. But in the present case there is no purchase or sale of any business, nor any other analogous circumstance giving to one party a just right to be protected against competition from the other. All of the members of the association are engaged in the same business within the same territory, and the object of the association is purely and simply to silence and stifle all competition as between its members. No equitable reason for such restraint exists; the only reason put forward being that, under the influence of competition as it existed prior to the organization of the association, prices for stenographic work had been reduced too far, and the association was organized for the purpose of putting an end to all competition, at least as between those who could be induced to become members. True, the restraint is not so far-reaching as it would have been if all the stenographers in the city had joined the association, but, so far as it goes, it is of precisely the same character, produces the same results, and is subject to the same legal objection. It may also be observed that, by the constitution of the association, any reputable stenographer, regularly engaged in law reporting in Cook county, is eligible to membership, and, if all or a major part of the stenographers in said county engaged in that business are not already members, it is because the association has not yet fully accomplished the purposes of its organization. We can see no legal difference between the restraint upon competition which it now exercises and that which it will exercise when it is in a position to dictate terms to all who are engaged in the business, and to all who may wish to obtain the services of law stenographic reporters. We are of the opinion that the demurrer to the declaration was properly sustained, and the judgment will therefore be affirmed.

RAILROAD CO v. LOCKWOOD.

(17 Wall. 357.)

Supreme Court of the United States. Oct., 1873.

Error to the circuit court for the Southern district of New York; the case being thus:

Lockwood, a drover, was injured whilst traveling on a stock train of the New York Central Railroad Company, proceeding from Buffalo to Albany, and brought this suit to recover damages for the injury. He had cattle in the train, and had been required, at Buffalo, to sign an agreement to attend to the loading, transporting, and unloading of them, and to take all risk of injury to them and of personal injury to himself, or to whomsoever went with the cattle; and he received what is called a drover's pass; that is to say, a pass certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates. It was shown on the trial, that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms; but that all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, at least the ordinary negligence of their servants; and requested the judge so to charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negligence on the part of the plaintiff, and that the negligence of the defendants caused the injury, they must find for the plaintiff, which they did. Judgment being entered accordingly, the railroad company took this writ of error.

It is unnecessary to notice some subordinate points made, as this court was of opinion that all the questions of fact were fairly left to the jury, and that the whole controversy depended on the main question of law stated.

T. R. Strong, for plaintiff in error. Messrs. Truman Smith and Cephas Brainerd, contra.

Mr Justice BRADLEY delivered the opinion of the court.

It may be assumed in limine, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, &c., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading, or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation; thus proportionally relieving the transportation of produce and merchandise from some of the burden with which it is loaded.

The question is, whether such modification of responsibility by notice or special contract may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard; whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants, is not so evidently repugnant to that policy as to be altogether null and void; or, at least null and void under certain circumstances.

In the case of sea-going vessels, congress has, by the act of 1851, relieved ship-owners from all responsibility for loss by fire unless caused by their own design or neglect; and from responsibility for loss of money and other valuables named, unless notified of their character and value; and has limited their liability to the value of ship and freight, where losses happen by the embezzlement or other act of the master, crew, or passengers; or by collision, or any cause occurring without their privity or knowledge; but the master and crew themselves are held responsible to the parties injured by their negligence or misconduct. Similar enactments have been made by state legislatures. This seems to be the only important modification of previously existing law on the subject, which in this country has been effected by legislative interference. And by this, it is seen, that though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and freight for the negligence and misconduct of his employés, and liable without limit for his own negligence.

It is true that the first section of the above

act relating to loss by fire has a proviso, that nothing in the act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners. This proviso, however, neither enacts nor affirms anything. It simply expresses the intent of congress to leave the right of contracting as it stood before the act.

The courts of New York, where this case arose, for a long time resisted the attempts of common carriers to limit their common-law liability, except for the purpose of procuring a disclosure of the character and value of articles liable to extra hazard and risk. This, they were allowed to enforce by means of a notice of non-liability, if the disclosure was not made. But such announcements as "all baggage at the risk of the owner," and such exceptions in bills of lading as "this company will not be responsible for injuries by fire, nor for goods lost, stolen, or damaged," were held to be unavailing and void, as being against the policy of the law. Cole v. Goodwin, 19 Wend. 257; Gould v. Hill, 2 Hill, 623.

But since the decision in the case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, by this court, in January term, 1848, it has been uniformly held, as well in the courts of New York as in the federal courts, that a common carrier may, by special contract, limit his common-law liability; although considerable diversity of opinion has existed as to the extent to which such limitation is admissible.

The case of New Jersey Steam Nav. Co. v. Merchants' Bank, above adverted to, grew out of the burning of the steamer Lexington. Certain money belonging to the bank had been intrusted to Harnden's Express, to be carried to Boston, and was on board the steamer when she was destroyed. By agreement between the steamboat company and Harnden, the crate of the latter and its contents were to be at his sole risk. The court held this agreement valid, so far as to exonerate the steamboat company from the responsibility imposed by law; but not to excuse them for misconduct or negligence, which the court said it would not presume that the parties intended to include, although the terms of the contract were broad enough for that purpose; and that inasmuch as the company had undertaken to carry the goods from one place to another, they were deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and were, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation; and as the court was of opinion that the steamboat company had been guilty of negligence in these particulars as well as in the management of the steamer during the fire, they held them responsible for the loss.

As this has been regarded as a leading case, we may pause for a moment to observe that the case before us seems almost precisely within the category of that decision. In that case, as in this, the contract was general, exempting the carrier from every risk and imposing it all upon the party; but the court would not presume that the parties intended to include the negligence of the carrier or his agents in that exception.

It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengers, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence. In doing so we shall first briefly review the course of decisions in New York, on which great stress has been laid, and which are claimed to be decisive of the question. Whilst we cannot concede this, it is, nevertheless, due to the courts of that state to examine carefully the grounds of their decision and to give them the weight which they justly deserve. We think it will be found, however, that the weight of opinion, even in New York, it not altogether on the side that favors the right of the carrier to stipulate for exemption from the consequences of his own or his servants' negligence.

The first recorded case that arose in New York after the before-mentioned decision in this court, involving the right of a carrier to limit his liability, was that of Dorr v. New Jersey Steam Nav. Co. (decided in 1850) 4 Sandf. 136. This case also arose out of the burning of the Lexington, under a bill of lading which excepted from the company's risk "danger of fire, water, breakage, leakage, and other accidents." Judge Campbell, delivering the opinion of the court, says: "A common carrier has in truth two distinct liabilities,—the one for losses by accident or mistake, where he is liable as an insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee. It would certainly seem reasonable that he might, by express special contract, restrict his liability as insurer; that he might protect himself against misfortune, even though public policy should require that he should not be permitted to stipulate for impunity where the loss occurs from his own default or neglect of duty. Such we understand to be the doctrine laid down in the case of New Jersey Steam Nav. Co. v. Merchants' Bank, in 6 How., and such we consider to be the law in the present case." And in Stoddard v. Railroad Co., 5 Sandf. 180, another express case, in which it was stipulated that the express company should be alone re-

sponsible for all losses, Judge Duer, for the court, says: "Conforming our decision to that of the supreme court of the United States, we must, therefore, hold: 1st. That the liability of the defendants as common carriers was restricted by the terms of the special agreement between them and Adams & Co., and that this restriction was valid in law. 2d. That by the just interpretation of this agreement the defendants were not to be exonerated from all losses, but remained liable for such as might result from the wrongful acts, or the want of due care and diligence of themselves or their agents and servants. 3d. That the plaintiffs, claiming through Adams & Co., are bound by the special agreement." The same view was taken in subsequent cases (Parsons v. Monteath, 13 Barb. 353; Moore v. Evans, 14 Barb. 524), all of which show that no idea was then entertained of sanctioning exemptions of liability for negligence.

It was not till 1858, in the case of Welles v. Railroad Co., 26 Barb. 641, that the supreme court was brought to assent to the proposition that a common carrier may stipulate against responsibility for the negligence of his servants. That was the case of a gratuitous passenger travelling on a free ticket, which exempted the company from liability. In 1862 the court of appeals by a majority affirmed this judgment (24 N. Y. 181), and in answer to the suggestion that public policy required that railroad companies should not be exonerated from the duty of carefulness in performing their important and hazardous duties, the court held that the case of free passengers could not seriously affect the incentives to carefulness, because there were very few such, compared with the great mass of the travelling public. Perkins v. Railroad Co., Id. 196, was also the case of a free passenger, with a similar ticket, and the court held that the indorsement exempted the company from all kinds of negligence of its agents, gross as well as ordinary; that there is, in truth, no practical distinction in the degrees of negligence.

The next cases of importance that arose in the New York courts were those of drovers' passes, in which the passenger took all responsibility of injury to himself and stock. The first was that of Smith v. Railroad Co. (decided in March, 1859); 29 Barb. 132. The contract was precisely the same as that in the present case. The damage arose from a flattened wheel in the car, which caused it to jump the track. The supreme court, by Hogeboom, J., held that the railroad company was liable for any injury happening to the passenger, not only by the gross negligence of the company's servants, but by ordinary negligence on their part. "For my part," says the judge, "I think not only gross negligence is not protected by the terms of the contract, but what is termed ordinary negligence, or the withholding of ordinary care, is not so protected. I think, notwithstanding the contract, the carrier is responsible for what, independent of any peculiar responsibility attached to his calling or employment, would be regarded as fault or misconduct on his part." The judge added that he thought the carrier might, by positive stipulation, relieve himself to a limited degree from the consequences of his own negligence or that of his servants. But, to accomplish that object, the contract must be clear and specific in its terms, and plainly covering such a case. Of course, this remark was extrajudicial. The judgment itself was affirmed by the court of appeals in 1862 by a vote of five judges to three. 24 N. Y. 222. Judge Wright strenuously contended that it is against public policy for a carrier of passengers, where human life is at stake, to stipulate for immunity for any want of care. "Contracts in restraint of trade are void," he says, "because they interfere with the welfare and convenience of the state; yet the state has a deep interest in protecting the lives of its citizens." He argued that it was a question affecting the public, and not alone the party who is carried. Judge Sutherland agreed in substance with Judge Wright. Two other judges held that if the party injured had been a gratuitous passenger the company would have been discharged, but in their view he was not a gratuitous passenger. One judge was for affirmance, on the ground that the negligence was that of the company itself. The remaining three judges held the contract valid to the utmost extent of exonerating the company, notwithstanding the grossest neglect on the part of its servants.

In that case, as in the one before us, the contract was general in its terms, and did not specify negligence of agents as a risk assumed by the passenger, though by its generality it included all risks.

The next case, Bissell v. Railroad Co., 29 Barb. 602, first decided in September, 1859, differed from the preceding in that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, "whether of negligence by their agents, or otherwise," for injury to the person or stock of the passenger. The latter was killed by the express train running into the stock train, and the jury found that his death was caused by the gross negligence of the agents and servants of the defendants. The supreme court held that gross negligence (whether of servants or principals) cannot be excused by contract in reference to the carriage of passengers for hire, and that such a contract is against the policy of the law, and void. In December, 1862, this judgment was reversed by the court of appeals (25 N. Y. 442), four judges against three; Judge Smith, who concurred in the judgment below, having in the meantime changed his views as to the materiality of the fact that the negligence stipulated against was that of the servants of the company, and not of the company itself. The majority now held that the ticket

was a free ticket, as it purported to be, and, therefore, that the case was governed by Welles v. Railroad Co.; but whether so, or not, the contract was founded on a valid consideration, and the passenger was bound by it even to the assumption of the risk arising from the gross negligence of the company's servants. Elaborate opinions were read by Justice Selden in favor, and by Justice Denio against the conclusion reached by the court. The former considered that no rule of public policy forbids such contracts, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge. In other words, unless a man chooses to pay the highest amount which the company by its charter is authorized to charge, he must submit to their terms, however onerous. Justice Denio, with much force of argument, combated this view, and insisted upon the impolicy and immorality of contracts stipulating immunity for negligence, either of servants or principals, where the lives and safety of passengers are concerned. The late case of Poucher v. Railroad Co., 49 N. Y. 263, is in all essential respects a similar case to this, and a similar result was reached.

These are the authorities which we are asked to follow. Cases may also be found in some of the other state courts which, by dicta or decision either favor or follow, more or less closely, the decisions in New York. A reference to the principal of them is all that is necessary here: Ashmore v. Pennsylvania Transportation Co., 28 N. J. Law, 180; Kinney v. Railroad Co., 32 N. J. Law, 407; Hale v. Navigation Co., 15 Conn. 539; Peck v. Weeks, 34 Conn. 145; Lawrence v. Railroad Co., 36 Conn. 63; Kimball v. Railroad Co., 26 Vt. 247; Mann v. Birchard, 40 Vt. 326; Express Co. v. Haynes, 42 Ill. 89; Id. 458; Illinois Cent. R. Co. v. Adams Exp. Co., Id. 474; Hawkins v. Railroad Co., 17 Mich. 57, 18 Mich. 427; Railroad Co. v. Brady, 32 Md. 333, 25 Md. 128; Levering v. Transportation Co., 42 Mo. 88.

A review of the cases decided by the courts of New York shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms. So that if we only felt bound by those precedents, we could perhaps, find no authority for reversing the judgment in this case. But on a question of general commercial law, the federal courts administering justice in New York have equal and co-ordinate jurisdiction with the courts of that state. And in deciding a case which involves a question of such importance to the whole country; a question on which the courts of New York have expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law.

In passing, however, it is apposite to call attention to the testimony of an authoritative witness as to the operation and effect of the recent decisions referred to. "The fruits of this rule," says Judge Davis, "are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts." Stinson v. Railroad Co., 32 N. Y. 337.

We now proceed to notice some cases decided in other states, in which a different view of the subject is taken.

In Pennsylvania, it is settled by a long course of decisions, that a common carrier cannot, by notice or special contract, limit his liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants and agents. Laing v. Colder, 8 Pa. St. 479; Railroad Co. v. Baldauf, 16 Pa. St. 67; Goldey v. Railroad Co., 30 Pa. St. 242; Powell v. Railroad Co., 32 Pa. St. 414; Railroad Co. v. Henderson, 51 Pa. St. 315; Farnham v. Railroad Co., 55 Pa. St. 53; Express Co. v. Sands, Id. 140; Empire Transp. Co. v. Wamsutta Oil Co., 63 Pa. St. 14. "The doctrine is firmly settled," says Chief Justice Thompson, in Farnham v. Railroad Co., 55 Pa. St. 62, "that a common carrier cannot limit his liability so as to cover his own or his servants' negligence." This inability is affirmed both when the exemption stipulated for is general, covering all risks, and where it specifically includes damages arising from the negligence of the carrier or his servants. In Railroad Co. v. Henderson, 51 Pa. St. 315, a drover's pass stipulated for immunity of the company in case of injury from negligence of its agents, or otherwise. The court, Judge Read delivering the opinion, after a careful review of the Pennsylvania decisions, says: "This indorsement relieves the company from all liability for any cause whatever, for any loss or injury to the person or property, however it may have been occasioned; and our doctrine, settled by the above decisions, made upon grave deliberation, declares that such a release is no excuse for negligence."

The Ohio cases are very decided on this subject, and reject all attempts of the carrier to excuse his own negligence, or that of his servants. In Davidson v. Graham, 2 Ohio St. 131, the court, after conceding the right of the carrier to make special contracts to a certain extent, says: "He cannot, however, protect himself from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in

the discharge of his duties are essential to the public interests. * * * And public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties." In Welsh v. Railroad, 10 Ohio St. 75, 76, the court says: "In this state, at least, railroad companies are rapidly becoming almost the exclusive carriers both of passengers and goods. In consequence of the public character and agency which they have voluntarily assumed, the most important powers and privileges have been granted to them by the state." From these facts, the court reasons that it is specially important that railroad companies should be held to the exercise of due diligence at least. And as to the distinction taken by some, that negligence of servants may be stipulated for, the court pertinently says: "This doctrine, when applied to a corporation which can only act through its agents and servants, would secure complete immunity for the neglect of every duty." And in relation to a drover's pass, substantially the same as that in the present case, the same court, in Railroad v. Curran, 19 Ohio St. 1, 12, 13, held: 1st. That the holder was not a gratuitous passenger; 2dly. That the contract constituted no defense against the negligence of the company's servants, being against the policy of the law. and void. The court refers to the cases of Bissell v. Railroad, 25 N. Y. 442, and of Pennsylvania Railroad v. Henderson, 51 Pa. St. 315, and expresses its concurrence in the Pennsylvania decision. This was in December term, 1869.

The Pennsylvania and Ohio decisions differ mainly in this, that the former give to a special contract (when the same is admissible) the effect of converting the common carrier into a special bailee for hire, whose duties are governed by his contract, and against whom, if negligence is charged, it must be proved by the party injured; whilst the latter hold that the character of the carrier is not changed by the contract, but that he is a common carrier still, with enlarged exemptions from responsibility, within which the burden of proof is on him to show that an injury occurs. The effect of this difference is to shift the burden of proof from one party to the other. It is unnecessary to adjudicate that point in this case, as the judge on the trial charged the jury, as requested by the defendants, that the burden of proof was on the plaintiff.

In Maine, whilst it is held that a common carrier may, by special contract, be exempted from responsibility for loss occasioned by natural causes, such as the weather, fire, heat, frost, &c., yet in a case where it was stipulated that a railroad company should be exonerated from all damages that might happen to any horses or cattle that might be sent over the road, and that the owners should take the risk of all such damages, the court held that the company were not thereby excused from the consequences of their negligence, and that the distinction between negligence and gross negligence in such a case is not tenable. "The very great danger," says the court, "to be anticipated by permitting them" [common carriers] "to enter into contracts to be exempt from losses occasioned by misconduct or negligence, can scarcely be overestimated. It would remove the principal safeguard for the preservation of life and property in such conveyances."

To the same purport it was held in Massachusetts in the late case of School Dist. v. Boston, etc., R. Co., 102 Mass. 552, 556, where the defendant set up a special contract that certain iron castings were taken at the owner's risk of fracture or injury during the course of transportation, loading, and unloading, and the court say: "The special contract here set up is not alleged, and could not by law be permitted, to exempt the defendants from liability for injuries by their own negligence." To the same purport, likewise, are many other decisions of the state courts, some of which are argued with great force and are worthy of attentive perusal, but, for want of room, can only be referred to here.

These views as to the impolicy of allowing stipulations against liability for negligence and misconduct are in accordance with the early English authorities. St. Germain, in the Doctor and Student (Dialogue 2, c. 38), pointedly says of the common carrier: "If he would per case refuse to carry it" [articles delivered for carriage] "unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like."

A century later this passage is quoted by Attorney-General Noy in his book of Maxims as unquestioned law. Noy's Maxims, 92. And so the law undoubtedly stood in England until comparatively a very recent period. Serjeant Steven, in his Commentaries (volume 2, p. 135), after stating that a common carrier's liability might, at common law, be varied by contract, adds that the law still held him responsible for negligence and misconduct.

The question arose in England principally upon public notices given by common carriers that they would not be responsible for valuable goods unless entered and paid for according to value. The courts held that this was a reasonable condition, and, if brought home to the owner, amounted to a special contract valid in law. But it was also held that it could not exonerate the carrier if a loss occurred by his actual misfeasance or gross negligence. Or, as Starkie says, "proof of a direct misfeasance or gross negligence is in effect an answer to proof of notice." 2 Starkie, Ev. (6th Am. Ed.) p. 205. But the term "gross negligence" was so vague and uncertain that it came to represent every in-

stance of actual negligence of the carrier or his servant—or ordinary negligence in the accustomed mode of speaking. Justice Story, in his work on Bailments (section 571), originally published in 1832, says that it is now held that, in cases of such notices, the carrier is liable for losses and injury occasioned not only by gross negligence, but by ordinary negligence; or, in other words, the carrier is bound to ordinary diligence.

In estimating the effect of these decisions it must be remembered that, in the cases covered by the notices referred to, the exemption claimed was entire, covering all cases of loss, negligence as well as others. They are, therefore, directly in point.

In 1863, in the great case of Peek v. Railway Co., 10 H. L. Cas. 473, Mr. Justice Blackburn, in the course of a very clear and able review of the law on the subject, after quoting this passage from Justice Story's work, proceeds to say: "In my opinion, the weight of authority was, in 1832, in favor of this view of the law, but the cases decided in our courts between 1832 and 1854 established that this was not the law, and that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants; and, as it seems to me, the reason why the legislature intervened in the railway and canal traffic act, 1854, was because it thought that the companies took advantage of those decisions (in Story's language), 'to evade altogether the salutary policy of the common law.'"

This quotation is sufficient to show the state of the law in England at the time of the publication of Justice Story's work; and it proves that, at that time, common carriers could not stipulate for immunity for their own or their servants' negligence. But in the case of Carr v. Railroad Co., 7 Exch. 707, and other cases decided whilst the change of opinion alluded to by Justice Blackburn was going on (several of which related to the carriage of horses and cattle), it was held that carriers could stipulate for exemption from liability for even their own gross negligence. Hence the act of 1854 was passed, called the railway and canal traffic act, declaring that railway and canal companies should be liable for negligence of themselves or their servants, notwithstanding any notice or condition, unless the court or judge trying the cause should adjudge the conditions just and reasonable. Upon this statute ensued a long list of cases deciding what conditions were or were not just and reasonable. The truth is, that this statute did little more than bring back the law to the original position in which it stood before the English courts took their departure from it. But as we shall have occasion to advert to this subject again, we pass it for the present.

It remains to see what has been held by this court on the subject now under consideration.

We have already referred to the leading case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 383. On the precise point now under consideration, Justice Nelson said, "If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents, in the transportation of goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties."

As to carriers of passengers, Mr. Justice Grier, in the case of Railroad v. Derby, 14 How. 486, delivering the opinion of the court, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'" That was the case of a free passenger, a stockholder of the company, taken over the road by the president to examine its condition; and it was contended in argument that, as to him, nothing but "gross negligence" would make the company liable. In the subsequent case of New World v. King, 16 How. 469, 474, which was also the case of a free passenger carried on a steamboat, and injured by the explosion of the boiler, Curtis, Justice, delivering the judgment, quoted the above proposition of Justice Grier, and said: "We desire to be understood to reaffirm that doctrine, as resting not only on public policy, but on sound principles of law."

In York Co. v. Central R. R., 3 Wall. 113, the court, after conceding that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, adds: "When such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement." In the case of Walker v. Transportation Co. (decided at the same term), Id. 150, it is true, the owner of a vessel destroyed by fire on the lakes, was held not to be responsible for the negligence of the officers and agents having charge of the vessel; but that was under the act of 1851, which the court held to apply to our great lakes as well as to the sea. And in Express Co. v. Kountze, 8 Wall. 342, 353, where the carriers were sued for the loss of gold-dust delivered to them on a bill of lading excluding liability for any loss or damage by fire, act of God, enemies of the government, or dangers incidental to a time of war, they were held liable for a robbery by a predatory band of armed men (one of the

excepted risks), because they negligently and needlessly took a route which was exposed to such incursions. The judge, at the trial, charged the jury that although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence, they were responsible; and that they were chargeable with negligence unless they exercised the care and prudence of a prudent man in his own affairs. This was held by this court to be a correct statement of the law.

Some of the above citations are only expressions of opinion, it is true; but they are the expressions of judges whose opinions are entitled to much weight; and the last-cited case is a judgment upon the precise point. Taken in connection with the concurring decisions of state courts before cited they seem to us decisive of the question, and leave but little to be added to the considerations which they suggest.

It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract.

We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts, also, losses by means of any superior force, and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods. Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made. Is the company a public carrier as to the twenty parcels and a private carrier as to the one?

On this point there are several authorities which support our view, some of which are noted in the margin.[1]

A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character.

But it is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he

[1] Davidson v. Graham, 2 Ohio St. 131; Graham v. Davis, 4 Ohio St. 362; Swindler v. Hilliard, 2 Rich. 286; Baker v. Brinson, 9 Rich. 201; Steele v. Townsend, 37 Ala. 247.

seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms.

Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485, the court sums up its judgment thus: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals, or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough,—if they did not accept this, they must pay tariff rates. These rates were 70 cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a car-load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected.

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less

imperative the application of the iron rule, that he must be responsible at all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

Hence, as before remarked, we regard the English statute called the railway and canal traffic act, passed in 1854, which declared void all notices and conditions made by common carriers except such as the judge, at the trial, or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into, without regard to the character of the contract and the relative situation of the parties.

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.

On this subject the remarks of Chief Justice Redfield, in his recent collection of American Railway Cases, seem to us eminently just. "It being clearly established, then," says he, "that common carriers have public duties which they are bound to discharge with impartiality, we must conclude that they cannot, either by notices or special contracts, release themselves from the performance of these public duties, even by the consent of those who employ them; for all extortion is done by the apparent consent of the victim. A public officer or servant, who has a monopoly in his department, has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him." And his conclusion is, that notwithstanding some exceptional decisions, the law of to-day stands substantially as follows: "1. That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances, and therefore not binding. 2. That every attempt of carriers, by general notices or special contract, to excuse themselves from responsibility for losses or damages resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and, therefore, based upon principles and a policy which the law will not uphold."

The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter.

We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply "negligence." And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that "every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it." (Article 1382.) Toullier, in his commentary on the Code, regards this as a happy thought, and a return to the law of nature. Volume 6, p. 243. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice.

In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad com-

pany to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence. The question whether the company was guilty of negligence in this case, which caused the injury sustained by the plaintiff, was fairly left to the jury. It was unnecessary to tell them whether, in the language of law writers, such negligence would be called gross or ordinary.

The conclusions to which we have come are—

First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

Fourthly. That a drover travelling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire.

Judgment affirmed.

SULLIVAN v. HERGAN.

(20 Atl. 232, 17 R. I. 109.)

Supreme Court of Rhode Island. July 12, 1890.

On petition for a new trial.

Patrick J. Galvin, for plaintiff. *Francis B. Peckham* and *William P. Sheffield, Jr.*, for defendant.

MATTESON, J. This is an action of *assumpsit* to recover moneys claimed to be due to the plaintiff from the defendant under a contract of hiring. It appears from the evidence reported that the plaintiff was employed by the defendant in his business of a dealer in groceries and liquors, as bar-tender and clerk, from November 27, 1886, until April 19, 1888, and was to receive as wages $18 per month until May 1, 1887, and $25 per month thereafter. At the trial the defendant set up as a defense the illegality of the contract, the sale of liquors being prohibited by law when the contract of hiring was made, and during the period of the plaintiff's employment. The jury returned a verdict for the plaintiff for $187.84. The defendant moves for a new trial, on the ground that the verdict is against the law and the evidence.

The principle that if a contract or promise be founded on a legal and an illegal consideration, and the illegal consideration cannot be separated from the legal, and rejected, the illegality of part vitiates the whole, so that no action can be maintained upon it as a contract, is conceded; but it is suggested that, inasmuch as the contract is illegal and void, and is therefore, as it is contended, a nullity, the plaintiff is entitled to recover for that portion of his services performed as clerk in the grocery part of the business, upon a *quantum meruit*, what such services were reasonably worth, and therefore that the verdict may be supported. We do not, however, agree with the suggestion. Although a contract thus infected with illegality is regarded in law as a nullity, in so far that the law will not lend its aid to enforce it, it is nevertheless not treated as if it had no existence in fact. The illegality extends to every part of the transaction, and it cannot, therefore, be made the foundation of an *assumpsit*. Both parties are *in pari delicto*, and the law will, for that reason, not aid either party to enforce the contract, but leaves them where it finds them. It may sometimes happen, in consequence, that a defendant may gain a pecuniary benefit by reason of his wrong-doing, or of that in which he has equally participated; but it is not for the sake of the defendant that his objection to his own illegal contract is sustained. In Holman v. Johnson, Cowp. 341, 343, Lord MANSFIELD remarks: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or from the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because it will not lend its aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio defendentis*." Bixby v. Moor, 51 N. H. 402, is a case strongly in point. In that case it appears that the defendant kept a billiard saloon and a bar for the sale of liquor. The liquor traffic was illegal. The plaintiff was employed by the defendants to work generally in and about the saloon. There was no special agreement that he should or should not sell liquor, or what particular duty he should do. But he was accustomed to work generally in and about the saloon, taking care of the room, building fires, taking care of the billiard tables, tending bar, and waiting upon customers, and, in the absence of the defendant, he had the whole charge of the business. In *assumpsit*, upon a *quantum meruit*, it was held that he could not recover compensation for any portion of his services. The court say: "In the present case, however, there is room for but one conclusion, namely, that the agreement was that the plaintiff at the defendant's request should perform all the services which he did in fact perform, and that the defendants, in consideration of the promise to perform (and the performance of) all those services, the illegal as well as the legal, should pay the plaintiff the reasonable worth of the entire services. In other words, the plaintiff made an entire promise to perform both classes of services. This entire promise (and the performance thereof) formed an entire consideration for the defendant's promise to pay, and a part of this indivisible consideration was illegal." In the present case the sums which the defendant promised to pay formed one entire consideration for all the services to be rendered by the plaintiff, both those in tending the bar, which were illegal, and those as clerk in the grocery store, which were legal. Had one price been agreed upon for the services as bar-keeper, and another as clerk in the grocery business, so that it would have been possible to separate the legal from the illegal part of the transaction, an action could have been maintained for the services which were legal; but, as it is, the defendant's promise being entire, and the consideration for it being partly legal and partly illegal and indivisible, both parties are to be regarded as equally in fault, and the law will lend its aid to neither. Petition granted.

SHAW v. CARPENTER et al.

(54 Vt. 155.)

Supreme Court of Vermont. Montpelier. Oct., 1881.

ROYCE, Ch. J. This cause was heard upon the report of a special master appointed to ascertain and report the amount due on the mortgage described in the petition.

It appears from the report that on the 24th day of July, 1872, one Benj. D. Peterson, who was then engaged in the business of bottling cider, soda, and mineral waters, at the city of Burlington, sold the good will of the business and all his stock, —tools, bottles, machinery, and fixtures, then in use by him in said business, as specified in certain inventories, which were signed by the said Peterson, to the defendant Carpenter.

Upon said inventories the various articles sold were separately carried out, with a separate price for each item. The footings of the separate pages were brought forward upon the last page, where the aggregate correctly appeared of the sum $3221.81. To this amount an item of $116 was added, which was included in the *note first due. It is not found *160 what the consideration for that item was. The good will of the business was included in the sale, and was not estimated in the inventory. It is probable that it may have been estimated by the parties at that time. For the amount so ascertained the defendant Carpenter executed four promissory notes payable to said Peterson, or order, and secured the same by the mortgage sought to be foreclosed. Said notes have all been paid, but the last, which was for $800; and that fell due on the 24th of July, 1876. The interest on that note was paid to the 24th of July, 1876.

On the 28th day of October, 1872, and before the maturity of any of said notes, Peterson sold them and the mortgage for an adequate consideration to the petitioner; the petitioner, then believing the notes to be based on a valid and legal consideration, and not suspecting that any illegal element entered into the consideration.

Of the property sold by Peterson to Carpenter, and which formed a part of the consideration of said notes, the master has found there were the following goods, in kind and amount: Lager beer, $23.94; Cider, $422; Ale, $209.38; Porter, $6.72; Alcohol, $2.25.

The defendant Carpenter claims that if any part of the consideration for the notes was illegal, they are void; that no recovery could be had upon them; and that a court of equity cannot grant any relief to the petitioner.

The first inquiry is, was the sale of any of the articles above enumerated prohibited by law? It is found that the lager beer was not an intoxicating drink, and its sale was not then prohibited, the act forbidding its sale having been passed in 1878. The sale of the cider was not illegal, unless the place where it was sold was a place of public resort. The question as to what constitutes a place of public resort, under s. 3800 of R. L., does not appear to have been before this court, except in the case of State v. Pratt, 34th Vt. 323; and in that it was submitted to the jury to find from the evidence whether the place where it was shown the intoxicating liquor was furnished was a place of public resort or not. The sale of spirituous or intoxi- *161 cating liquor, or of mixed *liquor, of which a part is spirituous or intoxicating, is prohibited generally; its sale is made illegal, without reference to the place where the sale is made. The sale of cider is not generally prohibited, and its sale is only made illegal when it is sold at or in a victualling house, tavern, grocery, shop, or cellar, or other place of public resort, or at any place to an habitual drunkard.

If the defendant would avoid payment for the cider, he must show that the sale was an illegal sale, that it was prohibited by law. The only ground upon which it is claimed the sale was illegal is, that it was made at or in a place of public resort. The master has not found that the sale was made at or in the establishment of Peterson, which it is claimed was a place of public resort; or where it, in fact, was made; or that the cider was in or about that establishment; or where it was, when sold. So that, from what appears in the report, the court cannot hold, as matter of law, conceding that the establishment of Peterson was a place of public resort, that the sale of the cider was illegal. But we do not think the establishment of Peterson was a place of public resort, or, rather, such a place as rendered the sale of the cider illegal by reason of its have been there made.

The words, "place of public resort," in the statute, are used in connection with the victualling house, tavern, grocery, shop, and cellar, in which the selling or furnishing of cider is absolutely prohibited. We all understand that such places are resorted to, to a greater or less extent, and hence they become, and are known as, places of public resort. But in the ascertainment of what is meant by "other places of public resort" we have to inquire as to what places were intended to come within that description. The legislature did not intend to prohibit the sale of cider as an article of commerce. This is evident from the fact that its manufacture and sale are not generally prohibited. Its sale is only prohibited in particular places, and to an habitual drunkard. And whether a place is a place of public resort must depend upon the evidence which gives character to the place.

In order to constitute it such a place as would render a sale of cider made at it illegal, it must appear that it was a place resorted to by the public for the purchase of cider. The fact that it is not *162 *drank at the place where it is obtained would not probably be regarded as controlling, if it appears that those who want it can and will be supplied at such place. The design of the legislature was to remove the temptation to its use, by putting it out of the power of those addicted to its use to obtain it, to use as a

beverage at the places enumerated in the statute.

This establishment was for the bottling of cider and other beverages for the market. It was a sort of warehouse, where cider and other drinks were prepared and stored in bulk; and the cider was put up in bottles for the market, and, when thus prepared was mostly sold at wholesale to dealers out of town, on orders received by mail. Some was sold to wholesale dealers in town, upon orders. There were no conveniences for selling it to be drank on the premises, and none was so sold or drank. And it was not a place that people resorted to for the purpose of buying cider, or that was generally resorted to for any purpose. This, in our judgment, does not show that the establishment was such a place of public resort as was intended by the statute.

The ale, porter and alcohol were intoxicating liquors, and, notwithstanding the ale and porter were in a damaged condition and unpalatable, as long as their intoxicating properties remained, it was illegal to sell them. The sale of the alcohol was prohibited; and the belief of Peterson that it was to be used for a legitimate and proper purpose, connected with the manufacture of a non-intoxicating drink, did not make the sale legal. State v. Pratt, 34 Vt. 323.

The sale of the ale, porter, and alcohol being illegal, the consideration for the notes, as far as the value of those articles went to make up the amount for which the notes were given, was an illegal consideration.

The important question in the case is, as to the effect that such partial illegality of consideration is to have upon the rights of the parties. Robinson v. Bland, administratrix of Sir John Bland, 2 Burr. 1077, has always been regarded as a leading case; and opinions were given in it by Lord MANSFIELD and Justices DENISON and WILMOT. The declaration contained three counts; the first, upon a bill of exchange; the second, for money *lent and advanced; and the third, *163 for money had and received. A verdict was found for the plaintiff for £672, the amount of the bill of exchange. It was found that the consideration for the bill of exchange was £300, lent by the plaintiff to Sir John Bland at the time and place of play; and £372 were lost at the same time and place by Sir John Bland to the plaintiff at play. It was held that the £372, part of the consideration for the bill, being for money lost at play, could not be recovered, all such securities being void under the statute; and that a part of the consideration for the bill being illegal, no recovery could be had under the first count; that the plaintiff was entitled to the £300 lent, and was allowed to recover it, under the count for money lent and advanced.

Judge DENISON says there is a distinction between the contract and security. If part of the contract arises upon a good consideration, and part of it upon a bad one, it is divisible. But it is otherwise as to the security. That, being entire, is bad for the whole.

Judge WILMOT: "As to contracts being good and the security void,—the contracts may certainly be good, though the security be void."

The same principle as to such a security being void was enunciated in Scott v. Gillmore, 3 Taunt. 226. See also Yundt v. Roberts, 5 Serg. and Rawle, 139; Phillips v. Cockayne, 3 Campbell, 119; Edgell v. Stanford, 6 Vt. 551. These two first cases have oftenest been quoted as authority for the rule that has generally prevailed in the English and American courts, that where a part of the consideration for a security is illegal the whole security is void.

The cases referred to by counsel for defendant were all cases where attempts were made to enforce such securities, and the cases of Hinesburgh v. Sumner, 9 Vt. 23, and Woodruff v. Hinman, 11 Vt. 592, were of the same kind. In none of these cases was the court called upon to decide what the effect of holding the security void would be upon the original contract, where that was bad, in part, upon a good and legal consideration.

In Carleton v. Woods, 28 N. H. 290, *164 the question was pre*sented. The declaration, in that case, contained counts upon several promissory notes, and a count for goods sold and delivered. The plaintiff agreed to sell the defendant a stock of goods and groceries at cost and freight. A schedule of the articles was made, and the cost of each. The sum total of the cost of all the articles was divided into several parts, and the notes declared upon were given for the same. Among the articles so sold were some spirituous liquors illegally sold, the price of which formed a part of the consideration for the notes. A verdict was taken for the plaintiff, for the cost of the goods remaining unpaid, except the spirituous liquors; and judgment was to be rendered on the verdict, or it was to be set aside, as the opinion of the court should be. It was held that the counts upon the notes were not maintainable; that the consideration of the several notes was, in part, illegal, and, therefore, no recovery could be had upon them; that the legal effect of the contract was, that each article was to be valued separately, and that the sale and delivery of each article formed the consideration for the promise to pay for it; that the contract was divisible; and, while the separate value of the articles sold could be ascertained, as fixed by the parties, the principle is not readily seen, which would defeat the right of recovery for the stipulated price of that portion, the sale of which was legal; and judgment was rendered on the verdict. The same was substantially held in Walker v. Lovell, in the same volume, 138. The law does not favor any party in evading payment, while he retains the consideration.

The notes which were given for the good will and property sold to Carpenter were all infected with illegality, and the defence of illegality attached to all of them; so that, if what is now claimed as a defence can be allowed, if proceedings had been instituted to compel payment before anything had been paid, the entire claim could

have been defeated, notwithstanding Carpenter had received, and was in the enjoyment of the property, upon the ground that the portion of the property above enumerated was illegally sold. It has somewhere been said, that the declaring such a security void was to be regarded as a punishment of the party for having made an illegal contract.

*The loss of the property illegally *165 sold would generally be considered a sufficient punishment, certainly, when the sale was only *malum prohibitum*, and no wrongful intention appears. But a court of equity could never hold that one might be deprived of his entire fortune, because in the consideration agreed to be paid for it, there was intermingled some article the sale of which was prohibited.

We regard the case of Carleton v. Woods, supra, as sound law and well sustained by authority. Its application works out just and equitable results, and we shall apply the principles there enunciated in the decision of this case.

Peterson could have recovered against Carpenter in an action of *assumpsit*, for all that was sold to him, except the ale, porter, and alcohol. The mortgage would be treated as security for the debt due from Carpenter, on account of the property legally sold to him. Peterson might have foreclosed the mortgage, and thus have compelled payment of the debt.

The petitioner, by his purchase of the notes and mortgage, acquired all the rights, legal and equitable, of Peterson. He could maintain a suit at law for his own benefit, in the name of Peterson, or a petition in equity, as assignee of the mortgage, to foreclose it. And in the disposition of such a petition it is the duty of a court of equity, which has been said to be the great sanctuary of plain dealing and honesty, to compel the payment of that portion of the debt that was secured by it, that was legally and fairly contracted.

The decree of the Court of Chancery is reversed and cause remanded, with mandate that a decree be entered for the petitioner for the amount due on the note for $800 described in the petition, with interest after deducting therefrom the sums of $209.38, $6.72, and $2.25, being for the ale, porter, and alcohol illegally sold,—as of the date of the note. If the amount due cannot be ascertained from the computations made by the master, it is to be ascertained in such manner as the court may direct.

Dissenting opinion was delivered by

ROSS, J. I am unable to concur in the decision of the court in this case. On the facts found by the master, it may be question*able whether the sale of the *166 cider was illegal, within the exact terms and language of the statute. However, when a man establishes a business for the bottling and sale of cider and other fermented drinks, in a city, like Burlington, has a warehouse for storing, manufacturing, bottling, and vending the same, and keeps an office, he so far makes the place of his business a place of public resort for the sale of cider, although the vending is carried on by solicitation of orders at the houses and places of business of his customers, and the delivery of the bottled cider is at the latter places, that in my opinion, it comes within the spirit and scope of the statute, and without any forced construction, within its language. But I do not regard this point very material; and should not on this ground have placed my dissent upon record. A part of the consideration of the note being illegal, the note is void and no action can be maintained thereon to enforce its collection. To the cases cited by the court, in the main opinion, may be added Cobb v. Cowdery et al., 40 Vt. 25; Bowen v. Buck, 28 Vt. 308. In Cobb v. Cowdery, supra, the distinction is taken between a consideration, in part void, and a consideration in part illegal. The note failing, what is there left for the mortgage to stand upon? The mortgage is but an incident to the debt it secures. On the authorities cited by the court in support of its decision, as well as all the reasoning, partial illegality of consideration avoids all securities. The note was a security, or evidence of the debt, of a higher nature than the original contract. The latter was merged in the note. The note in suit, and all the notes secured by the mortgage, were tainted by illegal consideration entering into them. Each note being an entire contract of itself, no division of the legal from the illegal, part of the consideration could be effected. Courts established for the enforcement of law, will not give aid, or countenance to anything illegal; nor, where the illegal is commingled with the legal, will they aid in separating, or purging the former from the latter. Their proper function is to establish and enforce the legal and to condemn and punish the illegal. Where a part, however small—of the consideration of an entire contract is illegal, the whole contract is tainted, and courts will not compel its performance

Collins v. Blantern, 2 Wils. 341, is a *167 leading case on *this subject, in which, the Lord Chief Justice WILMOT uses the quaint but forcible, and often quoted language: "You shall not stipulate for iniquity; all writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice; whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul! O procul este, profani.*" The mortgage is an entire contract. Its consideration was the notes, the payment of which was therein secured; every one of which was tainted with an illegal consideration in part. It was not given to secure the performance by Carpenter of his contract with Peterson, of July 24, 1872, by which he purchased his business and stock in trade, but was given solely to secure the payment of the notes which were executed in payment of that purchase. If the action were upon the notes, it is conceded that no recovery could be had; because every one of them is tainted with illegal

consideration. The illegal could not be separated from the legal portion of the consideration; and an enforcement of the collection of the notes would be the enforcement of an illegal contract. How does it differ when the mortgage, which is but an incident to the notes, is allowed to be foreclosed? Is it not an enforcement of an illegal contract? To foreclose the mortgage for the legal part of the consideration must not the illegal portion be ascertained and rejected; which the majority hold could not be done, if the action were upon the notes? What is the foreclosure but an action upon the notes described in its condition? and to ascertain the legal part of the consideration of the mortgage must not the notes be treated as divisible? I can see no other means of separating the legal from the illegal part of its consideration. In Vinton v. King, 4 Allen, 562, METCALF, J., says: "In an action brought by a mortgagee against his mortgagor, on a mortgage given to secure payment of a note, the defendant may show the same matters in defence (the Statute of Limitations excepted, 19 Pick. 535,) which he might show in defence of an action on the note." I am not aware of any exception to the rule *thus *168 stated, nor of any case to the contrary. I am not unaware, that Mr. Jones in his work on mortgages, s. 620, says: "The mortgage may be upheld for such part of the consideration as was free from the taint of illegality when the consideration is made up of several distinct transactions, some of which are legal, and others are not, and the one can be separated with certainty from the other." The cases he cites support this doctrine. Feldman v. Gambel, 26 N. J. Eq. 494; Williams v. Fitzhugh, 37 N. Y. 444; McCraney v. Alden, 46 Barb. (N. Y.) 272; Cook v. Barnes, 36 N. Y. 520.

It may well be admitted that a mortgage, given to secure the payment of several notes, or debts, a part of which arose out of wholly legal transactions, and a part of which were tainted with illegality, could be enforced to compel the payment of the former alone. In such a case the orator would not have to show in evidence, nor rely upon anything illegal, in maintaining his suit. In the language of GIBBS, Ch. J., in Simpson v. Bloss, 7 Taunt. 246, in speaking of Faikney v. Reynous, 4 Burr. 2069, and Petrie v. Hannay, 3 Term Rep. 418: "The ground of their decision was, that the plaintiffs required no aid from the illegal transaction to establish their case." This, as I understand, is the test most frequently applied in this class of cases. If the plaintiff can show a good cause of action, independent of, and without bringing into the case anything illegal, either by way of proof or otherwise, he may maintain his action therefor. If, on the other hand, he derives any aid from the illegal part of the transaction, by being obliged to show it to make out the legal part, or otherwise, he must fail. The court will not allow the unclean thing within the temple of justice. In the foreclosure of his mortgage the orator was bound to show in proof his notes, every one of which was tainted with illegality; and for that reason the notes all fall, and the mortgage given to secure them alone, falls with them. This point my brethren have not deemed worthy of their attention, nor alluded to. But if I am in error on this point, I cannot concur with my associates in holding that the original contract is divisible. It is in writing, and amenable to the rules of evidence which forbid varying, lessening or enlarging such contracts by parol tes- *169 *timony. It is in the following language: "In consideration of three thousand three hundred thirty-seven dollars and eighty-one cents received of John W. Carpenter, I, Benjamin D. Peterson do hereby sell, transfer and assign unto said Carpenter the good will of a certain business for bottling cider, soda and mineral waters, now carried on by me in Burlington, together with all the stock, tools, bottles, machinery and fixtures, now in use in said business, as specified in certain inventories hereto attached, and I agree to deliver to said Carpenter the gross amount of property described in said inventories, which said inventories are signed with my name." The inventories are referred to and made a part of the contract to show what personal property was to pass with the good will of the business. They are not referred to for the price of the several articles included. The master has found that the aggregate of the prices there carried out, did not amount to the sum named in the contract, and for which the notes were given, into $116. Hence, if the prices carried out on the inventories are to be regarded as a part of the contract, they do not show that the articles were severally sold for the price set against them, but the reverse. The contract is to be construed as a whole. Thus construed, it is an entire, indivisible contract. It was a sale of a business, as a going concern, including the good will, stock in trade, machinery and fixtures. It is not to be inferred, or intended, that Peterson would have sold the good will of the business, without selling the stock in trade, machinery and fixtures, nor that Carpenter would have purchased the latter without the former. It was not the sale of the good will as one separate transaction, of each bottle, barrel, and fixture as another separate transaction, and so divisible. But one consideration is named or paid; and but one thing is sold—the business, including the stock, &c., and good will as a going concern. As said by DEVENS, J., in Young & Conant Mfg. Co. v. Wakefield, 121 Mass. 91: "If but one consideration is paid for all the articles sold, so that it is not possible to determine the amount of consideration paid for each, the contract is entire. Miner v. Bradley, 22 Pick. 457. So if the purchase is of goods as a particular lot, even if the price is to be ascertained by the number of pounds in *170 the lot, or num*ber of barrels in which the goods are packed, the contract is also held entire. Clark v. Baker, 5 Met. 452; Morse v. Brackett, 98 Mass. 205; Mansfield v. Trigg, 113 Mass. 350. While in the cases last referred to, it could be ascertained what was the amount of consideration paid for each pound, or bar-

rel, yet the articles having been sold as one lot, it was to be inferred that one pound or barrel would not have been sold unless all were sold." On these principles, if the mortgage can be upheld as a security for the payment of the consideration of the original contract, as well as the notes given in payment therefor, the consideration of the contract is entire, indivisible, and tainted with illegality, and for that reason void, and should not be enforced. To my mind, the cases principally relied upon by my associates are not authority for their decision. In Robinson v. Bland, 2 Burr. 1077, the transactions were separate and distinct. One was borrowing three hundred pounds; the other losing three hundred seventy-two pounds in gaming. While the bill of exchange given for the two was held to be void because tainted with in part illegal consideration, the plaintiff was allowed to recover on the count for money loaned, for the three hundred pounds borrowed by the intestate. The plaintiff could establish this part of his claim without the aid of the other, in any manner. The remark of Justice DENISON, made in that case: "There is a distinction between the contract and the security. If part of the contract arises upon a good consideration, and part upon a bad one, it is divisible. But it is otherwise as to the security; that being entire, is bad for the whole," is not to be pressed beyond the case in hand, and given universal application. His language, as to its being "divisible," was true as applied to the facts of that case. The law was more accurately expressed by Mr. Justice WILMOT: "Here are two sums demanded, which are blended together in one bill of exchange; but are divisible in their nature, as to the money lent. The cases that have been cited are in point, that it is recoverable." Carleton v. Woods, 28 N. H. 290, comes nearer to supporting the decision of the majority of the court, but in my judgment, is distinguishable from the case at bar. It is there distinctly held that if the contract is entire, and part of the consideration is illegal, *the contract is void; but *171 that where an entire stock of goods is sold, at one and the same time, but each article for a separate and distinct agreed value, the contract is not to be regarded as entire and indivisible. The sale was for cost and freight, and WOODS, J., says: "We are unable to see how this case differs from the case of a sale by a merchant of various goods to his customers, at one and the same time, for separate values, stated at the time, which, when computed, would, of course, amount to a certain sum in the aggregate." It was on this theory that the court held, that, although the notes could not be maintained, because a part of the consideration was for spirituous liquors illegally sold, yet, on the general counts in *assumpsit*, for goods sold and delivered, the plaintiff might recover for the goods sold, as the court held, independently of, and as transactions separate from, the purchase of the liquors. To say the least, this was pressing the doctrine of divisibility of a contract to the extreme verge, and I am unwilling to go further. There may have been more in the case than appears in the report, justifying the holding of the court. On the facts stated, I think the authority is clearly against that contract being divisible. That case, however, lacks the element of being the sale of a going business, including the good will, and does not appear to have been reduced to writing. In my judgment, the decree of the Court of Chancery should be reversed, and the cause remanded, with a mandate to enter a decree dismissing the bill with costs.

TAFT, J., desires me to say that he concurs in the views I have expressed, except in regard to the sale of the cider being illegal, on which point he concurs in the views of the majority of the court.

ROYS v. JOHNSON et al.

(7 Gray, 162.)

Supreme Judicial Court of Massachusetts. Middlesex. October Term, 1856.

L. J. Fletcher, for plaintiff. W. S. Gardner, for defendants.

METCALF, J. It is agreed by the parties that the plaintiff performed for the defendants the services for which he now seeks to recover payment and that they have not paid him. It is for them, therefore, to show that he is not entitled to recover. This, in our opinion, is not shown by the statement of facts submitted to us. It appears, indeed, from that statement, that the defendants, without a license, set up theatrical exhibitions, in which they employed the plaintiff as an actor; and it follows, of course, that they thereby violated the law, and subjected themselves to punishment. But it does not appear that the plaintiff knew that they had no license. Unless he knew that fact, he is in no legal fault; and where a defendant is the only person who has violated the law, he cannot be allowed to take advantage of his own wrong, to defeat the rights of a plaintiff who is innocent.

In the cases cited by the defendants' counsel, where defences were sustained because the claims were void for illegality, the parties suing knew, or were bound to know, that they or the parties sued were violating or undertaking to violate the law. And this distinguishes all those cases, as well in law as in common justice, from the case at bar; as was held in Bloxsome v. Williams, 3 Barn. & C. 232. In that case, a suit was brought to recover damages for breach of a warranty of a horse sold to the plaintiff on Sunday. The defence was, that the contract was void within St. 29 Car. 2, which prohibits worldly labor, business or work, in the exercise of one's ordinary calling. It appeared that the defendant's ordinary calling was that of a dealer in horses, and therefore, that he had violated the statute by selling and warranting the horse; but that dealing in horses was not the plaintiff's ordinary calling, and therefore, that he had not violated the statute by purchasing the horse and taking a warranty. But, as the case states, there was no evidence that the plaintiff knew that the defendant was by trade a horsedealer at the time the bargain was entered into. The court held that the defendant was answerable for the breach of his contract. Bayley, J., said: "The defendant was the person offending, within the meaning of the statute, by exercising his ordinary calling on the Sunday. He might be thereby deprived of any right to sue upon a contract so illegally made; and upon the same principle any other person knowingly aiding him in a breach of the law, by becoming a party to such a contract, with the knowledge that it was illegal, could not sue upon it. But in this case, the fact that the defendant was a dealer in horses was not known to the plaintiff. He, therefore, has not knowingly concurred in aiding the defendant to offend the law; and that being so, it is not competent to the defendant to set up his own breach of the law as an answer to this action." See report of the same case in 5 Dowl. & R. 82, and a recognition of the doctrine of that case in Fennell v. Ridler, 8 Dowl. & R. 207, 208, and 5 Barn. & C. 409, and also in Begbie v. Levy, 1 Tyrw. 131, and 1 Cromp. & J. 183.

It is to be noticed that in the case of Bloxsome v. Williams, it was said that it was not known to the plaintiff that the defendant was a dealer in horses, because there was no evidence that he knew it. In the present case, we treat the plaintiff as not knowing that the defendant had no license, because the statement of facts does not show that he knew it.

It is ignorance of a fact, and not of the law, that saves the plaintiff's case. He undoubtedly knew, or was bound to know, that unlicensed theatrical exhibitions were unlawful; but he was not bound to know that the defendants had no license and were doing unlawful acts.

Judgment for the plaintiff.

TRACY v. TALMAGE.

STATE OF INDIANA v. LEAVITT.

(14 N. Y. 162.)

Court of Appeals of New York. 1856.

The North American Trust and Banking Company was, in July, 1838, organized in the city of New York as a corporation, under and by virtue of the act "to authorize the business of banking." Laws 1838, p. 245. By the articles of association the capital was $2,000,000, with power to increase the same to $50,000,000. The amount of the capital was subscribed, a small portion thereof paid in cash, and the residue secured by bonds and mortgages and stocks.

In August, 1838, the company purchased $1,000,000 of Arkansas bonds, paying therefor $300,000 in cash, and issuing certificates of deposit for $700,000, the residue of the price payable monthly, during some fifteen months. Of these bonds $200,000 were deposited with the comptroller of the state as security for bank notes issued to the company, and the residue were sent to Europe, and sold on behalf of the company to meet drafts which it had drawn on its correspondents in London. About the 15th of September, 1838, the company commenced receiving deposits and discounting commercial paper. The company never received from the comptroller bank notes to exceed $330,000. In January, 1839, the Trust and Banking Company purchased of the Morris Canal and Banking Company, a corporation created by the laws of the state of New Jersey, but which had an office and did business in the city of New York, bonds made by the state of Indiana, to the amount of $1,200,000, at par, and gave therefor, to the Morris Canal and Banking Company, its obligations, in the form of negotiable certificates of deposit, payable with interest at a future day. The most of these bonds were sent to the correspondents of the Trust and Banking Company, in London, and there sold at a discount to raise funds to meet the drafts of the company. In the fall of 1839 the Trust and Banking Company agreed to purchase, of the Morris Canal and Banking Company, bonds of the state of Indiana, amounting to $1,000,000 at par, and to pay for the same, at 98 per cent., in negotiable certificates of deposit, made by the Trust and Banking Company, payable at a future day. This agreement was not in writing. On or about the 28th of October, 1839, these bonds were delivered by the Morris Canal and Banking Company to the Trust and Banking Company, and the latter made and delivered to the former certificates of deposit for the amount of the purchase price. The most of these certificates were for $1,000 each. They respectively bore date October 28, 1839, were signed by the president and cashier of the North American Trust and Banking Company, and stated that James Kay had deposited in the bank a sum, which was named, payable to his order, on the return of the certificate, on demand after a future day, which was specified; each certificate was endorsed by Kay in blank. These Indiana bonds were sent to London by the Trust and Banking Company to be sold to raise funds to meet its drafts and obligations payable there; and they were sold there at a large discount soon after the purchase. Kay, the payee named in and who endorsed the certificates, was a clerk for the Morris Canal and Banking Company; he never deposited any money with the Trust and Banking Company, and had no interest in the certificates. On the 11th of December, 1839, a written agreement was made between the Morris Canal and Banking Company and the state of Indiana, which recited that the former was indebted to the latter for Indiana state stocks, theretofore sold and delivered by the latter to the former, and by which the Morris Canal and Canal and Banking Company agreed to deliver to the state of Indiana, among other securities, certificates of deposit in the North American Trust and Banking Company to the amount of $196,000. Subsequently, and during the same month, the Canal and Banking Company transferred and delivered to the state of Indiana $196,000 of the certificates issued to it by the Trust and Banking Company under date of October 28, 1839, and payable after January 1st, 1841, and the same were receipted by the state of Indiana on the back of the agreement last above mentioned. On the 2d of January, 1841, the state of Indiana surrendered to the Trust and Banking Company a portion of these certificates, to the amount of $175,000, and received therefor eighteen other certificates of deposit, in the aggregate, for the same amount, dated on that day, signed by the president and cashier of the Trust and Banking Company, and payable to the order of, and endorsed by, James Kay. Five of these certificates were for $9,000 each, and thirteen of them for $10,000 each. Each stated that James Kay had deposited, with the Trust and Banking Company, a sum, which was specified, and that the company engaged to repay the holder of the certificate this sum upon the surrender thereof at a future day named, with interest, at the rate of seven per cent. per annum. Of these eighteen certificates, the one first due was payable five months from date, and one became payable every month thereafter. The purchases of the Indiana bonds were negotiated and consummated in the city of New York, and all the certificates were issued there.

In August, 1841, the plaintiff herein, being a stockholder and creditor of the Trust and Banking Company, commenced this suit against it in the court of chancery. The bill was filed under the Revised Statutes (2 Rev. St. p. 463, §§ 39–42), and alleged that the company was insolvent, and that it had vio-

lated the law, &c. It prayed that the company might be enjoined from transacting business, that a receiver of its effects might be appointed and the corporation dissolved, &c. In September, thereafter, David Leavitt was appointed receiver, with the usual powers; and in June, 1843, a decree was made in the suit by which the Trust and Banking Company was adjudged to be insolvent, and it and its officers were perpetually enjoined, &c. An order was made in October, 1845, that the creditors of the company exhibit their claims to the receiver or be precluded from sharing in the funds, and providing that any claimant might enter his appearance in the action; and that if any claim were disallowed by the receiver, it should be referred to referees. Pursuant to this order the state of Indiana, in December, 1845, exhibited the claim in controversy to the receiver. In the notice of the claim furnished to the receiver it was stated that the state of Indiana had a debt against the Trust and Banking Company of $175,000 with interest thereon from the 2d of January, 1841, for a balance due at that date for bonds issued by said state and sold and delivered to the Trust and Banking Company by the Morris Canal and Banking Company or otherwise. That this debt was owned by the state of Indiana, and that it should be allowed and paid to it, or that it should be allowed in the name of the Morris Canal and Banking Company for the use and benefit of the state of Indiana, and paid to the latter as the assignee of the demand. Attached to the notice of claim were the eighteen certificates for $175,000, above mentioned, which it was alleged were issued by the Trust and Banking Company for the debt claimed. In March, 1846, the receiver disallowed the claim, and in March, 1847, an order was made referring it to three referees, who, after hearing the proofs, in September, 1850, reported against the validity of the claim. The report of the referees contained all the evidence given before them; and stated that they were of opinion, upon the proofs, that the claim was not valid, and that there was nothing due from the Trust and Banking Company or its receiver to the claimant. Other than this the particular conclusions of the referees as to the facts or law did not appear. The evidence proved the facts above stated. It also proved that the Indiana bonds were purchased by the Trust and Banking Company with the intention of selling them to raise money, and that they were so sold, principally in England, at a large discount. There was some evidence tending to prove that the Morris Canal and Banking Company knew at the time of the sale that the Trust and Banking Company purchased the bonds with this intention. It also appeared that the Trust and Banking Company, both before and after the purchase of the $1,000,000 of bonds in October, 1849, was accustomed to make and issue negotiable certificates of deposit, payable on time; and that during the time it carried on business, it issued negotiable paper, payable at a future day, to over $15,000,000. All the certificates issued on account of the Indiana bonds, except those in question, appeared to have been paid. There was evidence tending to prove that in making the sale of the bonds, the Morris Canal and Banking Company was in fact the agent of the state of Indiana. The state of Indiana filed exceptions to the report of the referees, which, in September, 1851, were overruled at a special term of the supreme court held in New York by Justice Edmonds, and the report made by the referees affirmed. An appeal was taken by the state of Indiana, and in 1854, the court, at a general term held in New York, reversed the judgment rendered at special term, and adjudged that the claim was lawful and valid against the Trust and Banking Company, and was justly due and owing to the claimant, with interest from January 2d, 1841, "as the balance remaining unpaid for state bonds sold and delivered to the Trust and Banking Company by the Morris Canal and Banking Company, and by the last mentioned company transferred to the claimant." The decree fixed and adjudged the amount of the demand to be $343,437.50, being the amount of the $175,000 and interest from January 2d, 1841; and the receiver was directed to pay the same in the due administration of the assets of the company. From this decree the receiver appealed to this court.

The cause was argued in this court in 1855, and the court ordered a re-argument. It was again argued at the March term, 1856.

SELDEN, J. To avoid confusion, I shall consider this case in the first instance as though the Morris Canal and Banking Company, instead of the state of Indiana, was the claimant upon the record. The general ground upon which the claim is resisted is, that it arises upon an illegal contract. Three grounds of illegality are alleged: (1) That the purchase of state stocks by the North American Trust and Banking Company for the purpose of re-sale, upon speculation, was beyond the scope of its corporate powers, and, therefore, illegal, and that the Morris Canal and Banking Company knew that such was the object of the purchase. (2) That the North American Trust and Banking Company had no power to issue negotiable promissory notes upon time; that such notes, therefore, and the contract of sale which provided for receiving them in payment, are illegal and void. (3) That the certificates or post notes delivered in payment for the state stock, being calculated and intended for circulation, were issued in violation of the restraining act; and that the Morris Canal and Banking Company was particeps criminis.

In examining the first of these grounds, I shall not notice the position taken by the counsel for the receiver, that a mere excess of authority on the part of a corporation in

making a contract, is equivalent in its effect to the violation of a positive penal enactment; because, so far as the alleged illegality consists in the purpose for which the stocks were purchased, the case can, I think, be disposed of upon principles which do not involve that question. That the North American Trust and Banking Company made the purchase with a view to a re-sale, and not to a deposit with the comptroller, seems to be established by the proof; and that such a purchase and re-sale were unauthorized and beyond the scope of the corporate powers of the company, was settled by this court in the case of Talmage v. Pell, 7 N. Y. 328.

It is contended by the counsel for the claimant, that there is no evidence that the vendors, the Morris Canal and Banking Company, had any knowledge of the object of the vendees in making the purchase. I shall, however, assume that they had such knowledge; because, in the view I take of the subject, it cannot affect the result. The question presented upon this branch of the case is, whether the bare knowledge by a vendor that the purchaser intends to make an unlawful use of the article sold, will prevent a recovery for the purchase money. Although I deem this question clear upon principle, I shall, nevertheless, rest my opinion in regard to it mainly upon the authorities.

A question somewhat analogous arose in the court of king's bench, in England, in the case of Faikney v. Reynous, 4 Burrows, 2069. The plaintiff and one of the defendants had been jointly concerned in stock-jobbing; and the plaintiff, in contravention of an express statute, had advanced £3,000, in compounding certain differences, for one-half of which the defendants had given the bond upon which the action was brought. Upon demurrer to a plea setting up these facts, the court held the plaintiff entitled to recover. Although that case differs from the one under consideration, in its facts, yet the principle upon which the case was decided, viz. that a party to a contract, innocent in itself, is not responsible for or affected by the use which the other may make of the subject of the contract, is equally applicable here. Lord Mansfield said, in speaking of the act of the defendant in giving the bond: "This is not prohibited. He is not concerned in the use which the other makes of the money; he may apply it as he thinks proper. But certainly this is a fair, honest transaction between these two."

There is a class of English cases which seems to me identical in principle with the present, and concerning which the decisions have been unvarying. I refer to the cases of goods purchased for the express purpose of being smuggled into England, in violation of the revenue laws, and where the object of the purchase was known to the vendor. The first of these cases is that of Holman v. Johnson, Cowp. 341, where the plaintiff, residing at Dunkirk, had sold to the defendant a quantity of tea, knowing that the latter intended to smuggle it into England, but had himself no concern in the smuggling. The action was brought for the price of the tea, and it was held, upon these facts, that the plaintiff could recover. The principle of the case is the same as that adopted in Faikney v. Reynous, supra, that mere knowledge by the vendor of the unlawful intent did not make him a participator in the guilt of the purchaser. Lord Mansfield, who delivered the opinion in this case also, says: "The seller indeed knows what the buyer is going to do with the goods; but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods."

Where, however, the seller does any act which is calculated to facilitate the smuggling, such as packing the goods in a particular manner, he is regarded as particeps criminis, and cannot recover; as is shown by the subsequent cases of Biggs v. Lawrence, 3 Term R. 454; Clugas v. Penaluna, 4 Term R. 466; and Waymell v. Reed, 5 Term R. 599. These were all cases where the plaintiff had sold goods to the defendant, knowing that they were to be smuggled into England; and in each of them the plaintiff was nonsuited. But they all differed from the case of Holman v. Johnson, in this, that the plaintiff had in each case done some act, in addition to the sale, in aid and furtherance of the defendant's design to violate the revenue laws, and the decision was in each case placed distinctly upon this ground. The language of Buller, J., in the case of Waymell v. Reed, is very explicit. He says: "In Holman v. Johnson, the seller did not assist the buyer in the smuggling. He merely sold the goods in the common and ordinary course of trade. But this case does not rest merely on the circumstance of the plaintiff's knowledge of the use intended to be made of the goods; for he actually assisted the defendants in the act of smuggling, by packing the goods up in a manner most convenient for that purpose."

In each of the three cases last cited, special care is taken to guard against any inference that it was intended to impair the force of the decision in Holman v. Johnson. Indeed, that decision seems to have been uniformly followed by the courts of England from that day to the present. In 1835 the question again arose in the case of Pellecat v. Angell, 2 Cromp., M. & R. 311, and the court held that the plaintiff could recover the price of goods sold to the defendant, although he knew at the time of the sale that they were bought to be smuggled into England. Lord Abinger says: "The distinction is, where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels or otherwise, there he must take the consequences of his own act." Again he says: "The plaintiff sold the goods; the defendant might smuggle them if he liked, or he might change his mind the next

day; it does not at all import a contract, of which the smuggling was an essential part." It is true, the chief baron in one part of his opinion seems to lay some stress upon the fact that the plaintiff was a foreigner; but it is clear that this can have nothing to do with the principle upon which those cases rest, which is, that the act of selling is not in itself a violation of the law; and the mere fact of knowledge of the unlawful intent of the vendee does not make the vendor a participator in the guilt. The language of the associates of the chief baron goes to show that the domicil of the plaintiff had no influence upon the decision. Bolland, B., says: "I think the distinction pointed out by the lord chief baron, between merely knowing of the illegal purpose, and being a party to it by some act, is the true one." Alderson, B., says: "If the plea disclosed circumstances from which it followed, that permitting the plaintiff to recover would be permitting him to receive the fruits of an illegal act, the argument for the defendant would be right; but that ground fails, because the mere sale to a party, although he may intend to commit an illegal act, is no breach of law." That the place of residence of the vendor has nothing to do with the question, and that the principle of the case of Holman v. Johnson is sound, is further shown by the case of Hodgson v. Temple, 5 Taunt. 181, decided by the court of common pleas in England. There, as it would seem, all the parties resided in London. The plaintiffs, who were distillers, had sold spirituous liquors to the defendant with full knowledge that the latter intended to retail them, in express violation of the revenue laws. It was insisted, in defence to an action brought for the purchase money of the liquors, that the plaintiffs were particeps criminis, and could not recover. But Mansfield, C. J., said: "This would be carrying the law much further than it has ever yet been carried. The merely selling goods knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment; but to effect that it is necessary that the vendor should be a sharer in the illegal transaction."

Opposed to this series of cases, holding one uniform language, and sanctioned by such names as Mansfield, Buller, Kenyon, Abinger and others, I know of but a single English case, viz., that of Langton v. Hughes, 1 Maule & S. 593. By a statute of 42 Geo. III. c. 38, brewers were prohibited from using anything but malt and hops in the brewing of beer. The plaintiffs, who were druggists, had sold to the defendants, who were brewers, certain drugs knowing that they were to be used contrary to the statute. In the 51 Geo. III. c. 87, another statute was passed prohibiting druggists from selling to brewers certain articles, and among them those sold to defendants. The sale in question was made before the latter statute, but the suit was brought afterwards. The court held that the plaintiff could not recover. It is difficult to ascertain from the opinions the precise ground upon which the court intended to rest its decision. The case was so clearly within the terms of the statute of 51 Geo. III. that the judges were evidently induced to resort to a somewhat strained construction of the previous statute, and even to an attempt to connect that with the statute passed after the sale, for the sake of sustaining the defence. Le Blanc, J., after stating the question, says: "That depends upon the provisions of 42 Geo. III. coupling them in their construction with those of 51 Geo. III." It is apparent, I think, upon a review of the whole case, that it was not very well considered, and that the decision was really produced by the reflex influence of the latter statute. This case, therefore, which does not appear to have been followed either in England or in this country, and which is virtually overruled by the subsequent case of Pellecat v. Angell, 2 Cromp., M. & R. 311, can have but little weight in opposition to the numerous authorities to which I have referred, going to establish the contrary principle.

There is another class of English cases which have been sometimes supposed to conflict with the doctrine advanced in Faikney v. Reynous and Holman v. Johnson, supra, but which, when the precise ground upon which they were decided is considered, will be found to support rather than to detract from the doctrine. That ground is this: that it was the express object of the plaintiffs in those cases, in selling the goods or lending the money, that they should be used for an unlawful purpose, and that such purpose entered into and formed a part of the contract of sale or loan. A brief reference to those cases will show that this is the principle upon which they rest. The first case of this class is that of Lightfoot v. Tenant, 1 Bos. & P. 551. The action was upon a bond given for goods sold, and the defendant pleaded that the plaintiff sold the goods "in order that" they should be shipped to the East Indies without the license of the East India Company, in violation of an express statute. The issue upon this plea was found for the defendant, and a motion for judgment non obstante veredicto was denied. Eyre, C. J., argues, that the jury having found that the plaintiff sold the goods "in order that" they should be shipped, &c., it cannot be said that he had no interest in their future destination; that he may well have sold the goods for an enhanced price, relying exclusively upon the profits to be realized from the illicit trade for payment. He says: "It is a possible case, that a tradesman may wish to speculate in this contraband trade, and to do it by dividing the profits with some man of spirit and enterprise, but without capital. Such a man would stipulate that the goods

which he sold should be put on board a ship under a foreign commission, and should be sent to Calcutta to be there sold. His share of the profits would be found in the price originally fixed on the goods, but his hopes of payment would rest entirely on the returns of this contraband trade." Again he says: "But the jury having found for the plea, the court cannot say that the plaintiff had nothing to do with the future destination of the goods; unless it was impossible to state a case in which they could have anything to do with it." The decision in this case clearly is based upon the fact, that the future use to be made of the goods entered into and formed a part of the contract of sale. There are two other English cases belonging to the same class. The first is that of Cannan v. Bryce, 3 Barn. & Ald. 179. The defendant had lent money to a firm, which afterwards became bankrupt; for the purpose of paying a balance due upon certain illegal stock-jobbing transactions, and which had been applied to that object. He having afterwards received money belonging to the bankrupts, the assignees brought their action to recover those moneys, and it was held that the defendant could not set off his demand for the money loaned. The other case is that of McKinnell v. Robinson, 3 Mees. & W. 434, which was an action of assumpsit for money lent. The defendant pleaded that the money was lent in a certain common gambling room, for the purpose of the defendant's illegally playing and gaming therewith; and on demurrer the plea was held good. In each of these cases it will be seen that the illegal use was the express object for which the money was lent; and this is relied upon by the court in both cases in giving their judgment. In the case of Cannan v. Bryce, Abbott, C. J., says: "It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object;" and in the case of McKinnell v. Robinson, Lord Abinger, in stating the principle by which the case was governed, says: "This principle is, that the repayment of money lent for the express purpose of accomplishing an illegal object, cannot be enforced."

It is worthy of note that the three cases last referred to present the views respectively of the heads of the three principal English courts, viz., Abbott, chief justice of the king's bench, Eyre, chief justice of the common pleas, and Abinger, chief baron of the exchequer; and their concurrence in resting their decisions upon the fact that the illegal object was in the contemplation of both parties, and formed a part of the original contract, goes strongly to confirm the doctrine of the cases of Faikney v. Reynous and Holman v. Johnson, supra. Indeed the whole current of English authority goes to support those cases, with the single exception of Langton et al. v. Hughes, supra. They have also frequently been referred to by the courts in this country as containing sound doctrine. De Groot v. Van Duzer, 17 Wend. 170; Bank v. Spalding, 12 Barb. 302; Armstrong v. Toler, 11 Wheat. 258. In the latter case, Chief Justice Marshall refers to the case of Faikney v. Reynous in the following terms: "The general proposition stated by Lord Mansfield, in Faikney v. Reynous, that if one person pay the debt of another at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law, has never been held to alter the case."

The principles established by this strong array of authorities are in entire accordance with the case of Talmage v. Pell, 7 N. Y. 328, decided by this court. It was a part of the contract in that case, between the banking company and the commissioners of the state of Ohio, that the bonds should remain in the hands of the agent of the state, to be sold on account of the banking company; and this fact is referred to and relied upon by Gardiner, J., by whom the opinion of the court was delivered. He says: "I am, for the reasons suggested, of the opinion that this bank had no authority to traffic in stocks as an article of merchandise, or to purchase them for the purpose of selling, as a means of obtaining money to discharge existing liabilities; that as the object of the purchase in this case was known to both parties, and made a part of their contract, the debt for the purchase money cannot be enforced by the vendors, and that the collateral securities must stand or fall with the principal agreement." The case contains no intimation whatever that the mere knowledge, by the agents of the state of Ohio, that the banking company purchased the bonds with a view to a resale, would have defeated a recovery. On the contrary, such an inference was carefully guarded against by the learned judge who delivered the opinion, as appears from the extract just given.

I consider it, therefore, as entirely settled by the authorities to which I have referred, that it is no defence to an action brought to recover the price of goods sold, that the vendor knew that they were bought for an illegal purpose, provided it is not made a part of the contract that they shall be used for that purpose; and provided, also, that the vendor has done nothing in aid or furtherance of the unlawful design. If, in this case, the bank had had no right to purchase state stocks for any purpose, then the contract of sale would have been necessarily illegal, and the vendor would, perhaps, be precluded from all remedy for the purchase money. But here the purchase and sale for

a lawful object was a contract which each party had a perfect right to make. Suppose the banking company, although intending at the time of the purchase to use the stocks for trading purposes, had, the next day, abandoned this intention, and deposited them with the comptroller; would this change of purpose reflect back upon the contract of purchase, if it was corrupt, and divest it of its illegal taint? This could hardly be pretended; and, if not, then the consequence of the doctrine contended for here, would inevitably be, that the vendor of the stocks, without having participated in any illegal act, or even illegal intent, but having simply known of such an intent subsequently abandoned, would be punished with a total loss of the property sold, and that for the benefit of the party alone guilty, if guilt could be predicated of such a transaction.

I am not aware of any principle which could justify this. The law does not punish a wrongful intent, when nothing is done to carry that intent into effect; much less, bare knowledge of such an intent, without any participation in it. Upon the whole, I think it clear, in reason as well as upon authority, that in a case like this, where the sale is not necessarily per se a violation of law, unless the unlawful purpose enters into and forms a part of the contract of sale, the vendee cannot set up his own illegal intent in bar of an action for the purchase money.

It follows, from this, that the sale of the stocks would have created a valid and legal obligation on the part of the banking company to pay the purchase money, but for the form of the security agreed to be taken in payment; and this brings me to the consideration of the second ground of defence, viz., that the North American Trust and Banking Company had no authority to issue negotiable promissory notes, payable at a future day; and consequently, that the contract which provided for their issue and for receiving them in payment, was illegal and void.

In considering this branch of the case, I shall not examine at length the questions so ably argued at bar, in regard to the nature of corporations and the limitations of their powers, but shall assume it to have been established, for the purposes of this case, at least, that associations under the general banking law, even prior to the act of 1840 (Laws 1840, p. 306, § 4), had no power to issue negotiable notes upon time; placing this assumption, however, not upon the safety fund act of 1829 (Laws 1829, p. 167), but upon the general principle of law which limits corporations to the exercise of powers expressly given to them, or such as are necessarily incident thereto, and upon the statute confirmatory of that principle. 1 Rev. St. p. 600, § 3.

It follows, that in issuing the certificates of post notes delivered to the Morris Canal and Banking Company in consideration of the stocks transferred, the North American Trust and Banking Company exceeded its corporate powers. That those certificates were negotiable promissory notes, is clear. Bank v. Merrill, 2 Hill, 295; Leavitt v. Palmer, 3 N. Y. 19; Talmage v. Pell, 7 N. Y. 328. Does this act of the Trust and Banking Company, thus transcending its legitimate powers, so taint and corrupt the contract of sale as to deprive the vendors of the stocks of all remedy for the purchase money? The counsel for the claimants sought upon the argument to maintain that the sale of the stocks and the receipt of the certificates were distinct transactions; and, hence, that the debt created by the sale would remain, notwithstanding the illegality of the securities. In this, however, he is not sustained, I think, by the evidence. The proof seems to be clear, that the agreement to receive the certificates or post notes was simultaneous with and formed a part of the contract of purchase. It becomes necessary, therefore, to meet the question whether the consent and agreement of the vendors to receive the certificates in payment, will prevent a recovery in any form for the stock sold.

It results, from what has been previously said, that there was nothing in the contract of sale, considered by itself, separately from the agreement in relation to the security, to impair the validity of the debt; but, on the contrary, that the sale of the stocks created as valid and meritorious a consideration for the obligation assumed by the Trust and Banking Company as if the money had actually been deposited according to the tenor of the certificates. The objection to the claim, therefore, rests upon the nature of the securities alone, and acquires no additional force from the want of power in the Trust and Banking Company to traffic in stocks.

It has long been settled that contracts founded upon an illegal consideration, or which contemplate the performance of that which is either malum in se, or prohibited by some positive statute, are void. But the application of this rule to contracts made by corporations, the sole objection to which consists in their being ultra vires, is comparatively modern. The doctrine rests mainly upon three recent English cases, viz.: East Anglian Ry. Co. v. Eastern Counties Ry. Co., 7 Eng. Law & Eq. 505; McGregor v. Manager, 16 Eng. Law & Eq. 180; and Mayor, etc., of Norwich v. Norfolk Ry. Co., 30 Eng. Law & Eq. 120.

That a contract by a corporation, which it has no legal capacity to make, is void and cannot be enforced, it would seem difficult to deny; and this principle alone is abundantly sufficient to sustain the cases above cited, which were all actions founded upon and affirming the validity of the illegal contract. But it is quite another question whether such a contract is so tainted with corruption, that the party dealing with

the corporation will be refused all remedy in a suit proceeding upon the ground of a disaffirmance of the contract, and asking only such relief as equity demands. Whether a contract of this nature can fairly be brought, consistently with either reason or adjudged cases, within the range of the maxim, "ex turpi causa non oritur actio," cannot be considered as settled by the cases referred to; especially as in the last of those cases the court was equally divided, and it was only disposed of by one of the judges withdrawing his opinion with a view to an appeal.

Prior to the case of East Anglian Ry. Co. v. Eastern Counties Ry. Co., supra, the rule which denied all relief, in equity, as well as at law, to any party to an illegal contract, had been generally applied only to cases where the contract was either malum in se or specifically prohibited by statute. It was wholly unnecessary to the decision of that case to resort to any extension of that rule; because, to enforce a contract against a party, which that party was incompetent in law to make, would, indeed, be, in the language of some of the cases, "to make the law an instrument in its own subversion." The courts, however, in that as well as the two subsequent cases, do appear to have been inclined to hold that contracts of corporations, which are ultra vires merely, come within the general rule which denies all aid to either party to a contract made in violation of law. But it will not be necessary here to pass upon the correctness of this doctrine advanced in those cases, as in the view I take of this case, it falls clearly within an exception to that rule; and, for the purposes of this question, I shall concede: (1) That the issuing and delivery by the North American Trust and Banking Company, of its promissory notes payable on time, was ultra vires; and that the effect of this upon the contract was the same as if it had been specifically prohibited under a penalty, and (2) that the notes issued were calculated and intended for circulation as money, and were, therefore, issued contrary to the inhibitions of the restraining act. These concessions are made for the purposes of this case only, and without intending definitely to decide the points conceded.

There are one or two classes of cases to which it will be necessary to refer in order to afford a clear view of the question here presented. The first consists in a series of cases in which a distinction has been taken between those illegal contracts where both parties are equally culpable, and those in which, although both have participated in the illegal act, the guilt rests chiefly upon one. The maxim "ex dolo malo non oritur actio" is qualified by another, viz., "in pari delicto melior est conditio defendentis." Unless, therefore, the parties are in pari delicto as well as particeps criminis, the courts, although the contract be illegal, will afford relief, where equity requires it, to the more innocent party.

It was insisted by the counsel for the receiver, upon the argument, that in no case would relief be afforded to any party to an illegal contract, unless he applied for such relief, or, at least, had elected to disaffirm the contract while it remained executory. This position cannot, I think, be sustained. It overlooks distinctions which are clearly settled. The cases in which the courts will give relief to one of the parties on the ground that he is not in pari delicto, form an independent class, entirely distinct from those cases which rest upon a disaffirmance of the contract before it is executed. It is essential, to both classes, that the contract be merely malum prohibitum. If malum in se, the courts will in no case interfere to relieve either party from any of its consequences. But where the contract neither involves moral turpitude nor violates any general principle of public policy, and money or property has been advanced upon it, relief will be granted to the party making the advance (1) where he is not in pari delicto; or (2) in some cases where he elects to disaffirm the contract while it remains executory. In cases belonging to the first of these classes, it is of no importance whether the contract has been executed or not; and in those belonging to the second, it is equally unimportant that the parties are in pari delicto. This will clearly appear upon a brief review of some of the leading cases.

The first case which I deem it material to notice is that of Smith v. Bromley, Doug. 695, note. The plaintiff's brother having become bankrupt, and a commission having been taken out against him, the plaintiff advanced £40 to the defendant, who was the principal creditor, to induce him to sign the certificate. The action, which was brought to recover this money, was sustained. In reply to the argument that the plaintiff was seeking to recover back money paid upon an illegal contract, Lord Mansfield said: "If the act is in itself immoral, or a violation of the general laws of public policy, then the party paying shall not have this action; for when both parties are equally criminal against such general laws, the rule is 'potior est conditio defendentis.' But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover; and it is astonishing that the reports do not distinguish between violations of the one sort and the other." Two things are to be noted in this extract: That a distinction is taken between contracts malum prohibitum merely, and such as are immoral or contrary to general principles of policy; and also that stress is laid upon the fact that the law contravened in this case was intended to protect one party from op-

pression by the other. The first is a valid distinction, which runs through all the subsequent cases—the last was merely incidental to the particular case, and not essential to the principle. The first cases in which the principle was applied, were naturally those where the statute violated was intended for the special protection of the party seeking relief from some undue advantage taken by the other, because those were the cases in which the injustice of applying the same rule to both parties would be the most glaring. But it soon came to be seen that the principle was equally applicable to cases where the law infringed was intended for the protection of the public in general.

The case of Jaques v. Golightly, 2 W. Bl. 1073, was an action brought to recover back money paid for insuring lottery tickets. The defendant kept an office for insurance contrary to the statute 14 Geo. III. c. 76. It was urged that the plaintiff being particeps criminis, and having knowingly transgressed a public law, was not entitled to relief; but the action was sustained by the unanimous opinion of the court. Blackstone, J., said: "These lottery acts differ from the stockjobbing act of 7 Geo. II. c. 8, because there both parties are made criminal and subject to penalties." The rule here suggested for determining whether the parties are in pari delicto, seems reasonable and just. There are, undoubtedly, other cases in which the parties are not equally guilty; but it is safe to assume, that whenever the statute imposes a penalty upon one party and none upon the other, they are not to be regarded as par delictum. In Browning v. Morris, 2 Cowp. 790, Lord Mansfield, after referring with approbation to the case of Jaques v. Golightly, reiterates the argument of Blackstone, J., in that case. He says: "And it is very material that the statute itself, by the distinction it makes, has marked the criminal, for the penalties are all on one side,—upon the officekeeper."

The question next arose in the case of Jaques v. Withy (1 H. Bl. 65), which is identical with the case of Jaques v. Golightly, decided by the same court fifteen years before. The action was brought to recover back money paid for insurance to the keeper of a lottery insurance office, and it was held to lie. It will be seen that these two cases are not like that of Smith v. Bromley, where an undue advantage was taken of the peculiar situation of the plaintiff; and that although some effort is made in Jaques v. Golightly, and by Lord Mansfield in Browning v. Morris, supra, to bring them within the reasoning of that case, they are really placed upon the broad ground that the parties are not in pari delicto, and, as evidence of this, the court rely upon the fact that the penalty was imposed upon the defendant alone. A similar question came before the court of king's bench in the case of Williams v. Hedley, 8 East, 378, where the previous cases were ably and elaborately reviewed by Lord Ellenborough. The action was brought to recover back money which had been paid by the plaintiff to compromise a qui tam action pending against him for usury. The principle of the decision cannot be better stated than by transcribing the head note of the reporter, which is this: "Money paid by A. to B., in order to compromise a qui tam action of usury brought by B. against A. on the ground of a usurious transaction between the latter and one E., may be recovered back in an action by A. for money had and received; for the prohibition and penalties of the statute of 18 Eliz. c. 5, attach only on the informer or plaintiff or other person suing out process in the penal action making composition, &c., contrary to the statute, and not upon the party paying the composition; and, therefore, the latter does not stand, in this respect, in pari delicto, nor is he particeps criminis with such compounding informer or plaintiff."

These are the leading English cases on this subject; and it is plain that they do not rest solely upon the ground that the statute infringed was intended to protect one party from acts of oppression or extortion by the other; and equally plain that relief is granted in this class of cases entirely irrespective of the question whether the contract be executed or executory. It was, in fact, executed in all these cases.

The series of cases here referred to have never been overruled. On the contrary, they have been expressly sanctioned and approved in several American cases. In Inhabitants v. Eaton, 11 Mass. 368, Chief Justice Parker, after referring to the cases of Smith v. Bromley and Browning v. Morris, supra, and to the distinction there taken, says: "This distinction seems to have been ever afterwards observed in the English courts; and being founded in sound principle, is worthy of adoption as a principle of common law in this country." The case of White v. Bank, 22 Pick. 181, proceeds upon the same distinction. It is impossible, as it seems to me, to distinguish this case in principle from that now before the court. The Revised Statutes of Massachusetts (chapter 36, § 57) prohibited banks from making any contract "for the payment of money at a future day certain," under a penalty of a forfeiture of their charter. The plaintiff had deposited money with the defendant in February, to remain until the 10th day of August; and the action was brought to recover this money. It was objected that the contract was illegal and the parties particeps criminis, but the defence was overruled. This is by no means an anomalous case, as the counsel for the receiver upon the argument of this case seemed to suppose. On the contrary, it belongs clearly to the same class with the English cases just reviewed. Wilde, J., who delivered the opinion of the court, after referring to those cases, and quoting

the remarks of Chief Justice Parker in Inhabitants of Worcester v. Eaton, given above, says: "The principle is in every respect applicable to the present case, and is decisive. The prohibition is particularly leveled against the bank, and not against any person dealing with the bank. In the words of Lord Mansfield, 'the statute itself, by the distinction it makes, has marked the criminal.' The plaintiff is subject to no penalty, but the defendants are liable for the violation of the statute to a forfeiture of their charter."

Again, in the case of Lowell v. Railroad Co., 23 Pick. 24, where the objection was raised that the parties were particeps criminis, the same justice says: "In respect to offences in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely malum prohibitum, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-doers." The same doctrine was reiterated in Atlas Bank v. Nahant Bank, 3 Metc. 581. The principle of these cases was also adopted by our own supreme court in the case Mount v. Waite, 7 Johns. 434. The action was to recover back money which the plaintiffs had paid to the defendants for insuring lottery tickets contrary to the policy of a statute passed in 1807. Kent, C. J., says: "The plaintiffs here committed no crime in making the contract. They violated no statute, nor was the contract malum in se. I think, therefore, the maxim as to parties in pari delicto does not apply, for the plaintiffs were not in delicto."

This case is the last of the class to which I shall refer; and I think it would be difficult to find a series of cases, running through almost a century, more uniform and consistent in tone and principle and in the distinctions upon which they are based. They have never, so far as I am aware, been overruled; and I know of no principle which would justify this court in disregarding them. The doctrine seems to me eminently reasonable and just, and I discover no principle of public policy to which it stands opposed. On the contrary, I concur in the sentiment which Judge Wilde, in White v. Bank, expresses, thus: "To decide that this action cannot be maintained, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute by taking advantage of the unwary and of those who may have no actual knowledge of the existence of the prohibition, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank."

This language is as applicable to the case before us as to that in which it was used. It is said that all persons dealing with banks and other corporations are presumed to know the extent of their powers. This is no doubt technically true, and yet we cannot shut our eyes to the fact, that in very many cases it is a mere legal fiction. If we take the present case as an example, it is plain that it would not have been easy for the Morris Canal and Banking Company, with the charter of the Trust and Banking Company and the restraining act both before them, to determine whether the issue of these certificates in payment for state stocks would violate either; and yet, upon the doctrine here contended for, an honest mistake in this respect would visit upon the former company a forfeiture of the entire amount of stocks transferred, which the latter company, if disposed, might pocket. Such a principle would afford the strongest possible inducement for banks to transgress the law. All that they could get into their hands, by persuading others to take their unauthorized paper, would be theirs. Under such a rule, arguments to make it appear that they have power to do what they really have not, might be made to constitute the most available portion of their capital; and unauthorized dealing in large amounts, with foreign states or corporations not familiar with our laws, the most profitable branch of their business. These considerations go, in my judgment, to strengthen and confirm the doctrine of the cases referred to, which hold that relief may be granted to the more innocent, when the parties are not in pari delicto.

The rule laid down in those cases for determining which is the more guilty party is directly applicable to the present case so far as the transaction is held to fall within the provisions of the restraining act. It has been conceded, as was contended by the counsel for the receiver upon the argument, that the issuing of the certificates in this case was a violation of sections 3, 6 and 7 of the act concerning unauthorized banking. 1 Rev. St. 712. It will be seen, by referring to those sections, that the penalties are imposed exclusively upon the corporation violating the provisions of the act, and upon its officers and members. So far, therefore, as the defence is based upon a violation of the restraining act, there is that statutory designation of the guilty party upon which most of the cases to which I have referred are made to rest. But it is obvious that the general principle for which I contend applies equally to that branch of the defence which rests upon the ground that the act of the banking company in issuing the notes, was ultra vires and against public policy. The imposition of the penalties for a violation of the restraining law upon the corporation alone, does not make it the guilty party, but it is simply evidence that the legislature so regarded it; and the reasons are equally strong for fixing the principal guilt upon the same party where its acts merely violate the principle of public policy. Although persons dealing with corporations are, for certain

purposes, presumed to know the extent of their corporate powers, yet this is by no means a safe rule by which to measure the moral delinquency of the respective parties. To me, therefore, it seems plain, that whether we regard the act of the Trust and Banking Company in issuing the certificates in question as a violation of the restraining law, or as simply ultra vires, or as against public policy, the corporation is to be regarded as comparatively the guilty party.

I wish here briefly to refer to another class of cases decided in this state, and known as the "Utica Insurance Cases," not as authority for my conclusion, but by way of illustrating the distinctions to which I have adverted. The first of these is Insurance Co. v. Scott, 19 Johns. 1. The action was upon a promissory note discounted by the insurance company in the ordinary way of discounting by a bank. It was held that the insurance company had no power to discount notes; and that in so doing it had violated the restraining act. But the court say: "In analogy to the statute against gaming, the notes and securities are absolutely void, into whatever hands they may pass, but there is a material distinction between the security and the contract of lending. The lending of money is not declared to be void, and, therefore, whenever money has been lent, it may be recovered although the security itself is void." Judgment was, however, given for the defendant in that case, because the action was brought upon the note alone. The next case was that of Insurance Co. v. Kip, 8 Cow. 20. This, also, was an action upon a note discounted by the insurance company; but the declaration also contained a count for money lent. The plaintiff recovered; and the court say: "The illegal contract, if any, was not the loan, for the plaintiffs had a right to loan the money to the defendants; but it was the agreement to secure the loan by a note discounted. Avoiding what was illegal, does not avoid what was lawful. The action for money lent, is rather a disaffirmance of the illegal contract." Similar decisions were made in three subsequent cases, viz.: Insurance Co. v. Cadwell, 3 Wend. 296; Insurance Co. v. Kip, Id. 369; and Insurance Co. v. Bloodgood, 4 Wend. 652.

These cases have never been overruled; and yet, I think I may say, they have generally been regarded with some suspicion as to their soundness. In New Hope Delaware Bridge Co. v. Poughkeepsie Silk Co., 25 Wend. 648, Nelson, J., in speaking of them, says: "Whether the doctrine of these cases is well founded and may be upheld upon established principles or not, or whether the result was not ultimately influenced by the peculiar phraseology and powers of the charter of the Utica Insurance Company, in respect to which they arose, it is not necessary at present to examine. I am free to say, in either aspect, I should have great difficulty in assenting to them." There is, undoubtedly, "great difficulty" in reconciling these cases with the settled rules in regard to illegal contracts; and the difficulty consists precisely in this, that the court, in the Utica insurance cases, have given to the guilty party the benefit of a principle which is only applicable to the more innocent. In the first case in which the insurance company recovered, viz., Insurance Co. v. Kip, the court cite and rely upon the following passage from Comyn: "Where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that he should recover." 2 Comyn, Cont. p. 2, c. 4, art. 20. Comyn cites, as authority for this passage, the case of Jaques v. Withy, 1 H. Bl. 65, which is one of the cases to which I have referred, in which the plaintiff recovered on the ground that he was not in pari delicto with the defendant; and on turning to that case it will be seen that the passage is copied verbatim from the argument of Sergeant Adair, counsel for the plaintiff. It is thus made apparent that the doctrine of the Utica insurance cases is built, in part, at least, upon the principles and arguments which lie at the foundation of the class of cases just passed in review. More can scarcely be needed to justify the doubt which has been cast upon these insurance cases. How principles, appropriately used to sustain a recovery against a party, upon the express ground that he is the party upon whom the prohibition and penalties of the law attach, can be made available to justify a recovery by a party so situated, is certainly difficult to comprehend.

But, notwithstanding the misapplication to these cases of the principles for which I contend, the cases themselves afford strong evidence of the appreciation, by the court, of the soundness of those principles. Indeed, few, as it seems to me, will be found to deny either the justice or policy of the rule which refuses to permit the guilty party to retain the fruits of an illegal transaction at the expense of the more innocent. But were it otherwise, the rule, as I have shown, is indisputably established; and that the present case falls within that rule is entirely clear. We have next, then, to ascertain the relief to which the Morris Canal and Banking Company would, if the claimant upon the record, be entitled.

The illegal contract itself is of course void, and no part of it can be enforced. It is impossible, I think, to sustain the reasoning adopted in the Utica insurance cases, by which that part of the contract which embraces the loan (in this case, the sale) is separated

from the portion relating to the security, and upheld as a distinct and valid contract. The contract there, as here, was entire; and it is contrary to all the rules which have been applied to illegal contracts to discriminate between their different parts, and hold one portion valid and the other void. Recoveries are not had in such cases upon the basis of the express contract, which is tainted with illegality; but upon an implied contract founded upon the moral obligation resting upon the defendant to account for the money or property received. The claim presented by the state of Indiana to the referees was in general terms, and broad enough to embrace a demand arising upon an implied contract to pay for the bonds transferred; and it has been repeatedly held that a corporation may become liable upon such a contract founded upon a moral obligation, like that existing in this case. Bank v. Patterson, 7 Cranch, 299; Danforth v. Turnpike Road, 12 Johns. 227; Bank v. Dandridge, 12 Wheat. 64.

It follows from these principles, that if the Morris Canal and Banking Company was the claimant upon the record, it would be entitled to recover, not the specific balance due upon the certificates, nor the price agreed to be paid for the stocks, but so much as the stocks transferred were reasonably worth at the time of such transfer, with interest, deducting therefrom whatever has been actually paid in any form by the North American Trust and Banking Company for the same, and leaving, however, the contract of sale, so far as it has been executed by payment, or its equivalent undisturbed.

The only remaining question is, whether the state of Indiana has succeeded to the rights of the Morris Canal and Banking Company in this respect. If, as it seems to have been held by the supreme court both at special and general terms, the Canal and Banking Company acted in the sale of the stocks as the agent of the state of Indiana, then, of course, the latter, as the principal, is the proper party here. But, aside from this, I cannot doubt that a court of equity would hold, upon the face of the transaction, that it was the intention of the Morris Canal and Banking Company to transfer to the state its entire claim against the Trust and Banking Company, growing out of the sale of the stocks, and would, if necessary, compel any formal defects in such transfer to be supplied; and as the proceeding here is of an equitable nature, the court, upon well settled principles, will regard what ought to be done as having been done. The judgment of the supreme court should be modified in accordance with these principles, and the proceedings remitted.

MITCHELL, J., delivered an opinion in favor of affirming the judgment of the supreme court at general term. He was of the opinion that the evidence did not establish that the Morris Canal and Banking Company, or the state of Indiana, had knowledge when the bonds were sold that the Trust and Banking Company purchased them for an illegal purpose, or with intent to make an illegal use of them, and that the last named company, at the time of the purchase, in 1839, had authority to make and issue notes or certificates payable at a future day. He held, that associations organized under the general banking law were not subject to the provision contained in the safety fund act (Laws 1829, p. 173, § 35), prohibiting moneyed corporations subject to the provisions of that act from issuing bills or notes, payable on time; and that such associations might lawfully issue such notes for a legitimate purpose, until prohibited by the act of 1840 (Laws 1840, p. 306, § 4).

DENIO, C. J., was also in favor of affirming the judgment, on substantially the same grounds as those stated by Judge MITCHELL.

COMSTOCK, HUBBARD, T. A. JOHNSON, and WRIGHT, JJ., concurred in the foregoing opinion delivered by Judge SELDEN, and were in favor of modifying the judgment in accordance with the principles stated in that opinion.

A. S. JOHNSON, J., dissented. He was in favor of reversing the judgment rendered at general term and affirming that rendered at special term.

Judgment modified.

TYLER v. CARLISLE.

(9 Atl. 356, 79 Me. 210.)

Supreme Judicial Court of Maine. March 1, 1887.

On exceptions from supreme judicial court, Knox county.

Assumpsit to recover money loaned. The verdict was for the defendant, and the plaintiff alleged exceptions.

C. E. Littlefield, for plaintiff. J. E. Hanley, for defendant.

PETERS, C. J. The plaintiff claims to recover a sum of money loaned by him while the defendant was engaged in playing at cards. The ruling at the trial was that, if the plaintiff lent the money with an express understanding, intention, and purpose that it was to be used to gamble with, and it was so used, the debt so created cannot be recovered; but otherwise if the plaintiff had merely knowledge that the money was to be so used. Upon authority and principle the ruling was correct. Any different doctrine would, in most instances, be impracticable and unjust. It does not follow that a lender has a guilty purpose merely because he knows or believes that the borrower has. There may be a visible line between the motives of the two. If it were not so, men would have great responsibilities for the motives and acts of others. A person may loan money to his friend,—to the man,—and not to his purpose. He may at the same time disapprove his purpose. He may not be willing to deny his friend, however much disapproving his acts. In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. There must be a combination of intention between lender and borrower,—a union of purposes. The lender must in some manner be a confederate or participator in the borrower's act,—be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower, not intend merely to serve or accommodate the man. In support of this view many cases might be adduced A few prominent ones will suffice. Green v. Collins, 3 Cliff. 494, Fed. Cas. No. 5,755; Gaylord v. Soragen, 32 Vt. 110; Hill v. Spear, 50 N. H. 253; Peck v. Briggs, 3 Denio, 107; McIntyre v. Parks, 3 Metc. (Mass.) 207; Banchor v. Mansel, 47 Me. 58. See Franklin Co. v. Lewiston Sav. Bank, 68 Me. 47.

Nor was the branch of the ruling wrong that plaintiff, even though a participator, could recover his money back if it had not been actually used for illegal purposes. In minor offenses, the locus penitentiæ continues until the money has been actually converted to the illegal use. The law encourages a repudiation of the illegal contract, even by a guilty participator, as long as it remains an executory contract, or the illegal purpose has not been put in operation. The lender can cease his own criminal design, and reclaim his money. "The reason is," says Wharton, "the plaintiff's claim is not to enforce, but to repudiate, an illegal contract." Whart. Cont. § 354, and cases there cited. The object of the law is to protect the public,—not the parties. "It best comports with public policy to arrest the illegal transaction before it is consummated," says the court in Stacy v. Foss, 19 Me. 335. See White v. Bank, 22 Pick. 181. The rule allowing a recovery back does not apply where the lender knows that some infamous crime is to be committed with the means which he furnishes. It applies only where the minor offenses are involved. Exceptions overruled.

DANFORTH, VIRGIN, LIBBEY, FOSTER, and HASKELL, JJ., concurred.

FROST v. GAGE.

(3 Allen, 560.)

Supreme Judicial Court of Massachusetts. Middlesex. Jan. Term, 1862.

Contract. At the second trial of this case, after the facts reported in 1 Allen, 262, had been proved, the plaintiff offered in evidence a release of their several claims by the creditors of Richard Frost, and Richard testified that, after the release had been signed by the plaintiff and defendant, the latter procured the signatures of other creditors to the same and delivered it to him, and he thereupon executed the assignment to the defendant. The defendant then offered to prove that he was Richard's largest creditor; that the plaintiff, who was Richard's son, requested him to aid in obtaining a settlement with Richard's creditors, and promised to make no claim upon him for any part of the proceeds of Richard's estate which might come into his hands as assignee, but to allow him to retain the plaintiff's share for his services, and also to execute to him a promissory note for a further sum, if he would sign the release and procure the signatures of other creditors to the same; and that he, being induced by said promise, did sign the release and procure the signatures of other creditors to the same. Morton, J., rejected this evidence, and the jury returned a verdict for the plaintiff. The defendant alleged exceptions.

A. F. L. Norris, for plaintiff. W. P. Webster, for defendant.

BIGELOW, C. J. The right of the plaintiff to maintain his action on the second count, on proof of the facts therein set forth, was determined at the former hearing of this case. 1 Allen, 262. The only point now raised which was not then considered by the court arises on the evidence offered by the defendant to show that there was an agreement between him and the plaintiff, by which the former agreed to sign the composition deed and procure the release of the other creditors of Richard Frost on a promise by the latter to pay a portion of the debt due from said Richard to the defendant, in addition to the dividend which he might receive under the assignment, in common with the other creditors. That such an agreement would be a fraud on the other creditors, and that the defendant could maintain no action upon it against the plaintiff, is too clear to admit of any doubt. It was a secret and underhand contract by which the defendant secured to himself an advantage over other creditors of the insolvent, while at the same time he was holding out to the same creditors that he was to share in the assets equally with them, and thereby inducing them to sign the composition deed and release the debtor from their claims. Story, Eq. § 378; Cockshott v. Bennett, 2 Term R. 763, 766; Lewis v. Jones, 4 Barn. & C. 511; Case v. Gerrish, 15 Pick. 49. The question then presents itself, whether such a fraudulent agreement can be set up by the defendant, who was a party to it, as a defense to an action by the plaintiff to recover the same share or dividend of the assets of the debtor as has been paid to the other creditors by the defendant. This is in some respects a novel question; but it seems to us to come within principles recognized in the adjudged cases, by the application of which it can be readily solved. Assuming that the defendant could establish all the facts contained in his offer of proof, it is clear that the plaintiff was a party to the fraudulent agreement by which the signatures of the other creditors to the release of the debtor were obtained. It was by his procurement, and on a promise by him to pay the defendant a portion of his debt beyond the amount which he would receive from the estate of the debtor, and the latter was induced to sign the release and to become the agent in procuring the signatures of the other creditors. It was through the procurement and instrumentality of the plaintiff, and by means of an agreement which operated as a fraud on the other creditors, to which he was a party, and for which he furnished the consideration, that the composition and release were obtained. He was therefore a participator in the fraud. Holding the relation of a creditor, and bound to act with good faith towards the other creditors, in entering into an agreement with them to compound with their debtor and to release him from their debts, he became a party to an agreement by which a secret advantage was attempted to be secured to the defendant, by which he was induced to become a party to the assignment and release, and thereby to hold out false colors to the other creditors, and lead them to believe that all were acting on equal terms, and to grant a discharge to their debtor on the faith that all were to receive a like portion of their respective debts. To adopt the significant figure which has been used to describe the effect of a transaction of this nature, in Story, Eq. § 378, the plaintiff did not himself act as a decoy duck to mislead the other creditors, but he did that which was quite as effectual in accomplishing the fraud on them; he procured the duck, and placed him in a position in which he was enabled to practice a deception, and to draw the creditors into an arrangement with their debtor to which otherwise they might not have assented. In this aspect of the case, we do not see that the plaintiff stands in any better situation, or is entitled to any greater favor in a court of law than the defendant. As participators in the fraud, they both stand on an equal footing. Neither can claim to recover anything in an action which can be maintained only by proof of a transaction into any part of which his fraud has entered as an essential element, affecting the rights of any parties interested

therein. It is on this ground that it has been held that a creditor cannot recover his share or dividend under a composition deed to which he became a party, if he had previously taken a private agreement for the payment of the residue of the debt. His right to recover the amount to which the fraudulent agreement did not extend is forfeited by his participation in a fraud connected with another part of the same transaction. The whole is regarded as an entire agreement, which is vitiated by the fraudulent act of the party, as to him, so that he can claim no benefit under any of its provisions. Higgins v. Pitt, 4 Exch. 323; Knight v. Hunt, 5 Bing. 432; Howden v. Haigh, 11 Adol. & E. 1033; Fors. Comp. Cr. 152. It is quite immaterial, that the funds to be distributed among other creditors are not diminished or rendered less available in consequence of the secret agreement. The fraud consists, not in causing any injury to the assets of the debtor, or in reducing the share or interest to which the creditors are entitled under the composition, but in the attempt to induce them to enter into an agreement for an equal dividend on their debts in ignorance of a private bargain, whereby a creditor is to receive an additional sum to that to which he may be entitled in common with all the creditors. Such an agreement vitiates the whole transaction, so that the party can claim no benefit under a composition into which he entered in consequence of such corrupt or fraudulent contract. It is quite clear, therefore, that the defendant, if he did not stand in the position of assignee having possession of the assets, and were compelled to bring an action for the share or dividend on his debt which might be coming to him in common with the other creditors, could not recover. The agreement into which he entered with the plaintiff would be a bar to his right to recover even that sum to which the fraudulent agreement did not extend. For a like reason, the plaintiff in this suit ought not to be allowed to recover. The fraud in which he participated, and by which he aided in inducing creditors to become parties to the release of their debtor, taints the whole transaction as to him, and deprives him of the right of maintaining an action to enforce in a court of law that part of the agreement of composition to which the secret agreement did not immediately relate.

It may be suggested that the application of this rule leads in the present case to the result of leaving in the hands of the defendant, who was equally guilty with the plaintiff, the fruits of the fraud. But this is often the consequence of allowing a party to plead in defense the illegality of a transaction on which a cause of action is founded. Such defenses are allowed, not out of favor to defendants, or to protect them from the effects of their unlawful contracts, but on the ground of public policy, which does not permit courts of justice to be used to aid either party in enforcing contracts which are unlawful or tainted with fraud, but leaves them in the condition in which their illegal or immoral acts have placed them.

We are therefore of opinion that the evidence offered at the trial was competent, and that it should have been admitted and submitted to the jury, with instructions in conformity to the principles above stated.

Exceptions sustained.

WOODWORTH v. BENNETT.

(43 N. Y. 273.)

Court of Appeals of New York. 1870.

Action for goods sold. The opinion states the case.

G. F. Bicknell, for appellant. Charles Mason, for respondent.

CHURCH, C. J. The point in this case is, whether the court below erred in allowing to the defendant the sum of $100 as an offset. The facts are substantially as follows: The plaintiff, defendant, Stephens and Truesdell, made an agreement in the nature of a copartnership, to propose or bid for public work on the Seneca river improvement. The bid was to be put in the name of the plaintiff alone, the defendant and Stephens to become sureties. Truesdell was at the time an engineer in the employ of the state on the canals. The bid was made in the name of the plaintiff, in accordance with the arrangement. Before the work was awarded the said parties made an agreement with one Haroun, to withdraw their claim to the work, and sell their bid to him for $400, he being a higher bidder for the same work, which was consummated, and he gave his note for the amount. It was then arranged that the note should be left with the plaintiff for collection, and that when collected each of said persons should be entitled to $100. The plaintiff collected the note, paid to Stephens and Truesdell each $100, and promised to pay the defendant, and apply it on their deal, but never did. It is claimed that it cannot be allowed, on account of the illegality of the transaction out of which it arose. To enable the court to apply correct legal principles, it is necessary to analyze the transaction and ascertain its true nature and character.

The original arrangement for a joint interest or copartnership was illegal, and contrary to a positive statute in two respects. The Laws of 1854, chapter 329, in substance requires that every proposal for work shall contain the names of all persons who are interested, and prohibits any secret agreement or understanding that any person not named shall become interested in any contract that may be made, and engineers, and all other persons in the employ of the state on the canals, are also prohibited from becoming interested in any contract or job on the public works.

In the next place, the transaction with Haroun was contrary to public policy, and illegal. It is manifest that the object and purpose of the purchase of the bid was to have it withdrawn so as to enable Haroun to take the contract upon a higher bid. This was directly against the interests of the state, and tended to destroy that honest competition which public bidding is designed to secure; and when as in this case, it was done partly for the benefit of an officer of the state whose duty it was to protect its interests, it was not only contrary to public policy but was grossly corrupt.

The supreme court placed its decision in favor of the defendant, upon the ground that as between these parties the illegal contract had been fully executed when Haroun paid the money, and that the plaintiff then became a mere depositary, and held the money for the use of the other parties.

It is undoubtedly true that if the contract or obligation does not depend upon nor require the enforcement of the unexecuted provisions of the illegal contract, it will be carried out. It has been laid down as a test, that whether a demand connected with an illegal transaction is capable of being enforced at law depends upon whether the party requires any aid from the illegal transaction to establish the case. Chit. Cont. 657. So it has been settled that a party who pays money to a third person for the use of another, which, on account of the illegality of the transaction, he was not obliged to pay, such third person cannot interpose the defense of illegality. Tenant v. Elliott, 1 Bos. & P. 3; Merritt v. Millard, *43 N. Y. 208; 3 Abb. Dec. 291. This principle is based upon the undoubted right of a person to waive the illegality, and pay the money; and that when once paid, either to the other party directly or to a third person for his use, it cannot be recalled; and that the third person, who was in no way connected with the original transaction, cannot avail himself of a defense which his principal saw fit to waive.

If the only illegal transaction was the contract with Haroun for the sale of the bid, these principles might be applicable, and would probably constitute a good answer to the objection to this counter-claim. The payment of the money by Haroun completed that contract, and nothing remained unexecuted. But here the original partnership was illegal; not because of its purposes and objects, but its composition was prohibited by law. If a lawful firm should receive funds from an illegal traffic or business, it may be that the illegality would be regarded at an end, and a division of the money enforced by virtue of the rights of the members under the contract of partnership. This is the utmost limit to which the rule can be carried. 2 Wall. 70.

In such a case the obligation to divide would not arise out of the illegal purposes of the firm, nor would the division carry out any of those purposes, but the obligation would arise out of the contract of partnership itself. Here this contract was illegal. The object of the statute was to enable the state officers to know with whom they contracted, and also to see that the statute, prohibiting engineers and other canal officers from becoming interested, was not violated, and to prevent all secret combinations in relation to obtaining work. The money obtained by this bid belongs to the firm; and the plaintiff could have been compelled to divide, if the firm had been lawful, by force of the contract organiz-

ing it. In this case he also agreed to pay the money, and defendant asks the court to compel him to perform this obligation. The answer to it is obvious. There is no obligation, because it was incurred contrary to law. It rests upon the contract of partnership, and that is void for illegality.

In law there was no partnership, and none of the parties obtained any rights under the contract creating it. Armstrong v. Lewis, 3 Mylne & K. 45.

The sentiment of "honor among thieves" cannot be enforced in courts of justice. Suppose the engineer had sued for his share after an express promise, would any court have tolerated his claim for a moment in the face of a statute prohibiting him from being interested? If not, in what respect does the defendant occupy any better position? The first step in his case is to prove that he was a secret partner and entitled to a share of this money. The law prohibits secret partners, and he is therefore not a partner.

The express promise does not aid the defendant, because the promise was only to carry out the unexecuted provision of the contract of partnership to divide the money. The two cases cited by the counsel for the defendant, if they are to be regarded as good law, are distinguishable from this. In the case of Faikney v. Renois, 4 Burr, 2069, one of two partners had paid £3,000 to settle differences in illegal stock-jobbing operations, and the defendant executed his bond to secure the share of the other partner. The court overruled the defense recognizing the exploded distinction between acts malum prohibitum and malum in se, and held that as between those parties the bond was to secure the plaintiff for money paid, and the purposes of the payment would not be inquired into. A similar decision was made upon the authority of this case in Petrie v. Hannay, 3 Term R. 418, Lord Kenyon dissenting. The distinction between the above cases and this is in the circumstance that there the illegal transactions had been closed up and settled, and the obligations sought to be enforced were for the money advanced for that purpose. Here it is sought to consummate the illegal contract by a new agreement that it shall be performed. No case has gone this length, and the two cases above cited have been very much shaken by subsequent decisions, and are, to say the least, questionable authority, especially the latter. Aubert v. Maze, 2 Bos. & P. 370; Mitchell v. Cockburne, 2 H. Bl. 380; Ex parte Daniels, 14 Ves. 190; Lowry v. Bourdieu, Doug. 467; Brown v. Turner, 7 Term R. 626; Belding v. Pitkin, 2 Caines, 147, note a.

The general rule on this subject is laid down in this court, in Gray v. Hook, 4 N. Y. 449, by Mullett, J., as follows: "The distinction between a void and valid new contract in relation to the subject-matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract, or whether it is based upon a moral obligation growing out of the execution of an agreement which could not be enforced by law, and upon the performance of which the law will raise no implied promise. In the first class of cases, no change in the form of a contract will avoid the illegality of the first consideration while express promises based upon the last class of considerations may be sustained."

It is sometimes difficult to apply general rules to particular cases, but this case comes clearly within the first class mentioned in the above rule. It is not from any regard to the rights of the party setting up this defense that courts refuse to enforce illegal contracts, but it is for the protection of the public. The plaintiff in this case is entitled to no sympathy or favorable consideration. He must have made an affidavit that no other person was interested with him in the proposal, and when he received this money, as between him and the defendant, the latter was entitled to it; and while we have no disposition to justify his conduct, his position enables him to secure the advantage of a decision which we are compelled to make in obedience to a principle of public policy which is indispensable for the protection of the community against the corrupting influences of illegal transactions.

The observation of Lord Mansfield in Holman v. Johnson, 1 Cowp. 343, is applicable here. He said: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant [in this case the plaintiff]. It is not for his sake however that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say."

Judgment must be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed and a new trial ordered.

SPRING CO. v. KNOWLTON.

(103 U. S. 49.)

Supreme Court of the United States. Oct., 1880.

Error to the circuit court of the United States for the Northern district of New York.

This suit was brought in 1869 by Dexter A. Knowlton, a citizen of Illinois, against the Congress and Empire Spring Company, in the supreme court of the state of New York, to recover the sum of $13,980, with interest from Feb. 20, 1866. In 1876 he died, and the suit was revived and continued by the administrators of his estate. They are citizens of Illinois, and on their application the suit was, March 20, 1877, removed to the circuit court of the United States. The parties, by written stipulation, waived a jury. The court tried the case, and found the facts to be substantially as follows:—

The Congress and Empire Spring Company is a corporation organized under the statute of the state of New York of Feb. 17, 1848, authorizing the formation of corporations for manufacturing, mining, mechanical, or chemical purposes, and subsequent acts amendatory thereof. Its capital stock was $1,000,000, divided into ten thousand shares of $100 each, issued in payment of property purchased by the trustees of the corporation for its use.

The mode by which such a corporation might increase its capital stock is prescribed by sections 21 and 22 of chapter 40 of the laws of 1848.

Section 21 prescribes how the notice of a meeting of the stockholders to consider the proposition to increase the capital stock shall be given, and what vote of the stockholders shall be necessary to carry the proposition.

Section 22 prescribes how the meeting of the stockholders, called under section 21, shall be organized, and declares that if a sufficient number of votes has been given in favor of increasing the amount of capital stock, "a certificate of the proceedings, showing a compliance with the provisions of this act, the amount of capital actually paid in, . . . the whole amount of debts and liabilities of the company, and the amount to which the capital shall be increased, . . . shall be made out, signed, and verified by the affidavit of the chairman and countersigned by the secretary, and such certificate shall be acknowledged by the chairman and filed, as required by the first section of this act; and when so filed the capital stock of such corporation shall be increased . . . to the amount specified in such certificate, . . . and the company shall be entitled to the privileges and provisions, and subject to the liabilities, of this act, as the case may be."

The corporation passed a resolution, Jan. 11, 1866, to increase its capital stock by the addition thereto of $200,000, for the purpose of building a glass factory for the manufacture of bottles and providing a working capital. It also resolved that the books of the company should be opened for subscriptions to the additional stock, and that each stockholder should be allowed to take one share of the new for every five shares he held of the original stock, and that when he had paid $80 on each share the company should issue to him a certificate as for full-paid stock.

At a meeting of the board of trustees of the corporation, held Feb. 8, 1866, a dividend of four per cent on the original stock was declared, payable Feb. 20, and it was resolved that a call of twenty per cent on the new stock should be made, payable on the latter date; that the books of the company should be at once opened for subscriptions to the new stock; that each stockholder should have the privilege of taking one share of the new for every five shares of the old stock held by him, and that on failure of any stockholder to pay, on or before that date, $20 on each share of the new stock taken by him, all his claim to such new stock should be forfeited and the same divided ratably among the stockholders who had paid the instalment of $20 per share.

In pursuance of the resolutions the trustees immediately issued a stock subscription agreement, by which the subscribers stipulated to take the number of shares set opposite their names and to pay for each share $80, in instalments, as called for by the directors; and upon failure to pay the instalments within sixty days after call, that the money already paid on the stock should be forfeited to the company. By the same agreement the company bound itself to pay interest up to Feb. 1, 1867, on all sums paid on the new stock, and on Feb. 8, 1867, to issue for every share of said new stock on which $80 had been paid a certificate to the holder as for full-paid stock; and it was provided that the holders of such stock should be entitled to vote thereon, and the same should draw dividends and be treated in all respects as full-paid stock.

This agreement was signed by one C. Sheehan, who subscribed for six hundred and ninety shares of the new stock, he being the holder of thirty-four hundred and ninety shares of the old stock.

Thereupon a contract was made between Sheehan and Knowlton, whereby the former agreed to lend the dividend on his old stock to the latter, who agreed to assume the new stock subscribed for by Sheehan, and pay all future calls thereon. Sheehan's dividend on his old stock amounted to $13,988. Knowlton, in consideration of the transfer to him of this dividend, delivered his note to Sheehan for $13,980, dated Feb. 20, 1866, payable in one year, and secured the same by a pledge of one hundred and fifty shares of the stock of the company. He paid the residue, to wit, $8, in cash.

Knowlton paid to the company, March 8,

1866, the call of twenty per cent on the new stock, subscribed by and sold to Sheehan as aforesaid, by the application thereto of Sheehan's dividend on the old stock, amounting to $13,980, for which the company gave Knowlton a receipt.

About December, 1868, Knowlton paid in full his note to Sheehan for $13,980.

Calls and personal demands were made both upon Sheehan and Knowlton more than sixty days before Jan. 25, 1867, for the payment of subsequent instalments on the stock subscribed by Sheehan, and both of them neglected and refused to pay the instalments called for; whereupon the trustees of the company passed a resolution by which they declared that the new stock subscribed by Sheehan and assumed by Knowlton should be and was forfeited.

From August, 1865, to August, 1866, Knowlton was a trustee and vice-president of the company; he advised the increase of the capital stock above mentioned, proposed the resolutions in relation thereto, moved their adoption, drew up and signed the stock subscription agreement, and advised others to sign it.

At a meeting of the stockholders of the company, held Aug. 7, 1867, it was resolved that the capital stock of the company should be reduced to the original sum of $1,000,000, and that the trustees be authorized to arrange with the holders of the new stock for retiring the same on such terms and conditions as they should deem for the interest of the company.

On the same day the board of trustees met and passed a resolution, whereby the executive committee of the board was authorized to adjust, on the best terms for the company, the claims of all persons holding receipts for payments on the new stock ordered to be retired.

The executive committee passed a resolution, March 27, 1868, that the company issue five-year coupon bonds sufficient to refund the payments made on the new stock of the company which had been retired.

No tender of these bonds was ever made to Knowlton, nor was any demand made for them by him; but he demanded repayment of the amount paid by him on his new stock, and the company refused to repay it or any part of it.

The majority of the holders of the original stock became subscribers for the new stock, and all of them except Sheehan, Knowlton, and one or two subscribers for small amounts, paid the calls made on them in respect to the new stock. The first call of twenty per cent on the new stock was paid mainly by the dividend on the old stock above mentioned, but about $3,000 were paid in cash. All the stockholders who did not subscribe for new stock were paid their part of the dividend in cash. About $86,500 of said five per cent bonds were issued by the company to retire the new stock.

As a conclusion of law from these facts, the court held that the plaintiffs, as such administrators, were entitled to judgment against the Congress and Empire Spring Company for the sum of $13,980, with interest from Feb. 20, 1866, and rendered judgment accordingly. The company sued out this writ of error.

It appears by a bill of exceptions that the defendant's counsel requested the court below to decide that the proceedings of the defendant in increasing its capital stock, and forfeiting the amount paid by the plaintiffs' intestate, were in all respects legal and valid. The court refused so to find, and ruled that the plan devised by him and the other trustees of the company was contrary to the provisions of the statute, against public policy, and a fraud upon stockholders not consenting thereto, and the public.

It further appears that the defendant's counsel requested the court to decide that, inasmuch as the intestate devised, counselled, and assisted in passing and adopting all the acts and resolutions for an increase of stock by the company, the plaintiffs were not entitled to recover. The court refused so to decide, and ruled that the intestate had a right to abandon the illegal transaction to which he was a party, and that by declining to pay further calls, and demanding repayment of the payments made before the consummation of the illegal scheme, he did abandon it, and his representatives were entitled to recover. To these refusals and rulings the defendant's counsel excepted.

The errors assigned here are that the court below erred in each of its refusals and rulings, and in deciding that the plaintiffs were entitled to recover.

Francis Kernan and Charles S. Lester, for plaintiff in error. H. M. Ruggles, contra.

Mr. Justice WOODS, after stating the case, delivered the opinion of the court.

The plaintiff in error claims that the plan adopted by it to increase its capital stock, by which certificates as for full-paid stock were to be issued on the payment of eighty per cent thereof, was against the law and public policy of the state of New York, and was, therefore, void; that Knowlton, having been an active party in devising this scheme, and having paid his money in part execution of it, his legal representatives cannot recover the sum so paid.

It is conceded by the defendants in error that the plan adopted by the company to increase its stock was in violation of the law of New York, and therefore void. It has been so held, in effect, by the court of appeals of the state of New York, in the case of Knowlton v. Spring Co., 57 N. Y. 518.

We are, then, to consider whether, upon the hypothesis that the plan for the increase of the stock was illegal, there can be a recovery upon the facts of the case as found by the circuit court.

We think it clear that there was only a par

performance of the illegal contract between the company and Knowlton in reference to the new stock, for which Sheehan subscribed and which he agreed to transfer to Knowlton.

The company, in fact, created no new stock. It only proposed to do so. To increase the stock of the company it was not only necessary that the meeting of the stockholders should be called, as prescribed by the law, and a vote of two-thirds of all the shares of stock should be cast at the meeting in favor of the increase, but that there should be a certificate of the proceedings, showing, among other things, a compliance with the provisions of the law, and the amount of the increase of the stock, signed and verified by the affidavit of the chairman of the meeting at which the increase was voted, and countersigned by the secretary, and such certificate should be acknowledged by the chairman and filed, as required by the first section of the act. And the law declared that "when so filed the capital stock of such corporation shall be increased to the amount specified in such certificate."

It does not appear from the findings of the circuit court that any such certificate was ever made or filed. Consequently it does not appear that the steps necessary, under the law, to an increase of the stock were ever taken. Neither does it appear that any scrip or certificates were ever issued to the subscribers to the new stock. So that all that was done amounted only to a proposition by the company, on the one hand, to increase its stock, and an agreement by Knowlton to take certain shares of the new stock when issued, and the payment by him of an instalment of twenty per cent thereon. There was no performance of the contract whatever by the company, and only a part performance by Knowlton.

It is to be observed that the making of the illegal contract was malum prohibitum and not malum in se. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud.

The question presented is, therefore, whether, conceding the contract to be illegal, money paid by one of the parties to it in part performance can be recovered, the other party not having performed the contract or any part of it, and both parties having abandoned the illegal agreement before it was consummated.

We think the authorities sustain the affirmative of this proposition.

Their result is fairly stated in 2 Comyn, Cont. 361, as follows: "Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are in pari delicto, neither of them can recover from the other the money so paid, but if the contract continues executory and the party paying the money be desirous of rescinding it, he may do so and recover back by action of indebitatus assumpsit for money had and received. And this distinction is taken in the books that where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained, but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that the plaintiff should recover."

Mr. Parsons, in his work on Contracts (volume 2, p. 746), says: "All contracts which provide that anything shall be done which is distinctly prohibited by law, or morality, or public policy, are void, so he who advances money in consideration of a promise or undertaking to do such a thing, may at any time before it is done rescind the contract and prevent the thing from being done and recover back his money."

To the same effect see 2 Add. Cont. § 1412; Chit. Cont. 944; 2 Story, Cont. § 617; 2 Greenl. Ev. § 111.

The views of the text-writers are sustained by a vast array of authorities, both English and American.

A few will be cited. Taylor v. Bowers, 1 Q. B. Div. 291, was an action to recover property assigned for the purpose of defrauding creditors. A verdict was rendered for the plaintiff, with leave to move to enter a verdict for the defendant. A rule was obtained on the ground that the plaintiff could not by the allegation of his own fraud get back the goods from the defendant. The queen's bench sustained the verdict, the chief justice, Cockburn, delivering the opinion. The defendant then appealed to the court of appeals, where the judgment was affirmed. Both courts agreed that an illegal contract partially performed might be repudiated and the money paid upon it recovered.

Lord Justice Mellish, in the court of appeals, said: "If the illegal transaction had been carried out, the plaintiff himself, in my judgment, could not afterwards have recovered the goods. But the illegal transaction was not carried out; it came wholly to an end. To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the

illegal transaction, in neither can he maintain an action; the law will not allow that to be done."

The same rule substantially is laid down in the following English cases: Lowry v. Bourdieu, 2 Doug. 452; Tappenden v. Randall, 2 Bos. & P. 467; Hastelow v. Jackson, 8 Barn. & C. 221; Bone v. Ekless, 5 Hurl. & N. 925; Lacaussade v. White, 7 Term R. 531; Cotton v. Thurland, 5 Term R. 405; Mount v. Stokes, 4 Term R. 561; Smith v. Bickmore, 4 Taunt. 474.

In Morgan v. Groff, 4 Barb. 524, it was held that money paid on an illegal contract, which remains executory, can be recovered back in an action founded on a disaffirmance, and on the ground that it is void.

To the same effect are the following cases: Insurance Co. v. Kip, 8 Cow. (N. Y.) 20; Merritt v. Millard, *43 N. Y. 208; White v. Bank, 22 Pick. 181; Lowell v. Railroad Corp., 23 Pick. 24.

In Thomas v. City of Richmond, 12 Wall. 349, this court cites with approval the note of Mr. Frere to the case of Smith v. Bromley, 2 Doug. 696, to the effect that a recovery can be had as for money had and received when the illegality consists in the contract itself, and that contract is not executed; in such case there is a locus penitentiæ; the delictum is incomplete; the contract may be rescinded by either party.

The rule is applied in the great majority of the cases, even when the parties to the illegal contract are in pari delicto, the question which of the two parties is the more blamable being often difficult of solution and quite immaterial. We think, therefore, that the facts of this case present no obstacle to a recovery by Knowlton's administrators of the sum paid by him on the stock which had been subscribed for by Sheehan.

The law of New York does not in express terms forbid a corporation from issuing certificates for full-paid stock when the stock has not been fully paid. The illegality of such an issue is deduced from several sections of the law under which the Congress and Empire Spring Company was organized, namely, sections 38, 40, 41, and 49. We think it is fairly inferable from the record that the trustees of the company, one of whom was Knowlton, did not know that the plan adopted by them for the increase of the stock was illegal, and that when they discovered that it was forbidden by the law, and before any harm was done or could have been done, the scheme was abandoned. Under such circumstances, the rule which would prevent the recovery of the money paid to carry on the illegal plan would be a very harsh one, not founded on any law or public policy.

It is suggested by counsel for the plaintiff in error that the court of appeals of the state of New York has in this identical suit, upon the same state of facts, adjudicated the rights of the parties, and that this court ought to consider the questions raised in this case as res judicata.

The reply to this suggestion is that it nowhere appears in the record that this case was ever before the court of appeals, or that it was ever decided by any court except the United States circuit court for the Northern district of New York, from which it has been brought to this court on error. We cannot consider facts not brought to our notice by the record.

Judgment affirmed.

Mr. Justice HARLAN dissenting.

This action was commenced in the supreme court of the state of New York. The present transcript is imperfect in that it does not contain all the proceedings in the courts of the state up to the removal of the case into the circuit court of the United States. It is, however, conceded, in the briefs of counsel, that Knowlton recovered in the supreme court a judgment which, upon a writ of error from the commission of appeals, was reversed upon the grounds stated in Knowlton v. Spring Co., 57 N. Y. 518. The learned district judge who tried the case commences his opinion, which is incorporated in the transcript, with the statement that "this case comes here by removal from the state court, after a decision adverse to the plaintiff by the commission of appeals, reversing the judgment of the supreme court in favor of plaintiff, and ordering a new trial. 57 N. Y. 518." He then proceeds to determine it upon principles of law different from those announced in that decision. Had it been again tried in the supreme court, judgment must have been rendered against these defendants in error, because the reversal was upon such grounds as precluded any recovery whatever by them. That decision should, in my opinion, have been accepted as the law of this case, although the proceedings in the commission of appeals are not set forth in the transcript. The reported case shows, beyond question, that it is the identical case now before us; at any rate, that it was between these parties and involved the same issues. We know that the adjudication of that court was long prior to the removal of this case, and that the questions arising upon this record have been once determined by a court of competent jurisdiction in a suit between the same parties touching the subject-matter now in controversy. All this plainly appears by that decision, the legal effect of which, the defendants in error should not be permitted to escape by removing the case into the circuit court.

Upon these grounds, and without expressing my own views upon the propositions of law discussed in the opinion of the court, I dissent from the judgment just rendered.

FORD *v.* HARRINGTON.

(16 N. Y. 285.)

Court of Appeals of New York. 1857.

This action was brought by the plaintiff as heir at law of James Conway to compel the defendant to convey to her fifty acres of land.

The defendant was an attorney and counselor of the supreme court. As such he had advised Conway to assign his contract for the purchase of the land in question to him, the defendant, to prevent Conway's creditor from reaching it. It was understood between them that after Conway had settled with the creditor the contract should be reassigned to him. The defendant gave his note for $44, and subsequently paid the balance due on the contract and took a conveyance to himself.

About a year afterward Conway died. The plaintiff, as heir at law of Conway, tendered to the defendant what he had paid in the matter, and presented to him a quit-claim deed and demanded that he execute it. Upon his refusal this action was brought. Conway was an alien. The plaintiff was also an alien when the action was brought. The case having been referred, the referee found in favor of the plaintiff. Judgment was entered accordingly, and affirmed at the general term of the supreme court. The defendant appealed to this court.

M. Burnell, for appellant. A. G. Rice, for respondent.

BOWEN, J. The judgment appealed from cannot be sustained upon the facts found by the referee, unless the relation of attorney and client, existing between the plaintiff's ancestor and the defendant at the time of the assignment of the contract in question by the former to the latter, distinguishes this case from the ordinary one of the transfer of property by a debtor, with the intent and for the purpose of defrauding creditors. The referee has found that James Conway, under whom, as his heir at law, the plaintiff claims title to the land in dispute, assigned the contract for the purchase of the land to the defendant, for the express purpose of placing it, and his interest in the land under the contract, beyond the reach of his creditors. At least such is the necessary inference from the facts found.

The general rule, that courts will, under such circumstances, extend no remedy to a grantor or vendor of property to recover back from the grantee or vendee the property thus transferred, although the transfer is without consideration, is too well settled to be now called in question.

But the referee has further found that, at the time of the transaction, the defendant was a practicing attorney and counselor of the supreme court, and was acting as the attorney and counsel of Conway, and that it was in accordance with and pursuant to his advice as such counsel, that the contract was assigned to him by Conway; and the referee states, as a conclusion of law, "that, as against an attorney and counselor, the law will set aside an agreement made with his client, by which property is placed in his hands to keep it out of the reach of the creditors of the client." Courts scrutinize closely transactions between attorney and client; and conveyances and transfers of property to the former by the latter, while that relation exists, are frequently set aside in cases where, but for that relation, they would be upheld. In such cases the law presumes that undue advantage has been taken of the confidential relation existing between attorney and client; and attorneys, in order to sustain such transfers to them, have been required to show affirmatively, either that they paid an adequate consideration, or that a gratuity was intended by the client, and that to obtain it no advantage was taken of the confidential relation existing between them, and that every thing was honest and fair on their part.

In this case no gratuity to the attorney was intended. In fact the client intended to make no transfer of property, for although all the forms necessary to constitute an assignment of the contract were complied with, yet the assignor intended that the whole transaction should be merely formal, and at the time supposed that such was the fact. He did not intend to part with any beneficial interest in the property. On the contrary, the assignment was made as a means of preventing his interest in the contract and in the land therein described from being applied upon the debt he owed, and of thereby enabling him to continue in the beneficial use and enjoyment of the property. His object in the transaction was to benefit himself and not to confer a benefit on his attorney. For aught that appears, he would, with equal willingness, have made the assignment to some other person, had he been so advised.

The rule of equity, which throws upon the attorney the burden of showing perfect fairness on his part in all his dealings with, and which renders it almost impossible for him to become the recipient of a gratuity or bounty from his client, is based upon the consideration that the relations existing between the parties is such that the attorney has it in his power to avail himself of the necessities, liberality or credulity of, and of his influence over, the client, and of that sense of dependence, on the part of the latter, upon his attorney, which always exists to a greater or less extent, and of the confidence which the client reposes in his attorney; and also upon the fact that it is difficult, and in most cases impossible, for the client to show that advantage has been taken of the relation.

The reason of the rule does not, perhaps, to the full extent, apply to this case; but yet Conway had applied to the defendant, as an attorney and counselor at law, for advice, and it was in accordance with and pursuant to, and, as it is to be presumed, in consequence of the advice there given that the as-

signment was made. The assignment was the direct result of the trust and confidence which Conway reposed in his attorney. I think this case does come within the reason of the rule applicable to ordinary cases of the transfer of property by a client to his attorney, although Conway's object in making the assignment was to benefit himself and not his attorney. The facts disclosed present a case where the court would be called upon to interfere between the defendant and the representative of his client, and compel the former to restore what he had obtained without consideration, were it not for the fact that in making the assignment the parties were both perpetrating a fraud, were both committing a crime; and the question is, which rule is to govern the case, the one applicable to dealings between attorney and client, or the rule that the court will not lend its aid to either of the parties to an illegal or fraudulent contract, either by enforcing its execution, if it be executory, or by rescinding it, if it be executed.

The plaintiff's counsel insists that the former rule should be applied, because it is founded in considerations of public policy. But public policy also dictated the adoption of the other rule.

The latter rule, however, is not of universal application. The taking of more than seven per cent per annum for the use of money is prohibited by statute, and all contracts reserving a greater rate of interest are declared to be void; yet it has been held that usurious interest, paid by a borrower, may be recovered back independently of the statute allowing such recovery; that the maxim inter partes in pari delicto, potior est conditio defendentis does not apply to such a case, for the reason that the law considers the borrower the victim of the usurer. Wheaton v. Hibbard, 20 Johns. 290. Upon the same principle it has been held in England that money paid to a creditor as a consideration for his signing the certificate of a bankrupt can be recovered back, although by statute all agreements by a bankrupt with his creditors to pay money for signing his certificate are declared void. Smith v. Bromley, 2 Doug. 696.

In Browning v. Morris, 2 Cowp. 790, Lord Mansfield laid down and enforced the rule that "where contracts or transactions are prohibited by positive statute for the sake of protecting one set of men from another set of men (the one from their situation and condition being liable to be oppressed or imposed upon by the other), there the parties are not in pari delicto; and, in furtherance of these statutes, the person injured, after the transaction is finished and completed may bring his action and defeat the contract."

Mr. Justice Story, in his treatise on Equity Jurisprudence (volume 1, § 300), says: "And indeed, in cases where both parties are in delicto, concurring in an illegal act, it does not always follow that they stand in pari delicto, for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship, undue influence or great inequality of age or condition, so that his guilt may be far less in degree than that of his associate in the offense; and besides, there may be, on the part of the court itself, a necessity of supporting the public interest or public policy, in many cases, however reprehensible the acts of the parties may be." In Osborne v. Williams, 18 Ves. 379, cited by Justice Story under the section above quoted, a bill was filed by the representatives of a deceased son against the representatives of his deceased father to compel the latter to account for the profits received by him from the use of a vessel employed by the post-office department in the public service as a mail packet, after a sale of the vessel by the father to the son. The father had been the commander of the vessel, and, on the transfer being made, the officers of the post-office appointed the son as commander in the place of the father. It appeared that, just prior to the transfer and the appointment of the son as commander, an agreement had been entered into between the father and son, without the knowledge of the officers of the department, by which agreement, in consideration of the father resigning the command, allowing the son £200 per annum, and defraying the expenses of the vessel, the son relinquished to the father all the earnings of the vessel in as full a manner as if the transfer had not been made and the father had remained in command; and it was shown that the profits, of which an account was sought, were received by the father under this agreement. It was held that this agreement was illegal, as being a fraud on the post-office, and also as being contrary to the ship registry acts; and the master of the rolls, in his opinion in the case, says: "The father, therefore, could never have enforced it" (the agreement); "but my doubt was whether the father, having received the profits, this court would decree them to be accounted for and refunded, or whether the general rule that in pari delicto potior est conditio possidentis should prevail, as both are guilty of a violation of the law. Upon an examination of the case, however, I think the plaintiffs are entitled to the relief sought by the bill. Courts, both of law and equity, have held that two parties may concur in an illegal act without being deemed in all respects in pari delicto. I consider this agreement as substantially the mere act of the father. He put up to sale a situation which the young man would naturally be desirous of obtaining, and could obtain only on the terms prescribed by the father;" and the representatives of the father were decreed to account to the representatives of the son for all the profits of the vessel received under the fraudulent and illegal contract.

Transactions, contracts and dealings be-

tween parent and child are classed with those between attorney and client, and courts scrutinize such dealings and interpose to set aside such contracts for the same reasons in the one case as in the other (1 Story, Eq. Jur. §§ 307-310); and if a father will be compelled to restore to his son property or money which the former has received from the latter under and pursuant to a contract between them which was illegal and founded in fraud, and in a case where the court would not interfere were it not for the confidential relation between the parties, as was done in Osborne v. Williams, I see no reason why the same thing should not be done in a like case, where the relation between the parties is that of attorney and client. There is as great a degree of confidence reposed and an equal sense of dependence in the one case as in the other.

In this case the report of the referee shows that the counsel and advice of the defendant was sought by Conway solely on the question whether his interest in the contract could be reached by his creditor. The advice by the defendant to assign the contract appears to have been volunteered on his part. He first suggested it, and if he had not so done it is to be presumed the assignment would not have been made.

I think this is a case where, on account of the relations existing between the parties and the circumstances under which the contract was assigned, the court was called upon to interfere and compel the attorney to restore what he had acquired under the assignment, on being repaid what he had disbursed, although the object of the assignment was to perpetrate a fraud. The parties, although in delicto, did not stand in pari delicto. In the transaction Conway was a mere instrument in the hands of the defendant. If an attorney will so far forget or willfully disregard his duty to the courts, whose license to practice he holds; to his clients, who, in consequence of such license, are induced to seek and act upon his counsel, and to the public, as for the purpose of gain and profit to himself, to induce by his advice the commission of fraud by those who thus confide in him, he at least should be compelled to restore to his victim the fruits of his iniquity. It would be a reproach to our judicial tribunals should they allow their officers, those appointed by them as their assistants in the administering of justice and equity, thus to acquire property by a prostitution of the trust so confided to them, and then to interpose the fraud committed pursuant to their advice as such officers, as a shield to protect them in the possession and enjoyment of that property.

The alienage of the plaintiff and of James Conway, the plaintiff's ancestor, constituted no bar to the plaintiff's recovery. An alien can hold land conveyed to him as against every one but the state, and, until office found, can maintain actions for its recovery (Bradstreet v. Supervisors of Oneida, 13 Wend. 546); and section 4 of chapter 115 of the Laws of 1845 (Laws of 1845, p. 95) provides that land held by the resident alien at the time of his death shall descend to the persons, although aliens, who, if citizens, would have been the heirs of the deceased had he been a citizen, and that such alien to whom lands thus descend may hold the same as against every one but the state.

I am of opinion that the judgment appealed from should be affirmed.

Judgment affirmed.

JOHNSON, J. (dissenting). If we uphold this judgment, we must decide that the maker of an assignment, in fraud of his creditors, may recover back for his own use the transferred property, provided he choose his attorney as assignee, and executes the instrument under his advice. Such a judgment would, at least, have this consequence, that future fraudulent transfers would generally be made to attorneys, and the salutary rule that the fraudulent grantor cannot undo, for his own benefit, the transfer he had made, would cease to have any practical operation in restraining frauds upon creditors. The case of Osborne v. Williams, 18 Ves. 379, upon the analogy of which this cause was decided in the supreme court, was put by the master of the rolls upon the ground that the terms which rendered the contract illegal were imposed by the father on his son, and that the consent of the son to those terms was obtained by a species of moral constraint, arising out of the circumstances. "He put up to sale a situation which the young man would naturally be desirous of obtaining, and could obtain only on the terms prescribed by his father." It was therefore held that the parties were not in pari delicto, and an account of the profits was decreed.

The grantor in a fraudulent conveyance is certainly not less guilty than the grantee, nor is that the species of dealing, between client and attorney, as to which equity affords protection to the client.

The judgment should be reversed and a new trial ordered.

DENIO, C. J., also dissented.

WHITE v. FRANKLIN BANK.

(22 Pick. 181.)

Supreme Judicial Court of Massachusetts. Suffolk and Nantucket. March Term, 1839.

By an agreed statement of facts, it appeared, that on the 10th of February, 1837, the plaintiff deposited with the defendants the sum of $2,000, and received from them a book containing the following words and figures, to wit:

"Dr. Franklin Bank, in account with B. F. White, Cr., 1837, Feb. 10th. To cash deposited, $2,000. The above deposit to remain until the 10th day of August. E. F. Bunnell, Cashier."

It further appeared, that on the 7th of July, 1837, the plaintiff brought this action against the bank to recover the money so deposited by him, declaring on the money counts, and on an account stated.

If the court should be of opinion, that the action could be maintained, the defendants were to be defaulted and judgment rendered for the sum of $2,000 with interest; otherwise the plaintiff was to become nonsuit.

WILDE, J. The first ground of the defence is, that the action was prematurely commenced. The entry in the book given to the plaintiff by the cashier of the bank, is undoubtedly good evidence of a promise to pay the amount of the deposit on the 10th day of August; and if this was a valid and legal promise this action cannot be maintained. But it is very clear, that this promise or agreement that the deposit should remain in the bank for the time limited, is void by virtue of Rev. St. c. 36, § 57, which provides that no bank shall make or issue any note, bill, check, draft, acceptance, certificate, or contract, in any form whatever, for the payment of money, at any future day certain, or with interest, excepting for money that may be borrowed of the commonwealth, with other exceptions not material in the present case.

The agreement that the deposit should remain until the 10th day of August amounts in law, by the obvious construction and meaning of it, to a promise to pay on that day. This, therefore, was an illegal contract and a direct contravention of the statute. Such a promise is void; and no court will lend its aid to enforce it. This is a well-settled principle of law. It was fully discussed and considered in the case of Wheeler v. Russell, 17 Mass. 281, and the late chief justice, in delivering the opinion of the court, remarked, "that no principle of law is better settled, than that no action will lie upon a contract made in violation of a statute or of a principle of the common law." The same principle is laid down in Bank v. Merrick, 14 Mass. 322, and in Russell v. De Grand, 15 Mass. 39. In Belding v. Pitkin, 2 Caines, 149, Thompson, J., said, "It is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful." The same principle is fully established by the English authorities. In Shiffner v. Gordon, 12 East, 304, Lord Ellenborough laid it down as a settled rule, "that where a contract which is illegal remains to be executed, the court will not assist either party, in an action to recover for the non-execution of it."

It is therefore very clear, we think, that no action can be maintained on the defendants' express promise, and that, if the plaintiff be entitled to recover in any form of action, it must be founded on an implied promise.

The second objection, and that on which the defendants' counsel principally rely, proceeds on the admission that the contract is illegal; and they insist that where money has been paid by one of two parties to the other, on an illegal contract, both being participes criminis, no action can be maintained to recover it back. The rule of law is so laid down by Lord Kenyon, in Howson v. Hancock, 8 Term R. 577, and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when the contract is merely malum prohibitum, the rule must be taken with some qualifications and exceptions, without which it cannot be reconciled with many decided cases. The rule as stated by Comyn, in his treatise on Contracts, will reconcile most of the cases which are apparently conflicting. "When money has been paid upon an illegal contract, it is a general rule that if the contract be executed, and both parties are in pari delicto, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action of indebitatus assumpsit for money had and received. And this distinction is taken in the books, namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that the plaintiff should recover." 2 Com. Cont. 109.

The rule, with these qualifications and distinctions, is well supported by the cases collected in Comyn and by later decisions. The question then is, whether, in conformity with these principles, upon the facts agreed, this action can be maintained.

The first ground on which the plaintiff's counsel rely in answer to the defendants' objection is, that there was no illegality in

making the deposit, and that the illegality of the transaction is confined to the promise of the bank and the security given for the repayment, that alone being prohibited by the statute.

The leading case on this point is that of Robinson v. Bland, 2 Burrows, 1077. That was an action on a bill of exchange given for money lent and for money won at play. By St. 9 Anne, c. 14, it was enacted that all notes, bills, bonds, judgments, mortgages, or other securities for money won or lent at play, should be utterly void. The court held, that the plaintiff was not entitled to recover on the bill of exchange, but that he might recover on the money counts for the money lent, although it was lent at the same time and place that the other money for which the bill was given was won. The same principle was laid down in the cases of Insurance Co. v. Scott, 19 Johns. 1; Insurance Co. v. Caldwell, 3 Wend. 296, and Insurance Co. v. Bloodgood, 4 Wend. 652. In these cases the decisions were, that although the notes were illegal and void as securities, yet that the money lent, for which the notes were given, might be recovered back. The principle of law established by these decisions is applicable to the present case. The only doubt arises from the meaning of the word "contract," in the prohibitory statute. But taking that word in connection with the other words of prohibition, we think it equivalent to the promise of the bank, and that the intention of the legislature was to prohibit the making or issuing of any security in any form whatever, for the payment of money at any future day.

The next answer to the objection of the defendants is, that although the plaintiff may be considered as being particeps criminis with the defendants, they are not in pari delicto. It is not universally true, that a party, who pays money as the consideration of an illegal contract, cannot recover it back. Where the parties are not in pari delicto, the rule "potior est conditio defendentis" is not applicable. In Lacaussade v. White, 7 Term R. 535, the court say, "that it was more consonant to the principles of sound policy and justice, that wherever money has been paid upon an illegal consideration it may be recovered back again by the party who has thus improperly paid it, than, by denying the remedy, to give effect to the illegal contract."

This principle, however, is not by law allowed to operate in favor of either party, where the illegality of the contract arises from any moral turpitude. In such cases the court will not undertake to ascertain the relative guilt of the parties or afford relief to either.

But where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, he may be compelled to refund. This is not only consonant to the principles of sound policy and justice, but is now so settled by authority, whatever doubts may have been entertained respecting it in former times.

In the case of Smith v. Bromley, 2 Doug. 696, note, it was decided, that the plaintiff was entitled to recover in an action for money had and received, for money paid by the plaintiff to the defendant for the purpose of inducing him to sign the certificate of a bankrupt, the plaintiff's sister. Lord Mansfield laid down the doctrine on this point, which has been repeatedly confirmed. "If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is potior est conditio defendentis. But there are other laws which are calculated for the protection of the subjects against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover." And this doctrine was afterwards adhered to and confirmed by the whole court, in the case of Jones v. Barkley, 2 Doug. 684.

On this distinction it has ever since been held, that where usurious interest has been paid, the excess above the legal interest may be recovered back by the borrower in an action for money had and received. So money paid to a lottery-office keeper as a premium for an illegal insurance, is recoverable back, in an action for money had and received. Jaques v. Golightly, 2 W. Bl. 1073. But in Browning v. Morris, Cowp. 790, it was decided, that where a lottery-office keeper pays money in consequence of having insured the defendant's tickets, such contract being prohibited by St. 17 Geo. III. c. 46, he cannot recover it back, though the premium of insurance paid by the insured to the lottery-office keeper might be. The distinction on which this case was decided is very material in the present case. Lord Mansfield referred to the determination in Jaques v. Golightly, where it was said, "that the statute is made to protect the ignorant and deluded multitude, who, in hopes of gain and prizes, and not conversant in calculations, are drawn in by the office keepers." And he adds, "It is very material, that the statute itself, by the distinction it makes, has marked the criminal; for the penalties are all on one side,—upon the office keeper. The man who makes the contract is liable to no penalty. So in usury there is no penalty upon the party who is imposed upon." The same distinction is noticed and enforced by Lord Ellenborough, in Williams v. Hedley, 8 East, 378. In that case it was decided, that where money was paid to a plaintiff to compromise a qui tam action for usury, it might be recovered back in an action for money had and received; because the pro-

hibition and penalties of St. 18 Eliz. c. 5, attached only on "the informer or plaintiff, or other person suing out process in the penal action, making composition, etc." It was argued for the defendant in that case, "that as the act of the defendant co-operated with that of the plaintiff in producing the mischief meant to be prevented and restrained by the statute, it was so far illegal, on the part of the defendant himself, as to preclude him from any remedy by suit to recover back money paid by him in furtherance of that object; and that if he was not therefore to be considered as strictly in pari delicto with the plaintiff in the qui tam action, he was at any rate particeps criminis, and in that respect not entitled to recover from his co-delinquent, money which he had paid him in the course and prosecntion of their mutual crime." This argument was overruled, and Lord Ellenborough fully approved the doctrine laid down by Lord Mansfield in Smith v. Bromley, and the decisions in the several cases in which that doctrine had been confirmed. The same distinction has been recognized in other cases, and was adopted by this court in Worcester v. Eaton, 11 Mass. 376, in which Parker, C. J., after referring to the above cases, said: "This distinction seems to have been ever afterwards observed in the English courts; and, being founded in sound principle, is worthy of adoption, as a principle of the common law in this country."

The principle is, in every respect, applicable to the present case, and is decisive. The prohibition is particularly levelled against the bank, and not against any person dealing with the bank. In the words of Lord Mansfield, "the statute itself, by the distinction it makes, has marked the criminal." The plaintiff is subject to no penalty, but the defendants are liable, for the violation of the statute, to a forfeiture of their charter. To decide that this action cannot be maintained would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute, by taking advantage of the unwary and of those who may have no actual knowledge of the existence of the prohibition of the statute, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank.

There is still another gronnd on which the plaintiff's counsel rely. This action proceeds in disaffirmance of an executory illegal contract, and was commenced before the money which the defendants contracted to pay was by the terms of the contract payable; the plaintiff therefore had a right to rescind the contract, or rather to treat it as a void contract, and to recover back the consideration money.

It was so decided in Walker v. Chapman, Lofft, 342, where money had been paid in order to procure a place in the customs, but the place had not been procured; and in an action brought by the party who paid the money, it was held that he should recover, because the contract continued executory. This case was cited with approbation by Buller, J., in Lowry v. Bourdieu, 2 Doug. 470; and the distinction between contracts executed and executory, he said, was a sound one. The same distinction has been recognized in actions brought to recover back money paid on illegal wagers, where both parties were in pari delicto. The case of Tappenden v. Randall, 2 Bos. & P. 467, was decided on that distinction. Heath, J., said: "It seems to me that the distinction adopted by Mr. Justice Buller between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of the kind occurs, I think there onght to be locus pœnitentiæ, and that a party should not be compelled against his will to adhere to the contract." The same distinction is recognized in several other cases. 5 Term R. 405; 1 H. Bl. 67; 7 Term R. 535; 3 Taunt. 277; 4 Taunt. 290.

In the case of Aubert v. Walsh, 3 Taunt. 277, the authorities were considered, and the law was definitely settled as above stated; and it does not appear that it has ever since been doubted. In Insurance Co. v. Kip, 8 Cow. 20, the same principle is recognized, although the case was not expressly decided on that point. The distinction seems to be founded in wise policy, as it has a tendency in some measure to prevent the execution of unlawful contracts, and can in no case work injustice to either party.

It is, however, denied by the defendant's counsel that the contract in question was executory, within the true intent and meaning of these decisions and the doctrine now laid down. This question has not been much discussed, and it is not necessary to decide it in the present case, the court being clearly of opinion that the plaintiff is entitled to recover on the other gronnds mentioned. We have considered the question as to the distinction between executory and executed contracts, because it may be of some importance that the law in that respect should not be supposed to be doubtful in our opinion, which might be inferred, perhaps, if we should leave this question unnoticed.

The only remaining question is, whether the plaintiff was bound to make a demand on the bank before he commenced his action. The general rule is, that where money is due and payable, an action will lie without any previous demand. But where money is de-

posited in a bank in the usual course of business, we should certainly hold that a previous demand would be requisite. But if money should be obtained by a bank by fraud, or, as in the present case, by means of an illegal contract, the bank claiming to hold it under such contract, there can be no good reason given why the bank should be exempted from the operation of the general rule. In Clark v. Moody, 17 Mass. 145, it was held, that if a factor should render an untrue account, claiming a greater credit than he was entitled to, the principal would have a right of action without a demand.

If the defendants had sold to the plaintiff a post-note payable at a future day, it could hardly be doubted that an action would lie to recover back the consideration money, without any previous demand; and there seems to be no substantial distinction between such a case and the one in question. Judgment on default.

BOSTON ICE CO. v. POTTER.

(123 Mass. 28.)

Supreme Judicial Court of Massachusetts. Suffolk. June 28, 1877.

Contract on an account annexed, for ice sold and delivered between April 1, 1874, and April 1, 1875. Answer, a general denial.

At the trial in the superior court, before Wilkinson, J., without a jury, the plaintiff offered evidence tending to show the delivery of the ice and its acceptance and use by the defendant from April 1, 1874, to April 1, 1875, and that the price claimed in the declaration was the market price. It appeared that the ice was delivered and used at the defendant's residence in Boston, and the amount left daily was regulated by the orders received there from the defendant's servants; that the defendant, in 1873, was supplied with ice by the plaintiff, but, on account of some dissatisfaction with the manner of supply, terminated his contract with it; that the defendant then made a contract with the Citizens' Ice Company to furnish him with ice; that some time before April, 1874, the Citizens' Ice Company sold its business to the plaintiff, with the privilege of supplying ice to its customers. There was some evidence tending to show that the plaintiff gave notice of this change of business to the defendant, and informed him of its intended supply of ice to him; but this was contradicted on the part of the defendant.

The judge found that the defendant received no notice from the plaintiff until after all the ice had been delivered by it, and that there was no contract of sale between the parties to this action except what was to be implied from the delivery of the ice by the plaintiff to the defendant and its use by him; and ruled that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and that the plaintiff could not maintain this action. The plaintiff alleged exceptions.

J. P. Farley, Jr., for plaintiff. E. C. Bumpus and E. M. Johnson, for defendant.

ENDICOTT, J. To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. Hills v. Snell, 104 Mass. 173, 177. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. Orcutt v. Nelson, 1 Gray, 536, 542; Winchester v. Howard, 97 Mass. 303; Hardman v. Booth, 1 Hurl. & C. 803; Humble v. Hunter, 12 Q. B. Div. 310; Robson v. Drummond, 2 Barn. & Adol. 303. If he had received notice and continued to take the ice as delivered, a contract would be implied. Mudge v. Oliver, 1 Allen, 74; Orcutt v. Nelson, ubi supra; Mitchell v. Lapage, Holt, N. P. 253.

There are two English cases very similar to the case at bar. In Schmaling v. Thomlinson, 6 Taunt, 147, a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of Boulton v. Jones, 2 Hurl. & N. 564, was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for

the price of the goods against the defendant. It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell, though the other judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is snch a set-off, it is sufficient to state that, as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defence to it.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject matter of this action.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties if the ice were now in existence. Exceptions overruled.

EXCHANGE BANK OF ST. LOUIS v. RICE et al.

(107 Mass. 37.)

Supreme Judicial Court of Massachusetts. Suffolk. March, 1871.

Contract. After the decision reported 98 Mass. 288. the parties stated the case as follows for the judgment of the superior court:

"On March 8, 1865, John P. Hill, at St Louis, drew on the defendants, commission merchants in Boston, a draft for $3300, payable thirty days after date to the order of R. R. Pitman & Company, and containing on its face a memorandum in the terms following: 'Against 12 bales cotton.' On the same day the draft was indorsed to and discounted in the usual course of business by the plaintiffs, and on March 15 was presented by them to the defendants at Boston, who caused it to be noted for non-acceptance. On March 8 Hill wrote to the defendants as follows: 'I ship you to-day per Merritt's Express 12 bales, weighing 5489 pounds, on which I have drawn on you @ 30 days for $3300.' To this letter the defendants replied on March 14 as follows: 'We now have the pleasure to acknowledge your favor of the 8th. Your shipment 12 bales cotton per Merritt's Express will receive due attention. Bill of lading not at hand. Your draft for $3300 is excessive; particularly as we shall have no margin on previous shipments, as the market now looks. We will honor the same, but shall expect you, on receipt of this, to make us shipment of cotton to cover the margin.' And on March 15 they again wrote to Hill as follows: 'Market for cotton continues weak. Have no bill lading 12 bales reported as shipped yesterday, and we have felt obliged therefore to have your draft for $3300 noted for non-acceptance. When bill lading is received, will accept draft.' The said bill of lading of the cotton ran to the defendants or order, and was received by them March 17, 1865.

"The defendants' letter of March 15 was shown to the plaintiffs by R.R. Pitman & Company March 22, 1865. The plaintiffs thereupon procured said letter, and the duplicate bill of lading, of Pitman & Company, and on March 27 again presented the draft, with the defendants' said letter and the duplicate bill of lading attached, to the defendants for acceptance. But the defendants declined to accept the same, and afterwards declined to pay, and they have never paid the same or any part thereof, and the same was duly protested for non-acceptance and non-payment. The twelve bales of cotton were received by the defendants on April 17, and were sold by them on April 21 for $1349 net, which sum they credited in their current account with Hill, upon which a balance then was and still is due to the defendants."

The superior court ordered judgment for the defendants; and the plaintiffs appealed. The case was argued at a former term.

B. F. Thomas and R. Olney, for plaintiffs.
H. W. Paine and R. D. Smith, for defendants.

GRAY, J. It has already been decided in this case, upon proof of substantially the same facts which are now agreed by the parties, that the plaintiffs could not sue the defendants as acceptors of the draft; because their promise to the drawer to accept it, having been made after the draft had been negotiated to the plaintiffs, did not amount to an acceptance; and the memorandum at the foot of the draft, that it was drawn against twelve bales of cotton, could have no more effect to charge the defendants as acceptors than the mere signature of the drawer, which of itself always imports a promise that he will have funds in the hands of the drawee to meet the draft. 98 Mass. 288.

The defendants' promise to the drawer to accept the draft was a mere chose in action, not negotiable, and upon which no one but he to whom it was made could maintain an action. Worcester Bank v. Wells, 8 Metc. (Mass.) 107; Luff v. Pope, 5 Hill, 413, and 7 Hill, 577.

The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter. And the recent decisions in this commonwealth and in England have tended to uphold the rule and to narrow the exceptions to it.

The unguarded expressions of Chief Justice Shaw in Carnegie v. Morrison, 2 Metc. (Mass.) 381, and Mr. Justice Bigelow in Brewer v. Dyer, 7 Cush. 337, to the contrary, on which the learned counsel for the plaintiffs relied at the argument, were afterwards, and while those two distinguished judges continued to hold seats upon this bench, qualified, the limits of the doctrine defined, and a disinclination repeatedly expressed to admit new exceptions to the general rule, in unanimous judgments of the court, drawn up by Mr. Justice Metcalf, and marked by his characteristic legal learning and cautious precision of statement. Mellen v. Whipple, 1 Gray, 317; Millard v. Baldwin, 3 Gray, 484; Field v. Crawford, 6 Gray, 116; Dow v. Clark, 7 Gray, 198. Those judgments have since been treated as settling the law of Massachusetts upon this subject. Colburn v. Phillips, 13 Gray, 64; Flint v. Pierce, 99 Mass. 68.

The first and principal exception, stated by Mr. Justice Metcalf, to the general rule, consists of those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, either expressly, or by implication

from his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors. That class of cases, as was pointed out in 1 Gray, 322, includes Carnegie v. Morrison and most of the earlier cases in this commonwealth; as well as the later cases of Frost v. Gage, 1 Allen, 262, and Putnam v. Field, 103 Mass. 556.

The only illustration, which the decisions of this court afford, of Mr. Justice Metcalf's second class of exceptions, is Felton v. Dickinson, 10 Mass. 287, in which it was held, in accordance with a number of early English authorities, and hardly argued against, that a son might sue upon a promise made for his benefit to his father. Those cases, with the proposition on which they have sometimes been supposed to rest, that, by reason of the near relation between parent and child, the latter might be thought to have an interest in the consideration and the contract, and the former to have entered into the contract as his agent, are not now law in England. Tweddle v. Atkinson, 1 Best & S. 393; Add. Cont. (6th Ed.) 1040. Dicey, Parties, 84. And this case does not require us to consider whether they ought still to be followed here.

The third exception, admitted by Mr. Justice Metcalf, is the case of Brewer v. Dyer, 7 Cush. 337, in which the defendant made a written promise to the lessee of a shop to take his lease (which was under seal) and pay the rent to the lessor according to its terms, entered into possession of the shop with the lessor's knowledge, paid him the rent quarterly for a year, and then before the expiration of the lease left the shop, and was held liable to an action by the lessor for the rent subsequently accruing. That case may perhaps be supported on the ground that such payment and receipt of the rent after the agreement between the defendant and the lessee warranted the inference of a direct promise by the defendant to the lessor to pay the rent to him for the residue of the term. See McFarlan v. Watson, 3 N. Y. 286. It certainly cannot be reconciled with the later authorities, without limiting it to its own special circumstances, and affords no safe guide in the decision of the present case.

The plaintiffs are then obliged to fall back upon the first exception to the general rule. But they fail to bring their case within that exception, or within any of the authorities to which they have referred us.

In Carnegie v. Morrison, 2 Metc. (Mass.) 381, the defendants, having funds in cash or credit of the plaintiffs' debtor, gave him a letter of credit, which was shown to the plaintiffs, and on the faith of which they drew the bill, for the amount of which they sued the defendants; and the drawing of that bill, whereby they made themselves liable to the drawee thereof, was a consideration moving from them. In Lilly v. Hays, 5 Adol. & E. 548, 1 Nev. & P. 26, the defendant, as the jury found, had authorized the plaintiff to be told that the defendant had received the money to his use, and thus promised the plaintiff to pay it to him So in Walker v. Rostron, 9 Mees. & W. 411, the defendant had promised the plaintiff to pay the sum in question. And the rule established by the modern cases in England, as laid down in the text books cited for the plaintiffs, does not permit the person for whose benefit a promise is made to another person, from whom the only consideration moves, to maintain an action against the promisor, unless either the latter has also made an express promise to the plaintiff, or the promisee acted as the plaintiff's agent merely. Metc. Cont. 209; Add. Cont. (6th Ed.) 630, 1041. Chit. Cont. (8th Ed.) 53. Where the promisee is in fact acting as the agent of a third person, although that is unknown to the promisor, the principal is the real party to the contract, and may therefore sue in his own name on the promise made to his agent. Sims v. Bonds, 5 Barn. & Adol. 389, 2 Nev. & M. 608; Huntington v. Knox, 7 Cush. 371; Barry v. Page, 10 Gray, 398; Hunter v. Giddings, 97 Mass. 41; Ford v. Williams, 21 How. 287.

In the case at bar, the plaintiffs had acquired no title in the cotton against which the draft was drawn. The bill of lading was not attached to the draft, or made payable to the holder thereof, or delivered to the plaintiffs. The case is thus distinguished from Allen v. Williams, 12 Pick. 297, and Bank v. Gardner, 15 Gray, 362, cited at the argument. The cotton was not of sufficient value to pay the draft, and the balance of account between the defendants and the drawer, at the time of their receipt and sale of the cotton, and ever since, was in favor of the defendants. There is no ground therefore for implying a promise from the defendants to the plaintiffs to pay to them either the amount of the draft or the proceeds of the cotton. Tiernan v. Jackson, 5 Pet. 580; Cowperthwaite v. Sheffield, 1 Sandf. 416, 3 N. Y. 243; Winter v. Drury, 5 N. Y. 525; Yates v. Bell, 3 Barn. & Ald. 643. The plaintiffs did not take the draft, or make advances, upon the faith of any promise of the defendants, or of any actual receipt by them of the cotton or the bill of lading, but solely upon the faith of the drawer's signature and implied promise that the defendants should have funds to meet the draft. The whole consideration of the defendants' promise moved from the drawer and not from the plaintiffs. And the defendants made no promise to the plaintiffs. Their only promise to accept the draft was made to Hill, the drawer, after the draft had been negotiated to the plaintiffs; and there is no proof that the defendants authorized that promise to be shown to the plaintiffs, or that Hill, to whom that promise was made, was an agent of the plaintiffs. His relation to them was that of drawer and payee, not of agent and principal. To infer, as suggested

in behalf of the plaintiffs, that he was their agent in receiving the defendants' promise, so that they might sue thereon in their own name, would be unsupported by any facts in the case, and would be an invasion of the rules of law, which will not allow any person, who took the draft before that promise was made, to maintain an action upon that promise, either as an acceptance or a promise to accept. Judgment for the defendants.

LAWRENCE v. FOX.

(20 N. Y. 268.)

Court of Appeals of New York. 1859.

I. S. Torrance, for appellant. E. P. Chapin, for appellee.

H. GRAY, J. The first objection raised on the trial amounts to this: That the evidence of the person present, who heard the declarations of Holly giving directions as to the payment of the money he was then advancing to the defendant, was mere hearsay and, therefore, not competent. Had the plaintiff sued Holly for this sum of money no objection to the competency of this evidence would have been thought of; and if the defendant had performed his promise by paying the sum loaned to him to the plaintiff, and Holly had afterward sued him for its recovery, and this evidence had been offered by the defendant, it would doubtless have been received without an objection from any source. All the defendant had the right to demand in this case was evidence which, as between Holly and the plaintiff, was competent to establish the relation between them of debtor and creditor. For that purpose the evidence was clearly competent; it covered the whole ground and warranted the verdict of the jury. But it is claimed that notwithstanding this promise was established by competent evidence, it was void for the want of consideration. It is now more than a quarter of a century since it was settled by the supreme court of this state—in an able and painstaking opinion by the late Chief Justice Savage, in which the authorities were fully examined and carefully analyzed—that a promise in all material respects like the one under consideration was valid; and the judgment of that court was unanimously affirmed by the court for the correction of errors. Farley v. Cleaveland, 4 Cow. 432; s. c. in error, 9 Cow. 639. In that case one Moon owed Farley and sold to Cleaveland a quantity of hay, in consideration of which Cleaveland promised to pay Moon's debt to Farley; and the decision in favor of Farley's right to recover was placed upon the ground that the hay received by Cleaveland from Moon was a valid consideration for Cleaveland's promise to pay Farley, and that the subsisting liability of Moon to pay Farley was no objection to the recovery. The fact that the money advanced by Holly to the defendant was a loan to him for a day, and that it thereby became the property of the defendant, seemed to impress the defendant's counsel with the idea that because the defendant's promise was not a trust fund placed by the plaintiff in the defendant's hands, out of which he was to realize money as from the sale of a chattel or the collection of a debt, the promise although made for the benefit of the plaintiff could not inure to his benefit. The hay which Cleaveland delivered to Moon was not to be paid to Farley, but the debt incurred by Cleaveland for the purchase of the hay, like the debt incurred by the defendant for money borrowed, was what was to be paid. That case has been often referred to by the courts of this state, and has never been doubted as sound authority for the principle upheld by it. Barker v. Bucklin, 2 Denio, 45; Canal Co. v. Westchester County Bank, 4 Denio, 97. It puts to rest the objection that the defendant's promise was void for want of consideration. The report of that case shows that the promise was not only made to Moon but to the plaintiff Farley. In this case the promise was made to Holly and not expressly to the plaintiff; and this difference between the two cases presents the question, raised by the defendant's objection, as to the want of privity between the plaintiff and defendant. As early as 1806 it was announced by the supreme court of this state, upon what was then regarded as the settled law of England, "That where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." Schermerhorn v. Vanderheyden, 1 Johns. 140, has often been reasserted by our courts and never departed from. The case of Seaman v. White has occasionally been referred to (but not by the courts) not only as having some bearing upon the question now under consideration, but as involving in doubt the soundness of the proposition stated in Schermerhorn v. Vanderheyden. In that case one Hill, on the 17th of August, 1835, made his note and procured it to be indorsed by Seaman and discounted by the Phœnix Bank. Before the note matured and while it was owned by the Phœnix Bank, Hill placed in the hands of the defendant, Whitney, his draft accepted by a third party, which the defendant indorsed, and on the 7th of October, 1835, got discounted and placed the avails in the hands of an agent with which to take up Hill's note; the note became due, Whitney withdrew the avails of the draft from the hands of his agent and appropriated it to a debt due him from Hill, and Seaman paid the note indorsed by him and brought his suit against Whitney. Upon this state of facts appearing, it was held that Seaman could not recover: first, for the reason that no promise had been made by Whitney to pay, and second, if a promise could be implied from the facts that Hill's accepted draft, with which to raise the means to pay the note, had been placed by Hill in the hands of Whitney, the promise would not be to Seaman, but to the Phœnix Bank who then owned the note; although in the course of the opinion of the court, it was stated that, in all cases the principle of which was sought to be applied to that case, the fund had been appropriated by an express undertaking of the defendant with the creditor. But before concluding the opinion of the court

in this case, the learned judge who delivered it conceded that an undertaking to pay the creditor may be implied from an arrangement to that effect between the defendant and the debtor. This question was subsequently, and in a case quite recent, again the subject of consideration by the supreme court, when it was held, that in declaring upon a promise, made to the debtor by a third party to pay the creditor of the debtor, founded upon a consideration advanced by the debtor, it was unnecessary to aver a promise to the creditor; for the reason that upon proof of a promise made to the debtor to pay the creditor, a promise to the creditor would be implied. And in support of this proposition, in no respect distinguishable from the one now under consideration, the case of Schermerhorn v. Vanderheyden, with many intermediate cases in our courts, were cited, in which the doctrine of that case was not only approved but affirmed. Canal Co. v. Westchester County Bank, 4 Denio, 97. The same principle is adjudged in several cases in Massachusetts. I will refer to but few of them. Arnold v. Lyman, 17 Mass. 400; Hall v. Marston, Id. 575; Brewer v. Dyer, 7 Cush. 337, 340. In Hall v. Marston the court say: "It seems to have been well settled that if A. promises B. for a valuable consideration to pay C., the latter may maintain assumpsit for the money;" and in Brewer v. Dyer, the recovery was upheld, as the court said, "upon the principle of law long recognized and clearly established, that when one person, for a valuable consideration, engages with another, by a simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement; that it does not rest upon the ground of any actual or supposed relationship between the parties as some of the earlier cases would seem to indicate, but upon the broader and more satisfactory basis, that the law operating on the act of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded." There is a more recent case decided by the same court, to which the defendant has referred and claims that it at least impairs the force of the former cases as authority. It is the case of Mellen v. Whipple, 1 Gray, 317. In that case one Rollins made his note for $500, payable to Ellis and Mayo, or order, and to secure its payment mortgaged to the payees a certain lot of ground, and then sold and conveyed the mortgaged premises to the defendant, by deed in which it was stated that the "granted premises were subject to a mortgage for $500, which mortgage, with the note for which it was given, the said Whipple is to assume and cancel." The deed thus made was accepted by Whipple, the mortgage was afterward duly assigned, and the note indorsed by Ellis and Mayo to the plaintiff's intestate. After Whipple received the deed he paid to the mortgagees and their assigns the interest upon the mortgage and note for a time, and upon refusing to continue his payments was sued by the plaintiff as administratrix of the assignee of the mortgage and note. The court held that the stipulation in the deed that Whipple should pay the mortgage and note was a matter exclusively between the two parties to the deed; that the sale by Rollins of the equity of redemption did not lessen the plaintiff's security, and that as nothing had been put into the defendant's hands for the purpose of meeting the plaintiff's claim on Rollins, there was no consideration to support an express promise, much less an implied one, that Whipple should pay Mellen the amount of the note. That is all that was decided in that case, and the substance of the reasons assigned for the decision; and whether the case was rightly disposed of or not, it has not in its facts any analogy to the case before us, nor do the reasons assigned for the decision bear in any degree upon the question we are now considering. But it is urged that because the defendant was not in any sense a trustee of the property of Holly for the benefit of the plaintiff, the law will not imply a promise. I agree that many of the cases where a promise was implied were cases of trusts, created for the benefit of the promisor. The case of Felton v. Dickinson, 10 Mass. 287, and others that might be cited are of that class; but concede them all to have been cases of trusts, and it proves nothing against the application of the rule to this case. The duty of the trustee to pay the cestui que trust, according to the terms of the trust, implies his promise to the latter to do so. In this case the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay. The fact that a breach of the duty imposed in the one case may be visited, and justly, with more serious consequences than in the other, by no means disproves the payment to be a duty in both. The principle illustrated by the example so frequently quoted (which concisely states the case in hand) "that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach," has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases. It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the benefit of the plaintiff, and, therefore, the plaintiff was not entitled to maintain this suit for the

recovery of a demand over which he had no control. It is enough that the plaintiff did not release the defendant from his promise, and whether he could or not is a question not now necessarily involved; but if it was, I think it would be found difficult to maintain the right of Holly to discharge a judgment recovered by the plaintiff upon confession or otherwise, for the breach of the defendant's promise; and if he could not, how could he discharge the suit before judgment, or the promise before suit, made as it was for the plaintiff's benefit and in accordance with legal presumption accepted by him (Berly v. Taylor, 5 Hill, 577-584 et seq.), until his dissent was shown? The cases cited and especially that of Farley v. Cleaveland, established the validity of a parol promise; it stands then upon the footing of a written one. Suppose the defendant had given his note in which for value received of Holly, he had promised to pay the plaintiff and the plaintiff had accepted the promise, retaining Holly's liability. Very clearly Holly could not have discharged that promise, be the right to release the defendant as it may. No one can doubt that he owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff; nor can it be doubted that whatever may be the diversity of opinion elsewhere, the adjudications in this state, from a very early period, approved by experience, have established the defendant's liability; if, therefore, it could be shown that a more strict and technically accurate application of the rules applied, would lead to a different result (which I by no means concede), the effort should not be made in the face of manifest justice.

The judgment should be affirmed.

JOHNSON, C.J., and DENIO, J., based their judgment upon the ground that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.

COMSTOCK, J. (dissenting). The plaintiff had nothing to do with the promise on which he brought this action. It was not made to him, nor did the consideration proceed from him. If he can maintain the suit, it is because an anomaly has found its way into the law on this subject. In general, there must be privity of contract. The party who sues upon a promise must be the promisee, or he must have some legal interest in the undertaking. In this case, it is plain that Holly, who loaned the money to the defendant, and to whom the promise in question was made, could at any time have claimed that it should be performed to himself personally. He had lent the money to the defendant, and at the same time directed the latter to pay the sum to the plaintiff. This direction he could countermand, and if he had done so, manifestly the defendant's promise to pay according to the direction would have ceased to exist. The plaintiff would receive a benefit by a complete execution of the arrangement, but the arrangement itself was between other parties, and was under their exclusive control. If the defendant had paid the money to Holly, his debt would have been discharged thereby. So Holly might have released the demand or assigned it to another person, or the parties might have annulled the promise now in question, and designated some other creditor of Holly as the party to whom the money should be paid. It has never been claimed that in a case thus situated the right of a third person to sue upon the promise rested on any sound principle of law. We are to inquire whether the rule has been so established by positive authority.

The cases which have sometimes been supposed to have a bearing on this question are quite numerous. In some of them, the dicta of judges, delivered upon very slight consideration, have been referred to as the decisions of the courts. Thus, in Schermerhorn v. Vanderheyden, 1 Johns. 140, the court is reported as saying: "We are of opinion that where one person makes a promise to another, for the benefit of a third person, that third person may maintain an action on such promise." This remark was made on the authority of Dutton v. Poole, Vent. 318, 332, decided in England nearly two hundred years ago. It was, however, but a mere remark, as the case was determined against the plaintiff on another ground. Yet this decision has often been referred to as authority for similar observations in later cases.

In another class of cases, which have been sometimes supposed to favor the doctrine, the promise was made to the person who brought the suit, while the consideration proceeded from another; the question considered being, whether the promise was void by the statute of frauds. Thus, in Gold v. Phillips, 10 Johns. 412, one Wood was indebted to the plaintiffs for services as attorneys and counsel, and he conveyed a farm to the defendants, who, as part of the consideration, were to pay that debt. Accordingly, the defendants wrote to the plaintiffs, informing them that an arrangement had been made by which they were to pay the demand. The defense was, that the promise was void within the statute, because, although in writing, it did not express the consideration. But the action was sustained, on the ground that the undertaking was original and not collateral. So in the case of Farley v. Cleaveland, 4 Cow. 432, 9 Cow. 639, the facts proved or offered to be proved were, that the plaintiff held a note against one Moon; that Moon sold hay to the defendant, who in consideration of that sale promised the plaintiff by parol to

pay the note. The only question was, whether the statute of frauds applied to the case. It was held by the supreme court, and afterward by the court of errors, that it did not. Such is also precisely the doctrine of Ellwood v. Monk, 5 Wend. 235, where it was held that a plea of the statute of frauds to a count upon a promise of the defendant to the plaintiff, to pay the latter a debt owing to him by another person, the promise being founded on a sale of property to the defendant by the other person, was bad.

The cases mentioned and others of a like character were referred to by Mr. Justice Jewett, in Barker v. Bucklin, 2 Denio, 45. In that case the learned justice considered at some length the question now before us. The authorities referred to were mainly those which I have cited, and others upon the statute of frauds. The case decided nothing on the present subject, because it was determined against the plaintiff on a ground not involved in this discussion. The doctrine was certainly advanced which the plaintiff now contends for, but among all the decisions which were cited, I do not think there is one standing directly upon it. The case of Arnold v. Lyman, 17 Mass. 400, might perhaps be regarded as an exception to this remark, if a different interpretation had not been given to that decision in the supreme court of the same state where it was pronounced. In the recent case of Mellen v. Whipple, 1 Gray, 317, that decision is understood as belonging to a class where the defendant has in his hands a trust fund, which was the foundation of the duty or promise on which the suit is brought.

The cases in which some trust was involved are also frequently referred to as authority for the doctrine now in question, but they do not sustain it. If A. delivers money or property to B., which the latter accepts upon a trust for the benefit of C., the latter can enforce the trust by an appropriate action for that purpose. Berly v. Taylor, 5 Hill, 577. If the trust be of money, I think the beneficiary may assent to it and bring the action for money had and received to his use. If it be of something else than money, the trustee must account for it according to the terms of the trust, and upon principles of equity. There is some authority even for saying that an express promise founded on the possession of a trust fund may be enforced by an action at law in the name of the beneficiary, although it was made to the creator of the trust. Thus, in Comyn, Dig. "Action on the Case upon Assumpsit," B, 15, it is laid down that if a man promise a pig of lead to A., and his executor give lead to make a pig to B., who assumes to deliver it to A., an assumpsit lies by A. against him. The case of Delaware & H. Canal Co. v. Westchester County Bank, 4 Denio, 97, involved a trust because the defendants had received from a third party a bill of exchange under an agreement that they would endeavor to collect it, and would pay over the proceeds when collected to the plaintiffs. A fund received under such an agreement does not belong to the person who receives it. He must account for it specifically; and perhaps there is no gross violation of principle in permitting the equitable owner of it to sue upon an express promise to pay it over. Having a specific interest in the thing, the undertaking to account for it may be regarded as in some sense made with him through the author of the trust. But further than this we cannot go without violating plain rules of law. In the case before us there was nothing in the nature of a trust or agency. The defendant borrowed the money of Holly and received it as his own. The plaintiff had no right in the fund, legal or equitable. The promise to repay the money created an obligation in favor of the lender to whom it was made and not in favor of any one else.

I have referred to the dictum in Schermerhorn v. Vanderheyden, 1 Johns. 140, as favoring the doctrine contended for. It was the earliest in this state, and was founded, as already observed, on the old English case of Dutton v. Poole, Vent. 318. That case has always been referred to as the ultimate authority whenever the rule in question has been mentioned, and it deserves, therefore, some further notice. The father of the plaintiff's wife being seized of certain lands, which afterward on his death descended to the defendant, and being about to cut £1,000 worth of timber to raise a portion for his daughter, the defendant promised the father in consideration of his forbearing to cut the timber, that he would pay the said daughter the £1,000. After verdict for the plaintiff, upon the issue of non-assumpsit, it was urged in arrest of judgment that the father ought to have brought the action, and not the husband and wife. It was held, after much discussion, that the action would lie. The court said: "It might be another case if the money had been to have been paid to a stranger; but there is such a manner of relation between the father and the child, and it is a kind of debt to the child to be provided for, that the plaintiff is plainly concerned." We need not criticise the reason given for this decision. It is enough for the present purpose, that the case is no authority for the general doctrine, to sustain which it has been so frequently cited. It belongs to a class of cases somewhat peculiar and anomalous, in which promises have been made to a parent, or person standing in a near relationship to the person for whose benefit it was made, and in which, on account of that relationship, the beneficiary has been allowed to maintain the action. Regarded as standing on any other ground, they have long since ceased to be the law in England. Thus,

in Crow v. Rogers, 1 Strange, 592, one Hardy was indebted to the plaintiff in the sum of £70, and upon a discourse between Hardy and the defendant, it was agreed that the defendant should pay that debt in consideration of a house, to be conveyed by Hardy to him. The plaintiff brought the action on that promise, and Dutton v. Poole was cited in support of it. But it was held that the action would not lie, because the plaintiff was a stranger to the transaction. Again, in Price v. Easton, 4 Barn. & Adol. 433, one William Price was indebted to the plaintiff in £13. The declaration averred a promise of the defendant to pay the debt, in consideration that William Price would work for him, and leave the wages in his hands; and that Price did work accordingly, and earned a large sum of money, which he left in the defendant's hands. After verdict for the plaintiff, a motion was made in arrest of judgment, on the ground that the plaintiff was a stranger to the consideration. Dutton v. Poole, and other cases of that class, were cited in opposition to the motion, but the judgment was arrested. Lord Denman said: "I think the declaration cannot be supported, as it does not show any consideration for the promise moving from the plaintiff to the defendant." Littledale, J., said: "No privity is shown between the plaintiff and the defendant. The case is precisely like Crow v. Rogers, and must be governed by it." Taunton, J., said: "It is consistent with all the matter alleged in the declaration, that the plaintiff may have been entirely ignorant of the arrangement between William Price and the defendant." Patterson, J., observed: "It is clear that the allegations do not show a right of action in the plaintiff. There is no promise to the plaintiff alleged." The same doctrine is recognized in Lilly v. Hays, 5 Adol. & E. 548, and such is now the settled rule in England, although at an early day there was some obscurity arising out of the case of Dutton v. Poole, and others of that peculiar class.

The question was also involved in some confusion by the earlier cases in Massachusetts. Indeed, the supreme court of that state seem at one time to have made a nearer approach to the doctrine on which this action must rest than the courts of this state have ever done. 10 Mass. 287; 17 Mass. 400. But in the recent case of Mellen v. Whipple, 1 Gray, 317, the subject was carefully reviewed and the doctrine utterly overthrown. One Rollin was indebted to the plaintiff's testator, and had secured the debt by a mortgage on his land. He then conveyed the equity of redemption to the defendant, by a deed which contained a clause declaring that the defendant was to assume and pay the mortgage. It was conceded that the acceptance of the deed with such a clause in it was equivalent to an express promise to pay the mortgage debt; and the question was, whether the mortgagee or his representative could sue on that undertaking. It was held that the suit could not be maintained; and in the course of a very careful and discriminating opinion by Judge Metcalf, it was shown that the cases which had been supposed to favor the action belonged to exceptional classes, none of which embraced the pure and simple case of an attempt by one person to enforce a promise made to another, from whom the consideration wholly proceeded. I am of that opinion.

The judgment of the court below should, therefore, be reversed, and a new trial granted.

GROVER, J., also dissented.

Judgment affirmed.

RAPPLYE v. RACINE SEEDER CO.

(44 N. W. 363, 79 Iowa, 220.)

Supreme Court of Iowa. Jan. 31, 1890.

Appeal from district court, Polk county: Josiah Given, Judge.

Action for breach of contract in the sale of certain seeders, in which the court, without the intervention of a jury, found the following facts:

"*First.* That prior to October 14, 1884, the firm of Young Bros., the plaintiff's assignors, were a copartnership engaged principally as manufacturers' agents in sale of agricultural implements throughout the state of Iowa, having their place of business at the city of Des Moines, in said state. *Second.* That on the 19th day of August, 1884, the Racine Seeder Company, of Racine, Wis., the defendant herein, made with said Young Bros. the contract introduced in evidence, and marked 'Exhibit A,' as alleged in plaintiff's petition. *Third.* That by said contract the defendant sold to Young Bros. nine hundred Strowbridge Broadcast sowers, for which payment was to be made by the promissory notes of Young Bros. as implements were delivered, and in consideration for such purchase the defendant granted to said firm the exclusive privilege of selling said implements in the western half of the state of Iowa. Young Bros. were to canvass said territory, and solicit written orders for said Strowbridge sower, in the name of defendant, using blank orders prescribed by it; and the orders thus taken were to be turned over to the defendant, and thereupon the implements were to be shipped by the defendant to the various purchasers, at the times stated in such orders. Young Bros. were further required to take promissory notes in settlement for implements thus sold, when sales were not for cash; and such notes were to be turned over to the defendant, in addition to the contracts before mentioned, as collateral security for the notes of Young Bros. If implements were sold for cash, the same was to be immediately applied by Young Bros. on the purchase price of the implements contracted for. *Fourth.* That, upon the faith of the above contract, Young Bros. proceeded to canvass the territory assigned them, taking orders for the said implements, and turning them over to defendant, and otherwise performing their part of said contract, and up to the 14th of October, 1884, had sold about three hundred of said implements, at prices varying from $16.50 to $18.75. Said contracts were identical in form with Exhibit A, hereto attached. *Fifth.* That on the 14th day of October, 1884, the said Young Bros. made a general assignment for the benefit of creditors to one Isaac Henshie, who continued to perform the duties of said assignee until his death, on December 8, 1884; that the record of the instrument found on pages Nos. 10, 11, 12, and 13 of book No. 154 of Chattel Mortgage Records, in recorder's office of Polk county, Iowa, introduced in evidence, is a true copy of said general assignment; that by said assignment all rights under said contract of Young Bros. with defendant passed to said assignee; that the plaintiff in this cause is the successor in office to said Isaac Henshie as assignee of said Young Bros., duly appointed by the circuit court of Polk county, Iowa, on or about the 13th day of December, 1884. *Sixth.* That on the 5th day of November, 1884, the defendant sent to Young Bros.' recent place of business, by messenger, the letter of that date set out in defendant's answer herein, giving notice of its refusal to go on with the contract before mentioned; that the defendant intended by the notice given in said letter to put an end to the contract entirely, and the same was understood and treated by the assignee of Young Bros. as so intended; that soon after the service of the above notice the defendants entered this same territory which had been granted by said contract to Young Bros., made new contracts, in its own name, with some of the persons with whom Young Bros. had contracted for the sale of said implements, and sold large numbers of the same to divers other persons in said territory. *Seventh.* That, as soon as practicable after entering upon his duties as assignee of said Young Bros.' estate, the said Isaac Henshie sought legal advice with reference to his rights as such assignee under said contract, and was advised that he had a right under the law to go on with the same, and require performance thereof on the part of defendant; and there was evidence tending to show that he thereupon procured an agent to further canvass the territory named in said contract, and was otherwise arranging to go on with the same, when he received said defendant's letter of November 5, 1884, giving notice of its refusal to perform said contract. Such evidence was, in substance, that said assignee called in from the road one William Gracey, who had previously been employed by Young Bros. to sell said Strowbridge sower, the goods handled by Young Bros., in said territory; that said Gracey was subsequently in the city; and that the account-book kept by the assignee showed an account with William Gracey, in which appeared the following entry: "October 20, 1884. Commenced work at sixty dollars per month and expenses;" that said Gracey received money from said assignee, and subsequently took the two orders for thirty-five of said Strowbridge sowers, which were introduced in evidence, and marked 'Exhibit B,' (22 and 23,) but this was no evidence that the defendant had knowledge of these matters; that at the time said letter of November 5, 1884, was received from the defendant said assignee had not had a reasonable time in which to perfect arrangements for going on with said contract. *Eighth.* That said Strowbridge Broadcast sower is a patented article, of which defendant was the sole manufacturer. About the month of February or March, 1885, however, a similar sower was put upon the market by the Joliet Wire Company, of Joliet, Ill., at less than this contract price; but this was considered by the defendant to be an infringement on the Strowbridge patent. *Ninth.* That at no time has defendant either made or tendered to plaintiff, or to his predecessor in office, the said Isaac Henshie, or to said

Young Bros., any compensation whatever for the labor or moneys expended by them, or for any portion of their performance of said contract, or made or offered in any manner to place the said persons, or either of them, *in statu quo*. *Tenth*. That defendant never delivered, nor tendered a delivery of, any portion of said nine hundred Strowbridge sowers sold to said Young Bros., although such delivery was demanded, to the number of said implements named in said orders turned over to said defendant, if such orders constituted a demand; and said defendant refused to deliver any portion of said implements, or to perform its part of said contract in any respect whatever. But no demand was made upon defendant for performance of said contract, unless the delivery of said orders constituted such demand. *Eleventh*. That neither the plaintiff nor his predecessor in office, the said Isaac Henshie, ever tendered the defendant any security in lieu of the promissory notes of Young Bros. agreed to be made, or made application to the court for authority to carry out said contract, or to require said defendant to accept any security in lieu of said notes, or gave defendant any notice that he intended to carry out said contract."

As a conclusion of law, the district court found with the defendant, and the plaintiff appeals.

Cummins & Wright and *N. B. Raymond*, for appellant. *Lehman & Park*, for appellee.

GRANGER, J. 1. The point receiving the principal attention in argument is as to the effect on the contract of the insolvency of Young Bros., and the assignment for the benefit of their creditors. Perhaps it may be better stated as a query, thus: Was the insolvency and assignment a justification for the defendant company in rescinding the contract? The answer to this question is a practical determination of the case, as to the plaintiff's cause of action. Its consideration has led counsel for appellant to consider at some length the law as to the assignment of contracts, and it is urged that the assignment in question is within its contemplation. A salient feature of the case is the manner or method of payment by Young Bros. for the seeders. The contract was for 900 seeders, to be delivered on the orders of Young Bros., for which the firm was to give its notes. Young Bros. were to deliver the seeders to purchasers from them, and settle for the same either by receiving cash or notes. If cash, it was to be turned over to defendant, to apply on the notes of Young Bros. If notes, they were to be turned over to defendant as collateral security for the notes already given by Young Bros. It is said in argument that the district court held the rescission sealed because, after the assignment, Young Bros. were not in a position to give their notes in pursuance of the terms of the contract; from which we infer this view of the court: That the defendant was entitled, under the contract, to the notes of Young Bros., aided collaterally by the notes taken by them in the sales of the seeders. As between defendant and Young Bros., nothing less could be regarded as a compliance with the contract. It could hardly be claimed that Young Bros., in a settlement for the machines, could substitute in lieu of their note that of another person or firm, regardless of the question of solvency or value, even though aided by the collateral notes as agreed upon, for the sole and conclusive reason that their engagements are for notes signed by them. Such a rule needs no elaboration.

The argument, then, leads us to the query, without reference to the statutory assignment for the benefit of creditors, could Young Bros. have so assigned the contract, without the consent of defendant, as to substitute another in their stead for performance, and whose note must be accepted in lieu of theirs by the defendant? This leads us to consider the authorities cited. Counsel for appellant quotes from Code, § 2084, as follows: "Instruments in writing, by which the maker promises * * * to pay or deliver any property or labor, or acknowledges any money or labor or property to be due, are assignable by indorsement thereon, or by other writing; and the assignee shall have a right of action in his own name." Counsel then say: "Under the very broad language of this provision, this court has held that all contracts are assignable, even in cases where, by the terms of the instrument, its assignment is prohibited." And reference is made to Moorman v. Collier, 32 Iowa, 138, and Bank v. Carpenter, 41 Iowa, 518. Section 2084 is a part of the chapter on "Notes and Bills;" and the section deals only with instruments in writing, and tells how they may be transferred, and who may sue thereon. In both of the cases to which reference is made the court had under consideration the validity of the transfer of an instrument in writing for the payment of money; and the language used in each case is not too broad, if properly limited by the subject of its application. In Moorman v. Collier, the language relied on is that "all instruments, under our statute, are assignable;" and the statement takes as authority Revision, § 1796, which corresponds with section 2084 of the Code, and the language of the case is only as to "instruments." It does not say, "all contracts." The case evidently means all instruments for the payment or delivery of money, property, or labor, as specified in the section and chapter. The case of Bank v. Carpenter was an action on a written guaranty, which was held assignable; and in its discussion this language is used: "Generally, by the common law, a guaranty is not negotiable, or in any manner transferable, so as to enable the assignee to maintain an action thereon. * * * But under our statutes this and every other kind of contract is assignable." It cites for support Code, §§ 2082-2087, inclusive; and it is said in the opinion that "even in a case where, by the terms of the instrument, its assignment is prohibited, it may be assigned." The sections referred to are the six first sections in the chapter on "Notes and Bills," which chapter, of course, has reference to other instruments than notes and bills, and the provisions, in brief, as to assignments are that a party entitled to recover on an in-

strument or an open account may transfer his right of recovery to another; but there is nothing in the language of the chapter to indicate a legislative intent to authorize a party to a contract by assignment to transfer his obligations to perform to a third party, and thus effect his release, without the consent of his obligee. Let us suppose that A. contracts in writing to render service, as a traveling salesman, to B., for a specified compensation. Under the law, if B. shall be indebted to A. on the contract, A. may assign his claim. But suppose A. should assign his contract to C., whereby C. was to receive the pay and render the service. Must B. accept that? B. has contracted for the services of A. He is entitled to that; and, before B. can be required to pay either to A. or his assigns, he must have what he contracted for. The law will permit a person to assign what is his, either in possession or by right of action, but not his obligations to another; and such is the substance of the provisions of the statutes on the subject of assignments referred to. Thus we think that Young Bros. could not, without reference to the assignment for the benefit of creditors, have so assigned the contract in question, without the consent of the defendant, as to have required defendant to have accepted in lieu of theirs the notes of their assignee.

We may then inquire if there is anything in the statutory assignment for the benefit of creditors to change the rule? It is urged that the statutory provisions as to assignments for the benefit of creditors is broad enough to enable the assignee to execute any contract that might come into his hands. The difficulties of the case are not with the provisions of the statute as to the authority of the assignee. They are more with his incapacity or indisposition to execute the contract. We should not lose sight of the real question under consideration by a contemplation of what the assignee could have done if defendant, after insolvency, had been willing to deliver the seeders. It may be conceded that the contract could thus have been executed by the assignee on behalf of Young Bros. But the query is, had the defendant the right to refuse delivery of the seeders after insolvency and assignment? In other words, had it the right to terminate the contract? If it were a case of insolvency without the assignment, we think it would be conceded on authority that the obligation to deliver could only be on a tender of a cash payment in lieu of notes agreed upon. Pardee v. Kanady, 100 N. Y. 121, 12 N. E. Rep. 885. Does the fact of the assignment affect the rights of the defendant? The reason of the rule in cases of insolvency is too manifest to need explanation. A person who contracts to deliver property on a credit, in anticipation of a solvent purchaser, ought not to be required to deliver it after insolvency, which is a practical confession by the purchaser of his inability to comply with the terms of the contract. If to the fact of insolvency is added that of an assignment for the benefit of creditors, why should the rule be changed? If the delivery is excused in case of insolvency because the property will not be paid for, the same reasons exist for excusing the delivery after assignment. If the insolvent did not possess a right to enforce the contract except by cash payment, he could convey no greater right to his assignee. The argument deals with the question of the right of appellant to a delivery of the seeders upon cash payment therefor. To our minds, the record does not present the question for consideration. The contract was not to pay cash, but to settle by note. After insolvency defendant was not required to anticipate a readiness for cash payment; and, if either Young Bros. or plaintiff desired to make such payment, a tender to that effect should have been made. Soon after the assignment, defendant, as it should, gave notice that because of the insolvency and dissolution of the partnership the contract was rescinded. This notice was to Young Bros. If the assignee then desired to pay in cash, and have the seeders delivered, the proposition or tender should have been made. But neither the pleadings in the case, nor the findings of the court, deal with this question. The case in the district court seems to have been tried upon an issue as to the right of the assignee to carry out the contract by giving his note in lieu of that of Young Bros. The pleadings and findings have to do with a willingness on the part of the assignee to carry out the contract; but it appears only to have been a carrying out of the contract as Young Bros. were authorized to do, and not by payments in cash. A reference to the eleventh finding shows that the assignee has never in any manner indicated to defendant a purpose or desire to secure or perform the contract. Insolvency, in such cases, implies an inability to perform, on which the defendant might rely until otherwise assured.

Appellant contends, with much zeal, that the mere fact of insolvency does not put an end to the contract of sale; and several authorities are cited in support of the rule. It is not necessary for us to state an opinion on a state of facts so broad. The case In re Steel Co., 4 Ch. Div. 108, cited by appellant, bears upon the question of when the facts will justify a seller on credit in refusing to deliver because of the subsequent insolvency of the purchaser. The facts in that case are that the Carnforth Iron Company, in October, 1874, contracted to supply iron to be delivered monthly, and to be paid for in installments, but on credit. The installments were delivered till in February, 1875, when the purchasing company called a meeting of its creditors, and said it was carrying on business at a loss, and was short of capital, and asked for an extension of time, which the creditors refused. The selling company then refused to deliver the iron except upon cash payments, and the purchasing company then rescinded the contract. The selling company then asked for damage, which the court held could not be recovered; holding that there was no such declaration of insolvency as to justify the selling company in refusing to deliver. The syllabus of the case, which appears to be supported by the opinion, deduces a rule as follows: "In order to justify the vendors, in such a case, in exercising their right of refusal to deliver, there must be such proof or admis-

sion of the insolvency of the purchasers at the time as amounts to a declaration of intention not to pay for the goods." The case does not appear to be an authority against the right of refusal to deliver where the fact of insolvency exists, and is so evidenced as to amount to a declared purpose not to pay. It is the fact of the insolvency that seems to be the turning point in the case, and that would surely seem to be the reasonable rule. The case of Morgan v. Bain, L. R. 10 C. P. 15, also cited by appellants, was one for the delivery of iron on credit; and the purchasers became insolvent. Lord COLERIDGE, C. J., in his opinion, said: "It is not disputed that upon the occurrence of insolvency the vendor would not be bound to deliver to the insolvent purchaser an installment of the iron becoming due, without a tender of the price." BRETT, J., in the same case, said, without commiting himself to the theory that the mere fact of insolvency would *per se* put an end to the contract, that such fact, with that of notice to the seller of the insolvency, would justify an assumption by the seller that the purchaser intended to abandon the contract. The notice upon which he relied, and gave his adherence to the holding in that case, was the commencement of insolvent proceedings under the bankrupt act. In this case the fact of the insolvency is unquestioned, and a like notice is given by an insolvent proceeding for the benefit of creditors. Hence it seems the defendant, in this case, is within any of the rules cited. Other authorities cited by appellant are not more favorable to his position.

2. Defendant presented a counter-claim, based on an open account alleging a balance due of $27.98, as to which the court established a claim against the estate of Young Bros. for $27, based on the following finding of facts: "*Twelfth.* On defendant's counter-claim, the court finds that defendant received orders from Young Bros. for the goods mentioned in the account under dates September 5, 6, 8, 15, and 17, 1884; that these orders were treated in the usual way, the usual directions given for shipping, and the goods charged on the books to Young Bros.; that both of Young Bros. were on the witness stand, and neither of them denied having received the goods; that, the balance of defendant's counter-claim not being denied, the defendant should recover the sum of three hundred and twenty-seven and ninety-eight one-hundredths dollars, less the sum of three hundred dollars due the plaintiff for commission earned by Young Bros. under the contract of 1883, declared on in plaintiff's petition." It is urged that the proofs are not sufficient to sustain the finding. The argument concedes a practical dispute in the testimony, and the finding has the force of a verdict by the jury. The evidence is such that we cannot interfere.

3. It is next said that it was error to enter a personal judgment against the assignee. The assignment is in these words: "The court erred in rendering a personal judgment against the plaintiff herein for the balance due upon defendant's counter-claim, for the reason that such judgment is contrary to law and the evidence. Said defendant was entitled only to the establishment of his claim as a creditor of said estate." The assignment is not sustained by the record. The judgment of the court is merely the establishment of a claim against the estate. It is not a personal judgment. It would only be subject to *pro rata* payment, like other claims. The wording of the judgment is "that such be and is hereby established as a claim against the estate of Young Bros., and against the said Rapplye as their assignee." These words have no other meaning than the establishment of the claim. It would appear that appellant has based this assignment rather upon statements in the abstract with reference to the judgment than upon record of the judgment as copied in the abstract. Affirmed.

COOLIDGE v. RUGGLES.

(15 Mass. 387.)

Supreme Judicial Court of Massachusetts. Suffolk and Nantucket. 1819.

Assumpsit on the following writing, viz.:—

"Boston, October 1, 1812.

"For value received, I promise to pay the bearer hereof, six months after date, nine hundred and eighty dollars, provided the ship Mary arrives at a European port of discharge, free from capture and condemnation by the British.

"Samuel Ruggles."

At the trial before Jackson, J., at the sittings here, after the last March term, it appeared that the said promise was made to one W. S. Skinner, the consideration whereof was a certain document, known by the name of "a Sawyer license," which was intended for the protection of merchant vessels of the United States from capture by British cruisers, war then existing between the United States and Great Britain; and that, about two years after receiving the said note, the said Skinner transferred and delivered the same, with other effects, to the plaintiff, to be by him collected and passed to the credit of Skinner, in an account then open between him and the plaintiff, and upon which Skinner was indebted to the plaintiff. The signature of the defendant was admitted, and the plaintiff proved that the said ship Mary, mentioned in the said note, arrived at a European port of discharge, and there delivered her cargo in safety, without any capture or condemnation whatsoever.

A verdict was returned for the plaintiff, under the direction of the judge; and the defendant tendered a bill of exceptions as at common law, which was sealed by the judge. The question chiefly insisted on at the argument, and which alone was considered by the court, was, whether the plaintiff could maintain the action, as assignee of the note sued.

Mr. Hubbard, for plaintiff. The Solicitor General and Mr. Cooke, for defendant.

PARKER, C. J., delivered the opinion of the court. The only question to which we have turned our attention in this case, is, whether the written promise declared on is negotiable in its nature, so that an action may be maintained upon it in the name of the plaintiff, who is assignee. And we are all of opinion that it is not so negotiable, on account of the contingency on which the payment of the money is made to depend.

All promises to pay money, being at common law choses in action, were unassignable. It is only by virtue of the statute of 3 & 4 Anne, c. 9, that certain descriptions of them are assignable, so as that the property and the right of action vest in the assignee.

The paper declared on does not come within the description of notes made assignable by that statute. For it has been declared by frequent judicial decisions, that a note or bill, to attain that character, must be payable in money absolutely. A note or bill payable to bearer stands upon the same ground as a note payable to order. The only difference is in the mode of transfer. The latter must be by endorsement; the former may be by delivery; but both must contain a promise to pay money unconditionally.

The cases which show that an action may be maintained by an assignee, in his own name, are all where there has been, after the assignment, a promise to pay to the assignee; and to this effect the case of Fenner v. Mears, 2 W. Bl. 1269, is unquestionably good law; and several cases have been decided by this court upon the same principle. In this case, no promise is shown to pay to the assignee.

Cases were cited to show that the promise in this case is assignable in equity. But the difference between that, and an assignment under the statute of Anne, is too well known to need explanation. The verdict is set aside and a new trial granted.

WALKER et al. v. BROOKS et al.
(125 Mass. 241.)

Supreme Judicial Court of Massachusetts. Worcester. Aug. 31, 1878.

G. F. Hoar and F. T. Blackmer, for plaintiffs. J. J. Storrow, for defendants.

GRAY, C. J. This bill was filed May 21, 1877, by Joseph H. Walker and George M. Walker, copartners, against James W. Brooks and Horace H. Bigelow. The material allegations of the bill are as follows:

1st. That on March 21, 1872, the defendant Bigelow executed to the two plaintiffs a lease of and license to use a certain patented machine for compressing heels for boots and shoes, for which the plaintiffs were to pay him a royalty of ten cents, or, in case of their rendering true accounts to him monthly, the sum of one-half cent, for each pair of heels thereby compressed.

2d. That, at the same date, Bigelow entered into an agreement with Joseph H. Walker, one of the plaintiffs, to pay him monthly for certain services in introducing the machine to the public (which he afterwards performed) sums equal to those to be paid by the plaintiffs to Bigelow under the lease and license from him.

3d. That Bigelow has assigned each of these contracts to the other defendant Brooks, who has become in equity entitled to all the advantages thereof and to receive all sums of money due or to become due from the plaintiffs under the same, and has become in equity bound to perform all the obligations expressed or implied therein to be performed by Bigelow.

4th. That all the rights and obligations of Joseph H. Walker, under his agreement with Bigelow, have been assigned to and vested in the plaintiffs, and they are in equity entitled to receive all sums which are or may become due under the same.

5th. That the plaintiffs, under the lease and license to them, have used the patented machine, and have duly kept and rendered accounts to the defendants, and have paid to them in full for such lease and use to February 1, 1877, the sum of $3000, and now owe and are ready to pay to the defendant Brooks a further sum of $164.75 for such use since that time.

6th. That there is due a like sum from Brooks to the plaintiffs, and that they have demanded of him that he should pay to them the sum so paid by them, and should set off the sum so due from them as rent as aforesaid against the sum so in equity due to them from him; and that he has wholly refused to do so, and threatens to sue them for this sum, and to set aside and avoid the lease and license, and to seize upon and take possession of the leased machines, alleging that the plaintiffs have not performed the stipulations and conditions thereof on their part.

7th. That the plaintiffs have fully performed the same, and are ready and offer to do so hereafter, except that they insist and aver that in equity they are entitled to have the sums due as aforesaid, from either of the parties to the other, set off, and that such right to a set-off operates as an extinguishment and payment of those sums.

The prayer of the bill is for a discovery under oath; for an account of all sums due from the plaintiffs to the defendants or either of them, and from the defendants or either of them to the plaintiffs; for a set-off of such sums against each other; for an injunction against bringing any suit against the plaintiffs on account of any claim against them as above stated; and for further relief.

To this bill the defendants have demurred, because the plaintiffs have a plain, adequate and complete remedy at law, and because they have not stated such a case as entitles them to any discovery or relief in equity. We are of opinion that the demurrer is well taken, and that the bill cannot be sustained on any of the grounds assigned by the learned counsel for the plaintiffs.

It is attempted, in the first place, to bring the case within the rule, that where there are cross demands between the parties of such a nature that if both were recoverable at law they would be the subject of a set-off, then, if either of them is a matter of equitable jurisdiction, the set-off may be enforced in equity. It is said that the defendant Brooks, as the assignee of the claim of the other defendant Bigelow against the plaintiffs, has an equitable right of action against the plaintiffs, which, though at law it could only be sued in the name of Bigelow, might in equity be sued by Brooks; and that such right of Brooks to sue the plaintiffs in equity affords a foundation for jurisdiction in equity to order a set-off of that equitable right against the plaintiffs' claim.

But a court of equity will not entertain a bill by the assignee of a strictly legal right, merely upon the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such an action from being brought in his name, or that an action so brought would not afford the assignee an adequate remedy.

In Hammond v. Messenger, 9 Sim. 327, 332, Vice Chancellor Shadwell so held, and said, "If this case were stripped of all special circumstances, it would be simply a bill filed by a plaintiff who had obtained, from certain persons to whom a debt was due, a right to sue in their names for the debt. It is quite new to me that, in such a simple case as that, this court allows, in the first instance, a bill to be filed against the debtor by the person who has become the assignee of the debt. I admit that, if special circumstances are stated, and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that

right, this court will interpose for the purpose of preventing that species of wrong being done; and, if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor. If bills of this kind were allowable, it is obvious that they would be pretty frequent; but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances."

It is true that Mr. Justice Story, in his Commentaries, observed upon that opinion, "This doctrine is apparently new, at least in the broad extent in which it is laid down; and does not seem to have been generally adopted in America. On the contrary, the more general principle established in this country seems to be, that wherever an assignee has an equitable right or interest in a debt or other property (as the assignee of a debt certainly has) there a court of equity is the proper forum to enforce it; and he is not to be driven to any circuity by instituting a suit at law in the name of the person who is possessed of the legal title. A cestui que trust may ordinarily sue third persons in a court of equity, upon his equitable title, without any reference to the existence of a legal title in his trustee, which may be enforced at law." Story, Eq. Jur. § 1057a. To the same effect is the statement in Story, Eq. Pl. § 153.

But the adjudged cases, including those cited by the learned commentator, upon being examined, fail to support his position, and show that the doctrine of Hammond v. Messenger is amply sustained by earlier authorities in England and in this country.

A century and a half ago, parties for whose benefit their agent had obtained policies of insurance in his own name, brought bills in equity against the underwriters. But Lord Chancellor King refused to sustain them, saying, "At this rate, all policies of insurance would be tried in this court, for they are generally taken in the name of a trustee;" and again, "If I should give way to this attempt, no action would ever be brought on a policy." And his decision was affirmed in the house of lords. Dhegetoft v. Assurance Co., Mos. 83, and 4 Brown, Parl. Cas. (2d Ed.) 436; Fall v. Chambers, Mos. 193; Lord Hardwicke afterwards expressed a like opinion. Motteux v. Assurance Co., 1 Atk. 545, 547.

In Cator v. Burke, 1 Brown, Ch. 434, Cator, with whom Hargrave had deposited, as security for a debt of his own to Cator, a bond made by Burke to Hargrave, filed a bill in equity against Burke and Hargrave, to compel Burke to pay the debt to the plaintiff, out of a counter bond for a larger amount, which Hargrave had made to Burke; and to prevent Burke from setting up the counter bond as a defense to any action at law which might be brought against him in the name of Hargrave. The bill was dismissed; Lord Loughborough saying, "The bond can never be considered in any other light than as an unassignable security; to consider it otherwise would bring all the causes on bonds in Westminster Hall into this court. The plaintiff has mistaken both the law and equity; for first, he has supposed that the holder of a bond might, where there was no discovery to be made, come hither, and have a different relief from what he could have at law; and secondly, that if there was fraud in giving the counter bond, it could not be made use of at law. When this bill is dismissed with costs, you may bring your action in the name of Hargrave. If this bill would lie by the simple act of assigning the bond, a suit in equity might be brought on every bond that is given." So in Rose v. Clarke, 1 Younge & C. 534, 548, Vice Chancellor Knight-Bruce said, "As I apprehend, an equitable title to money secured by a bond is not of itself sufficient to entitle the party so interested to sue the obligor in equity for payment of the money. There must, I conceive, be something more."

The decision in Riddle v. Mandeville, 5 Cranch, 322, allowing an indorsee of a promissory note to sustain a bill in equity against a remote indorser, proceeded upon the ground that in Virginia no remedy at law could be had against him, except by the circuitous course of successive actions by each indorsee against his immediate indorser, and that in that particular case the intermediate party was insolvent. See Mandeville v. Riddle, 1 Cranch, 290; Harris v. Johnston, 3 Cranch, 311. That Chief Justice Marshall, who delivered the opinions in these cases, did not consider them as establishing the general proposition that the assignee of a chose in action, who could not sue thereon in his own name at law, might therefore do so in equity, is manifest from his opinion in the later case of Lenox v. Roberts, 2 Wheat. 373, in which the assignee of all the property of a banking corporation was allowed to maintain a bill in equity in his own name upon a promissory note which had not been formally indorsed to him, for the reason that, "as the act of incorporation had expired, no action could be maintained at law by the bank itself."

In Carter v. Insurance Co., 1 Johns. Ch. 463, Chancellor Kent dismissed a bill in equity brought against an insurance company by the assignees of a policy of insurance; and briefly stated his reasons to be, that the demand was properly cognizable at law, and there was no good reason for coming into the court of chancery to recover on the contract of insurance; that the plaintiffs were entitled to make use of the names of the original assured in the suit at law, and the nominal plaintiffs would not be permitted to defeat or prejudice the right of action; that it might be said here, as was said by the chancellor in the analogous case of Dhegetoft v. Assurance Co., supra, that at this rate all policies of insurance would be tried in this court; and

that the bill stated no special ground for equitable relief.

It was held by the courts of appeals of Maryland and Virginia, and by the supreme court of Tennessee in an opinion delivered by Judge Catron, (afterwards a justice of the supreme court of the United States,) that the mere fact of the assignment of a legal chose in action gave the assignee no right to invoke the jurisdiction of a court of equity. Adair v. Winchester, 7 Gill & J. 114; Moseley v. Boush, 4 Rand. 392; Smiley v. Bell, Mart. & Y. 378. The opposing decision in Townsend v. Carpenter, 11 Ohio, 21, is unsupported by any reference to authorities.

The cases before Chancellor Walworth of Field v. Maghee, 5 Paige, 539, and Rogers v. Insurance Co., 6 Paige, 583, contain no decision upon this point; and in the later case of Ontario Bank v. Mumford, 2 Barb. Ch. 596, 615, he said, "As a general rule, this court will not entertain a suit brought by the assignee of a debt or of a chose in action, which is a mere legal demand, but will leave him to his remedy at law by a suit in the name of the assignor;" and referred to the cases before Chancellor Kent and Vice Chancellor Shadwell, and in the courts of Maryland, Virginia and Tennessee, already cited.

The statement in Story, Eq. Jur. § 1436a, that "if a legal debt is due to the plaintiff by the defendant, and the defendant is the assignee of a legal debt due to a third person from the plaintiff, which has been duly assigned to himself, a court of equity will set off the one against the other, if both debts could properly be the subject of a set-off at law," is pervaded by the same error that we have considered.

The decision of the vice chancellor in Williams v. Davies, 2 Sim. 461, by which a creditor appears to have been restrained in equity from taking judgment and execution at law on a debt of one to whom he owed a larger sum, is obscurely reported, and was disapproved by Lord Chancellor Cottenham. Clark v. Cort, Craig & P. 154, 159; Rawson v. Samuel, Craig & P. 161, 178. In Clark v. Cort, the bill upon which the set-off was ordered was by the assignees of a claim which required the investigation of accounts and the application of a security, of which the court would have had jurisdiction if the suit had been by the assignor; and the chancellor said, "The case, then, is not that of a mere assignee of a legal debt, coming into equity to have the benefit of a set-off which he could not have at law." In Rawson v. Samuel, he observed, "We speak familiarly of equitable set-off, as distinguished from the set-off at law; but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross demands is not sufficient." And see Watson v. Railway Co., L. R. 2 C. P. 593; Spaulding v. Backus, 122 Mass. 553.

In this commonwealth, the assignee of a chose in action has an adequate and complete remedy at law, in the right to maintain an action thereon in the name of his assignor, or of his executor or administrator, without his consent, and even against his protest, at least upon giving him, if seasonably demanded, a bond of indemnity against costs. Dennis v. Twitchell, 10 Metc. (Mass.) 180, 184; Rockwood v. Brown, 1 Gray, 261; Bates v. Kempton, 7 Gray, 382; Foss v. Bank, 111 Mass. 285. In any action at law, brought by Brooks in the name of Bigelow, to recover the sums due him from these two plaintiffs under the license, they could set off the demand, under the other contract assigned to them, of Joseph H. Walker against Bigelow, if Bigelow had notice of such assignment before bringing his action. Gen. St. c. 130, § 5; Cook v. Mills, 5 Allen, 36, 38. Their neglect to give such notice cannot entitle them to demand the interposition of a court of equity. Wolcott v. Jones, 4 Allen, 367.

The bill shows no case for an account that cannot be taken at law. Badger v. McNamara, 123 Mass. 117. It cannot be maintained to restrain a forfeiture; because it does not show that there is any danger of irreparable injury, therein differing from Florence Sewing-Mach. Co. v. Grover & B. Sewing-Mach. Co., 110 Mass. 1. It cannot be maintained under Gen. St. c. 113, § 2, to reach and apply, in payment of a debt, property or rights of a debtor which cannot be come at to be attached or taken on execution in a suit at law against him; because it is not framed in that aspect, and because the statute relates to rights of property, or claims of the debtor against third persons, and does not extend to claims of the debtor against the plaintiff himself. Crompton v. Anthony, 13 Allen, 33, 37. It cannot be maintained for discovery; because it cannot be maintained for relief, and does not show that any discovery is required in aid of proceedings at law. Pool v. Lloyd, 5 Metc. (Mass.) 525; Ahrend v. Odiorne, 118 Mass. 261.

Demurrer sustained, and bill dismissed.

ARKANSAS VALLEY SMELTING CO. v. BELDEN MIN. CO.

(8 Sup. Ct. 1308, 127 U. S. 379.)

Supreme Court of the United States. May 14, 1888.

In error to the circuit court of the United States for the district of Colorado.

This was an action brought by a smelting company, incorporated by the laws of Missouri, against a mining company, incorporated by the laws of Maine, and both doing business in Colorado by virtue of a compliance with its laws, to recover damages for the breach of a contract to deliver ore, made by the defendant with Billing & Eilers, and assigned to the plaintiff. The material allegations of the complaint were as follows: On July 12, 1881, a contract in writing was made between the defendant of the first part and Billing & Eilers of the second part, by which it was agreed that the defendant should sell and deliver to Billing & Eilers, at their smelting works in Leadville, 10,000 tons of carbonate lead ore from its mines at Red Cliff, at the rate of at least 50 tons a day, beginning upon the completion of a railroad from Leadville to Red Cliff, and continuing until the whole should have been delivered, and that "all ore so delivered shall at once, upon the delivery thereof, become the property of the second party;" and it was further agreed as follows: "The value of said ore and the price to be paid therefor shall be fixed in lots of about one hundred tons each; that is to say, as soon as such a lot of ore shall have been delivered to said second party, it shall be sampled at the works of said second party, and the sample assayed by either or both of the parties hereto, and the value of such lots of ore shall be fixed by such assay; in case the parties hereto cannot agree as to such assay, they shall agree upon some third disinterested and competent party, whose assay shall be final. The price to be paid by said second party for such lot of ore shall be fixed on the basis hereinafter agreed upon by the closing New York quotations for silver and common lead, on the day of the delivery of sample bottle, and so on until all of said ore shall have been delivered. Said second party shall pay said first party at said Leadville for each such lot of ore at once, upon the determination of its assay value, at the following prices;" specifying, by reference to the New York quotations, the price to be paid per pound for the lead contained in the ore, and the price to be paid for the silver contained in each ton of ore, varying according to the proportions of silica and of iron in the ore. The complaint further alleged that the railroad was completed on November 30, 1881, and thereupon the defendant, under and in compliance with the contract, began to deliver ore to Billing & Eilers at their smelting works, and delivered 167 tons between that date and January 1, 1882, when "the said firm of Billing and Eilers was dissolved, and the said contract and the business of said firm, and the smelting works at which said ores were to be delivered, were sold, assigned, and transferred to G. Billing, whereof the defendant had due notice;" that after such transfer and assignment the defendant continued to deliver ore under the contract, and between January 1 and April 21, 1882, delivered to Billing at said smelting works 894 tons; that on May 1, 1882, the contract, together with the smelting works, was sold and conveyed by Billing to the plaintiff, whereof the defendant had due notice; that the defendant then ceased to deliver ore under the contract, and afterwards refused to perform the contract, and gave notice to the plaintiff that it considered the contract canceled and annulled; that all the ore so delivered under the contract was paid for according to its terms; that "the plaintiff and its said assignors were at all times during their respective ownerships ready, able, and willing to pay on the like terms for each lot as delivered, when and as the defendant should deliver the same, according to the terms of said contract, and the time of payment was fixed on the day of delivery of the 'sample bottle,' by which expression was, by the custom of the trade, intended the completion of the assay or test by which the value of the ore was definitely fixed;" and that "the said Billing and Eilers, and the said G. Billing, their successor and assignee, at all times since the delivery of said contract, and during the respective periods when it was held by them respectively, were able, ready, and willing to and did comply with and perform all the terms of the same, so far as they were by said contract required; and the said plaintiff has been at all times able, ready, and willing to perform and comply with the terms thereof, and has from time to time, since the said contract was assigned to it, so notified the defendant." The defendant demurred to the complaint for various reasons, one of which was that the contract therein set forth could not be assigned, but was personal in its nature, and could not, by the pretended assignment thereof to the plaintiff, vest the plaintiff with any power to sue the defendant for the alleged breach of contract. The circuit court sustained the demurrer, and gave judgment for the defendant; and the plaintiff sued out this writ of error.

R. S. Morrison, T. M. Patterson, and C. S. Thomas, for plaintiff in error.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

If the assignment to the plaintiff of the contract sued on was valid, the plaintiff is the real party in interest, and as such entitled, under the practice in Colorado, to maintain this action in its own name. Rev. St. § 914; Code Civ. Proc. Colo. § 3; Steel Co. v. Lundberg, 121 U. S. 451, 7 Sup. Ct. 958. The vital question in the case, therefore, is whether the contract between the defendant and Bil-

ling & Eilers was assignable by the latter, under the circumstances stated in the complaint. At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract." Humble v. Hunter, 12 Q. B. 310, 317; Winchester v. Howard, 97 Mass. 303, 305; Ice Co. v. Potter, 123 Mass. 28; King v. Batterson, 13 R. I. 117, 120; Lansden v. McCarthy, 45 Mo. 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: "Rights arising out of contract cannot be transferred if they are coupled with liabilities, of if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." Pol. Cont. (4th Ed.) 425. The contract here sued on was one by which the defendant agreed to deliver 10,000 tons of lead ore from its mines to Billing & Eilers at their smelting works. The ore was to be delivered at the rate of 50 tons a day, and it was expressly agreed that it should become the property of Billing & Eilers as soon as delivered. The price was not fixed by the contract, or payable upon the delivery of the ore. But, as often as a hundred tons of ore had been delivered, the ore was to be assayed by the parties or one of them, and, if they could not agree, by an umpire; and it was only after all this had been done, and according to the result of the assay, and the proportions of lead, silver, silica, and iron thereby proved to be in the ore, that the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price the defendant had no security for its payment, except in the character and solvency of Billing & Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted. The fact that upon the dissolution of the firm of Billing & Eilers, and the transfer by Eilers to Billing of this contract, together with the smelting works and business of the partnership, the defendant continued to deliver ore to Billing according to the contract, did not oblige the defendant to deliver ore to a stranger, to whom Billing had undertaken, without the defendant's consent, to assign the contract. The change in a partnership by the coming in or the withdrawal of a partner might perhaps be held to be within the contemplation of the parties originally contracting; but, however that may be, an assent to such a change in the one party cannot estop the other to deny the validity of a subsequent assignment of the whole contract to a stranger. The technical rule of law, recognized in Murray v. Harway, 56 N. Y. 337, cited for the plaintiff, by which a lessee's express covenant not to assign has been held to be wholly determined by one assignment with the lessor's consent, has no application to this case. The cause of action set forth in the complaint is not for any failure to deliver ore to Billing before his assignment to the plaintiff, (which might perhaps be an assignable chose in action,) but it is for a refusal to deliver ore to the plaintiff since this assignment. Performance and readiness to perform by the plaintiff and its assignors, during the periods for which they respectively held the contract, is all that is alleged; there is no allegation that Billing is ready to pay for any ore delivered to the plaintiff. In short, the plaintiff undertakes to step into the shoes of Billing, and to substitute its liability for his. The defendant had a perfect right to decline to assent to this, and to refuse to recognize a party, with whom it had never contracted, as entitled to demand further deliveries of ore. The cases cited in the careful brief of the plaintiff's counsel, as tending to support this action, are distinguishable from the case at bar, and the principal ones may be classified as follows: First. Cases of agreements to sell and deliver goods for a fixed price, payable in cash on delivery, in which the owner would receive the price at the time of parting with his property, nothing further would remain to be done by the purchaser, and the rights of the seller could not be affected by the question whether the price was paid by the person with whom he originally contracted or by an assignee. Sears v. Conover, *42 N. Y. 113, 4 Abb. Dec. 179; Tyler v. Barrows, 6 Rob. 104. Second. Cases upon the question how far executors succeed to rights and liabilities under a contract of their testator. Hambly v. Trott, Cowp. 371, 375; Wentworth v. Cock, 10 Adol. & E. 42, 2 Perry & D. 251; 3 Williams, Ex'rs (7th Ed.) 1723–1725. Assignment by operation of law, as in the case of an executor, is quite different from assignment by act of the party; and the one might be held to have been in the contemplation of the parties to this contract, although the other was not. A lease, for instance, even if containing an express covenant against assignment by the lessee, passes to his executor. And it is by no means clear that an executor would be

bound to perform, or would be entitled to the benefit of, such a contract as that now in question. Dickinson v. Calahan, 19 Pa. St. 227. Third. Cases of assignments by contractors for public works, in which the contracts, and the statutes under which they were made, were held to permit all persons to bid for the contracts, and to execute them through third persons. Taylor v. Palmer, 31 Cal. 240, 247; St. Louis v. Clemens, 42 Mo. 69; Philadelphia v. Lockhardt, 73 Pa. St. 211; Devlin v. New York, 63 N. Y. 8. Fourth. Other cases of contracts assigned by the party who was to do certain work, not by the party who was to pay for it, and in which the question was whether the work was of such a nature that it was intended to be performed by the original contractor only. Robson v. Drummond, 2 Barn. & Adol. 303; Waggon Co. v. Lea, 5 Q. B. Div. 149; Parsons v. Woodward. 22 N. J. Law. 196. Without considering whether all the cases cited were well decided, it is sufficient to say that none of them can control the decision of the present case. Judgment affirmed.

VANBUSKIRK et al. v. HARTFORD FIRE INS. CO.

(14 Conn. 141.)

Supreme Court of Errors of Connecticut. June, 1841.

W. W. Ellsworth, for plaintiffs. Hungerford & Cone, for assignee.

WAITE, J. The plaintiffs brought their suit, by foreign attachment, against Joseph Mortimer, and attached a debt claimed to be due to him from the defendants upon a policy of insurance. Having recovered judgment in that suit they brought their scire facias against the defendants to recover their demand. Payment was resisted, by the defendants, upon the ground of an assignment of the debt made to John Mortimer, previous to the attachment. It is found, by the court below, that no notice of that assignment was given to the defendants until long after the attachment.

The question arising in this case, is, whether the plaintiffs are entitled to recover.

If the case is to be governed by the laws of this state, it is clear, that the defence cannot prevail: for the rule here, is well settled, that, in order to perfect an assignment of a chose in action, as against bona fide creditors and purchasers without notice, notice of such assignment must be given to the debtor within a reasonable time; and unless such notice is given, creditors may attach and acquire a valid lien; and others may purchase the debt, and gain a title superior to that of the first assignee. Bishop v. Holcomb, 10 Conn. 444; Judah v. Judd, 5 Day, 534; Woodbridge v. Perkins, 3 Day, 364. And so far as regards subsequent purchasers, the same law is fully recognized and established in England. Williams v. Thorp, 2 Simons, 257; Dearle v. Hall, 3 Russ. 1; Loveridge v. Cooper, 3 Russ. 30; Foster v. Cockerell, 9 Bligh, 322; 2 Story, Eq. 301. Here, no notice of the assignment of the debt to John Mortimer was given to the defendants until after the attachment; and it is not claimed, that the plaintiffs had any knowledge of that assignment. They, therefore, by the law of this state, acquired a lien paramount to the title of the assignee. In this respect, an attaching creditor stands in a situation, very similar to that of a subsequent purchaser. He obtains a lien upon the debt, as valid as the title acquired by a purchaser.

But although it is not denied by the defendants, that such is the law of Connecticut, yet it is claimed by them, that the assignment was made in the state of New York, where a different rule of law applies in relation to assignments of choses in action; and that upon the principles of comity, the same effect ought to be given to the assignment here as would be given to it, in that state.

But does it appear, that the law of the state of New York differs from ours? It is found by the court, (and as we are informed in the language of the witness,) that "an assignment of a chose in action is effectual to convey the title to the assignee, upon delivery of the instrument; and no notice need be given, by the debtor, that such claim against him had been assigned." That undoubtedly is the law here, so far as regards the parties to the assignment. It is even good as against all persons who have notice of the assignment. But would it be effectual as against attaching creditors, and subsequent purchasers without such notice? That fact is not found by the court; nor, in our opinion, is it a necessary inference from what is found.

To justify the conclusion that the laws of the state of New York so widely differ from ours and those of England, upon a principle, which, we believe so correct and salutary, as that requiring notice to be given of the assignment of a chose in action, to protect it against the subsequently acquired rights of other persons, it ought to be made distinctly to appear, and not left to any forced construction.

What would be the effect of such a conflict of laws upon the present case, were it proved to exist, we do not deem it necessary to determine. Upon that question there are various and conflicting decisions. Manufacturing Co. v. Prall, 9 Conn. 487; Oliver v. Townes, 14 Mart. 97; Pomeroy v. Rice, 16 Pick. 22; Daniels v. Willard, 16 Pick. 36; Burlock v. Taylor, 16 Pick. 335.

But as we are not satisfied from the finding of the court below, that any material difference exists between the law of this state and that of New York, we are of opinion, that the plaintiffs are entitled to judgment for the amount due by the defendants on the policy, at the time the original writ was served upon them.

In this opinion the other judges concurred.

MOTT v. CLARK.

(9 Pa. St. 399.)

Supreme Court of Pennsylvania. Dec. Term, 1848.

Dec. 18. This was an ejectment to recover a moiety of two pieces of land, one moiety of which plaintiff was in possession of.

The main question arose out of the following facts: In 1820 John Clark obtained the title by a sheriff's deed to the whole property; but in fact he was trustee for his father, Vinson Clark, for a moiety. In 1821 John conveyed this moiety to Vinson Clark, the defendant, but the deed was not registered until 1836.

In 1831, John Clark mortgaged the whole property to Broadhead, the mortgage being registered in November. But according to the verdict Broadhead had notice at and before the date of this mortgage, of the real extent of John Clark's title, and of the deed to V. Clark.

In 1832, Broadhead, by deed which was never registered, assigned the bond and mortgage to Johnson, who had no notice of V. Clark's title.

In 1835, there was a judgment recovered by Johnson on another cause of action against John Clark, under which the whole of the property in question was, in 1837, sold and conveyed by the sheriff to Johnson. But at this sale notice was given of Vinson Clark's title to the moiety.

In 1844, Johnson conveyed to the plaintiff, who, it was assumed, had notice of V. Clark's title, and in 1845, he assigned him the mortgage. On the accompanying bond judgment had been entered in 1832. Whether this was assigned or not, could not be gathered from the bill of exceptions.

Under these circumstances the defendant contended that the sheriff's sale having passed but a moiety, on account of the notice given by V. Clark, the plaintiff's right under the mortgage was postponed: 1. Because of the notice to the mortgagee of the state of the title. 2. Because the assignment was not registered before Vinson Clark's deed was. 3. Because the mortgage merged in plaintiff's title under the sheriff's deed.

On this point the court (Jessup, P. J.) instructed the jury, that if Broadhead had notice of V. Clark's deed, plaintiff was bound by it.

The other exceptions were as follows: 1. The court permitted defendant to read the proceedings under the judgment on the bond whereby other property had been sold to Johnson subsequently to his purchase of the property in question. 2. They permitted defendant to examine John Clark to prove notice to Broadhead of the title and deed to V. Clark, and that this moiety of the land was included by mistake. 3. They also permitted defendant to prove that Johnson at the sheriff's sale gave but the value of a moiety of the premises. 4. The defendants had shown several judgments against J. Clark, prior to that under which plaintiff purchased—which were liens—and that no purchase-money was paid by him to the sheriff. The court told the jury that if plaintiff held under the mortgage only, then the amount of his bid, which was applicable to other creditors on their liens who had acquiesced, should be applied to the payment of the mortgage debt.

Mr. Reeder, for plaintiff in error. J. M. Porter, contra.

ROGERS, J. (after stating the two titles under the mortgage and the sheriff's sale.) Either of the titles as above stated would entitle the plaintiff to a verdict. But the defendants contend the plaintiff cannot recover because Thomas Clark, on the 5th of January, 1841 conveyed an undivided half of the premises (being the property in dispute) to his father Vinson Clark. That this deed was acknowledged on the day of its date, and was recorded May 1st, 1821. The deed being recorded before the sheriff's sale, and moreover V. Clark having given notice at the sale, the court properly instructed the jury that the purchaser at the sheriff's sale obtained no title unless the deed from John Clark to V. Clark was fraudulent. The jury decided that it was a bona fide conveyance. There is therefore an end to the title grounded on the sheriff's deed.

Has then the plaintiff, the assignee of Broadhead, a title under the mortgage?—and this is a principal point in this case. The mortgage to Broadhead was recorded 28th November, 1831, but the deed from J. Clark to V. Clark, although prior in date, was not recorded until May 1st, 1836. And this would be decisive of the case; but the defendant replies, that although his deed is recorded upwards of five years after the entry of the mortgage, he is not to be postponed because the mortgagee had actual notice of the conveyance of a moiety of the property by John Clark to his father, V. Clark. The fact of notice was properly left by the court to the jury, who found that the mortgagee had notice. But in answer the plaintiff contends that admitting this to be so, he is an assignee without notice, and, however it may be as between the mortgagee and third persons, he takes the property discharged of all equities of which he had no knowledge. The question, therefore, is (granting he had no notice, which is undoubted), does the assignee stand in the same or a better position than the mortgagee? On this point the court instructed the jury, that the assignment of a mortgage is not so within the recording acts, as to give the assignee protection against an unrecorded deed, of which the mortgagee had full notice. That a mortgagee is a purchaser within the statute of frauds is ruled in Lancaster v. Dolan, 1 Rawle, 245, on the authority of Chapman v. Emery, Cowp. 278. Now it has been repeatedly ruled, that al-

though a purchaser has notice of an equitable claim, by which his conscience is affected, yet a person purchasing from him bona fide, and without notice of the right, will not be bound by it. So a person having notice of an equitable claim may safely purchase of a person who bought bona fide, and without notice. These positions are elementary, and are fully sustained by the authorities cited. If, therefore, a mortgagee is to be considered on the footing of a purchaser, it would seem to follow that an assignee without notice takes the property discharged of a latent equity, if any existed. These cases, although analogous, are not expressly in point, but the case of an assignee of a bond and mortgage is expressly ruled in Livingston v. Dean, 2 Johns. Ch. 479. He takes it subject to all the equity of the mortgagor, but not to the latent equity of a third person. To subject him to such an equity he must have express or constructive notice at the time of the assignment. It is a general and well-settled principle, says the chancellor in Murray v. Lylburn, 2 Johns, Ch. 443, that the assignee of a chose in action takes it subject to the same equity it was subject to in the hands of the assignee. 2 Vern. 691-765; 1 P. Wms. 497; 1 Ves. 122; 4 Ves. 118. But this rule is generally understood to mean the equity residing in the original obligor or debtor, and not an equity residing in some third person against the assignor. He takes it subject to all the equity of the obligor, say the judges in the very elaborately argued case of Norton v. Rose, 2 Wash. (Va.) 233, on this very point, touching the rights of the assignee of a bond. The assignee can always go to the debtor and ascertain what claims he may have against the bond or other chose in action, which he is about purchasing from the obligor; but he may not be able with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries, and for this reason the claim of the assignee, without notice of a chose in action, in the late case of Redfearn v. Ferrier, 1 Dow, 50, was preferred to that of a party setting up a secret equity against the assignor. Lord Eldon observed in that case, that if it were not to be so, no assignment could ever be taken with safety. It would be utterly impossible to guard against combination by the mortgagor and mortgagee, particularly with the aid of the owner of the latent equity. If V. Clark the owner as he alleges of the moiety, loses his property, it is his own laches for it was his duty to put his deed on record as notice of his title. Having neglected his duty, he is postponed to the mortgagee, who is a purchaser within the statute of frauds. At law his title is available against the owner, who neglected to put his deed on record. The assignee stands in the position of the mortgagee so far as regards the legal title, but stands, as the authorities evidently show, unaffected with an equity of which he had no knowledge or possibility of knowledge, and against which it would be impossible for him, with the most careful diligence, to guard himself. If he had notice of the outstanding equity, he would be in the same position as the mortgagee and equity in such case would relieve the owner of the estate, notwithstanding his neglect. The principle on which courts of equity act, is that actual notice is equivalent to constructive notice derived from the registry of the deed. The intention of the acts requiring deeds to be recorded was to secure subsequent purchasers and mortgagees against prior secret conveyances and fraudulent encumbrances; and therefore when a person has notice of a prior conveyance, it is not a secret conveyance by which he can be prejudiced; for he can be in no danger where he knows of another encumbrance because then he might have stopped his hand from proceeding, and therefore is not the person whom the statute meant to relieve. The court of chancery affords relief, because it is against equity for him to protect himself by his legal title when he had express notice of a prior conveyance or encumbrance. But it is evident this must be personal to the mortgagee, and cannot affect his innocent assignee. Why should an innocent assignee be deprived of the benefit of the legal title, in favour of a person who, by his neglect to put his deed on record, has put it in the power of the mortgagee to perpetrate a fraud? It is an invariable principle of equity, that where one of two innocent persons must suffer, he who is the cause of the loss must bear it. But it is contended Jeromus Johnson is postponed because he did not put his deed or assignment on record until after V. Clark's deed was recorded. In Lightner v. Mooney, 10 Watts, 407; Ebner v. Goundie, 5 Watts & S. 49; Goundie v. Water Co., 7 Pa. St. 233,—it is ruled, under our statute, that where there are two deeds of conveyance of different dates, neither of which is recorded within six months, that which is first recorded will take priority. And this would be conclusive, but for the answer that the assignee is not bound to register his assignment, and is in no default, as is conclusively shown by Mr. Justice Kennedy in Craft v. Webster, 4 Rawle, 254. The learned judge, after an able review of the point, comes to the following conclusion: "Having shown that an assignment of a mortgage is not a conveyance of and concerning land, whereby the same may be in any way affected in law or equity (which are the words of the recording act), it is not necessary that it should be recorded, as required by that act, to give it validity against a subsequent assignment made by the mortgagee to a third person for valuable consideration, without notice of the first. If the first assignment were in writing, proved and recorded, the

recording would afford the assignee no additional protection against a claim under a subsequent assignment."

This is the principal point in the case; but, as it goes down for another trial, it becomes necessary briefly to notice the other exceptions. We cannot see the relevancy of testimony as admitted in the first bill, because it was the sale of other property with no connexion that we can perceive with this case unless it should appear to be for the same debt; in which case, the proceeds of sale would be applicable to the payment of the mortgage. 2d. We cannot see what interest J. Clark has in the controversy. He is not directly interested in the event, nor would a verdict and judgment in this case be evidence in any suit to which he may be a party. There has been nothing exhibited to us to show that he has an interest to have the mortgage extinguished by the rents. So far as appears, if he has any interest, it is to prove that the mortgagor has been paid, as perhaps, in that event, it might render him liable to an action at the suit of the assignee. The evidence contained in the third bill was improperly admitted, for the value of the property in dispute has nothing to do with the issue, and is only calculated to perplex the minds of the jury, by exciting an impression that Johnson had made an advantageous bargain. That Johnson paid only the one-half of the value of the property, after the notice of V. Clark at the sheriff's sale cannot affect his title to the property, and ought not to have the slightest weight in the determination of this case.

There is no error in proving that Johnson received the benefit of the whole proceeds of the sheriff's sale, by retaining it on account of his mortgage. The effect of the evidence will depend on other circumstances. For, if there was a surplus over and above the liens against the estate, the mortgagor would have the right to apply that surplus to the extinguishment of the mortgage. But if there was no surplus but money applicable to judgment creditors, which has been misapplied, they are the persons who, having been injured, have alone the right to complain. The sheriff would be answerable to the creditors, and Johnson would be answerable to the sheriff, and nothing but an express contract or agreement would protect them. The court, therefore, did injustice to the plaintiff in charging the jury that this money having been received by Johnson for Clark's property, and not accounted for by him to other creditors, and they having acquiesced therein, should now be applied by the jury to cancel, so far as it goes, the indebtedness of John Clark to Johnson. Admitting the fact that Johnson received money which he has not accounted for to the other creditors, yet there is no evidence of any agreement by the creditors that the money should be misapplied. If so, they have their remedy against Johnson, and not the mortgagor; and the court had no right to expose Johnson to the risk of paying the money not only to the mortgagor, but to the creditors also.

I refrain from noticing the question of merger, because it forms no part of the case now before the court. It will be time enough to decide when it properly arises.

Judgment reversed, and a venire de novo awarded.

ELLER et al. v. LACY.

(36 N. E. 1088, 137 Ind. 436.)

Supreme Court of Indiana. April 7, 1894.

Appeal from circuit court, Hamilton county; R. R. Stephenson, Judge.

Action by John Lacy against Joseph W. Eller and others. From a judgment overruling a demurrer to the complaint, defendants appeal. Reversed.

Roberts & Vestal, for appellants. Shirts & Kilbourne, for appellee.

HACKNEY, J. The appellee sued to set aside as fraudulent the conveyance of certain real estate from the appellant Joseph W. Eller. The complaint alleges that in the year 1878 the appellee held a judgment against Joseph W. Eller and Jackson, Albert, and William Lacy for $6,750, and proceedings were pending to review said judgment; whereupon the parties to said judgment entered into the following agreement as to said judgment and said proceedings to review: "This cause settled and compromised on the following terms, to wit: The judgment rendered in this court on the 15th day of September, 1877, in favor of the said John Lacy, and against the plaintiffs in this suit, for the sum of $6,750, is fully paid and satisfied, the receipt whereof is hereby acknowledged by the said John Lacy, and he is to enter satisfaction in full of said judgment on the judgment docket of said court. The plaintiffs are to pay all costs in this cause, and to pay to said John Lacy the sum of $50 each and every year as long as he, the said John Lacy, may live; and, in case the above sum should prove insufficient for the reasonable support of defendant in consequence of his long-protracted sickness, then and in that case the plaintiffs are to pay, in addition to that sum, a sufficient sum to furnish said defendant a reasonable support. [Signed] John Lacy. William Lacy. J. W. Eller. Jackson Lacy." The entry of the satisfaction of said judgment is then alleged, and the complaint further alleges that "the defendants, except the said Eller herein, have paid plaintiff each year the fifty dollars due from them and from each of them; they also paid such sum in addition as has been necessary in case of sickness of plaintiff, as in said agreement provided. But the plaintiff avers that about five years ago the defendant Eller failed and refused, and has ever since failed and refused, to pay his portion of said money, or any part thereof; that judgments have been rendered in favor of plaintiff in this court for those installments due from him; that executions have been returned, 'No property found whereon to levy;' * * * that said judgment, interest, and costs amounted at the time to about three hundred dollars." Then follow allegations of the ownership by said Eller of certain real estate, and that the same was fraudulently conveyed by him to his two daughters, a conveyance by one daughter to the other, who is an appellant herein, the insolvency of said Joseph W. Eller, and the fact that he had not at the time of said conveyance, nor since, property sufficient to pay said debt due and to become due. A judgment against said Joseph W. Eller for $200 is sought under said agreement, and it is prayed that said conveyances be set aside "to satisfy the judgment heretofore taken by plaintiff against the defendant J. W. Eller, as well as the judgment taken in this action," etc.

The circuit court overruled the demurrer of the appellants to the complaint, and the correctness of that ruling is attacked here for several reasons. The first objection to the complaint is that it seeks to recover against one of several joint obligors, and to set aside the conveyance of one of several joint obligors, without an allegation that the others of such obligors have not sufficient means and property from which the plaintiff's claim could be made in whole or in part. The appellee concedes expressly that "it is not clear from the face of the contract whether it was intended to be $50 from each of the promisors." We need not determine whether the agreement gave the appellee $150 "each and every year," but to our minds it is perfectly clear that, whatever sum was secured by the agreement, it was, by the terms of the agreement, payable by the obligors jointly. The language of the agreement is that "the plaintiffs are to pay * * * to said John Lacy," and "the plaintiffs are to pay in addition." There is not one word in the agreement casting the slightest doubt upon the character of the instrument in this respect. But it is said that the parties construed the agreement as several, "because the complaint shows that each of the other parties had paid $50 per annum, and that the appellant Joseph W. Eller had paid a similar sum per annum until four or five years prior to the bringing of the suit." The complaint alleges, as will be seen, that "the defendants," excepting Eller, "have paid plaintiff each year the fifty dollars due from them and from each of them; they also paid such sum in addition" as necessary in sickness. Omitting the words "due from them and each of them," which are but a conclusion of the pleader, and confining the inquiry to the fact, or the acts of the parties so paying, it does not appear that there was any severance in any payments, either as to persons or amounts. The failure of Eller to contribute to such payments neither changed the character of the contract nor created a construction of it, nor did that fact release the other obligors from the payment of the whole sum due from time to time by the terms of the contract. It is unnecessary that we should intimate an opinion as to whether a construction by the parties of a plain and unambiguous contract may prevail as against the only possible construction or legal interpretation its terms will permit. If the obli-

gation is joint, there is not only no action stated for the claim to a personal judgment for the $200 against Eller upon the obligation, but there could be no cause for setting aside a conveyance of his property without exhausting those who were, as to such sum, liable jointly with him. As long as the legal remedy existed against part of the joint debtors, equity would not extend its relief as to another of such debtors. This is elemental, but our attention has fallen upon two cases involving the exact question before us. Wales v. Lawrence, 36 N. J. Eq. 207; Randolph v. Daly, 16 N. J. Eq. 313. Against this conclusion, appellee's learned counsel do not contend further than we have suggested,—that the parties had construed the contract as several.

It remains to inquire as to the sufficiency of the complaint upon the allegations of the recovery of judgments against Eller alone upon said contract. It will be observed that a personal judgment is not sought upon the judgments so alleged against Eller, and therefore the complaint as to them could be sufficient only to reach the property so alleged to have been fraudulently conveyed. While a copy of the judgment was not a necessary exhibit with the complaint, yet it will be observed that some fact was necessary to have been alleged to show the character and validity of the judgment. Here it does not appear that the alleged judgment debtor was brought into court by any process, nor are the dates, amounts, or character of the judgments given. It does not appear that no other than Eller was a defendant in the cases wherein the alleged judgments were rendered. If the element of the complaint seeking to set aside the conveyances were eliminated, the complaint would probably be deficient in stating a cause of action for a personal judgment upon said judgments. However, since a personal judgment upon this branch of the appellee's claims is not sought, it is unnecessary to consider and determine the sufficiency of the complaint for that purpose. The court erred in overruling the demurrer to the complaint, and for this error the judgment is reversed.

ANGUS v. ROBINSON et al.

(8 Atl. 497, 59 Vt. 585.)

Supreme Court of Vermont. March 25, 1887.

Exceptions from Orleans county court, February term, 1885; Ross, J., presiding.

Action of assumpsit. Heard on demurrer to the fourth count of the declaration. Demurrer sustained. The facts appear in the opinion.

Crane & Alfred, for plaintiff. Edwards, Dickerman & Young, for defendants.

POWERS, J. The fourth count demurred to sets out a contract made by the plaintiff and Goff jointly, of the one part, and the defendant's intestate, of the other part, whereby certain stock and bonds of the Montreal, Boston & Portland Railway were sold to such intestate, and certain labor was to be done upon said railway as part consideration for such sale. It also avers the delivery of certain other bonds by said Angus and Goff to the intestate to insure the performance of their contract. It further avers full performance of the contract by Angus and Goff. In this posture of things the plaintiff discloses a perfected right of action in Angus and Goff to recover the unpaid purchase money of the stock and bonds sold, and also the bonds put up as collateral, or their proceeds if converted by the intestate to his own use. The count further avers that, after performance by Angus and Goff of the contract on their part, the intestate settled with Goff for his interest in the contract and his interest in the collateral bonds; and the plaintiff's contention is that he may now maintain an action in his own name to recover one-half the unpaid purchase money and half the proceeds of the collateral bonds. We think such action cannot be maintained. The sale of the stock and bonds with the collateral undertaking to put the railway in running condition was the consideration of the intestate's promise. The delivery of the collateral bonds was a mere incident of such sale, -a mere security for the performance of the principal contract by Angus and Goff.

If Robinson had contracted with Angus and Goff severally for the share of each in the stock and bonds, and promised them severally to pay for such shares, it would be quite another thing. But, however, as between themselves, the ownership of the stock and bonds in truth was, the declaration states their interest to be "joint and equal," and sets them out as joint contractors; and the principle that joint contractors must all sue upon their joint contract is too elementary to require the citation of authorities. Robinson's settlement, then, with Goff for his interest was in substance a satisfaction of the joint indebtedness pro tanto. What Goff received belonged to Angus and Goff, and the balance due from Robinson belongs to them jointly. It is not the case of the novation of a contract. If Angus, Goff, and Robinson had mutually agreed upon a disintegration of the demand, and Robinson had promised to pay Angus his share, the case would be different. But here Angus was no party to the severance made by Goff and Robinson, and was not bound by it; and, if it did not bind him, it did not bind them in respect to him.

The cases cited by the learned counsel for the plaintiff are not in conflict with this holding. In Hall v. Leigh, 8 Cranch, 50, a consignee sold merchandise for two owners. But each owned one-half severally, which fact was disclosed in the consignment, and separate instructions for the sale were made. In Beach v. Hotchkiss, 2 Conn. 697, defendant had paid one of several joint contractors his share of the common debt, but had not liquidated the account with the others. Assumpsit cannot be maintained by the others severally for their share. Some language is used by the court giving support to the plaintiff's contention in the case at bar, but the result of the case is inconsistent with it. In Austin v. Walsh, 2 Mass. 401, A. and B. jointly ship goods consigned to C. to sell. After shipment, A. and B. sever their interest in the adventure, and A. gives B. written instructions to C. to pay B. his moiety. B. shows this direction to C., who refuses to account to B., but says he will pay B. if proceeds belong to him. It was held that the agreement between A. and B. to sever their interest would not entitle them to sue C. severally, unless, after notice, C. had consented to it, and to account to each for his share. But as the action was not on the original contract, but on C.'s promise to pay B. if he was entitled, and he had shown he was entitled, he might recover.

Without further review, the true rule appears to be that where all the parties in interest in the joint contract agree to a severance of the joint interest, and the obligor promises to pay each his several share, each may sue therefor; the suit being based upon the promise to pay each severally, and not on the original joint promise. Here the count is clearly in assumpsit, and the right of recovery is based upon the original undertaking. The act of bringing the suit cannot in law be effectual to work a severance of the joint interest of Angus and Goff, and thus, by way of a ratification of the unwarranted severance made by Goff and Robinson, give Angus a several action. The severance must first be made, and a new promise must appear as the basis of the new right of action springing from the severance.

The judgment of the county court sustaining the demurrer, and adjudging the plaintiff's new fourth count insufficient, is affirmed, and the case remanded.

SMITH v. WILLIAMS.

(1 Murph. 426.)

Supreme Court of North Carolina. July, 1810.

This was an action on the case for a breach of warranty in the sale of a negro. The declaration stated, "that the defendant warranted the negro to be sound and healthy as far as he knew; that the negro was unsound and unhealthy, being afflicted with a rupture, and that the defendant well knew he was so afflicted at the time of the warranty and sale." The jury found a verdict for the plaintiff, subject to the opinion of the court on a point of law reserved in the course of the trial, viz.: Whether the plaintiff could be permitted to prove such a warranty, when at the delivery of the negro, upon the sale, he received from the defendant a written instrument, but not under seal, in the following words:

"Know all men by these presents, that I, Obed Williams, of the county of Onslow, and state of North Carolina, have bargained and sold unto David Smith, of the aforesaid county and state, one negro fellow, named George, about thirty years of age, for and in consideration of three hundred dollars. I do warrant and defend the said negro against the lawful claim or claims of any person or persons whomsoever, unto him the said Smith, his heirs and assigns forever. Given under my hand this 29th January, 1802.

"Obed Williams.

"Teste, George Roan."

This instrument had been proved in Onslow county court, and registered. The point reserved was sent to this court.

TAYLOR, J. The contract between the parties is stated at length in the special case, and appears to be both formally and substantially a bill of sale in all respects, except as to the want of a seal. This omission, however, is so important in the legal estimation of the paper, that it cannot be classed amongst specialties, but must remain a simple contract, on which no additional validity can be conferred by the subsequent registration. For I do not apprehend that any legal effect can be given to a paper by recording it, if that ceremony were not required by law.

It might not, however, be an useless enquiry to consider, whether a paper containing nearly all the component parts of a specialty or deed, does not advance some greater claims to be respected in the scale of evidence, than such proofs of a contract as rest upon the memory of witnesses.

The solemnity of sealed instruments has been, from the earliest periods of the law, highly regarded; because the forms and ceremonies which accompany them, bespeak deliberation in the parties, and afford a safe ground for courts and juries to ascertain and settle contested rights. This deliberation is inferred, not from any one circumstance attending the transaction, but as the general effect of the whole. Thus in Plowd. 308, B: "It is said that deeds are received as a lien final to the party making them, although he received no consideration, in respect of the deliberate mode in which they are supposed to be made and executed; for, first, the deed is prepared and drawn; then, the seal is affixed; and lastly, the contracting party delivers it, which is the consummation of his resolution." Hence it appears, that the law gives to deeds a respect and importance which it denies to any other contracts; not an empty and unmeaning respect, but such as properly arises from the existence of all those circumstances which are calculated to fix and make authentic the contracts of men.

A contract cannot be a deed, if either it is not prepared and drawn; if the seal be not affixed, or if it be not delivered; but still if the deliberation is inferred from all these circumstances, it is fair reasoning to presume some degree of deliberation from any one or two of them, and to give to the paper, when it is introduced as evidence of the parties' transaction, precisely such credence as belongs to it, from its partaking more or less of the nature of a deed.

To give this rule a practical application to the case before us, the conclusion would be, that as the paper is without a seal, it cannot be a deed, and is therefore not decisive evidence as that instrument is; it is not a final lien; but as it possesses some of the essentials of a deed, viz. a formal draught and delivery, so far it shall be regarded as evidence of no slight nature of the fact it is introduced to establish.

The writers on the law of evidence have accordingly, in arranging the degrees of proof, placed written evidence of every kind higher in the scale of probability than unwritten; and notwithstanding the splendid eloquence of Cicero, to the contrary, in his declamation for the poet Archias, the sages of our law have said that the fallibility of human memory weakens the effect of that testimony which the most upright mind, awfully impressed with the solemnity of an oath, may be disposed to give. Time wears away the distinct image and clear impression of the fact, and leaves in the mind, uncertain opinions, imperfect notions and vague surmises.

It is, however, contended by the plaintiff, that contracts by our law are distinguished by specialty and by parol; that there is no third kind, and that whatever is not a specialty, though it be in writing, is by parol. To establish this position, a case is cited from 7 Term R. 350, by which it is certainly proved. But the position being established, whether it will authorize the inference that parol evidence is admissible to vary and extend written evidence, will best appear from an examination of the case, and from some attention to the question which called for the solution of the court.

In the case cited, the declaration states, that the defendant, being indebted as administratrix, promised to pay when requested, and the judgment is against her generally. From this statement it is manifest, that the promise could not be extended beyond the consideration which was in another right as administratrix, and made to bind the defendant personally. But in order to avoid this objection, it was contended, that the promise being reduced to writing, the necessity of a consideration was dispensed with; and that the fact of its having been made in writing, might well be presumed after verdict, if necessary to support the verdict, which latter position was conceded by the court.

It is, then, perfectly evident, that the only question in the case was, whether nudum pactum could be alleged against a contract in writing, but without seal? That it could not, had been a notion entertained by several eminent men, and amongst the rest by the learned commentator, who observes, that "every bond, from the solemnity of the instrument, and every note, from the subscription of the drawer, carries with it internal evidence of a good consideration." This doctrine, however, is inaccurate as applied to notes, when a suit is brought by the payee, and is only correct as between the indorsee and drawer. To demonstrate the propriety of the objection, it became necessary for the court, in Ram v. Hughes, to enter into a definition and classification of contracts, into those by specialty and those by parol; to which latter division every contract belongs that is not sealed, though it may be written. Every written unsealed contract is, therefore, in the strict language of legal precision, a parol contract, and like all others, must be supported by a consideration.

But let it be considered, what the court would have said, if the case, instead of requiring them to give a precise and comprehensive definition of contracts, had called upon them for a description of the evidence by which contracts may be supported. They would, I apprehend, have said, (because the law says so,) the evidence which may be adduced in proof of a contract is threefold: 1st, matter of record; 2d, specialty; 3d, unsealed written evidence, or oral testimony. It is therefore necessary to distinguish between a contract, and the evidence of a contract, for though they may be, and are, in many cases, identified; yet, in legal language, a parol contract may be proved by written evidence. This is the case now before us, and this brings me to the question it presents, which I understand to be, whether oral evidence is proper to extend and enlarge a contract which the parties have committed to writing? The first reflection that occurs to the mind upon the statement of the question, independent of any technical rules, is, that the parties, by making a written memorial of their transaction, have implicitly agreed, that in the event of any future misunderstanding, that writing shall be referred to, as the proof of their act and intention; that such obligations as arose from the paper, by just construction or legal intendment, should be valid and compulsory on them; but that they would not subject themselves to any stipulations beyond their contract; because, if they meant to be bound by any such, they might have added them to the writing; and thus have given them a clearness, a force, and a direction, which they could not have by being trusted to the memory of a witness. For this end, the paper is signed, is witnessed, and is mistakenly recorded. But the plaintiff says, "Besides the warranty of title contained in the writing, the defendant made me another warranty as to the quality, which I can prove by a witness present at the time; and though he has complied with the warranty which was committed to writing, yet he has broken the one which was orally made, whence I am injured and seek compensation."

We are then to decide, whether the law deems such proof admissible.

By the common law of England, there were but few contracts necessary to be made in writing. Property lying in grant, as rights and future interests, and that sort of real property, to which the term incorporeal hereditament applies, must have been authenticated by deed. So the law remained until St. 32 Hen. VIII., which, permitting a partial disposition of land by will, required the will to be in writing; but estates in land might still be conveyed by a symbolical delivery in presence of the neighbors, without any written instrument; though it was thought prudent to add security to the transaction by the charter of feoffment. The statute of 29 Car. II., commonly called the statute of frauds, has made writing and signing essential in a great variety of cases wherein they were not so before, and has certainly increased the necessity of caution in the English courts, with respect to the admission of verbal testimony, to add to or alter written instruments, in cases coming within the provisions of that statute. That law, being posterior to the date of the charter under which this state was settled, has never had operation here; so that the common law remained unaltered until the year 1715, when a partial enactment was made of the provisions of the English statute.

The law must therefore be sought for in cases arising before the statute of frauds, and expositions upon that statute are no otherwise authoritative than as they affirm or recognize the ancient law. But I believe there can be no doubt that the rule is as ancient as any in the law of evidence, and that it existed before the necessity of reducing any act into writing was introduced.

In Plowd. 345, Lord Dyer remarks, "Men's deeds and wills, by which they settle their estates, are the laws which private men are allowed to make, and they are not to be al-

tered even by the king, in his courts of law or conscience."

In Rutland's Case, 5 Coke, the court resolved that it was very inconvenient that matters in writing should be controlled by averment of parties, to be proved by uncertain testimony of slippery memory, and should be perilous to purchasers, farmers, &c.

The case of Meres v. Ansel, 3 Wilson, 275, is directly in point upon the general principle, to shew that parol evidence shall not be admitted to contradict, disannul or substantially vary a written agreement.

In 2 Atk. 384, Lord Hardwicke says: "It is not only contrary to the statute, but to common law, to add anything to a written agreement by parol evidence."

All written contracts, says Justice Ashurst, whether by deed or not, are intended to be standing evidence against the parties entering into them. 4 Term R. 331.

1 Ves. Jr. 241, parol evidence to prove an agreement made upon the purchase of an annuity that it was redeemable, was rejected.

In a very recent case, in 7 Ves. 211, we are furnished with the opinion of the present master of rolls, Sir William Grant, than whom no judge ever ranked higher in the estimation of his contemporaries, for profound and accurate knowledge in legal science, and a proper and discriminating application of well grounded principles to the cases which arise in judgment before him. His observations are, "By the rule of law, independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that enquiry that the rule was adopted. Though the written instrument does not contain the terms, it must, in contemplation of law, be taken to contain the agreement, as furnishing better evidence than any parol can supply."

To these authorities, I will add a decision of the circuit court of Pennsylvania, because it appears to be in principle the very case under consideration.

An action on the case was brought by the assignee of a bond against the assignor, upon a written assignment in general terms. The plaintiffs offered oral evidence to shew that the defendant had expressly guarantied the payment of the bond. "Chase, Justice. You may explain, but you cannot alter a written contract by parol testimony. A case of explanation implies uncertainty, ambiguity and doubt upon the face of the instrument. But the proposition now is a plain case of alteration; that is, an offer to prove by witnesses, that the assignor promised something beyond the plain words and meaning of his written contract. Such evidence is inadmissible, and has been so adjudged in the supreme court, in Clark v. Russell, 3 Dal. 415. I grant that chancery will not confine itself to the strict rule, in cases of fraud, and of trust; but we are sitting as judges at common law, and I can perceive no reason to depart from it."

I suppose the above authorities are amply sufficient to establish the proposition for which they are cited, and therefore I forbear to make any other references for that purpose. The exceptions to the general rule may be comprised under the heads of fraud, surprise, mistake, in cases of resulting trust, to rebut an equity, or to explain latent ambiguities; and there may also be some other cases which cannot be properly ranged under the titles specified. But as the case stated is, in my opinion, directly opposed by the general rule, so far as it seeks to establish the proof of warranty as to quality, by parol, and presents no fact to bring it within any of the exceptions, it would be needless to multiply authorities with respect to them.

As to the exception on the ground of fraud, I conceive that only occurs, where something intended to have been inserted in the contract, is omitted through the misrepresentation or unfair practice of one of the parties. In such case, the omission may be supplied by parol evidence. But there is no allegation here that the additional warranty was intended or understood by either party to have been inserted in the agreement.

It is also necessary to attend to the nature of the remedy adopted by the plaintiff in this case, which is founded on the warranty, and is in assumpsit. The questions arising upon the general issue are, whether the warranty was made, and whether it was true at the time of making. For if the warranty were made, and not complied with, it is wholly immaterial whether the defect was known to the seller or not,—a principle that seems to extend to every case where the plaintiff proceeds on the warranty. But in an action of deceit, the scienter or fraud is a material part of the declaration, and must be brought home to the defendant to authorize a recovery against him, and in such case it seems, from the authorities, that proofs of the fraudulent conduct of the defendant may be drawn from sources dehors the written contract. It cannot be contended that inserting the scienter in a declaration on the warranty, will convert it into an action of deceit founded on tort. In the latter action, the knowledge of the defendant, or something equivalent to it, by which the fraud is charged, is a substantive allegation, and must be proved; in the former, it is merely surplusage, and may be rejected.

COOPER v. KANE.

(19 Wend. 386.)

Supreme Court of New York. 1838.

This was an action of replevin, tried at the Albany circuit in October, 1835, before the Hon. Hiram Denio, then one of the circuit judges.

The action was in the detinet for detaining a quantity of sand taken from a lot in the city of Albany belonging to the plaintiff, which the defendant had excavated under a contract with the plaintiff, so as to make the lot conform to a profile or plan of the streets established by the corporation. The contract was in writing; the defendant was to excavate the lot and make the necessary embankments within a limited time, for which he was to be paid by the plaintiff $180, when the work was done. The defendant completed the job and was paid the stipulated price. Whilst engaged in the work, the defendant placed a large quantity of sand, which was taken off of the lot in order to make it conform to the required plan, on an adjoining lot not belonging to the plaintiff, and when requested by the plaintiff to permit her to take it away, he refused such permission; for this detention the action was brought. There was no stipulation in the contract as to whom the sand, taken from the lot in making the excavation, should belong after it was taken off the lot. The defendant then offered to prove a custom of the city of Albany which had existed for a great number of years and was well known and understood, that in the excavation of lots, the material excavated belonged to the excavator and not to the owner of the lot, unless there was an express reservation in the contract to the contrary. The judge rejected the testimony, and instructed the jury, that on the evidence adduced the plaintiff was entitled to their verdict, who accordingly found a verdict for the plaintiff with six cents damages, and six cents costs, and assessed the value of the property at $157. The defendant moves for a new trial. The cause was submitted on written arguments.

J. Holmes, for plaintiff. C. M. Jenkins, for defendant.

NELSON, C. J. I am inclined to the opinion that the evidence of the custom in respect to contracts like the one out of which this action has arisen, by way of explaining it, and which was offered by the defendant for that purpose, was admissible. It did not go to vary any express or necessarily implied stipulations between the parties therein contained, but rather to establish what amounted to a complete performance agreeably to the presumed understanding of the parties.

Mr. Starkie says (2 Starkie, Ev. 258, 259), "where parties have not entered into any express and specific contract, a presumption nevertheless arises, that they meant to contract and to deal according to the general usage, practice and understanding, if any such exist, in relation to the subject matter." The same rule of evidence is also recognized by Phillipps (volume 1, pp. 420, 421), and Lord Kenyon remarked in Whitnel v. Gratham, 6 Term R. 398, that evidence of usage was admissible to expound a private deed, as well as the king's charter. The right of carriers, dyers, wharfingers, &c. to a lien on the goods entrusted to them for their compensation, is frequently established by usage, independently of the contract. In Rushforth v. Hadfield, 6 East, 519, Lord Ellenborough permitted the defendants (common carriers) to go into proof of common usage to detain the goods for a general balance, on the ground of an implied agreement arising out of it between the parties. He observed that if there be a general usage of trade to deal with common carriers in this way, all persons dealing in the trade are supposed to contract with them upon the footing of the general practice, adopting the general lien into their contract. Lawrence, J., admitted that the lien must be by contract between the parties, but observed that usage of trade was evidence of the contract, and if so long established as to afford a presumption it was commonly known, it was fair to conclude the particular parties contracted with reference to it. In Kirkman v. Shawcross, 6 Term R. 14, the dyers, dressers, whisters, printers, &c., of a neighborhood, held a public meeting and entered into an agreement that they would receive no more goods in the way of their trade, except on the condition that they should have a lien on them for a general balance, which was extensively published. The court held that any person who delivered goods to them after notice must be deemed to have assented to the terms prescribed; and, as we have seen, notice might be inferred from the general notoriety of the terms thus published.

Now, in this case, there is simply an agreement to excavate the earth in a certain street and to make the necessary embankment, according to a map of the corporation, for a given compensation. Nothing is said about the surplus earth, where it is to be laid, or what is to be done with it. Would it be a workmanlike execution of the contract to pile it upon the adjacent bank? or may the contractor dispose of it as he sees fit, and as most convenient and profitable to himself? It appears to me, the solution of these questions may very well be referred to common usage in such cases, if any exist; and that if it should be proved as said by Lawrence, J., "It is fair to conclude the particular parties contracted with reference to it." This usage may often have a very important influence upon the minds of the parties as exemplified in this case: for the value of the materials, which the plaintiff has recovered, nearly equals the price of the job. If in fact the usage exists, and the contract was made in reference to it, serious injustice must be the result of upholding the verdict.

New trial granted.

GRAY v. CLARK et al.

(11 Vt. 583.)

Supreme Court of Vermont. Washington. July, 1839.

Ejectment for a third of an acre of land in Marshfield. Plea, not guilty, and trial by jury. Upon the trial in the court below, it appeared in evidence, that on the 26th day of July, 1826, Luther Hunt deeded the land in controversy, with some sixty seven acres more, to Eli Wheelock, and the lands so deeded are described as follows:

"All that part of lot No. three in the fifth range of lots in said town, meaning to convey all that part of said lot that was deeded to me by Daniel Wilson on the 20th day of August, 1823, bounds the same, being more or less; also, about one third of an acre of land of lot No. three, in the fifth range, lying south of the road, bounded westerly by the land conveyed to the school district, north by the road, easterly by the western line of Mr. Carleton, meaning the same land that Luther Hunt's buildings stand on, having recourse to the deed from English to said Wilson for more particular bounds."

The consideration of this deed was eight hundred and fifty dollars. On the same 26th of July, 1826, Wheelock executed to said Hunt, for the consideration of eight hundred dollars, a mortgage deed of lands described as follows: "all that part of lot No. three in the fifth range of lots in said town, meaning to convey all that part of said lot that Luther Hunt deeded to me this day, excepting seventeen acres lying in the southeast corner of said lot, also including one quarter of an acre which James English deeded to Daniel Wilson, and *Wilson to Hunt, to Wheelock," to secure the payment of eight hundred and fifty dollars, specified in four promissory notes, in the condition of said mortgage deed mentioned. The land in controversy is the piece described in the last mentioned deed as one quarter acre which James English deeded to Daniel Wilson. Wheelock continued in possession of the premises until the 29th of January, 1830, when he executed to the plaintiff's intestate a mortgage deed to secure her maintenance during her life, and soon after absconded, and wholly failed to perform the condition of this last mortgage. Afterwards, in March, 1832, Hunt brought a bill of foreclosure against Wheelock and the plaintiff's intestate, obtained a final decree, took possession of the premises, and conveyed them to one Damon, who deeded them to the defendant. It was admitted that Hunt had a good title to the land when he conveyed to Wheelock, and that the plaintiff was entitled to recover, unless the land in question was conveyed to Hunt by Wheelock's mortgage deed to him, but if the land was not conveyed to Hunt by that deed, then the defendants were entitled to a verdict. The county court directed the jury to return a verdict for the defendants, and the plaintiff excepted.

A. Spalding and *L. B. Peck*, for plaintiff.

Wm. Upham and *O. H. Smith*, for defendants.

The opinion of the court was delivered by

REDFIELD, J. The only question to be determined in this case is, whether the land in question was included in the exception in Wheelock's mortgage deed to Hunt, or in the grant.

All the land referred to in this deed originally belonged to Hunt, and had all, that day, been deeded to Wheelock.—The notes secured by the mortgage were a portion of the consideration of the purchase, and, from the amount, $850, being the same as the consideration expressed in Hunt's deed to Wheelock, it is presumed were for the principal part of the consideration. The land in dispute, instead of being deeded, as recited in Wheelock's deed to Hunt, by English to Wilson, and by him to Hunt, was deeded by English directly to Hunt. *In Hunt's deed to Wheelock, the land is described in different parcels, by reference to the deeds by which he derived his title. The mortgage deed, executed by Wheelock to Hunt to secure the consideration, from the precise correspondence in the terms of description of the estate, was manifestly copied from the deed, and, after the entire estate had been described by general terms, and the exceptions also, the dubious clause is superadded.

If we adopt the rule, *ut res magis valeat quam pereat*, we must consider this as forming a part of the exception, for as the whole estate had already been described, it would not enlarge, nor in any way render more certain, the grant, but would enlarge the exception. But this maxim in regard to the construction of deeds is but one among the very great number which the sages of the law have left us. The great object, and, indeed, the only foundation of all rules of construction of contracts, is, to come at the intention of the parties. And any rule, which leads us aside of this grand object, is to be disregarded. In the present case, from the general nature and object of the transaction and the common course of business, there can be little doubt of the intention of the parties to include the buildings, which constituted the principal value of the purchase, in the mortgage, which was executed to secure the purchase money. This view is favored, too, we think, by the manner in which the mortgage was drawn, being copied from the deed, and, in that, the different parcels being described separately, it did not probably occur to the parties, that a general reference to that deed would include all its particulars, therefore, *ex maxima cautela*, these particulars are again repeated. We ought not, therefore, to adopt a construction which will defeat the obvious intention of the parties, and produce a result which it is highly improbable, perhaps absurd, to suppose they contemplated. This view is in accordance with established rules of construction. Cholmondeley v. Clinton, 2 B. & Ald. Rep. 625. Hassell v. Long, 2 M. & S. 363.

It has been repeatedly said that, in the interpretation of contracts, a nice grammatical construction is not always to be regarded. Cromwell v. Grumsden, 1 Ld. Raym. 335.—2 Salk. 462. Fountain v. Guavers, 2 Show. R. 333. 7 Peterds. Ab. 139. Hence we are under no necessity of re*ferring the word "including" to the next immediate antecedent "excepting." The term "including" may have reference to the deed, as well as the exception. And, it is evident, the most natural and obvious import of the word is, "including" in the deed, and not in the exception.

But, at most, the term "including" in its connection, is equivocal. In such cases, resort may always be had to the circumstances under which the contract was executed, and the contemporaneous construction given to it by the parties, as evidenced by possession or other similar acts. Attorney General v. Parker, 3 Atk. R. 576. King v. Varlo, Cowper, 248. Bainbridge v. Statham, 7 Dowl. & Ryl. 141, (16 Eng. C. L. 279.) Wadley v. Bayliss, 5 Taunt. R. 752. (1 Eng. C. L. 385.) Jackson v. Wood,

13 Johns. 346. In this view, it is evident that the construction contended for by the defendant must prevail. For the land has always been claimed and held under the deed by defendant, and that claim fully acquiesced in by plaintiff for many years, without any pretence of claim on his part, so far as appears in the case.

In every view of the case, then, we think the construction given to the deed by the county court must prevail.

Judgment affirmed.

BECK & PAULI LITHOGRAPHING CO. v. COLORADO MILLING & ELEVATOR CO.

(3 C. C. A. 248, 52 Fed. 700.)

Circuit Court of Appeals, Eighth Circuit. October 31, 1892.

No. 141.

In error to the circuit court of the United States for the district of Colorado. Reversed.

Statement by SANBORN, Circuit Judge: This was an action by the plaintiff in error to recover the contract price of certain stationery and advertising matter furnished the defendant. It was tried on the merits, and at the close of the evidence the court instructed the jury to return a verdict for the defendant, and this instruction is assigned as error. The plaintiff was a corporation of Wisconsin, engaged in lithographing and printing, and its principal place of business was at Milwaukee, in that state. The defendant was a corporation of Colorado, engaged in the business of milling, and its principal place of business was at Denver, in that state. In June, 1889, the plaintiff agreed to make new designs of certain buildings of defendant, with sketches of its trade-marks; to execute engravings thereof in a strictly first-class style; to embody these on the stationery described below; to submit to defendant for approval proofs thereof; to submit designs and proofs of hangers, on fine chromo plate, for advertising defendant's business, by the following fall; to engrave a strictly first-class vignette of one of defendant's plants; to submit a sketch and proof thereof to defendant; to furnish defendant with 10,000 business cards and 5,000 checks in August, 1889; to furnish, in the course of the year, letter heads, noteheads, bill heads, statements, bills, envelopes, and cards to the defendant to the number of 331,100, and 5,000 hangers; and to furnish the vignette and 5,000 hangers more after the approval of the proofs thereof by the defendant. The defendant agreed to take and pay for this stationery, this vignette, and these hangers at certain agreed prices, which amounted in the aggregate to about $6,000. The plaintiff furnished the 10,000 cards and 5,000 checks required under the contract in August, 1889, and the defendant received and paid for them. The plaintiff introduced testimony to the effect that it strictly complied with and fully performed these contracts in every respect, except that it shipped the articles contracted for (which were not delivered in August) by rail from Milwaukee to the defendant, at Denver, in December, 1889, in five boxes, four of which did not arrive at Denver until 9:42 a. m., January 1, 1890, and the fifth did not arrive there until January 4, 1890; that before January 8, 1890, all of these articles were tendered to the defendant, and it refused to examine or receive them; that the sketches and proofs of the designs, trademarks, and hangers had been submitted to and approved by the defendant during the summer and fall of 1889, before these articles were manufactured, and that the last proof was approved November 16, 1889; that on December 16, 1889, the defendant wrote the plaintiff to forward by express 2,000 statements and 3,000 envelopes "as per proofs submitted;" that the state of the art and process of lithographing is such that, after the general idea of a piece of work is conceived, it is customary to make first a pencil design, and, when this is found satisfactory, to prepare a colored sketch where colored work is required; that after the sketch is colored it is lithographed, that is, transferred to a stone; that each color requires a separate stone; and in these hangers there were nine colors; that it requires from two to three months to reproduce on stone a colored sketch like that used for the hangers; that the artists' work and the reproduction on stone were the most expensive parts of this work contracted for; and that the expense of the materials and printing was but a small part of the entire expense of the work.

F. W. v. Cotzhausen, for plaintiff in error.
V. D. Markham, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge (after stating the facts). The ground on which it is sought to sustain the instruction of the court below to return a verdict for the defendant in this case is that the plaintiff failed to tender or deliver the articles contracted for to the defendant, at Denver, until six or eight days after the expiration of the year, that the plaintiff did not therefore furnish them "in the course of the year," and that this failure justified the defendant in repudiating the contract, and refusing to pay any part of the contract price.

It is a general principle governing the construction of contracts that stipulations as to the time of their performance are not necessarily of their essence, unless it clearly appears in the given case from the express stipulations of the contract or the nature of its subject-matter that the parties intended performance within the time fixed in the contract to be a condition precedent to its enforcement, and, where the intention of the parties does not so appear, performance shortly after the time limited on the part of either party will not justify a refusal to perform by the party aggrieved, but his only remedy will be an action or counterclaim for the damages he has sustained from the breach of the stipulations. In the application of this principle to the cases as they have arisen, in the promulgation of the rules naturally deduced from it, and in the assignment of the various cases to the respective classes in which the stipulation as to time of performance is, or is not, deemed of the essence of the contract, the controlling consideration has been, and ought to be, to so decide and classify the cases that unjust penalties may not be inflicted, nor un-

reasonable damages recovered. Thus, in the ordinary contract of merchants for the sale and delivery, or the manufacture and sale, of marketable commodities within a time certain, it has been held that performance within the time is a condition precedent to the enforcement of the contract, and that a failure in this regard would justify the aggrieved party in refusing performance at a later day. Norrington v. Wright, 115 U. S. 188–203, 6 Sup. Ct. 12. This application of the general principle commends itself as just and reasonable, on account of the frequent and rapid interchange and use of such commodities made necessary by the demands of commerce, and because such goods, if not received in time by the vendee, may usually be sold to others by the vendor at small loss, and thus he may himself measure the damages he ought to suffer from his delay by the difference in the market value of his goods. On the other hand, it has been held that an express stipulation in a contract for the construction of a house, that it should be completed on a day certain, and that, in case of failure to complete it within the time limited, the builder would forfeit $1,000, would not justify the owner of the land on which the house was constructed in refusing to accept it for a breach of this stipulation when the house was completed shortly after the time fixed, nor even in retaining the penalty stipulated in the contract, but that he must perform his part of the contract, and that he could retain from or recover of the builder the damages he sustained by the delay and those only. Tayloe v. Sandiford, 7 Wheat. 13, 17. This application of the general rule is equally just and reasonable. The lumber and material bestowed on a house by a builder become of little comparative value to him, while they are ordinarily of much greater value to the owner of the land on which it stands, and to permit the latter to escape payment because his house is completed a few days later than the contract requires would result in great injustice to the contractor, while the rule adopted fully protects the owner, and does no injustice to any one. The cases just referred to illustrate two well-settled rules of law which have been deduced from this general principle, and in accordance with which this case must be determined. They are:

In contracts of merchants for the sale and delivery or for the manufacture and sale of marketable commodities a statement descriptive of the subject-matter, or some material incident, such as the time of shipment, is a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. Norrington v. Wright, 115 U. S. 188, 203, 6 Sup. Ct. 12; Rolling Mill v. Rhodes, 121 U. S. 255, 261, 7 Sup. Ct. 882. But in contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation. Tayloe v. Sandiford, 7 Wheat. 13, 17; Hambly v. Railroad Co., 21 Fed. 541, 544, 554, 557.

It only remains to determine whether the contracts in the case at bar are the ordinary contracts of merchants for the manufacture and sale of marketable commodities or contracts for labor, skill, and materials, and this is not a difficult task. A contract to manufacture and furnish articles for the especial, exclusive, and peculiar use of another, with special features which he requires, and which render them of value to him, but useless and unsalable to others,—articles whose chief cost and value are derived from the labor and skill bestowed upon them, and not from the materials of which they are made,—is a contract for work and labor, and not a contract of sale. Engraving Co. v. Moore, 75 Wis. 170, 172, 43 N. W. 1124; Goddard v. Binney, 115 Mass. 450; Hinds v. Kellogg (Com. Pl.) 13 N. Y. Supp. 922; Turner v. Mason (Mich.) 32 N. W. 846. Thus in Engraving Co. v. Moore, supra, where the lithographing company had contracted to manufacture a large quantity of engravings and lithographs for a theatrical manager, with special features, useful to him only during a certain season, and they were completed and set aside in the rooms of the lithographer, and there burned before delivery to the manager, the court held that the contract was not one for the sale of personal property, but one for work, skill, and materials, because it was not the materials, but the lithographer's work of skill, that gave the value to the finished advertisements, and was the actual subject-matter of the contract, and because that work and skill, while it added the chief value to the finished articles for the especial use of the defendant, made both the articles and the materials worthless for all other purposes.

The contracts in the case we are considering were not for the blank paper on which they were finally impressed; that was of small value in proportion to the value of the finished articles; they were not for the sale of anything then in existence; they were for the artistic skill and labor of the employés of the defendant in preparing the sketches and designs, transferring them upon stone, and finally impressing them upon the paper the defendant was to furnish; and they authorized the plaintiff, without other orders than the contracts themselves, and the approvals of the designs and proofs there called for, to prepare and furnish all the articles named in the contracts and to collect the contract price therefor. These contracts required the names of defendant's mills and its trade-marks to be so impressed upon all these articles that when they were completed they

were not only unsalable to all others, but worthless to plaintiff for all purposes but waste paper. The contracts are evidence that on December 31, 1889, the articles contracted for would have been worth about $6,000 to the defendant, and if a few days later, when they were tendered, they were not worth so much, the defendant may recover the damages it suffered from the delay from December 31, 1889, to the date of the tender, in a proper action therefor, or may have the same allowed in this action under proper pleadings and proofs, and no injustice will result; while, if the defendant was permitted on account of this delay to utterly repudiate the contract, the plaintiff must practically lose the entire $6,000. The contracts contain no stipulation from which it can be fairly inferred that the parties intended the time of performance to be even material; indeed, they strongly indicate the contrary. They provide that a certain portion of the articles shall be furnished in two months, that the remainder of the stationery and 5,000 hangers shall be furnished in the course of the year, and that 5,000 hangers more and the vignette shall be furnished within a reasonable time after the proofs are approved by the defendant; there is no stipulation for the payment of any damages or the avoidance of the contracts on account of a failure to perform within any of the times stipulated in the contracts, and the parties themselves proceeded so leisurely thereunder that the first and only admitted request by the defendant for the delivery of any of the articles not delivered in August was on December 16, 1889. In Tayloe v. Sandiford, supra, the court refused to permit the owner to retain the $1,000 which the house builder had expressly agreed to pay if he failed to complete the house within the time fixed in the contract. In the absence of any such stipulation, or any clearly-expressed intent that time should be material even, it would be clearly unjustified by the law and inequitable to hold that the plaintiff is compelled to forfeit his entire contract price on account of this trifling delay that may have been immaterial to the defendant, and, if not, may be fully compensated in damages.

The result is that these contracts were not for the sale and delivery, or the manufacture and delivery, of marketable commodities. They were contracts for artistic skill and labor, and the materials on which they were to be bestowed in the manufacture of articles which were not salable to any one but the defendant when completed because impressed with special features useful only to it. There was nothing in the contracts or their subject-matter indicating any intention of the parties that the stipulations as to time should be deemed of their essence; and the defendant was not justified on account of the slight delay disclosed by the record in refusing to accept the goods, or in repudiating the entire contract. This conclusion disposes of the case, and it is unnecessary to notice other errors assigned. The judgment below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

JAQUITH v. HUDSON.[1]

(5 Mich. 123.)

Supreme Court of Michigan. May Term, 1858.

Error to circuit court, Wayne county.

The action was by Jaquith against Hudson, upon a promissory note for one thousand dollars, given by the latter to the former, April 15th, 1855, and payable twelve months after date. Defendant pleaded the general issue, and gave notice that on the trial he would prove that, previous to said 15th day of April, 1855, plaintiff and defendant had been and were partners in trade, at Trenton, in said county of Wayne, under the name of Hudson & Jaquith; that, on that day the copartnership was dissolved, and the parties then entered into an agreement, of which the following is a copy:

"This article of agreement, made and entered into between Austin E. Jaquith, of Trenton, Wayne county, and state of Michigan, of the first part, and Jonathan Hudson, of Trenton, county of Wayne, and state of Michigan, of the second part, witnesseth, that the said Austin E. Jaquith agrees to sell, and by these presents does sell and convey unto the said Jonathan Hudson, his heirs and assigns, all his right, title, and interest in the stock of goods now owned by the firm of Hudson and Jaquith, together with all the notes, books, book accounts, moneys, deposits, debts, dues, and demands, as well as all assets that in anywise belong to the said firm of Hudson & Jaquith; and that the copartnership that has existed between the said firm of Hudson & Jaquith is hereby dissolved; and that the said Austin E. Jaquith, by these presents, agrees that he will not engage in the mercantile business, in Trenton, for himself, or in connection with any other one, for the space of three years from this date, upon the forfeiture of the sum of one thousand dollars, to be collected by the said Hudson as his damages. In consideration whereof, the said Jonathan Hudson, of the second part, agrees for himself, his heirs and administrators, to pay unto the said Austin E. Jaquith the sum of nine hundred dollars, for his services in the firm of Hudson & Jaquith, together with all the money that he (the said Austin E. Jaquith) paid into said firm, deducting therefrom the amount which he (the said Austin E. Jaquith) has drawn from said firm; the remainder the said Hudson agrees to pay to the said Jaquith, his heirs or assigns, at a time and in a manner as shall be specified in a note bearing even date with these presents. And the said Hudson, for himself, his heirs and assigns, agrees to pay all the debts, notes and liabilities of the firm of Hudson & Jaquith, and to execute unto the said Jaquith a good and sufficient bond of indemnification against all claims, debts, or liabilities of the firm of Hudson & Jaquith.

"Trenton, April, 1855.

"Austin E. Jaquith. [L. S.]
"Jonathan Hudson. [L. S.]

"Witness: Arthur Edwards. Arthur Edwards, Jr."

And defendant further gave notice, among other things, that he would show, on the trial, that, after the execution of said agreement in writing, and the giving of said note in pursuance thereof, on or about the 15th day of July, 1855, plaintiff, in violation of said agreement, entered into the mercantile business at Trenton, and had continued to carry on the same ever since; by means whereof the consideration of said note had failed. And he further gave notice, that he (the defendant) continued to carry on the mercantile business at Trenton, after the dissolution of said copartnership; and by means of the breach of said articles by plaintiff, defendant had sustained damages to the sum of one thousand dollars, liquidated by said articles for a breach thereof, which sum he would claim to have deducted from the amount of said note, on the trial.

* * * * * *

The court was then asked by plaintiff's counsel to charge the jury, as follows:

* * * * * *

"2. That, even if the agreement set up was, in the opinion of the jury, properly delivered, as between the parties, the defendant can not recoup any damages against the plaintiff, except upon evidence showing that some damage was actually sustained by him; that the clause in the agreement as to damages, can not, of itself, and in the absence of evidence, operate to the reduction of the claim of the plaintiff, as the sum fixed in the agreement is in the nature of a penalty, and not liquidated damages; and no damages can be recovered under it except such as are proven." The court refused so to charge; and plaintiff excepted.

* * * * * *

The court charged the jury, that it was not necessary for the defendant to prove any actual damage under the plaintiff's breach of the said agreement, as the damages therein fixed were liquidated damages, and not a penalty.

The issue was then submitted to the jury on the evidence, who found a verdict for the plaintiff, in the sum of eighteen dollars and eight cents, allowing the defendant the sum of one thousand dollars mentioned in the agreement.

Plaintiff brought the case to this court, by writ of error, accompanied by bill of exceptions.

D. Bethune Duffield, for plaintiff in error.
G. V. N. Lothrop, for defendant in error.

CHRISTIANCY, J. * * * The second exception raises the single question, whether

[1] Irrelevant parts omitted.

the sum of $1,000, mentioned in the covenant of Jaquith not to go into business in Trenton, is to be construed as a penalty, or as stipulated damages—the plaintiff in error insisting it should be construed as the former, the defendant as the latter.

We shall not attempt here to analyze all the decided cases upon the subject, which were read and cited upon the argument, and which, with others, have been examined. It is not to be denied that there is some conflict, and more confusion, in the cases; judges have been long and constantly complaining of the confusion and want of harmony in the decisions upon this subject. But, while no one can fail to discover a very great amount of apparent conflict, still it will be found, on examination, that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case. And while there are some isolated cases (and they are but few), which seem to rest upon no very intelligible principle, it will be found, we think, that the following general principles may be confidently said to result from, and to reconcile, the great majority of the cases, both in England and in this country:

First. The law, following the dictates of equity and natural justice, in cases of this kind, adopts the principle of just compensation for the loss of injury actually sustained; considering it no greater violation of this principle to confine the injured party to the recovery of less, than to enable him, by the aid of the court to extort more. It is the application, in a court of law, of that principle long recognized in courts of equity, which, disregarding the penalty of the bond, gives only the damages actually sustained. This principle may be stated, in other words, to be, that courts of justice will not recognize or enforce a contract, or any stipulation of a contract, clearly unjust and unconscionable; a principle of common sense and common honesty so obviously in accordance with the dictates of justice and sound policy as to make it rather matter of surprise that courts of law had not always, and in all cases, adopted it to the same extent as courts of equity. And, happily for the purposes of justice, the tendency of courts of law seems now to be towards the full recognition of the principle, in all cases.

This principle of natural justice, the courts of law, following courts of equity, have, in this class of cases, adopted as the law of the contract; and they will not permit the parties by express stipulation, or any form of language, however clear the intent, to set it aside; on the familiar ground, "conventus privatorum non potest publico juri derogare."

But the court will apply this principle, and disregard the express stipulation of parties, only in those cases where it is obvious from the contract before them, and the whole subject-matter, that the principle of compensation has been disregarded, and that to carry out the express stipulation of the parties, would violate this principle, which alone the court recognizes as the law of the contract.

The violation, or disregard, of this principle of compensation, may appear to the court in various ways—from the contract, the sum mentioned, and the subject-matter. Thus, where a large sum (say one thousand dollars) is made payable solely in consequence of the non-payment of a much smaller sum (say one hundred dollars), at a certain day; or where the contract is for the performance of several stipulations of very different degrees of importance, and one large sum is payable on the breach of any one of them, even the most trivial, the damages for which can, in no reasonable probability, amount to that sum; in the first case, the court must see that the real damage is readily computed, and that the principle of compensation has been overlooked, or purposely disregarded; in the second case, though there may be more difficulty in ascertaining the precise amount of damage, yet, as the contract exacts the same large sum for the breach of a trivial or comparatively unimportant stipulation, as for that of the most important, or of all of them together, it is equally clear that the parties have wholly departed from the idea of just compensation, and attempted to fix a rule of damages which the law will not recognize or enforce.

We do not mean to say that the principle above stated as deducible from the cases, is to be found generally announced in express terms, in the language of the courts; but it will be found, we think, to be necessarily implied in, and to form the only rational foundation for, all that large class of cases which have held the sum to be in the nature of a penalty, notwithstanding the strongest and most explicit declarations of the parties that it was intended as stipulated and ascertained damages.

It is true, the courts in nearly all these cases profess to be construing the contract with reference to the intention of the parties, as if for the purpose of ascertaining and giving effect to that intention; yet it is obvious, from these cases, that wherever it has appeared to the court, from the face of the contract and the subject-matter, that the sum was clearly too large for just compensation, here, while they will allow any form of words, even those expressing the direct contrary, to indicate the intent to make it a penalty, yet no form of words, no force of language, is competent to the expression of the opposite intent. Here, then, is an intention incapable of expression in words; and as all written contracts must be expressed in words, it would seem to be a mere waste of time and effort to look for such an intention in such a contract. And as the question is between two opposite intents only, and the negation of the one necessarily implies the existence of the other, there would seem to be no room left for construction with

reference to the intent. It must, then, be manifest that the intention of the parties in such cases is not governing consideration.

But some of the cases attempt to justify this mode of construing the contract with reference to the intent, by declaring, in substance, that though the language is the strongest which could be used to evince the intention in favor of stipulated damages, still, if it appear clearly, by reference to the subject-matter, that the parties have made the stipulation without reference to the principle of just compensation, and so excessive as to be out of all proportion to the actual damage, the court must hold that they could not have intended it as stipulated damages, though they have so expressly declared. See, as an example of this class of cases, Kemble v. Farren, 6 Bing. 141.

Now this, it is true, may lead to the same result in the particular case, as to have placed the decision upon the true ground, viz., that though the parties actually intended the sum to be paid, as the damages agreed upon between them, yet it being clearly unconscionable, the court would disregard the intention, and refuse to enforce the stipulation. But, as a rule of construction, or interpretation of contracts, it is radically vicious, and tends to a confusion of ideas in the construction of contracts generally. It is this, more than anything else, which has produced so much apparent conflict in the decisions upon this whole subject of penalty and stipulated damages. It sets at defiance all rules of interpretation, by denying the intention of the parties to be what they, in the most unambiguous terms, have declared it to be, and finds an intention directly opposite to that which is clearly expressed—"divinatio, non interpretatio est, quæ omnino recedit a litera."

Again, the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that, if the intention to make the sum stipulated damages should clearly appear. the court would enforce the contract according to that intention. To test this, let it be asked, whether, in such a case, if it were admitted that the parties actually intended the sum to be considered as stipulated damages, and not as a penalty, would a court of law enforce it for the amount stipulated? Clearly, they could not, without going back to the technical and long exploded doctrine which gave the whole penalty of the bond, without reference to the damages actually sustained. They would thus be simply changing the names of things, and enforcing, under the name of stipulated damages, what in its own nature is but a penalty.

The real question in this class of cases will be found to be, not what the parties intended, but whether the sum is, in fact, in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties can not alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages; it must, therefore, we think, be very obvious that the actual intention of the parties, in this class of cases, and relating to this point, is wholly immaterial; and though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is not, and can not be made, the real basis of these decisions. In endeavoring to reconcile their decisions with the actual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say "that the parties must be considered as not meaning exactly what they say." Homer v. Flintoff, 9 Mees. & W., per Park, B. May it not be said, with at least equal propriety, that the courts have sometimes said what they did not exactly mean?

The foregoing remarks are all to be confined to that class of cases where it was clear, from the sum mentioned and the subject-matter, that the principle of compensation had been disregarded.

But, secondly, there are great numbers of cases, where, from the nature of the contract and the subject-matter of the stipulation, for the breach of which the sum is provided, it is apparent to the court that the actual damages for a breach are uncertain in their nature, difficult to be ascertained, or impossible to be estimated with certainty, by reference to any pecuniary standard, and where the parties themselves are more intimately acquainted with all the peculiar circumstances, and therefore better able to compute the actual or probable damages, than courts or juries, from any evidence which can be brought before them. In all such cases, the law permits the parties to ascertain for themselves, and to provide in the contract itself, the amount of the damages which shall be paid for the breach. In permitting this, the law does not lose sight of the principle of compensation, which is the law of the contract, but merely adopts the computation or estimate of the damages made by the parties, as being the best and most certain mode of ascertaining the actual damage, or what sum will amount to a just compensation. The reason, therefore, for allowing the parties to ascertain for themselves the damages in this class of cases, is the same which denies the right in the former class of cases; viz., the courts adopt the best and most practicable mode of ascertaining the sum which will produce just compensation.

In this class of cases where the law permits the parties to ascertain and fix the amount of damages in the contract, the first inquiry obviously is, whether they have done

so in fact? And here, the intention of the parties is the governing consideration; and in ascertaining this intention, no merely technical effect will be given to the particular words relating to the sum, but the entire contract, the subject-matter, and often the situation of the parties with respect to each other and to the subject-matter, will be considered. Thus though the word "penalty" be used (Sainter v. Fergason, 7 Man., G. & S. 716; Jones v. Green, 3 Younge & J. 299; Pierce v. Fuller, 8 Mass. 223), or "forfeit" (Noble v. Noble, 7 Cow. 307), or "forfeit and pay" (Fletcher v. Dycke, 2 Term R. 32), it will still be held to be stipulated damages, if, from the whole contract, the subject-matter, and situation of the parties, it can be gathered that such was their intention. And in proportion as the difficulty of ascertaining the actual damage by proof is greater or less, where this difficulty grows out of the nature of such damages, in the like proportion is the presumption more or less strong that the parties intended to fix the amount.

It remains only to apply these principles to the case before us. It is contended by the plaintiff in error, that the payment of the one thousand dollars mentioned in the covenant of Jaquith is not made dependent solely upon the breach of the stipulation not to go into business in Trenton, but that it applies equally—First, to the agreement to sell to Hudson his interest in the goods; second, to sell his interest in the books, notes, accounts, etc.; and, third, to the agreement to dissolve the partnership. But we can perceive no ground for such a construction. The language in reference to the sale of the interest in the goods, books, notes, accounts, etc., and that in reference to the dissolution, is not that of a sale in futuro, nor for the dissolution of the partnership at a future period, but it is that of a present sale and a present dissolution—"does hereby sell," and "the copartnership is hereby dissolved," is the language of the instrument. It is plain, from this language, from the subject-matter, and from all the acts of the parties, that these provisions were to take, and did take, immediate effect. There could be no possible occasion to provide any penalty or stipulated damages for the non-performance of these stipulations, because this sale and dissolution would already have been accomplished the moment the contract took effect for any purpose; and, until it took effect, the stipulation for the one thousand dollars could not take effect or afford any security, nor would Hudson be bound or need the security. But it remained to provide for the future. If Jaquith were to be at liberty to set up a rival store in the same village, it might seriously affect the success of Hudson's business; and we are bound to infer, from the whole scope of this contract, that Hudson would never have agreed to pay the consideration mentioned in it, nor to have entered into the contract at all, but for the stipulation of Jaquith "that he will not engage in the mercantile business in Trenton, for himself or in connection with any other one, for the space of three years from this date, upon the forfeiture of the sum of one thousand dollars, to be collected by said Hudson as his damages." This stipulation of Jaquith not to go into business, is the only one on his part which looks to the future; and it is to this, alone, that the language in reference to the one thousand dollars applies. Any other construction would do violence to the language, and be at war with the whole subject matter.

The damages to arise from the breach of this covenant, from the nature of the case, must be not only uncertain in their nature, but impossible to be exhibited in proof, with any reasonable degree of accuracy, by any evidence which could possibly be adduced. It is easy to see that while the damages might be very heavy, it would be very difficult clearly to prove any. Their nature and amount could be better estimated by the parties themselves, than by witnesses, courts, or juries. It is, then, precisely one of that class of cases in which it has always been recognized as peculiarly appropriate for the parties to fix and agree upon the damages for themselves. In such a case, the language must be very clear to the contrary, to overcome the inference of intent (so to fix them), to be drawn from the subject-matter and the situation of the parties; because, it is difficult to suppose, in such a case, that the party taking the stipulation intended it only to cover the amount of damages actually to be proved, as he would be entitled to the latter without the mention of any sum in the contract, and he must also be supposed to know that his actual damages, from the nature of the case, are not susceptible of legal proof to anything approaching their actual extent. That the parties actually intended, in this case, to fix the amount to be recovered, is clear from the language itself, without the aid of a reference to the subject-matter, "upon the forfeiture of the sum of one thousand dollars, to be collected by the said Hudson as his damages." It is manifest from this language that it was intended Hudson should "collect," or, in other words, receive this amount, and that it should be for his damages for the breach of the stipulation. This language is stronger than "forfeit and pay," or "under the penalty of," as these might be supposed to have reference to the form of the penal part of a bond, or to the form of action upon it, and not to the actual "collection" of the money.

It is, therefore, very clear, from every view we have been able to take of this case, that it was competent and proper for the parties to ascertain and fix for themselves the

amount of damages for the breach complained of, and equally clear that they have done so in fact. From the uncertain nature of the damages, we cannot say that the sum in this case exceeds the actual damages, or that the principle of compensation has been violated. Indeed, it would have been perhaps difficult to discover a violation of this principle had the sum in this case been more than it now is, though, doubtless, even in such cases as the present, if the sum stated were so excessive as clearly to exceed all reasonable apprehension of actual loss or injury for the breach, we should be compelled to disregard the intention of the parties, and treat the sum only as a penalty to cover the actual damages to be exhibited in proof. In this case the party must be held to the amount stipulated in his contract.

The second exception, therefore, is not well taken; the court properly refused to charge as requested, and no error appearing in the record, the judgment of the circuit court for the county of Wayne must be affirmed.

The other justices concurred.

HOBBS et al. v. COLUMBIA FALLS BRICK CO.

(31 N E. 756, 157 Mass. 109.)

Supreme Judicial Court of Massachusetts. Suffolk. Sept. 7, 1892.

Exceptions from superior court, Suffolk county.

Action by John S. Hobbs and others against the Columbia Falls Brick Company on a contract for the sale and delivery of brick. Judgment for plaintiffs, and defendant excepts. Exceptions sustained.

S. L. Whipple, for plaintiffs. F. T. Benner, for defendant.

MORTON, J. We think that upon the facts which were agreed, and upon those which appeared in evidence from the testimony of its president and treasurer, the defendant was entitled to go to the jury on the question whether there had been an abandonment of the contract by the plaintiffs and their assignees which was assented to by the defendant. The court ruled generally upon the evidence thus disclosed that it would not constitute a defense. If, therefore, the defendant can avail of it in any aspect as a defense, it is entitled to a new trial. As the case was left it appeared that after the contract was entered into the plaintiffs became insolvent, and made a voluntary assignment for the benefit of their creditors, of which they gave notice to the defendant. They afterwards took the benefit of the insolvent act, and compounded with their creditors by composition proceedings. No reference to the contract was contained in the schedule of assets which they filed in the insolvency court, and there was no allusion to it in the statement of their assets which was made by them at a meeting of their creditors. The contract was an executory one, and the plaintiffs knew that the brick were to be made at the plaintiffs' place, in Maine. They gave no notice, directly or indirectly, to the defendant, till May 12th,—more than four months after the notice of their assignment,—that they would claim performance, and did not till then offer to pay or secure the defendant under the contract. The defendant sold the brick some time in April. We think it would have been competent for the jury to find, under these circumstances, that the plaintiffs had abandoned the contract, and that the defendant had assented to and acted upon such abandonment. The jury could properly have regarded the giving of the notice of the assignment as equivalent to the plaintiffs saying that they could not go on with the contract, especially when taken in connection with all the other circumstances. Morgan v. Bain, L. R. 10 C. P. 15; In re Steel Co., 4 Ch. Div. 108; Ex parte Stapleton, 10 Ch. Div. 586; Ex parte Chalmers, L. R. 8 Ch. App. 289.

While the fact that the plaintiffs became insolvent after entering into the contract would of itself not have terminated the contract, it was competent for the jury to find that the notice which they gave to the defendant of the assignment, and their subsequent conduct, justified the defendant in the assumption that they had abandoned the contract. The conduct of the assignees, assuming that the contract passed to them, does not put the matter in any better shape for the plaintiffs. It was their duty within a reasonable time after the assignment to elect whether to proceed or not with the contract, and to notify the defendant accordingly. Ex parte Chalmers, supra; Ex parte Stapleton, supra. They did not do this. On the contrary, when the defendant's treasurer inquired whether they were going to claim the contract, the reply which he got left on his mind the impression that they were not. They did nothing to indicate that they were going to claim it, and did not offer to pay or in any way secure the defendant for the performance of the contract. They continued to hold the property assigned to them till April 17th, without taking any action in reference to the contract, when they reconveyed it to the plaintiffs, who could derive no higher right from the assignees than they themselves possessed. Inasmuch as there must be a new trial, and the case may then go off on the ground which we have indicated above, or the facts relating to it may not then be as now stated, we have not considered the effect of the testimony offered by the defendant, tending to show that the plaintiffs were hopelessly insolvent at the time when they made the contract, and knew themselves to be so, and concealed the fact from the defendant, who was thereby induced to enter into the contract. Exceptions sustained.

CUTTER v. COCHRANE.

(116 Mass. 408.)

Supreme Judicial Court of Massachusetts. Suffolk. Dec. 28, 1874.

Contract for money had and received, with counts on an agreement to repay money paid by the plaintiff to the defendant on a contract, alleged to have been rescinded.

At the trial in the superior court, before Rockwell, J., the plaintiff offered evidence tending to prove the following facts: In November, 1870, the plaintiff and the defendant, acting through his agent, Hugh Cochrane, entered into a verbal agreement for purchase by the plaintiff of the defendant, as guardian of certain minor heirs, of a dwelling-house and land connected therewith, situated in Malden. On November 11, the plaintiff made the first payment, and took a receipt and memorandum, as follows: "Received of Mrs. E. J. Cutter one hundred dollars, on account of purchase of estate known as Cochrane estate, situated on court leading from Main street; price, forty-seven hundred dollars; to be paid in instalments of seventy-five dollars per month, until June 1, 1871, at which time amounts of payments to equal one thousand dollars, and one thousand dollars to be paid in quarterly payments from that date. Balance on mortgage for three years from that date. Bond for deed to be given on that date, and deed when the balance of the second thousand is paid. Hugh Cochrane, for Guardian."

The authority of Hugh Cochrane to act as agent for the defendant was not denied. Various payments were made by the plaintiff, from November 11, 1870, to October 17, 1871, amounting to $950 in all, for which receipts were given, sometimes signed by the defendant and sometimes by Hugh Cochrane in his behalf.

In November, 1870, the plaintiff entered into possession of the house and premises under the agreement of sale, and continued to occupy the same until July, 1872. About April 1, 1872, no further payments having been made, Hugh Cochrane went to the house of the plaintiff, and said the defendant was dissatisfied, on account of the delay in making the payments; and it was then agreed that the agreement of sale should be rescinded; that the plaintiff should give up possession of the premises to the defendant, but should hold possession and keep the house furnished for a while, to enable the defendant to make a more advantageous sale of the same, and pay the defendant interest at eight per cent. per annum on the purchase money for the time she should have occupied; and that the defendant, in consideration thereof, should pay back to the plaintiff the several sums she had paid towards the purchase, with eight per cent. per annum on the several payments from the date of such payments, and also refund to her $60.03, being the amount of taxes on the estate paid by her. The plaintiff remained, and kept the house furnished until the defendant sold the same on May 24, 1872, and, as soon as requested thereafter, gave up the possession to the purchaser on July 18, 1872. In September, 1872, she went to the store of the defendant in Boston for a settlement, where she found Hugh Cochrane and the defendant together, and where Hugh, in the defendant's presence, made out a statement of the balance due the plaintiff, placing it at $267.75; that it differed from the above agreement only in that it did not embrace the item of taxes, nor did it allow her interest on the payments made by her; while on his side was claimed an item of $24.25, alleged to have been paid by him for insurance, and which he contended ought to be paid by the plaintiff. The plaintiff declined to settle on these terms, and subsequently, and before suit brought, made formal demand for all the money paid by her as above, which was refused by the defendant.

After the evidence was closed, the defendant's counsel asked the judge to rule that the plaintiff was not entitled to recover, on the ground that there was no consideration for the alleged promise on the part of the defendant. The judge so ruled and ordered a verdict for the defendant, and the plaintiff alleged exceptions.

N. B. Bryant, for plaintiff. J. P. Converse and E. A. Kelly, for defendant.

AMES, J. Whether by her failure to make the stipulated payments the plaintiff had lost all her rights under the original contract, and forfeited the money which she had paid, is a question which the defendant is not entitled to raise in this case. The settlement which was had between the parties proceeded upon a very different ground. An agreement to rescind a previous contract imports that, until it is rescinded, it is recognized by both parties as subsisting and binding. The rescinding of a previous contract containing mutual stipulations is a release by each party to the other. The release by one is the consideration for the release by the other, and the mutual releases form the consideration for the new promise, and are sufficient to give it full legal effect. The defendant is bound to account for the money that has been paid to him, not because the purchase did not go into effect, but because, in consideration of mutual releases, he has excused the plaintiff from its fulfilment, has consented to a new agreement, and has expressly promised to account for the money.

Exceptions sustained.

BUTTERFIELD v. HARTSHORN.

(7 N. H. 345.)

Superior Court of New Hampshire. Hillsborough. Dec. Term, 1834.

Assumpsit for money had and received. On trial, it appeared that prior to the 29th of September, 1826, one John Hartshorn was duly appointed executor of the last will of Benjamin Hartshorn, whose estate was decreed to be administered in the insolvent court.

The plaintiff presented a claim against said estate, of $45.66, which was allowed by the commissioner, and a decree of the probate court was passed on the 29th of September, 1826, for the payment of the claim allowed the plaintiff and other creditors of the estate.

It further appeared, that on the 17th of November, 1826, the said John Hartshorn, executor, sold and conveyed to the defendant a farm which had belonged to the testator, for the sum of $1900, and that upon that occasion, by agreement between him and the defendant, the defendant retained a sufficient amount of the purchase money to pay the claims against said estate which remained unpaid, among which was that of the plaintiff; and the defendant agreed with the executor to pay to the plaintiff the amount of his claim, to recover which this action is brought.

Upon this evidence, verdict was taken for the plaintiff by consent; and it was agreed that judgment should be rendered upon the verdict, or that the verdict should be set aside, and judgment entered for the defendant, as the court should direct.

J. U. Parker, for plaintiff. E. Parker, for defendant.

UPHAM, J. In this case, the plaintiff having a claim against the estate of Benjamin Hartshorn, which had been allowed, it became the duty of the executor to provide for its payment, if he had assets. If the executor might have compelled the plaintiff to a suit upon the bond, in order to recover the amount of his claim, it was no part of his duty as executor to adopt that course; and it is evident that he intended to provide for the payment of the plaintiff's claim without compelling him to resort to legal proceedings. For this purpose he directed the amount due the plaintiff to be paid out of funds left by him with the defendant, arising from the sale of lands belonging to the estate; and the defendant cannot prevail in the exception which has been taken by him in this case,—that it was in the power of the executor to have done differently, and to have withstood payment until compelled by a suit upon his bond. Besides, the executor is a stranger to this suit; and, if this defence should be considered as open to him (see, contra, Adams v. Dakin, 2 N. H. 374), it is open only to him, and cannot avail to this defendant.

The second exception which has been taken is equally untenable. The defendant purchased the land, and thereby became indebted to the executor. By agreement between the executor and the defendant, the defendant retained, not the land, as that had passed to him by the sale, but a portion of the purchase money, for the purpose of paying the debts of certain creditors of the estate, among which was the debt due the plaintiff; and if there is a sufficient privity betwixt the defendant and the plaintiff, the purchase money so retained is the plaintiff's money, for which the defendant is liable to him in an action for money had and received to his use. As between the plaintiff and defendant, it is the same as if the land had been paid for, and the executor had then deposited a portion of the purchase money with the defendant, directing him to pay certain debts due from the executor, and which the defendant promised to pay.

But the principal question in this case is, whether the plaintiff can avail himself of the promise made by the defendant to the executor,—he never having agreed to accept the defendant as his debtor, nor having made any demand of him for the money prior to the commencement of this suit.

Can the plaintiff avail himself of the deposit of the money by the executor with the defendant, and the defendant's promise to Hartshorn, the executor, to pay it, without some evidence of assent on the part of the plaintiff before the institution of a suit?

It is apparent, that in cases of this kind, a contract, in order to be binding, must be mutual to all concerned, and that until it is completed by the assent of all interested, it is liable to be defeated, and the money deposited countermanded.

It seems, also, to be clear, that no contract of the kind here attempted to be entered into can be made, without an entire change of the original rights and liabilities of the parties to it. There is to be a deposit of money for the payment of a prior debt,—an agreement to hold the money for this purpose, and an agreement on the part of a third person to accept it in compliance with this arrangement. It is made through the agency of three individuals, for the purpose of payment; and it can have no other effect than to extinguish the original debt, and create a new liability of debtor and creditor betwixt the person holding the money and the individual who is to receive it. On any other supposition there would be a duplicate liability for the same debt; and the deposite, instead of being a payment, would be a mere collateral security,—which is totally different from the avowed object of the parties.

What proceedings will constitute an assent to this contract and discharge the original debtor? Will a demand of the money have this

effect? An individual who should receive advices from his debtor of a deposite of money for his benefit, would hardly deem a demand of the money, accompanied by a refusal of payment, a discharge of the prior debt. A suit to recover money is no more decisive evidence of an election to receive it, than a demand; and the bringing of a suit cannot be considered evidence of an assent to a contract, and thereby support the action which had no foundation until it was brought.

To entitle the plaintiff to recover, there must be an extinguishment of the original debt; and it is questionable whether, in cases of this kind, anything can operate as an extinguishment of the original debt but payment, or an express agreement of the creditor to take another person as his debtor in discharge of the original claim. A contract of this description is an extinguishment of the original debt. Coxon v. Chadley, 3 Barn. & C. 591.

The bailee is either a stakeholder—holding the money to abide a contingency, and bound either to deliver it to the depositor, if he remands it, or to the creditor if he claims it,—the first claimant thereby making it his money; and of course, if the creditor's money then a payment of the original debt,—or the bailee is liable solely to the depositor, there being no privity of contract betwixt himself and any other person.

If this be true, the money being holden upon a contingency, neither party can sue without a prior demand. It is unnecessary to determine, in this case, whether suit may be made with demand. If so, it must be solely on the ground that by such demand the prior debt is extinguished.

It is important in this case to refer to such authorities as bear upon it. The case of Hall v. Marston, 17 Mass. 575, directly conflicts with the principles laid down as above. But one authority is cited to sustain it, which is from Com. Dig., "Action upon the Case upon Assumpsit," E: "If money be given to A to deliver to B, B may have an action." The reference in Comyn is to Rolle, Abr., and Hardres, 321. The case in Hardres is Bell vs. Chaplain, where A delivered goods, the property of B, to C, who promised, for a consideration given by A, to deliver them to B; and it was holden that either A or B might sue C for not delivering them. In that case the goods delivered were the property of B, and no question arose as to the extinguishment of a prior debt. The case in Massachusetts proceeds upon the same principle. The court remark, that "wherever one has in his hands the money of another which he ought to pay over, he is liable to this action." The question of title to the money, which settles the question of a right of action, is assumed to be in the plaintiff.

The case of Weston v. Barker, 12 Johns. 276, is similar to that in 17 Mass., except that there was an express agreement to hold the balance of the money subject to the order of the depositors; and an order was afterwards drawn by them for the money in favor of the plaintiff, of which the defendant had notice. In this case Spencer, J., dissented. Neilson v. Blight, 1 Johns. Cas. 205, is a similar authority.

The cases, Wilson v. Coupland, 5 Barn. & Ald. 228; Meerh v. Moessard, 1 Moore & P. 8; Israel v. Douglas, 1 H. Bl. 239; Tatlock v. Harris, 3 Term R. 180,—differ from this case. In those cases there was an agreement of all the parties operating to the extinguishment of the original debt, and a new promise was made by the person holding the money directly to the creditor. These cases are similar to Cuxon v. Chadley and Heaton v. Angier, above cited. On such a promise there is no doubt a suit would lie. Surtees v. Hubbard, 4 Esp. 203; Gill v. Brown, 12 Johns. 385; Beecker v. Beecker, 7 Johns. 103; Holley v. Rathbone, 8 Johns. 149. It would be irrevocable on the part of the promissor. A person cannot revoke an authority to his debtor to pay a debt to a third party, the creditor of the former, after the debtor has given a pledge to such third party that he will pay the money according to the authority. Chit. Cont. 185.

These cases are distinct from the case now under consideration. Up to the time when this action was brought, the plaintiff had never consented to receive the money of this defendant, and there never had been any contract made betwixt them relative to it.

The case, Wharton v. Walker, 4 Barn. & C. 163, conflicts with the Massachusetts and New York authorities, and is directly in point in favor of the defendant. One Lythgoe was indebted to the plaintiff in the sum of £4. 5s. and gave the plaintiff an order for that sum upon the defendant, who was his tenant, to be paid out of the next rent that became due. When the next rent became due, Lythgoe left in the hands of the defendant the amount due to the plaintiff, and gave a receipt for the whole rent; and the defendant promised to pay the plaintiff, who afterwards brought an action for money had and received. It was held that the action could not be maintained, because the plaintiff's debt against Lythgoe was not discharged.

Bayley, J., says, that if, by an agreement betwixt the three parties, the plaintiff had undertaken to look to the defendant, and not to his original debtor, that would have been binding, and the plaintiff might have maintained an action, on the agreement; but in order to give that right of action there must be an extinguishment of the original debt. But no such bargain was made in this case. Upon the defendant's refusing to pay the plaintiff, the latter might still sue Lythgoe, as in Coxon v. Chadwell, 3 Barn. & C. 591.

The other judges severally expressed a concurring opinion.

See, also, Bourne v. Mason, 1 Vent. 6; Crow

v. Rogers, 1 Strange, 192; Williams v. Everett, 14 East, 532; Johnson v. Collins, 1 East, 104; Stewart v. Fry, 7 Taunt. 339; Lowther v. Berry, 8 Mod. 116; Crifford v. Berry, 11 Mod. 241; 3 East, 171.

The general rule applicable to cases of this kind is, that the legal interest in the contract resides with the party from whom the consideration moves, notwithstanding it may inure to another's benefit, or even is to be performed to another in person. So that "were A to promise B, for some consideration he has given him, to pay C a sum of money, B, and not C, would be legally concerned in this agreement." This rule is laid down by Hamm. Part. Act. p. 6, after adverting to the authorities referred to in Comyn, and cited in 17 Mass., which he says militate against the general rule, and are unsustained by subsequent decisions.

There is some conflict in the authorities on this subject, but we consider the general rule as laid down, and which is recognized as settled law in England, to be the better opinion, and established on sound legal principles. The verdict, therefore, for the plaintiff, must be set aside, and judgment entered for the defendant.

MARKLE v. HATFIELD.

(2 Johns. 455.)

Supreme Court of New York. 1807.

This case came before the court on a writ of error, from the court of common pleas, of Dutchess county, founded upon a bill of exceptions.

The suit below was an action of assumpsit. The declaration contained a count for divers cattle, sold and delivered to the defendant; and counts for money paid, &c. lent, &c. and for money had and received, to the use of the plaintiff, and an insimul computassent. Plea, non-assumpsit.

Upon the trial, the plaintiff below proved, that in October, 1805, he sold to the defendant, who was a butcher, a number of cattle, for 120 dollars, and that the defendant paid him the said sum in bank bills, which the plaintiff received in full payment. Among the bills so received, there was one for fifty dollars, of the Boston Branch Bank of the United States. The plaintiff, on the same day on which he sold the cattle and received the bills in payment, paid the same note of 50 dollars to a third person; and soon afterwards, it was discovered to be counterfeit, and was returned to the plaintiff. The same bill was produced, and proved to be counterfeit, upon the trial. No evidence was given that the defendant below knew the bill to be counterfeit, and he was proved to be an illiterate man. The counsel for the defendant, at the trial, insisted, that the plaintiff was not entitled to recover upon the proof; but the court charged the jury that the evidence was sufficient, and that the plaintiff was entitled to recover the fifty dollars, with interest, though there was no evidence of any fraud in the defendant, and the jury found accordingly. The bill of exceptions was taken to this opinion, and the charge of the court below.

Mr. Ruggles, for plaintiff in error. J. Tallmadge, contra.

KENT, C. J. The justice of this case is clearly with the defendant in error. He parted with his goods to the plaintiff, without receiving the compensation which was intended. It would be matter of regret, if the law obliged us to regard a payment in counterfeit, instead of genuine bank bills, as a valid payment of a debt, merely because the creditor did not perceive and detect the false bills, at the time of payment. The reasonable doctrine, and one which undoubtedly agrees with the common sense of mankind, is laid down by Paulus in the Digest; and has been incorporated into the French law. He says, that if a creditor receive by mistake any thing in payment, different from what was due, and upon the supposition that it was the thing actually due, as if he receive brass instead of gold, the debtor is not discharged, and the creditor, upon offering to return that which he received, may demand that which is due by the contract. Si quum aurum tibi promisissem, tibi ignoranti quasi aurum æs solverim, non liberabor. Dig. 46. 3. 50; Poth Tr. Obl. No. 495.

But there are some ancient dicta in the English law, which advance a contrary doctrine, in respect to gold and silver coin. It is said, that the creditor must at his peril count and examine the money at the time he receives it. Bank bills are not money, in the strictly legal and technical sense of the term, but as they circulate, and are received as money, in the ordinary transactions of business, it becomes material to examine into the authority and solidity of these positions in the books. In Shep. Touch. p. 140, it is laid down, and with a reference to the Terms de Ley, that if payment be made partly with counterfeit coin, and the party accept it, and put it up, it is a good payment. Shepherd's Touchstone is supposed to be the work of Mr. Justice Doderidge, and as such, it has always been considered as a book of authority; but it loses some of its character for accuracy, when we consider it as a posthumous and surreptitious publication. The book to which it refers, gives no increased weight to the dictum. The same doctrine is contained in Wade's Case, 5 Coke, 114, but it is supported only on the authority of the case of Vane v. Studley, which is there cited, in which it is said to have been adjudged, that where the lessor demanded rent of his lessee, according to the condition of re-entry, and the lessee paid the rent to the lessor, who received it and put it into his purse, and afterwards discovering a counterfeit piece among the money, he refused to carry it away, and re-entered for the condition broken, the re-entry was held not to be lawful, because he accepted the money at his peril. This case of Vane v. Studley is cited cautiously, and stated, as said to have been so adjudged. With regard to Wade's Case itself, it did not require the aid of any such decision, because no such question arose in that case, and it was adopted by Lord Coke merely in illustration of his opinion. Perhaps, the question arising upon the forfeiture of a condition, might have induced the judges the more readily to adopt the rule, though in Shepherd the rule is laid down as general, and without any special application. These loose dicta, and this doubtful case of Vane v. Studley, are then, as far as I have been able to discover, all the authority which we have for this ancient doctrine; and it is to be remarked, that we find no subsequent sanction of it, through all the accumulated decisions in the English law. On the contrary, the modern decisions are founded on different principles. They apply another and juster rule to cases of payment in negotiable paper. These cases are so very analogous to the one before us, that it would be very difficult to raise a distinction.

In Stedman v. Gooch, 1 Esp. 3, the plaintiff took in payment, for goods sold to the defendant, three promissory notes of one Finlay, payable at the house of one Brown, and gave

the defendant a receipt to that effect. It appeared that Finlay had no effects in the hands of Brown, and the plaintiff sued upon the original demand, before the notes were payable. Lord Kenyon held, and his opinion was afterwards concurred in, by the other judges of the king's bench, that if such a bill or note was of no value, the creditor might consider it as waste paper, and resort to his original demand. If the plaintiff in that case was not bound by the acceptance of the promissory note of Finlay, because it proved afterwards to be of no value, why should the defendant in the present case, be bound by the acceptance of a pretended promissory note from the Boston Branch Bank, when the note proves, afterwards, to be counterfeit? Whether it be the promissory note of an individual, or of a corporation, can make no difference. The creditor, in both cases, is presumed to have been ignorant of the want of value in the note. He cannot be chargeable with negligence, in not detecting, in the first instance, the want of value, because, the means of ascertaining whether the note was or was not of value, may be, and probably were, equally in both cases, absent from the party. The like doctrine was advanced in the case of Owenson v. Morse, 7 Term R. 64, and it has been adopted and applied to a similar transaction of payment, in a negotiable note, in the case of Roget v. Merritt (decided in this court) 2 Caines, 117.

The negotiable note of a third person, and a bank note, are equally promissory notes, for the payment of money; and if the receiver may be presumed in the one case, and not in the other, to have taken upon him the risk of the solvency of the drawer, there is no presumption in either case, that he assumes upon himself the risk of forgery. In the case of goldsmiths' notes, which were formerly accounted as ready cash, Lord Ch. J. Holt did, indeed, once say (Tassel v. Lewis, 1 Ld. Raym. 743) that the receiver gave credit to the goldsmith, and took them at his peril; but this doctrine has since been exploded by repeated decisions (Strange, 415, 508, 1248). Even were we to admit, (which I do not) that there might be some difficulty in surmounting the opinion of Lord Coke, as to gold and silver coins, yet, as to bank bills and other promissory notes, we must conclude, upon the strength of authority, as well as upon the reason and justice of the case, that the charge of the court below was correct, and that the judgment ought to be affirmed.

I have not thought it requisite to pay much attention to the case of Price v. Neal, 3 Burrows, 1354, which was cited in the argument, because, I consider that case as decided upon principles, which have no application to the case before us. It was there held, to be incumbent upon the acceptor of a forged bill of exchange, to satisfy himself of the genuineness of the drawer's hand, before he accepts and pays it, as he must be presumed to know his correspondent's hand; and that it was not incumbent upon the defendant to inquire into that fact. That decision, therefore, turned upon the negligence imputable to the one party and not to the other. No such imputation arises in the present case. The acceptance of a bill, and the indorsement of a note give a credit to the paper, which, upon commercial principles, the party is not afterwards at liberty to recall.

Judgment affirmed.

CHELTENHAM STONE & GRAVEL CO. v. GATES IRON WORKS.

(16 N. E. 923, 124 Ill. 623.)

Supreme Court of Illinois. May 9, 1888.

Appeal from appellate court, First district.

Frederic Ullmann, for appellant. Henry H. Anderson, for appellee.

SHELDON, C. J. This is an appeal from a judgment of the appellate court for the First district, affirming a judgment of the superior court of Cook county. The case made by the evidence was this: Between March 19 and October 15, 1885, appellee, the Gates Iron Works, sold appellant, the Cheltenham Stone & Gravel Company, machinery and merchandise to the amount of $3,940.97. Accounts were rendered monthly, and payments were made on account from time to time. During August, 1885, appellee received from appellant iron to the amount of $2,600, and a note dated August 10, 1885, for $1,000, due 90 days from said date, signed by the Cheltenham Improvement Company, payable to appellee. Both these items, the iron and the note, were credited appellant on appellee's books, and the statement of account rendered appellant on September 1st showed a credit of the two amounts, and the statement of account thereafter rendered started off with the balance after deducting these amounts. When the transactions for the season were closed, appellee's books showed an indebtedness against appellant of $145.97. This amount is conceded to be still due. Prior to the maturity of its note, the improvement company had become insolvent, and the note was not paid. Appellee sued the improvement company on the note, and obtained judgment, but was unable to collect it. Then it brought this suit against appellant on the account, ignoring the credit it had given for the amount of the nete, and on the trial tendered appellant an assignment of its judgment against the improvement company. Appellant recovered a verdict and judgment for $1,145.97, the full amount of its claim.

It is insisted that the presumption of law from these facts was that the note was taken in absolute payment; and, as there was no evidence offered tending to rebut that presumption, appellee was, on the case made by it, only entitled to a verdict for $145.97; and that the court erred in not granting appellant's motion, made when the appellee rested its case, to direct the jury to find a verdict for appellee for $145.97, and also in not giving the following instruction asked by appellant, but refused, viz.: "If the jury believe, from the evidence, that the note referred to was credited by the plaintiff to the defendant on the books of the plaintiff, and included as a credit in statement of account afterwards rendered by the plaintiff to defendant, then the presumption of law is that said note was received in payment, and the burden of proof is upon the plaintiff to show that such was not the intention of the parties at the time said note was given; and if the plaintiff has failed to show such intention, that the same should not be received as payment, by a fair preponderance of testimony, the jury will find for the defendant on that issue." Story, in his work on Promissory Notes (section 104), lays down the rule in this respect as follows: "In general, by our law, unless otherwise specially agreed, the taking of a promissory note for a pre-existing debt or a contemporaneous consideration is treated prima facie as a conditional payment only; that is, as payment only, if it is duly paid at maturity. But in some of the American states a different rule is applied, and, unless it is otherwise agreed, the taking of a promissory note is deemed prima facie an absolute payment of the pre-existing debt or other consideration. But, in each case, the rule is founded upon a mere presumption of the supposed intention of the parties, and is open to explanation and rebutter, by establishing, by proper proofs, what the real intention of the parties was; and this may be established, not only by express words, but by reasonable implication from the attendant circumstances." In Tobey v. Barber, 5 Johns. 68, a note of a third person was given for rent due, and a receipt given for the rent. The note was not paid, the maker having become insolvent before the note became due. The court say: "The taking of the note was no extinguishment of the debt due for the rent. It is a rule, well settled and repeatedly recognized in this court, that taking a note, either of the debtor or of a third person, for a pre-existing debt, is no payment unless it be expressly agreed to take the note as payment, and to run the risk of its being paid, or unless the creditor parts with the note, or is guilty of laches in not presenting it for payment in due time; and it was held that the inference arising from the reeceipt was not enough to establish such a positive agreement." Johnson v. Weed, 9 Johns. 310, is to the same effect,—a case where the note of a third person had been given in payment of a debt, and a receipt in full given. McIntyre v. Kennedy, 29 Pa. St. 448; Hunter v. Moul, 98 Pa. St. 13; Brown v. Olmsted, 50 Cal. 162, —are authorities in support of the rule that taking the note of a third person for a pre-existing debt is no payment unless it be expressly agreed to take the note as payment. The decisions in this state are essentially to the same effect. Walsh v. Lennon, 98 Ill. 27; Wilhelm v. Schmidt, 84 Ill. 185.

It is insisted that, although the acceptance of the note merely might not be payment, yet, treating the note as payment, as was done here, by crediting it as payment on appellee's books, and in statements of account rendered, shows that the note was taken in payment. We do not consider this any stronger evidence, in that regard, than were the receipts in full which were given in the cases

cited from Johnson. In regard to the receipt in Johnson v. Weed, the court remarked: "It might still have been understood, consistently with the words of it, [receipt,] that the note was received in full, under the usual condition of its being a good note." And so in Brigham v. Lally, 130 Mass. 485, a case where such a note of a third person had been taken on an open account, and the debtor credited therewith, it was held that the trial court properly refused to rule that placing the note to the credit of the defendant upon the plaintiff's journal and ledger, and making no other appropriation of the money, was in law a payment. We think the ruling of the court here complained of is entirely well sustained by authority.

Counsel for appellee, in his address to the jury, was allowed by the court, against appellant's objection, to argue that a scheme had existed whereby one of the defendant's officers had foisted the note upon the plaintiff, knowing the maker to be or about to become insolvent, so that the loss might fall upon the plaintiff; and an instruction asked by the defendant that there was no evidence in such regard, and that the jury should disregard the remarks of counsel with reference thereto, was refused; and this action of the court is assigned for error. While these remarks of counsel may have been improper, and the court might well have interposed as requested, we cannot say that the refusal to do so was such error as should cause a reversal of the judgment. The judgment of the appellate court must be affirmed.

LAMB v. LATHROP et al.

(13 Wend. 95.)

Supreme Court of New York. Oct., 1834.

Demurrer. The plaintiff declared on a note made by the defendants, bearing date 8th March, 1831, whereby the defendants promised, one year after date, to pay to the plaintiff $50 in a horse, neat stock, or first rate pine lumber, to be delivered in Cortland village, at the market price, at the appraisal of two persons of the names of Bartlett and Rowley, with use; and alleged non-performance. The defendants pleaded, that when the note became due, to wit, on the 8th March, 1832, they tendered to the plaintiff the said sum of $50 and the interest thereof for one year, in a horse, appraised by Bartlett at $70, averring that Rowley was not on that day in the state, but was in the state of Pennsylvania, wholly beyond the reach, power and control of the defendants, so that they could not procure his attendance to unite with Bartlett in the appraisal of the horse, and concluding by alleging that the plaintiff refused to receive the horse so tendered by them; wherefore they prayed judgment, &c. This plea did not contain the averment of tout temps prist. The plaintiff replied, that after the tender of the horse, to wit, on the 10th day of March, &c. at, &c. he demanded the same horse of the defendants, which horse then was in their possession, and that the defendants refused to deliver the horse to him, unless he would pay to them $16.50, the difference between the appraised value of the horse and the sum of $50, with the interest thereof for one year; concluding with a verification and prayer of judgment. To which replication the defendants demurred.

M. T. Reynolds, for plaintiff. J. A. Spencer, for defendants.

SAVAGE, C. J. The principal question arises upon the plea of the defendants, the validity of which is denied by the plaintiff, and the first ground urged on his part is, that it is not averred that the defendant is still ready to deliver the horse. It is contended, on the authority of Chipman's Essay on Contracts, p. 96, that such an averment is necessary; and that, in a case like this, the replication of a subsequent demand and refusal authorizes a recovery upon the original cause of action. The learned author of this essay argues that as there is at this day no case where property is lost to the creditor by a tender and refusal, it follows that every plea of tender must contain an averment that the property is still ready. It is true that property tendered is not lost to the creditor by his neglect or refusal to receive it; but it is also true that, in the case of a tender of specific articles, the courts in this state consider the contract to deliver or pay such articles discharged. The tender, properly made, is a satisfaction of the demand; the debt is paid, and the articles tendered become the property of the creditor, and afterwards are kept at his risk and expense. In the case of Slingerland v. Morse, 8 Johns. 478, the court say, "We consider it a complete bar to the suit upon the contract." In Shelden v. Skinner, 4 Wend. 528, 529, this subject was again considered by this court, and such a tender held analogous, as it was in the last case cited, to the French consignation, whereby the debtor is discharged. The creditor must resort to the specific articles, and to the person who tendered them as the bailee thereof. The relation of debtor and creditor no longer subsists between these parties, but that of trustee and cestui que trust, or bailor and bailee. See 2 Kent, Comm. 508, 509. If such be the law, the defendant in this case was not bound to aver that the horse was still ready; and the plea is not faulty for want of such averment.

The remaining objections to this plea are, that it is not averred that the appraisal was by the persons agreed upon, nor at the market price, nor that the tender was made in satisfaction of the debt. No authority is cited to show that it should be averred that the offer was made in satisfaction of the debt; the precedents are not so, nor do I see any necessity for such an averment. The plaintiff complains that the defendant did not pay him $50 and interest in a horse, according to his contract. The defendant says, that on the day, and at the place appointed, he tendered to him the said sum in a horse, according to his contract; that is enough. Nor can it be necessary, in such case, to aver that the appraisement was at the market price. The market price is the price of every article, unless some other is mentioned The market price, I apprehend, was inserted as directory to the appraisers and the averment that the horse was appraised by the appraisers is sufficiently minute and certain; to appraise at any other price would be a violation of duty, even if the words market price were omitted. The presumption, in such cases is, that the persons designated have done their duty; not that they have violated it.

But the objection that there is no averment that the property in question was appraised by the persons agreed upon is not so easily obviated. The defendants, by their contract, agreed to pay $50 and interest for one year, in a horse, at the appraisal of Bartlett and Rowley. They aver that they tendered the horse at the appraisal of Bartlett; that is not a compliance with the contract. The appraisement by two persons is a condition precedent to the tender; the plaintiff has not agreed to accept a horse at the appraisement of Bartlett alone, nor of Bartlett and any other except Rowley. It is not sufficient that the act done may be equivalent. The plaintiff relied upon the judgment of those particular persons; the defendants undertook to procure it: if they failed, they must pay the money. There is a debt due the plaintiff;

he agrees to receive a horse, provided it is appraised by Bartlett and Rowley. The defendants agree to pay the money, if they do not deliver a horse at the appraisal of Bartlett and Rowley. This is the legal effect of the contract. It is manifest that the defendants have not procured the appraisal of the two persons named; and as they have not performed the condition upon which they were to be excused from the payment of the money, it follows that the money must be paid. It is not for the defendants to say that they can make a new agreement for the plaintiff; nor can the court do it. The plaintiff has substantially said, I will not agree to take a horse at all, unless at the appraisal of these two men. I will not take the appraisal of one of them, but of both. The defendants entered voluntarily into the agreement, and they must perform it. This case appears to me to be analogous to the cases upon fire policies, where, if the certificate of certain persons is required, no other can be substituted. 6 Term R. 719; 1 H. Bl. 254; 2 H. Bl. 574. This view of the subject is sufficient to authorize a judgment in favor of the plaintiff.

It is not improper to remark, that the plea is defective in another particular, though the point is made here as an objection to the replication. The horse, it seems, was appraised at $70, and the defendant claims the payment of the difference in money, before he is liable to deliver the horse. Under what agreement of the plaintiff do the defendants set up this claim? The plaintiff hath said that he will receive a horse worth $53, on certain conditions; but it does not follow that he is to receive a horse of a greater value, and pay the difference. He has entered into no such agreement. The defendants must tender the horse according to agreement; if he is of greater value, they must either tender him at the amount to be paid, or keep him, and pay the money.

The plea is bad, and the plaintiff is entitled to judgment, with leave to defendants to amend, on payment of costs.

RAY v. THOMPSON.

(12 Cush. 281.)

Supreme Judicial Court of Massachusetts. Middlesex. Oct. Term, 1853.

Assumpsit for the price of a horse sold to the defendant. The defence was that the horse was sold under a conditional contract, with a right to return him within a specified time, if not satisfactory to the defendant, and that the defendant did so return him. At the trial in the court of common pleas before Mellen, J., the plaintiff offered evidence tending to prove that during the time limited by the contract for the return of the horse, and while he was in the defendant's possession, the defendant misused and abused the horse, whereby he was materially injured and lessened in value, and that the plaintiff did not accept him in return; which evidence, the presiding judge, on objection by the defendant, rejected, and, the verdict being for the defendant, the plaintiff alleged exceptions to the ruling.

J. W. Bacon, for plaintiff. G. A. Somerby, for defendant.

PER CURIAM. The evidence offered by the plaintiff ought to have been admitted, to prove, if he could, that the horse had been abused and injured by the defendant, and so to show that the defendant had put it out of his power to comply with the condition, by returning the horse. The sale was on a condition subsequent; that is, on condition, he did not elect to keep the horse, to return him within the time limited. Being on a condition subsequent, the property vested presently in the vendee, defeasible only on the performance of the condition. If the defendant, in the meantime, disabled himself from performing the condition,—and if the horse was substantially injured by the defendant by such abuse, he would be so disabled,—then the sale became absolute, the obligation to pay the price became unconditional, and the plaintiff might declare as upon an indebitatus assumpsit, without setting out the conditional contract. Moss v. Sweet, 3 Eng. Law & Eq. 311, 16 Adol. & E. 493.

New trial ordered.

LAKE SHORE & M. S. RY. CO. v. RICHARDS.

(38 N. E. 773, 152 Ill. 59.)

Supreme Court of Illinois. June 19, 1894.

Appeal from appellate court, First district. Assumpsit by Edward S. Richards, surviving partner of the firm of Richards, Maynard & Co., against the Lake Shore & Michigan Southern Railway Company. Plaintiff obtained judgment, which was affirmed by the appellate court. Defendant appeals. Reversed.

The other facts fully appear in the following staement by BAILEY, C. J.:

This was a suit in assumpsit, brought by Edward S. Richards, surviving partner of the firm of Richards, Maynard & Co., against the Lake Shore & Michigan Southern Railway Company, to recover damages for breaches of a contract, the material provisions of which will be stated presently. Prior to the execution of said contract, grain, brought by western railroads to Chicago, and destined, either before or upon its arrival in that city, for transportation by rail to the east, was delivered by the western to the eastern railroads, and was by the latter weighed and transferred from western to eastern cars. At that time the transfer of such grain was accomplished by placing the loaded and empty cars side by side on parallel tracks, and by shoveling the grain from one car to the other by hand. The weighing was done on track scales, by first weighing the loaded car, and then weighing it after it was unloaded, the difference between such weights being the weight of the grain. This process was expensive, and the weights thus obtained, as the evidence tends to show, were, owing to a variety of causes, liable to be inaccurate. Richards, the plaintiff, was the inventor and patentee of a new process for weighing and transferring grain in bulk, which was claimed to be cheaper than the old method, and which furnished more accurate weights than could be had by the existing mode of weighing. By this process, the loaded cars of grain were run up onto an elevated track in a transfer house, and empty cars were placed alongside of them on a lower track. The grain was then shoveled by steam shovels from the loaded cars into hoppers, where it was weighed, and then allowed to run by force of gravity into the empty cars below. Negotiations were thereupon entered into between Richards and the defendant company with a view to the adoption by the latter of this new mode of weighing and transferring grain, and these negotiations resulted in a written contract between the company, of the first part, and Richards, of the second part, bearing date January 2, 1884, which contract was afterwards assigned by Richards to the firm of Richards, Maynard & Co., consisting of Richards and John W. Maynard.

Said contract recited by way of preamble that one of its objects was to provide a cheaper method of transferring grain, mill feed, and seed from one car to another than the one employed by said company, and for that purpose to use the device of Richards, secured to him by letters patent, etc.; and that Richards intended to erect and build a grain transfer house on the land thereinafter described, for the purpose of so handling, weighing, and transferring in bulk such grain, mill feed, and seed as might be delivered to him for that purpose by the company. The company then agreed, in consideration of the nominal rental of $10 per year, and of the covenants in the contract to be kept and performed by Richards, to lease to him, for the term of 10 years, certain land upon which to erect such transfer house and the necessary approaches thereto, and also agreed that, as soon as such transfer house and approaches were constructed, it would build and maintain thereon and through such transfer house such track or tracks as might be necessary to transact the business contemplated by said agreement, and do all switching of loaded and empty cars to and from said transfer house at its own expense, and without cost to Richards, provided that the actual cost thereof should be taken into account in determining the fair amount to be paid Richards, as provided in the following covenant: "Third. Said first party further covenants and agrees that, in case there shall be any saving to it in switching, weighing, and transferring of products in this agreement referred to through the methods and devices adopted by said second party, over and above the actual cost of doing the same work under the ways and methods now in use by said first party, then, and in that event, it will pay to second party one half of said saving, the just and actual amount thereof to be ascertained and determined as provided in covenant 'First,' of 'Mutual Covenants,' said amounts, if found due, to be paid to said second party on or before the middle of each month for the month preceding." Richards, on his part, agreed at his own cost and expense to construct and maintain, for the full period of 10 years, on said land, a transfer house and approaches, suitable and proper for carrying out the purpose in said contract expressed, and furnish and supply said house with hopper scales and every other device necessary to properly weigh and transfer said grain, etc. He also covenanted as follows: "Second. That he will receive, weigh, and transfer all products contemplated by this agreement which may be delivered to his said transfer house by or under the direction of said first party with promptness and dispatch, and within such time as to prevent any accumulation of cars or freight, whereby shippers might have just ground of complaint; and, if said second party shall fail to transfer as fast as required, the said first party may transfer by such other method as

it deems proper, and said second party shall do all said work in transfer house at his own cost and expense, without cost to said first party: provided, that the actual cost of doing said work shall be taken into account in determining the saving, if any, between the Richards method of transferring grain and the methods in use by the first party at the date of this agreement, and also for the purpose of determining the just amount to be paid to said second party, as provided in covenant 'Third' of first party: provided, also, that the cost of weighing such products shall not be considered in determining the actual cost of such transfer."

Said contract then contained various paragraphs denominated "Mutual Covenants," the first of which provided the mode for ascertaining and determining the cost of transferring grain, etc., by the new method, and the amount of money thereby saved. The only other provisions of the contract material to the present controversy are the third, fourth, and sixth of said "Mutual Covenants," which are as follows: "Third. And it is mutually covenanted and agreed that all shipments originating at points west of Chicago, and properly billed through to eastern points, and requiring transfer through said house, shall be classed 'through shipments,' and be transferred in the same manner as reconsigned property, and upon the same basis of cost to said first party; it being specially understood and agreed that under no circumstances is said first party to be charged for any weights upon any transfers made through this house, but nothing in this agreement contained shall be so construed as to prevent said second party from charging such fees as may be agreed upon between him and the owner of the property delivered for weights and transfer, and for such other service as he may render in connection therewith, and from collecting his charges as provided in the following mutual agreement. Fourth. It is further mutually understood and agreed that said second party is to receive his compensation for his time, labor, and investments employed in building, operating, and maintaining said transfer house entirely from the weighing of property passing through it, and from the owners thereof, and not from said first party, except as provided in covenant third of said first party; and said first party shall not make use of the weights obtained from said second party in the conduct of its business for any other purpose than billing property to destination, but, upon the request of said second party, said first party will collect such weighing charges as he may show are due to him, in the same manner as other advanced charges are collected, and pay the amount so collected to said second party on or before the middle of each and every month." "Sixth. If at any time differences should arise between the said parties hereto as to its spirit, meaning, or execution, such differences shall be settled by a reference of all matters in dispute to three disinterested arbitrators, each of the parties hereto to select one, and the two so chosen to select a third, and the decision of any two of the court so formed shall be binding between the parties hereto, final, and without appeal."

The declaration, after setting forth said contract in hæc verba, alleges that on the 23d day of January, 1884, the plaintiff assigned all his interest in said contract to the firm of Richards, Maynard & Co., and that said assignment was ratified and confirmed by the defendant; that said firm thereupon erected, on the land described in the contract, a grain transfer house and hopper scales, and all machinery pertaining thereto, the same being completed June 24, 1884, when said firm entered upon the business of transferring grain, etc., from car to car, and weighing the same, as provided for in the agreement; that said firm could not conveniently transfer mill feed through their transfer house, and that the right to have such transfer of mill feed and the weighing thereof was waived by the defendant; that said firm continued to transfer and weigh all such grain and seed as was presented to them by the defendant at their transfer house to be transferred and weighed until June 16, 1886, and kept and performed the contract on their part, yet the defendant, although often requested so to do, has not kept and performed said contract on its part; that on June 16, 1886, the defendant abandoned said contract, and neglected and refused to perform it, and, without reasonable or just cause, refused to be bound thereby; that, after the abandonment of said contract by the defendant, and its refusal to perform the same, to wit, in December, 1887, said Maynard died; that said firm and the plaintiff have always been ready and willing and have offered the defendant to continue in the service and employment of the defendant in weighing and transferring grain and seed as provided by said contract; that the weights so obtained by said firm in weighing and transferring grain and seed were of the value of $1.40 per car, and that the number of cars annually transferred on the track to the cars of the defendant company amounted to 18,000; that, to wit, 18,000 cars of grain and seed per annum will continue to be transferred on said track to the cars of the defendant company; that the saving to the defendant in the switching, weighing, and transfer of grain and seed by the plaintiff's method is $5,000 per annum; that the plaintiff's firm was obliged to and did lay out and expend in building and equipping their transfer house a large sum of money, and that said transfer house is valuable only for the purposes contemplated by said agreement, and that in consequence of the refusal of the defendant to be bound by the terms of said contract, said transfer house has become of no value, whereby the plaintiff has suffered damage in the sum of $25,000; that there is due

to the plaintiff from the defendant, on account of such nonperformance of said contract by it, a large sum of money, to wit, the sum of $300,000, being the amount of damage to and amount due the plaintiff by reason of the breach of said contract, from the date the defendant wrongfully refused to perform said contract on its part. By an amendment to said count the plaintiff claimed special damages for loss of profits which said firm, or the plaintiff, as survivor, would have received from the various shippers of grain but for said breach of contract, and alleged that said firm, or the plaintiff, as its representative, had a contract with the receivers and shippers of grain and seed at Chicago, for the purchase by them of the weights of grain and seed which said firm, or the plaintiff, as survivor, obtained or would have obtained in transferring grain and seed from the cars of western railroads having their terminus at Chicago to the cars of the defendant company; that, but for said breach of said contract, said firm, or the plaintiff, as survivor, would have received 70 cents per car from such receivers and shippers of grain and seed at Chicago for the weights of 15,000 cars of grain and seed per year for eight years,—the unexpired term of said contract.

The defendant pleaded non assumpsit, and also a special plea, alleging, in substance, that at the July term, 1886, of the superior court of Cook county, the plaintiff and said Maynard exhibited their bill in chancery against the defendant in said court for the nonperformance of the same identical promises and undertakings in the declaration mentioned; that at the March term, 1887, of said court the defendant was decreed to be indebted to said complainants for such nonperformance of said promises and undertakings; that said cause was referred to a master in chancery for an accounting, to ascertain the amount of such indebtedness; that the master found that the defendant was indebted to said complainants in the sum of $9,886.68 damages; that the court confirmed such finding, and entered a decree ordering the defendant to pay the complainants that sum and costs; that while an appeal to the appellate court from said decree was pending, Maynard died; that said appeal, being prosecuted against the present plaintiff as survivor, was afterwards affirmed by the appellate court, and that thereupon the defendant paid and satisfied the same. To said special plea the plaintiff replied that the cause of action set out in the declaration was not for the nonperformance of the same promises and undertakings in said plea mentioned, and for which said decree was rendered, but for the nonperformance of other and different promises and undertakings, from the defendant to the plaintiff. At the trial, which was had before the court and a jury, evidence was offered by the plaintiff tending to sustain the cause of action alleged in his declaration, and the jury thereupon returned their verdict finding the issues for the plaintiff, and assessing his damages at $75,000. For this sum and costs the court, after denying the defendant's motion for a new trial, gave judgment for the plaintiff. On appeal to the appellate court said judgment was affirmed, (40 Ill. App. 560,) and this appeal is from said judgment of affirmance.

Pliny B. Smith (Jas. I. Best and John N. Jewett, of counsel), for appellant. A. M. Pence (Wm. A. Gardner, of counsel), for appellee.

SHOPE, J. It is insisted in this court that the evidence is insufficient to sustain the verdict and judgment. The right and duty of this court to review the facts is placed upon two grounds: First, that under section 2, art. 6, of the constitution which provides, "The supreme court shall consist of seven judges, and shall have original jurisdiction in cases relating to the revenue, in mandamus and habeas corpus, and appellate jurisdiction in all other cases," the provision of section 90 of the practice act, restricting the powers of this court to the consideration of questions of law only, and prohibiting the assignment of errors calling in question the judgment of the appellate courts upon questions of fact, is unconstitutional and void. We have so frequently held the act valid that it would seem to be no longer an open question. But, if it was, the correctness of former holdings in this regard is clearly authorized by the provisions of section 11 of the same article of the constitution. It is there provided that after the year 1874 inferior appellate courts, of uniform organization and jurisdiction, may be created by the legislature, to which appeals and writs of error, as the general assembly shall provide, may be prosecuted, "and from which appeals and writs of error shall lie to the supreme court in all criminal cases in which a franchise or freehold or the validity of a statute is involved and in such other cases as may be provided by law." Under this provision the legislature was authorized to vest such courts with appellate jurisdiction in all such cases as, in the legislative discretion, was deemed proper. In four classes of cases—that is, criminal cases, and those involving a franchise or freehold or the validity of a statute—the legislature is prohibited from making the determination of such appellate courts final. In such cases appeals and writs of error must be allowed to the supreme court. In all other cases in which courts are given jurisdiction by statute it is left, by the constitution, discretionary with the legislature to make the judgments of those courts final, or to provide for further appeal or writ of error, as in the legislative discretion shall be deemed proper. It necessarily follows that, since the creation and organization of the appellate courts, the jurisdiction of this court to review the final judgments of those

courts, except in the former classes of cases ennmerated in the constitution, is subject to the restrictions created by the legislature. And it follows that we are precluded from the consideration of any assignment of error questioning the determination of the appellate court upon questions of fact.

At the close of plaintiff's evidence in chief, the defendant moved the court to instruct the jury to return a verdict in its favor, upon the ground that the evidence was insufficient to maintain the cause of action set forth in the declaration, which was overruled. The motion was in the nature of a demurrer to the evidence, and, if defendant desired to avail itself thereof, it should have abided by it. Instead of doing this, it introduced evidence in its behalf, and submitted the cause to the jury without renewing its motion, thereby waiving the error, if error there was, in the decision of the court. Railway Co. v. Velie, 140 Ill. 59, 29 N. E. 706.

The defendant, however, by its instructions 1, 2, and 3, refused by the court, sought to raise the same question. By these instructions the court was asked to instruct the jury—First, the evidence was not sufficient to sustain a verdict for plaintiff; second, there was a variance between the proof and cause of action stated in the declaration; and, third, that the evidence did not show an abandonment of the contract by the defendant, and the verdict should therefore be for the defendant. Instructions taking the case from the jury should only be given where the evidence, with all the legitimate and natural inferences to be drawn therefrom, is wholly insufficient, if credited, to sustain a verdict for the plaintiff. Simmons v. Railroad Co., 110 Ill. 346; Purdy v. Hall, 134 Ill. 298, 25 N. E. 645; Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285, and cases cited. Where there is evidence tending to sustain the issues in behalf of the plaintiff, the weight to be given thereto must be submitted to the jury; and, when their finding of facts has been approved by the trial and appellate courts, no question of the sufficiency of the evidence to support the verdict can be raised in this court. It will be proper, therefore, to so far examine the evidence as to enable us to determine whether there was evidence tending to support the plaintiff's cause of action alleged in his declaration. In the discussion which will follow, it will become apparent that we are of opinion that there was evidence tending to sustain plaintiff's cause of action, as alleged, and that, therefore, said instructions were properly refused. Whether the evidence, when considered together, is sufficient to maintain the plaintiff's case, is a question which does not fall within our province to determine.

The principal question to be determined in this case arises upon the second and third instructions given at the instance of the plaintiff, as follows: "(2) If the jury believe from the evidence that the defendant, by its acts and conduct, showed an intention not to be bound by said contract, then said Richards, Maynard & Co. had the right to treat said contract as abandoned by said defendant, and to bring suit for the recovery of damages at any time thereafter, unless you believe from the evidence that the defendant company receded from such intention not to be bound, prior to the time when said plaintiff chose to treat said contract as abandoned by the defendant. An intention can only be known by acts, conduct, or declaration. Your inquiry in this connection is: First. Did defendant, by act and conduct, violate the substantial terms of the contract, and commit breaches in substantial provisions thereof? Second. Did such acts and conduct, if you believe from the evidence they existed, warrant the conclusion that they would be continued, and that it was the intention of the defendant to continue such acts and conduct? (3) If the jury believe from the evidence that the defendant railway refused to, and did not, live up to its said contract, in its substantial provisions, and refused to perform it according to its terms, and abandoned the same without the fault of Richards, Maynard & Co., and that defendant prevented Richards, Maynard & Co. from performing the substantial provisions of said contract according to its terms, then the plaintiff is entitled to recover; and it is not necessary that Richards, Maynard & Co. should have been prevented from performing said contract by physical force, in order to give them the right to treat said contract as abandoned by the defendant railway, and to recover damages from said defendant company in this suit. If the jury believe from the evidence that said defendant railway refused to, and did not, live up to its said contract, and refused to perform it according to its terms, and if you believe from the evidence that defendant defeated the substantial objects of the contract, or rendered it unattainable by proper performance on the part of the firm of Richards, Maynard & Co., and that defendant prevented Richards, Maynard & Co. from performing the said contract according to its terms, as above suggested, then the jury may find for the plaintiff, and assess the damages at such a sum as they believe from the evidence that the plaintiff has suffered by reason of such breach." Bearing upon the same proposition, more or less directly, the court gave to the jury, at the instance of the defendant, its seventh, twelfth, sixteenth, and seventeenth instructions, as follows: "(7) You are instructed that, if the defendant committed breaches of the contract, still, if, from the evidence, you believe that such breaches did not defeat the substantial objects of the contract, or render it unattainable by proper performance on the part of the firm of Richards, Maynard & Co., then the plaintiff cannot recover, and your verdict

must be for the defendant." "(12) The jury are instructed, as a matter of law, that a mere failure or refusal of the defendant to pay to plaintiff, or the firm of Richards, Maynard & Co., any sum of money demanded by him or them, and claimed to be on account of services previously rendered by said firm under the contract in question, cannot be construed or treated as an abandonment of the said contract by the defendant, entitling the plaintiff or his said firm to maintain the present action, which is solely for the recovery of such profits as might have accrued to the plaintiff or his firm, if, on their part, said contract had been fully executed, continuously, for the period limited by said contract." "(16) The jury is further instructed, as a matter of law, that, in order to entitle the plaintiff to recover in this case, it is necessary for him to establish by a preponderance of evidence that he and the firm of Richards, Maynard & Co. were, by the acts of the defendant, prevented from the performance of said contract on their part, or that the execution of the said contract on their part was interrupted by, and was the legitimate consequence of, the acts of the defendant in disregard of its obligations under said contract. (17) The failure of the defendant to pay, when demanded, any moneys due and owing to plaintiff under the contract, was not such an act or omission, in itself, on the part of defendant, as to prevent the plaintiff completing the contract."

Upon an examination of the evidence for the purpose of determining the propriety of the instructions, it will be found that it tends to prove that shortly after the plaintiff's firm had, in pursuance of the contract, constructed and equipped their transfer house, and commenced the weighing and transfer of grain therein, controversies arose between the parties as to the proper construction of the contract, the rights of the plaintiff, and the duties and obligations of the defendant, thereunder. It was claimed by the defendant that it was not required by the contract to deliver to the plaintiff's firm, to be by them weighed and transferred, all of the grain received by the defendant from western railroads for transportation to the east over its lines, but that it had the option to deliver, to be thus weighed and transferred, only such grain as it chose to deliver, and had the right to divert from plaintiff's transfer house, and was at liberty to transfer and weigh, all or such part of the grain received by it from western railroads as it thought proper, by other modes; and, acting on that interpretation of the contract, it did in fact withhold large amounts of grain from the transfer house, and had the same transferred by other methods, thereby depriving the plaintiff's firm of a considerable portion of the business to which they were entitled by the terms of the contract. And also that soon after the transfer house was open, and during all the time it was in operation, the defendant claimed the right under the contract, and adopted and persisted in the practice, of using the weights obtained from the plaintiff's firm for other purposes than that of billing the property weighed to its destination,—that is to say, by giving away such weights to the western railroads over which the property had been brought to Chicago, or thus placing it out of the power of plaintiff's firm to make sales of such weights to western railroads and others,—thereby depriving them of practically the only source of profit secured to them by the contract. It will also appear that the evidence tends to show that other differences arose as to the amount to be paid by the defendant on account of the expense of transferring through the transfer house, and as to the basis upon which the cost thereof should be computed, etc. The construction placed upon this contract in respect of the matters of difference before mentioned; by this court, in Railway Co. v. Richards, 126 Ill. 448, 18 N. E. 794, relieves us of the necessity of again construing it. We there held that both the giving away of weights to the western railroads, and the refusal of appellant company to deliver to plaintiff's firm, for weighing and transfer, all grain received by it for transportation from western railroads, was a violation of its contract. It was there found that the market value of the weights was 70 cents per car, and that the appellant had given away to western railroads the weights of 12,357 cars transferred and weighed by plaintiffs, in violation of the contract. It was also found that many other cars had been transferred and weighed by other methods than through the transfer house of plaintiffs; that 1,267 of such cars were transferred on track by appellant in January, February, and March, 1885, alone, in violation of the contract. That bill was filed on June 5, 1886, and asked, among other things, a reformation of the contract. The court, by its final decree, refused to reform the contract, but held it to be valid and binding between the parties, in the form in which it was executed. There can be no question that on June 5, 1886, and prior thereto, the evidence tended to show that the defendant was then guilty of breaches of the contract, as it was then held to be subsisting and binding between the parties. Aside from the large amount of business diverted by appellant from the transfer house of the plaintiffs, which it was bound to furnish them under the contract, as there construed, of the 24,700 car loads of grain and seed which appellant delivered to and permitted to be weighed and transferred through the transfer house, the weight of 12,357 cars, or 50 per cent. of the entire business done, was given away by the defendant, in violation of its covenants.

We need not pursue this branch of the case further. But to these may be added

other breaches of the contract by the defendant, which the evidence tends to show, namely, its refusal to pay the transfer charges or expenses, and its refusal to be bound by the stipulations of the contract providing for a submission to arbitration of all differences between the parties in respect of the spirit, meaning, or execution of the contract. It admits of no argument that the principal consideration upon which plaintiff's firm undertook to build, equip, and operate their transfer house was the privilege given them of weighing and transferring all grain and seed delivered by western roads to the defendant for transportation eastward over its lines, and the right secured to them to control the weights of the grain thus transferred, and make sale of them to whomsoever might desire to purchase. It was clearly contemplated that the sale of such weights should be the source of profit to plaintiffs, and, as the result shows, was practically their only source of profit from the business. During the time the transfer house was in operation, there is no complaint that they did not keep and perform their agreements. By the wrongful act of the defendant in giving away the weights, more than one-half of the legitimate profits of the business actually done was taken from them, and by the wrongful diversion of business they were deprived of large profits to which they were entitled under their contract. By the wrongful act of the defendant, they were deprived of a very large proportion of the substantial consideration upon which the contract was entered into by plaintiffs.

The evidence tends to show that the defendant, after the 5th of June, 1886,—the date of filing the bill in the case referred to,—manifested and declared its intention to persist for the future in the same course of conduct, and to insist upon the same construction of the contract. May 13, 1886, the attorney to whom the matter had been referred by the defendant, in reply to a note inclosing an itemized statement of account, refused to allow, under the contract, for weights given away by defendant, and expressly said, "under the contract, the company is not bound to deliver grain to Richards, except at its option." On June 9, 1886, the defendant's western division superintendent wrote to plaintiff, acknowledging receipt of statement of May, 1886, for cost of grain and seed transferred, and disallowing the account, but restating the same in accordance with the interpretation of the contract previously insisted upon by the defendant. On June 11, 1886, plaintiff's firm replied, noting the refusal contained in the letter of June 9th, restating the balance due, and notifying the defendant that unless the same was paid by 12 m., June 16th, plaintiff would be compelled to suspend operations, etc. On the same day the attorney of the company, to whom the matter had been referred, wrote the plaintiff's firm that the company could not change the position taken in the letter of the superintendent and the letter of May 13, 1886, before mentioned. It thus appears that as late as June 11th the company was insisting that under the contract it was not bound to deliver grain to the transfer house of plaintiff's firm, except as it chose to do so; and was likewise denying its liability under the contract for the weights it had given away, and for transfer charges, etc. No change occurring in the attitude of the parties, plaintiff's firm closed their house on June 16th, and notified the defendant accordingly. As early as September 11, 1885, the plaintiff's firm addressed a communication to the president of the defendant company, asking for an arbitration of the differences between them, under the contract, and naming a person to represent the plaintiff's firm, and again, on March 29, 1886, made a like demand, and naming an arbitrator to act for and on behalf of the plaintiff's firm. The defendant company declined to submit the matters in difference to arbitration. The correspondence before referred to, as well as other facts shown, may be fairly said to show a fixed determination on the part of the defendant company, after June 5, 1886, to persist in and continue the same breaches of its contract in the future of which it had theretofore been guilty; that is, to persistently pursue a course of conduct which would deprive plaintiff's firm of much the larger portion, if not all, of the substantial benefits of the contract. If it might, at its option and will, give away one-half of the weights of cars actually transferred, as it claimed the right to do, it might give them all away. If it was optional with the defendant to deliver for weighing and transfer only such cars of grain received by it from western roads for transportation east over its lines as it might choose, and divert the business from the transfer house at will, the contract ceased to be operative and binding on the defendant. Such construction, in effect, was a repudiation of that part of the contract to be kept and performed by the defendant, and was a denial of the right of the plaintiff to have and demand the substantial benefits of the contract as it existed between the parties.

That the breaches of the contract which the evidence tends to establish were such as would justify a rescission thereof by Richards, Maynard & Co. and enable them to recover upon quantum meruit or quantum valebant, so far as they had actually performed, does not admit of question. The relief sought is not upon that principle. The law is familiar that upon rescission of the contract the recovery is confined to the value of the services, etc., rendered, and that damages for the breach, for the loss of expenditures or of profits, would not be allowable. U. S. v. Behan, 110 U. S. 338, 4 Sup. Ct. 81. It is well settled that where one party repudiates the contract, and refuses longer to

be bound by it, the injured party has an election to pursue either of three remedies: He may treat the contract as rescinded, and recover upon quantum meruit so far as he has performed: or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and, at the end of the time specified in the contract for performance, sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In the latter case the contract would be continued in force for that purpose. Where, however, the injured party elects to keep the contract in force for the purpose of recovering future profits, treating the contract as repudiated by the other party, in order to such recovery the plaintiff must allege and prove performance upon his part, or a legal excuse for nonperformance. As said by Lord Coleridge in Freeth v. Burr, L. R. 9 C. P. 208: "In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation or intention to abandon, and altogether refuse performance of, the contract." His lordship then adds: "I say this in order to explain the ground upon which I think the decision in these cases must rest. There has been some conflict among them. But I think it may be taken that the fair result of them is as I have stated, viz. that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

It is insisted by appellant that, to authorize one party to treat the contract as renounced and abandoned by the other, the breach must have been such, in effect, as to prevent performance by the injured party, or render the further execution of the contract by him impossible. It appears to be the theory of counsel for appellant that, in order to entitle the plaintiff to recover future profits under the contract, the breach by the defendant must have been of a condition precedent to be performed on its part, and which rendered the contract incapable of execution by the other, or some act or conduct on the part of the defendant amounting to a physical obstruction or prevention of performance by the plaintiff. This contention does not commend itself either upon considerations of good conscience or convenience, and it will be found not to be sustained by the weight of authority. It would seem to be inequitable, and promotive of no good purpose, to require a party to continue in the performance of a contract, notwithstanding the refusal of the other party to be longer bound by it. The effect in many cases must be great loss to the plaintiff, without any corresponding benefit to the defendant. Or if it be ultimately held that the plaintiff is entitled to recover his expenditures, and for his labor in performing, the amount to be paid by the defendant will be greatly enhanced, while the plaintiff would, of necessity, take the hazard of increased loss in the event of the defendant's insolvency. It would seem to be reasonable and just, upon the repudiation of the contract by one party, that the other be held justified in ceasing performance, stopping expenditure, and thus curtailing the damages which the other party would be ultimately liable to pay, and to permit recovery once for all of the damages that the injured party will sustain by the nonperformance of the other party; the locus poenitentiae being kept open until the injured party elects to treat the contract as abandoned by the other, and brings suit as for nonperformance. While the decision should not be made to rest upon grounds of convenience to the parties, however just and equitable, which, in view of the decided cases, need not be done, yet the defendant should not be heard to complain, if, after acts and declarations evincing a clear determination to be no longer bound by or to perform the contract on his part, the other party treats it as abandoned by him. As said in Frost v. Knight, L. R. 7 Exch. 111: "It is obvious that such a course must lead to the convenience of both parties, and, though we should be unwilling to found our opinion upon ground of convenience alone, yet the latter tends strongly to support the view that such an action ought to be admitted and upheld. By acting upon such notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the nonfulfillment of the contract." See, also, Hosmer v. Wilson, 7 Mich. 304; cases infra. The right of the plaintiff to have kept his transfer house in operation, and have been ready at all times to perform on his part, and, under the construction of the contract given in Railway Co. v. Richards, supra, to have recovered from time to time his damage for breaches thereof, or, at the end of the time, sued to recover damages for all breaches, is not questioned in this proceeding. The plaintiff, however, in good conscience, while seeking to recover what he is entitled to under the contract, should do that which would be of least injury to the defendant. And if the defendant had repudiated the contract, so as to deprive the plaintiff of the substantial benefits arising from performance, it ought not to complain that the course was pursued least prejudicial to it.

The question here presented has not been directly involved in any of the cases heretofore considered by the court. In the cases of Fox v. Kitton, 19 Ill. 519; McPherson v. Walker, 40 Ill. 371; Chamber of Commerce v. Sollitt, 43 Ill. 523; Follansbee

v. Adams, 86 Ill. 14; and Kadish v. Young, 108 Id. 170,—the questions involved were determined upon principles analogous, in some respects, to those which must control in this case. In Kadish v. Young, supra, a contract was made for the future delivery of grain. On the day succeeding the making of the contract the purchasers gave notice to the seller that they would not be bound by it, and the question was whether such notice created a breach of the contract, and imposed on the seller the obligation to resell the barley on the market, or make a forward contract for the purchase of other grain of like amount and time of delivery, within reasonable time after the notice, and, if he sold, to credit the purchaser with the amount of the sale, or give him the benefit of such forward contract; or whether, notwithstanding the notice, the seller had the legal right to wait until the day of delivery under the contract, and then resell and charge the purchaser with the difference. And it was held that the seller was not bound to act upon the notice, but was entitled, notwithstanding, to tender, etc., on the day for delivery fixed by the contract. In the opinion, by the late Mr. Justice Scholfield, the authorities were reviewed, and the cases of Cort v. Railway Co., 6 Eng. Law & Eq. 230; Hochster v. De Latour, 20 Eng. Law & Eq. 157; Frost v. Knight, L. R. 7 Exch. 111; Roper v. Johnson, L. R. 8 C. P. 167, 4 Moak, Eng. R. 397,—and other English and American cases, are commented upon, approved, and are held not to be in conflict with Leigh v. Paterson, 8 Taunt. 540; Phillpotts v. Evans, 5 Mees. & W. 475; Ripley v. McClure, 4 Exch. 344,—and other cases in which it is held that a party to a contract to be performed in the future cannot create a breach by merely giving notice that he will not perform. It will be found, upon examination of Kadish v. Young, that the learned writer clearly recognized the doctrine, that the party receiving the notice might have acted upon it, and accepted and treated the contract as broken. In Fox v. Kitton, supra, the question was whether, when a party agrees to do an act at a future time, and, before the time for performance arrives, declares he will not keep his contract, but repudiates it, the other party may act on such declaration, and treat the contract as at an end. And on the authority of Phillpotts v. Evans, and Hochster v. De Latour, it was held that he might do so. It will be found, also, in McPherson v. Walker and Chamber of Commerce v. Sollitt, that Cort v. Railway Co., Hochster v. De Latour, and other English and American cases holding the same doctrine, are cited with approval, and relied upon as sustaining the decision in those cases.

Before proceeding to our examination of the cases referred to, it is proper to notice other Illinois cases supposed to have some bearing upon the question under consideration. Selby v. Hutchinson, 4 Gilman, 319, was a case of rescission merely. It was there said: "In order to justify an abandonment of the contract, and of the proper remedy growing out of it, the failure of the opposite party must be a total one; the object of the contract must have been defeated, or rendered unattainable, by" the misconduct or default of the other party. In the subsequent case of Leopold v. Salkey, 89 Ill. 412, also a case of rescission, the language of Selby v. Hutchinson is commented upon, and it is said that case "is not understood as laying down the rule that, to justify abandonment of a contract, the opposite party must have failed to discharge every obligation imposed upon him, but simply that matters which do not go to the substance of the contract, and the failure to perform which would not render performance of the rest a thing different in substance from what was contracted for, do not authorize an abandonment of the contract; for when the failure to perform the contract is in respect to matters which would render the performance of the rest a thing different in substance from what was contracted for, so far as we are aware, the authorities all agree the party not in default may abandon the contract." It may be true that there are cases where the party will be justified in rescinding the contract, thereby putting an end to it for all purposes, where he would not be justified in treating it as renounced by the other party, which we are not called upon to decide. Yet it will be found that under the rule as stated in these cases, as explained in the later case, the party will be entitled to recover future profits. The court, in these cases, was called upon simply to determine, whether the facts there presented warranted rescission, and laid down the rule applicable to such facts, without, as a matter of course, intimating a distinction between the case there being considered and cases like that under consideration here. In the case of Palm v. Railroad Co., 18 Ill. 217, the question presented to the court was whether the failure to pay the consideration for the work agreed to be done, according to the terms of the contract, was such an act as would authorize the other party to treat the contract as renounced, and bring suit for future profits. And the court held that it was not. The court say: "In this case we have a contract for the manufacture and delivery of sixteen engines, each to be paid for on delivery, without any expression or intimation that the parties expected or intended that any extraordinary consequences were to follow if the money was not paid when due. All that the contract provides is that so much money and so much bonds shall become due upon the delivery of each engine. By its terms, it simply gives the party a cause of action for that amount. * * * The contract provides for no other penalty or liability, and the law imposes no other, except, perhaps, that this violation of the contract by the defendant, in

failing to make the payment, may justify the plaintiff in treating the contract as rescinded." Or they could go on and complete the contract, and, at the end, recover the amount due thereunder. There was in that case no refusal to receive locomotives under the contract, nor were plaintiffs forbidden to complete it, nor was it in any way put out of their power to do so. Very many of the cases before referred to have been decided since the Palm Case, which, it must be remarked, cites no authority sustaining the view of that case contended for by appellant in this case. The learned judge who wrote in the Palm Case says: "I have examined all the authorities referred to by counsel, and have made diligent search myself, but have found no case where the plaintiff had been allowed to recover for losses sustained by not being permitted to complete the contract, unless he has been prevented from going on with his work by the positive affirmative act of the other party, or where the other party has neglected to do some act, without which the plaintiff could not, in the nature of things, go on with his contract. * * *" After giving instances of conditions precedent, the learned judge holds, as before said, that the failure to pay would not authorize the plaintiff to treat the contract as abandoned by the defendant, unless payment, in a specified time and manner, was, by the contract, made a condition precedent to performance by the plaintiff. The case of Christian Co. v. Overholt, 18 Ill. 223, is similar in its facts to the Palm Case, and is decided upon the same principle. In that case it is said: "The plaintiffs could only recover for prospective profits where they have been prevented from going on, either by some affirmative act of the defendant, as by being ordered to desist from further work, or by the omission to perform some condition precedent to the further prosecution, as to furnish or do something necessary to its further progress." The breach there alleged was a failure to pay an installment as it fell due under the contract, and the case was disposed of upon the authority of the Palm Case. Stress is laid by counsel upon the words, "prevented from going on." It is apparent from the language of the court, especially in the Overholt Case, that physical prevention was not contemplated, for the illustration given shows that at least an order to desist from the work would be a prevention, within the meaning of the term as used. While, in those cases, there was no failure to perform a condition precedent, or a legal prevention from going on with the work under the contract, which would authorize the plaintiffs to treat the contract as repudiated by the other party, and sue for prospective damages, and the court so held, still the cases clearly recognize that when there is a failure to perform a precedent condition, or there is a legal prevention of performance, by one party, the other may treat the contract as abandoned by him, and bring suit for future profits or prospective damages. The same language, i. e. that the party suing must be "prevented" from performance, has been used in numerous cases, but, wherever the attention of the court has been directly called to the sense in which the word has been used, it has been held not to mean that there must be physical prevention, but that any acts, conduct, or declarations of the party, evincing a clear intention to repudiate the contract, and to treat it as no longer binding, is a legal prevention of performance by the other party. Thus, in Hosmer v. Wilson, supra, it was held that an absolute refusal of the defendant to accept the manufactured article when it should be completed was to be considered in the same light, as respects the plaintiff's remedy, as an absolute physical prevention by the defendant; citing, in support, Cort v. Railway Co., supra; Derby v. Johnson, 21 Vt. 21; Clark v. Marsiglia, 1 Denio, 317; Hochster v. De Latour, supra.

In Cort v. Railway Co., supra, the plaintiffs contracted to supply the defendants with 3,900 tons of iron chairs to be used in railway construction. They manufactured and delivered various quantities of chairs from May, 1847, until December, 1849, when the defendants informed plaintiffs that they did not want any more, and not to send any more, leaving 2,113 tons undelivered. Whereupon, plaintiffs brought suit to recover damages, including loss of profits. It was objected that, to entitle the plaintiffs to recover, they should have proved that the chairs had been made and had been tendered in the manner provided by the contract, or at least before the bringing of the suit, etc. In delivering the opinion of the court, Lord Campbell, C. J., said: "We are of opinion that the jury were fully justified, from the evidence, in finding that the plaintiffs were ready and willing to perform the contract although they never made and tendered the residue of the chairs. In common sense the meaning of * * * 'readiness and willingness' must be that the noncompletion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it, if it had not been renounced by the defendants. What more can reasonably be required by the parties for whom the goods are to be manufactured?" And after showing that if, after having accepted a part, the defendants resolved not to accept the balance, the effect of compelling the plaintiffs to proceed with the manufacture and tender of them would be the enhancement of the damages the defendant would be required to pay, his lordship proceeds: "Upon the last issue, was there not evidence that the defendants refused to accept the residue of the chairs? If they had said, 'Make no more for us, for we will have nothing to do with them,' was not that refusing to accept or receive them according to the contract? But the learned counsel for the defendant laid peculiar stress upon the

words [of the plea], 'nor did they prevent or discharge the plaintiffs from supplying the residue of the chairs, and from the further execution of the contract.' We consider the material part of the allegation which the last plea traverses to be that the defendants refused to receive the residue of the chairs. But, assuming that the whole must be proved, we think there is evidence to show that the defendants did prevent and discharge the plaintiffs from supplying the residue of the chairs, and from the further execution of the contract. It is contended that 'prevent,' here, must mean obstruction by physical force; and, in answer to a question from the court, we were told it would not be a preventing of delivery of goods if the purchaser were to write, in a letter to the person who ought to supply them, 'Should you come to my house to deliver them, I will blow your brains out.' But may I not reasonably say that I was prevented from completing a contract by being desired not to complete it? Are there no means of preventing an act from being done, except by physical force or brute violence?" After reviewing and commenting upon cases cited, it is then held that the plaintiffs were entitled to a verdict "on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them."

Without further quotation from cases, it seems clear, both upon principle and by authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or, by his act and conduct, shows that he has renounced it, and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party. And it can make no difference whether the contract has been partially performed, or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will be no longer bound, or by acts and conduct which clearly evince that the determination has been reached, and is being acted upon. It would seem clear, on principle, that a mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract, will not, of themselves, amount to a breach, so as to create an effectual renunciation of the contract; for one party cannot, by any act or declaration, destroy the binding force and efficacy of the contract. Kadish v. Young, supra. As said by Bowen, L. J., in Johnstone v. Milling, 16 Q. B. Div. 460: "Its real operation appears to be to give the promisee the right of electing either to treat the declaration as brutum fulmen, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. * * * If he does so elect, it becomes a breach of contract, and he can recover upon it as such." Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for purposes of maintaining the action for the recovery of damages.

These views are amply sustained by numerous decided cases. In Hochster v. De Latour, 20 Eng. Law & Eq. 157, the plaintiff contracted to enter into the service of the defendant, as a courier, and in such capacity attend him in travels about the continent of Europe, the service to begin on June 1st, and to continue for at least three months, at fixed monthly wages. But before the 1st of June, although the plaintiff was ready and willing to perform, the defendant renounced the contract, and signified his determination to the plaintiff no longer to be bound by it; and the plaintiff, before the time for performance had arrived, brought assumpsit to recover his damages for the breach. It is there said: "It is surely much more rational, and more for the benefit of both parties, that after the renunciation of the agreement by the defendant the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. * * * The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of the option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer." And it was there held that, after the defendant had signified his determination not to be bound by the contract, the plaintiff was entitled to bring his action immediately, and was not obliged to wait until after the day for the performance to begin had arrived. In Frost v. Knight, supra, the defendant had promised to marry the plaintiff upon the death of his father. While his father was still living, he repudiated the engagement, and announced his intention not to fulfill his promise. The plaintiff, without waiting for the death of the father, at once brought her action to recover damages for the breach. And the court there say: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract was to be executed, and then hold the other party responsible for all the consequences of nonperformance. But in that case he keeps the contract alive for the benefit of the other party as well as

his own; he remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." The case of Freeth v. Burr, supra, already quoted from, is an instructive case, and fully sustains Hochster v. De Latour, and other cases of like tenor before cited. It is there said that the test of whether there is a renunciation or not is "whether the acts and conduct of the party evince an intention no longer to be bound by the contract." In Iron Co. v. Naylor, 9 Q. B. Div. 648, Jessel, M. R., reaffirms and approves the doctrine of Freeth v. Burr, and holds that the question of whether there has been a renunciation of the contract by the defendant is a question of fact, to be determined by the consideration of the nature of the breach, and the circumstances under which it occurred. The case, however, went off upon the holding that the circumstances were not sufficient to evince a determination on the part of the defendant to put an end to the contract, and to be no longer bound by it. The decision was affirmed by the house of lords on appeal, Lord Selborne there saying: "You must look at the actual circumstances of the case, in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation,—to an absolute refusal to perform the contract,—such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary, in the present case, than to look at the conduct of the parties, and see whether anything of that kind has taken place here." Iron Co. v. Naylor, L. R. 9 App. Cas. 438. See, also, Roper v. Johnston, L. R. 8 C. P. 167; Ex parte Stapleton, 10 Ch. Div. 586; Planche v. Colburn, 8 Bing. 14; Railway Co. v. Xenos, 13 C. B. (N. S.) 825.

The principle seems to have found general recognition by the courts of the country, a few only of which need be noticed. In Masterton v. Mayor, etc., 7 Hill, 61, the plaintiffs undertook and partially performed their contract with defendants to furnish material, etc., for the construction of the city hall. By order of the defendants, the work was indefinitely suspended, and the plaintiffs brought suit to recover damages, including future profits. The principle announced in the English cases before noted is approved. Beardsley, J., there said: "The party who is ready to perform is entitled to full indemnity for the loss of his contract. He should not be made to suffer by the delinquency of the other party, but ought to recover precisely what he would have made by performance. This is as sound in morals as it is in law. * * * The plaintiffs were not bound to wait till the period had elapsed for the complete performance of the agreement, nor to make successive offers of performance, in order to recover all their damages. They might regard the contract as broken up, so far as to absolve them from making further efforts to perform, and give them a right to recover full damages as for a total breach." The case of Hosmer v. Wilson has been already cited. In Derby v. Johnson, supra, after holding that, by the order of the defendants to discontinue the work, the plaintiffs were prevented from further performance, it is said: "The plaintiffs might, in addition, in another form of action, have recovered their damages for being prevented from completing the whole work. In making these claims the plaintiffs would be acting upon the contract as still subsisting and binding, and they might well do so, for it doubtless continued binding on the defendants." In Hinckley v. Pittsburgh Steel Co., 121 U. S. 264, 7 Sup. Ct. 875, the defendant agreed to purchase from the plaintiff steel rails, to be drilled as the defendant might direct. The defendant refused to give the directions, and at his instance the rolling of the rails was postponed until after the time of delivery, when the defendant refused to accept any rails under the contract. It was there said: "The defendant contends that the plaintiff should have manufactured the rails, and tendered them to the defendant, and, upon his refusal to accept and pay for them, should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the contract price. But we think no such rule is applicable to this case. This was a contract for the manufacture of an article, and not for the sale of an existing article. By reason of the facts found as to the conduct and action of the defendant, the plaintiff was excused from actually manufacturing the rails, and the rule of damage applicable to the case of the refusal of a purchaser to take an existing article is not applicable to a case like the present." In Haines v. Tucker, 50 N. H. 307, the defendants agreed to purchase of the plaintiffs 5,000 bushels of malt, and to receive and pay for the same at the rate of 1,000 bushels per month. Although plaintiffs were prepared to deliver the 1,000 bushels per month, the defendants called for and received less

than 1,000 bushels during the first three months. The plaintiffs informed defendants that they were prepared to furnish the malt according to the terms of the contract, and requested them to receive the same at the rate of 1,000 bushels per month, which the defendants refused to do. The undelivered malt, not utilized by plaintiffs themselves, was sold on the market, and plaintiffs brought assumpsit against the defendants to recover damages for a breach of the contract. And it was there held—following Cort v. Railway Co., supra, and other cases —that the conduct of the defendants amounted to an unqualified renunciation of the contract, and that after such renunciation it was no longer necessary that the plaintiffs should hold themselves in readiness to perform, or to go to the trouble and expense of offering what had already been refused. In Smith v. Lewis, 24 Conn. 624, the doctrine as announced in Cort v. Railway Co. was approved and followed, and again reaffirmed in the same case. 26 Conn. 110. In these cases the holding was that, under a contract containing mutual and dependent covenants, a refusal on the part of the defendant to perform obviated the necessity of performance, or tender of performance, on the part of the plaintiff, after such refusal. See, also, U. S. v. Behan, supra; Crabtree v. Messersmith, 19 Iowa, 179; Holloway v. Griffith, 32 Iowa, 409; Dugan v. Anderson, 36 Md. 567; Burtis v. Thompson, 42 N. Y. 246; Howard v. Daly, 61 N. Y. 362; Smoot's Case, 15 Wall. 36; Dingley v. Oler, 117 U. S. 503, 6 Sup. Ct. 850; Mountjoy v. Metzger (Pa. St.) 12 Am. Law Reg. (N. S.) 442.

It follows that, upon principle and authority, we are of opinion that instructions 2 and 3, when considered together, as they must be, announced the law to the jury correctly. The objection that the jury were thereby left to determine what were the "substantial provisions of the contract" is, in view of the course of the trial and facts proved, obviated by the instructions 7, 12, 13, 16, and 17, given for appellant. By the seventh, as will be observed, the jury were told that, if the defendant committed breaches, still, if they did not defeat the substantial objects of the contract, or render it unattainable by proper performance on the part of Richards, Maynard & Co., then the plaintiff could not recover. By the 12th they were told that the mere failure or refusal of the defendant to pay the plaintiff or his firm any sum of money demanded and claimed to be due on account of services rendered under the contract could not be construed as an abandonment of the contract by the defendant, such as would entitle the plaintiff or his firm to maintain the present action. By the sixteenth the jury were told, as a matter of law, that, to entitle the plaintiff to recover in this case, it was necessary for him to establish, by a preponderance of the evidence, that he and Richards, Maynard & Co. were, by the acts of the defendant, prevented from performance of said contract on their part, etc. By the seventeenth they are again told that a failure to pay money due and owing to the plaintiff under the contract was not such an act or omission, in itself, on the part of the defendant, as would prevent the plaintiff from completing the contract. And by the thirteenth instruction given on behalf of the defendant the jury were told that if they believe from the evidence that the plaintiff's firm closed their transfer house for the reasons stated in their letter of June 11, 1886, to Mr. Amsden, namely, for refusal to pay their claim of $2,592.95, and their account for the month of May, 1886, "and for no other reason," then the plaintiff could not recover, and the verdict must be for defendant. So, by the eleventh instruction given on behalf of defendant, the jury were told that, in determining whether the damages arising from any breach of the contract by the defendant can be ascertained and compensated for, they were not to take into consideration any refusal of the defendant to submit any differences between it and Richards, Maynard & Co. to arbitration; that the refusal to submit matters in dispute to arbitration was not such a breach of the terms of the contract as to warrant a recovery for such breach. It seems clear, therefore, under the facts proved, that the question submitted to the jury was whether the acts and conduct of the defendant showed a fixed determination to be no longer bound by the substantial provisions of the contract upon its part. As already seen, the consideration moving to Richards, Maynard & Co. for entering into the contract was the stipulation, on defendant's behalf, to deliver, to be weighed and transferred through their house, all grain received by it from western roads, to be transported east over its lines, that it could control; that practically the only benefit to be derived by Richards, Maynard & Co. from the contract was by the sale of weights of grain thus transferred. The evidence tended to show that the railroad company had repudiated its liability to perform this part of its contract, and its duty, under the contract, to use the weights derived from the plaintiff's firm only in billing the grain to destination, but gave the same away, so as to deprive plaintiff's firm of the profits it would derive by the sale of such weights.

From what has preceded, no extended discussion will be necessary of the point made, that there was a variance between the special count of the declaration and proof. It was alleged "that on the 16th day of June, 1886, the defendant abandoned the contract on its part, neglected and refused to perform the same, and refused, without any reasonable or just cause, to be bound by the same," etc. As already shown, the effect of the position taken by, and the conduct of,

appellant, was a denial of its obligation to perform the substantial parts of the contract on its part.

In connection with this point, it will be proper to notice the contention that in the suit brought June 5, 1886, before referred to, the plaintiff recovered damages for all the breaches of the contract up to the bringing of that suit, and that, therefore, such breaches, being merged in the judgment in that cause, could not subsequently be made the occasion, by Richards, Maynard & Co., for treating the contract as abandoned by appellant. In bringing that suit, the plaintiff undoubtedly treated the contract as subsisting, and had not then elected to treat it as abandoned by the defendant, and to sue for prospective damages. The suit was brought, and recovery had for actual breaches to the time of bringing it. We are not required to determine the question thus presented. If it should be conceded that the plaintiff's claim in bringing that action is inconsistent with his right to show such breaches in this proceeding, it could not affect the result. Subsequent to the bringing of that action, as already shown, the railroad company refused to recede from its previous position, both in respect of its obligation under the contract to deliver cars to Richards, Maynard & Co., and to observe its contract in respect of the use to be made of the weights. And the evidence tends to show that at the time Richards, Maynard & Co. closed their transfer house, appellant was denying its liability under the contract, and evinced a clear intention not to be bound by its provisions.

It is urged, however, that there was here only a partial breach, arising from a difference in the construction of the contract, and that there was at no time a repudiation or renunciation of the contract by appellant; that they were at all times desirous of keeping it in force, and performing it. These are, as a matter of course, questions of fact, which are conclusively settled by the judgment of the appellate court. But in view of the instructions asked and refused, which sought to take the case from the jury, it may be remarked that the evidence tended to show a repudiation by the railway company of the substantial provisions of the contract, which formed the consideration for the execution of it by plaintiff's firm. It was not enough, to show that there was no repudiation of the contract obligation of the plaintiff, to prove that appellant was furnishing some cars to be transferred through plaintiff's transfer house, whereby plaintiff was partially receiving the benefits he claimed under the contract. The correspondence between the parties before and after the 5th of June, 1886, shows that appellant was not delivering cars of grain to be transferred through the transfer house because it recognized any obligation on its part to do so, but claimed, and acted on such claim, that it was only bound to deliver such cars as it saw proper. In other words, it refused to be bound by the provision of the contract requiring it to deliver cars to plaintiff's firm. Under the construction of the contract upon which it had acted, and was proposing to continue to act, it was under no obligation to deliver any cars to be transferred by plaintiff's firm, thus absolutely repudiating its contract liability to do so. True, it had not altogether ceased to deliver some cars to be thus transferred, but they were not delivered because of any contract liability to do it, but at their convenience and option. Its persistence in this course of conduct had been shown by its repeated refusal to submit the matters in dispute to arbitration under the contract. The president of the company wrote, in reply to the demand of plaintiff's firm for arbitration, "I have to say that this company having at all times faithfully performed its obligations under said contract, I do not consider there are any matters calling for arbitration," and declining the request for arbitration. While it is undoubtedly true that refusal to arbitrate would not, under the provisions of this contract, justify the plaintiff in treating the contract as renounced by appellant company, yet such refusal, and the correspondence in respect of the matter, tend to show the persistency with which appellant refused to be bound by the contract.

It is also objected that the court erred in the admission of testimony: First, that appellee was permitted to prove the cost of the transfer house, etc. It is a sufficient answer to say that it does not appear the evidence was objected to. It is, however, said that the court erred in refusing to give the fifth instruction for appellant, which was, in effect, that no recovery could be had for the cost or value of the transfer house and its equipments in this action. This instruction might with propriety have been given, but its refusal was not error. At the beginning of the hearing before the jury, counsel for the plaintiff stated that he did not attempt to show the breaches for the purpose of recovering for them, but proved them for the purpose of showing simply a breach of the contract, which entitled the plaintiff to abandon the further performance of it, and sue for damages for loss of future profits, when the following colloquy occurred: Mr. Jewett (for defendant): "In other words, there is nothing but the claim for future profits in this case." Mr. Pence (for plaintiff): "That is all there is in this case." Later, and at the close of plaintiff's testimony, the plaintiff sought to show what the transfer house was worth, "standing there, useless for the purpose for which it had been erected," to which an objection by the defendant was sustained. This all took place in the presence of the jury, and would leave no question in the mind of any intelligent person as to the damages sought and allowed to

be recovered. It seems clear that the jury could not have understood that they were to take anything into consideration other than the profits to be derived from the transfer of grain under the contract, and they were in effect so told by the fourth instruction given at the instance of plaintiff.

On the trial of the cause, certain letters written, one by Mr. Blodgett and one by Mr. Clark, commendatory of plaintiff's method of transferring grain, etc., were offered and read in evidence over the objection of defendant. That these letters were incompetent scarcely admits of question, and it is difficult to perceive upon what principle they were admitted. That the error was a harmless one is equally apparent. It was not controverted that the "Richards Method," so called, accomplished the purpose, nor was there any pretense that it was a failure, so that the plaintiffs did not perform their contract.

Other points are made in argument, which, in view of the length of this opinion, seemingly made necessary by the very ingenious argument of the learned counsel, it must suffice to say, have been carefully considered, and are not deemed of such gravity as to warrant further discussion. Finding no prejudicial error in this record, the judgment of the appellate court will be affirmed. Affirmed.

NEWCOMB v. BRACKETT.

(16 Mass. 161.)

Supreme Judicial Court of Massachusetts. Norfolk. 1819.

The declaration was in case, "for that the said B. at, &c. on the 8th of August, 1808, by his memorandum in writing of that date, by him subscribed, acknowledged that he had then and there received of the plaintiff a bill of sale of one half of the sloop Union and her apparel, the consideration whereof the said B. then and there acknowledged in writing under his hand to be 200 dollars; which sum the said B. then and there, in said memorandum by him subscribed, promised the plaintiff to account to him for in a transfer of a deed which the said B. then held against one Jackson Field's estate, as soon as the plaintiff should pay said B. the residue of a debt to him, which should not exceed 100 dollars. And the plaintiff avers that the transfer of a deed against said J. Field's estate, mentioned in said memorandum, was to be a transfer, assignment and conveyance of the land, described in a certain deed made to said B. by one J. Field, which land the said B. then and there promised to convey to the plaintiff. And the plaintiff further avers that the said B. on the 19th of April, 1810, by his deed of release and quitclaim, by him duly executed, did release and quitclaim to one J. N. Arnold all the right, title and interest, which he the said B. then had to a certain real estate described in said deed, which said real estate was the same of which the said B. then held a deed from said J. Field, and of which the said B. was then in possession, and which he had in and by said memorandum engaged to transfer to the plaintiff; and upon which transfer he had engaged to account for said 200 dollars. And the plaintiff further avers, that the said B. had not before said 19th of April accounted to the plaintiff for said 200 dollars, in a transfer of a deed held by him, the said B., against said J. Field's estate. And the plaintiff further says, that the said B., by his deed aforesaid made to said J. N. Arnold, has broken his promise aforesaid, and become unable to perform the same, according to the terms thereof. To the damage, &c."

The defendant demurred to this declaration, and assigned the following causes of demurrer.

1. That the plaintiff hath not alleged or shown, that he has ever paid or tendered to the defendant the residue of said debt, mentioned in the declaration.

2. That he has not alleged or shown, that he has paid or offered to pay to the defendant the sum of 100 dollars, mentioned in the declaration.

3. That he has not alleged or shown, that he ever requested the defendant to transfer to him the deed which the defendant held against J. Field's estate, or to assign and transfer to him the land mentioned in the declaration.

The demurrer was joined by the plaintiff.

Mr. Loud, for the defendant. The undertaking of the defendant, as it is stated in the declaration, should receive the same construction, as it would have, if the sale of the sloop by the plaintiff had been executory, and had been written thus: "In consideration that J. Newcomb has agreed to execute a bill of sale of one half of the sloop, &c., the value of which is 200 dollars, I promise to account for the same in the transfer of a deed, &c. as soon as," &c. It was a part of the same transaction, executed at the same time, and given in consideration of the defendant's promise to convey the land. The plaintiff was to convey the sloop, and to pay 100 dollars; and when he had done both, the defendant was to give a deed of the land spoken of.

If the plaintiff can recover in the present action, he must do so, either upon the ground of the contract's being rescinded, or because he has performed all the precedent conditions on his part, to entitle himself to damages; and we contend that he cannot recover on either ground. Not on that of the contract's being rescinded; because he declares only upon the special agreement, and admits it to be open. He claims, not the value of the sloop, as so much money paid, but general damages; the rule of which would probably be the value of the land, at the time it was conveyed to Arnold, or at the time of bringing his action. Assumpsit for money had and received is the usual action to recover money paid by the plaintiff, in pursuance of a contract which has failed; as where either of the parties had a right to consider the contract rescinded by the terms of it, or where the plaintiff is prevented by the defendant from performing some antecedent condition. No case is recollected, in which an action upon the special agreement has been brought, to recover back money so paid, or the value of any goods sold and delivered, unless upon the notion of fraud practised by the purchaser.

Another reason, why the contract cannot be considered as rescinded, is that the parties cannot be put in statu quo. It was a barter transaction. The sloop sold to the defendant was not money paid. The plaintiff then has performed a part of the contract.

If the contract is to be considered as still open, the action can be no better supported. The payment of the 100 dollars is a condition precedent on the part of the plaintiff, and that too upon which the defendant assumed to convey the land. If the defendant had not subsequently conveyed the same land to Arnold, there could be no pretence for an action by the plaintiff, before payment or tender of the 100 dollars. It is difficult to perceive why that conveyance should alter the case.

The misfeasance of the defendant cannot excuse the plaintiff from performing the whole of a condition precedent, of which he has performed a part; and it certainly ought not to have that effect here, where the plaintiff has lain by until the defendant has lost any other remedy for the recovery of the money, by lapse of time.

This is not like that class of cases, which contain mutual covenants, and in which it is held that the plaintiff, after having performed the gist of the consideration on his part, may maintain an action against the defendant for non-performance on his part; upon the ground that the latter has his remedy against the plaintiff, for neglect of any collateral stipulations. This is the conditional promise of the defendant alone.

If the plaintiff, on the contrary, has sustained any loss, it has always been and still is in his power, by paying the 100 dollars, to compel the defendant to execute a good conveyance of the land, or to answer in damages for its value.

Mr. Metcalf, for plaintiff.

PARKER, C. J. The contract set forth in the declaration is substantially, that in consideration of the value of a sloop sold by the plaintiff to the defendant, estimated at 200 dollars, the defendant would, upon payment of 100 dollars by the plaintiff, which was due to the defendant from one Field, and to secure which he had taken a deed of Field's estate, convey said estate to the plaintiff; and the breach of the contract alleged is, that the defendant had disabled himself from performing the contract, by conveying the same estate to another person.

The declaration is demurred to, and the objection to it is, that the plaintiff had neither paid, nor offered to pay, the debt of Field to the defendant; and therefore has no title to the action.

No time is fixed in the contract, within which the money was to be paid, or the estate conveyed to the plaintiff. The plaintiff then had a reasonable time, by virtue of the contract, to perform his part of it; and the defendant might have hastened him, by tendering the deed, and demanding the money which the plaintiff had assumed to pay.

It is implied in the contract, on the part of the defendant, that he would do nothing by which he should become unable to perform it; and by making a deed to another person, he has disabled himself, and so virtually broken his contract. It being impossible for him, after having thus done, to account for the 200 dollars in the land, as he undertook, there is a breach of his contract, for which proper damages may be recovered. The law will not, in such circumstances, require a payment or tender by the plaintiff; for this would be to hazard an additional loss, without any possible advantage.

This opinion is supported by several decided cases, which are collected by Mr. Metcalf in a note to the case of Raynay v. Alexander, in his valuable edition of Yelverton's Reports (page 76). The case in the text is—The plaintiff declared upon a promise to deliver, on a particular day, fifteen out of seventeen tods of wool, to be chosen by the plaintiff, upon payment of £6, and averred that he was ready to pay the £6 on the day; yet the defendant had not delivered the wool. Verdict for plaintiff—and judgment arrested, because not averred that the plaintiff had chosen the fifteen tods out of the seventeen; which was a condition precedent. But Popham, C. J., said, if the defendant had sold one of the tods of wool before the election made by the plaintiff, that had destroyed the election and made the promise absolute, and had been a breach of it. The same law, if the defendant would not have permitted the plaintiff to see the wool, that he might make election; for that had excused the act to be done by the plaintiff, and had been a default by the defendant.

The law is well summed up by Mr. Metcalf in his note: "When the consideration of the contract is executory, or its performance depends upon some act to be done or forborne by the plaintiff, or on some other event, the plaintiff must aver performance of such precedent condition, or show some excuse for the non-performance."

The declaration, in the case at bar, shows that the defendant had conveyed to a stranger the land, which he promised to convey to the plaintiff. This excuses the plaintiff from tendering the money, and entitles him to damages from the breach of the contract.

Declaration adjudged good.

MORTON v. LAMB.

(7 Term. R. 125.)

Trinity Term. 37 Geo. III.

In an action on the case the plaintiff declared against the defendant for that whereas on the 10th Feb. 1796, at Manchester in the county of Lancaster, in consideration that the plaintiff, at the special instance and request of the defendant had then and there bought of the defendant 200 quarters of wheat at £5 0s. 6d. per quarter, such price to be therefore paid by the plaintiff to the defendant, he the defendant undertook and then and there promised the plaintiff to deliver the said corn to him (the plaintiff) at Shardlow in the county of Derby in one month from that time, viz. of the sale; and then he alleged that although he (the plaintiff) always from the time of making such sale for the space of one month then next following and afterwards was ready and willing to receive the said corn at Shardlow, yet the defendant not regarding his said promise &c. did not in one month from the time of the making of such sale as aforesaid or at any other time deliver the said corn to the plaintiff at Shardlow or elsewhere, although he (the defendant) was often requested so to do, &c. The defendant pleaded the general issue; and at the trial the plaintiff recovered a verdict.

Mr. Holroyd obtained, in the last term, a rule calling on the plaintiff to shew cause why the judgment should not be arrested, because it was not averred that the plaintiff had tendered to the defendant the price of the corn, or was ready to have paid for it on delivery. He said this was necessary on the principle established in many cases, particularly in Thorpe v. Thorpe, Salk. 171; Callonel v. Briggs, Id. 113; Kingston v. Preston, Doug. 688; Jones v. Barclay, Doug. 684, and Goodisson v. Nunn, 4 Term R. 761,—that when something is to be done by both parties to a contract at the same time, as in this case the tendering of the money and the delivery of the corn, there the party suing the other for non-performance of his part must aver an offer at least at the same time to perform what was to be done by himself.

Messrs. Law, Wood, and Scarlett, now shewed cause. The covenants here are mutual and independent, and each party has a remedy by action against the other for non-performance of his part. But if there be any precedence between them, the delivery of the goods ought, in the regular order of things, to precede the payment of the price. In neither case can the averment contended for be necessary. The distinction is taken in many cases that where two things are to be done, and the time of doing it is mentioned for one and not for the other, there the thing for doing which the time is stipulated must be done first, and so averred to be. Pafford v. Webbe, 2 Rolle, 88; Pordage v. Cole, 1 Saund. 319; Peters v. Opie, 2 Saund. 352; 1 Vent. 177, 214; Elwick v. Cudworth, 1 Lutw. 493; Hilton v. Smith, Id. 496. So in Thorpe v. Thorpe, 1 Salk. 171; 1 Lutw. 250; it was said by Holt, C. J., that if by the agreement a day certain is appointed for the payment of money, and this day is to happen before the act can be performed for which the money is to be paid, there although the words are that he shall pay so much for the performance of the act, yet after the day appointed the party shall have his action for the money before the thing is performed. And that is a stronger case than the present, because the act for which the recompense is to be given ought in reason to precede the recompense itself. In Blackwell v. Nash, 1 Strange, 535, the plaintiff declared in debt for a penalty on a covenant that he should transfer so much stock to the defendant on or before the 21st September, and that the defendant in consideration of the premises covenanted to accept and pay for it; and then the plaintiff averred that he was ready and offered to transfer the stock on that day, but that the defendant refused to accept or pay for it: It was objected in arrest of judgment that the actual transfer of the stock was a condition precedent which ought to have been averred: But the court held that "in consideration of the premises" meant in consideration of the covenant to transfer, and not of an actual transferring, for which the defendant had his remedy; though if it did mean the latter, a tender and refusal would amount to performance. And they added that in all such cases the great question was, who was to do the first act? But that where the transfer was to be upon payment, there was no colour to make the transfer a condition precedent. The same doctrine was held in Dawson v. Myer, 1 Strange, 712. These cases went on the ground that the parties had mutual remedies on their reciprocal promises, and therefore there was no need of the averment contended for. But the case of Merrit v. Rane, 1 Strange, 458, applies as strongly in another point of view. There the plaintiff declared on an agreement that in consideration of £252 paid to the defendant he agreed to transfer £6000 South-sea stock to the plaintiff or his executors, &c. at any time before the 9th January 1720, within three days after demand in writing, upon payment of the further sum of £9000 then he averred the demand in writing, and that he attended on the day, but that the defendant did not appear to transfer: One of the objections was, that the plaintiff had not averred that he had money there on the day to have paid upon the transfer: But the court said that as to the plaintiff's not shewing a tender that ought to have

come from the defendant by way of excuse, that he was there ready to have transferred if the plaintiff had been there to have paid the money. To apply therefore the reasoning of all these authorities to the present case:—Here the first act to be done was by the defendant, namely, the carrying of the corn to Shardlow; by not doing which he broke his agreement, and a cause of action accrued to the plaintiff according to that class of cases, wherein agreements of this sort have been construed to give mutual remedies to the parties. But admitting that he was not bound to deliver the corn there until the plaintiff was prepared to pay for it; still that ought to come from the defendant by way of excuse, and the tender of payment was not necessary to be averred by the plaintiff as a condition precedent to the right of action. The defendant might have shewn in excuse for the non-performance on his part, either that he carried the corn to the place, and was ready to have delivered it, but that the plaintiff was not there to receive it; or that the plaintiff refused to receive it; or that he was not ready to pay for it. Lancashire v. Killingworth, 12 Mod. 531, Salk. 623. Ughtred's Case, 7 Coke, 10. Where an action is brought for money due, the defendant may shew in his defence a tender and refusal, or that he was prepared at the day and place appointed to pay the money, but that the plaintiff was not there to receive it; yet it never was held necessary for the plaintiff to aver in his declaration that he was ready to receive it. And here, if the readiness to pay had been averred, it could have answered no purpose; because no issue could have been taken on it. Besides in no case is tender of payment necessary to be averred when the contract is executory, as it is in this case; for there the parties necessarily rely upon the mutual remedies arising out of it; they give mutual credit to each other. All the cases cited on the other side are, if strictly considered, cases of condition precedent. Several of them, as well as the subsequent cases of Campbell v. Jones, 6 Term R. 570, and Porter v. Shepherd, Id. 665, laid down the rule that whether covenants be or be not independent on each other must depend on the good sense of the thing; that is, who in the fair sense and meaning of the parties was required to do the first act. Now here there is no doubt that the first act was to be done by the defendant which he neglected to do: and it would be absurd to require a person to pay for goods before he had received them; though if he were not ready to pay for them at the time when the other was ready to deliver them, that might be a reason for the non-delivery. But still that is only matter of defence and excuse on the part of the defendant, which it is incumbent on him to shew. And yet the effect of the averment required is, that the plaintiff was bound to tender the price before the goods were even offered to him.

Mr. Holroyd, contrà. This action is not brought against the defendant for having omitted to carry the corn to Shardlow, even allowing that to be the first act to be done; and therefore much of the plaintiff's argument does not apply. But the ground of complaint is that it was not delivered to him there; and consequently upon this form of declaring it may be assumed that the defendant did carry the corn there. The question then comes to this, whether the defendant was bound to deliver his corn, the plaintiff not being there ready to pay for it. For if not, then it follows, according to all the late determinations, that he ought to have averred a tender of the price, or that he was there ready to pay for it, if the defendant had been there ready to receive it, and deliver the corn. And for this purpose it is not necessary to shew that the tender of the price was a condition precedent, strictly so considered; for according to Goodisson v. Nunn, 4 Term R. 761, and Kingston v. Preston, Doug. 688, if the acts are concurrent and in the nature of the transaction to be done at the same time, before one of the parties can maintain an action against the other for the non-performance of his part, he must aver that he performed or was ready to perform every thing on his own part. Callonel v. Briggs, 1 Salk. 113, is in point. That was an executory agreement, like the present, to pay so much money six months after the bargain, the plaintiff transferring stock. There Lord Holt said, "If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender, and the other a payment or a tender; and this," says he, "though there be mutual promises. If I sell you my horse for £10, if you will have the horse, I must have the money; or if I will have the money, you must have the horse." Or according to Lancashire v. Killingworth, Salk. 623, the plaintiff should have averred that he was ready at the place to have received the corn on the last day of the time within which it was to be delivered, and ready and willing to have paid the price; but that no person was there on the part of the defendant to deliver the corn. The delivery of the corn, and the payment of the price, were concurrent acts to be done by the parties at the same time, the one depending on the other; and if so, then within the principle of all the modern cases, the plaintiff ought to have averred in his declaration a tender of the price, for want of which it is bad.

Lord KENYON, Ch. J. If this question depended on the technical niceties of pleading,

I should not feel so much confidence as I do: but it depends altogether on the true construction of this agreement. The defendant agreed with the plaintiff for a certain quantity of corn, to be delivered at Shardlow within a certain time; and there can be no doubt but that the parties intended that the payment should be made at the time of the delivery. It is not imputed to the defendant that he did not carry the corn to Shardlow, but that he did not deliver it to the plaintiff: to this declaration the defendant objects, and says "I did not deliver the corn to you (the plaintiff), because you do not say that you were ready to pay for it; and if you were not ready, I am not bound to deliver the corn;" and the question is whether that should or should not have been alleged. The case decided by Lord Holt, in Salk. 112, if indeed so plain a case wanted that authority to support it, shows that where two concurrent acts are to be done, the party who sues the other for non-performance must aver that he had performed or was ready to perform, his part of the contract. Then the plaintiff in this case cannot impute to the defendant the nondelivery of the corn, without alleging that he was ready to pay the price of it. A plaintiff, who comes into a court of justice, must show that he is in a condition to maintain his action. But it has been argued that the delivery of the corn was a condition precedent, and some cases have been cited to prove it: but they do not appear to me to be applicable. In the one in Saunders (Saund. 350), the party was to pull down a wall, and was then to be paid for it; there is no doubt but that the pulling down of the wall was a condition precedent to the payment; the act was to be done, and then the price was to be paid for it. So in the case in Salk. 171, where work was to be done, and then the workman was to be paid. And in ordinary cases of this kind the work is to be done before the wages are earned: but those cases do not apply to the present, where both the acts are to be done at the same time. Speaking of conditions precedent and subsequent in other cases only leads to confusion. In the case of Campbell v. Jones, I thought, and still continue of that opinion, that whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done: but here both things, the delivery of the corn by one, and the payment by the other, were to be done at the same time; and as the plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action against the defendant for not delivering it.

GROSE, J. It is difficult to reconcile all the cases in the books on the subject of conditions precedent; but the good sense to be extracted from them all is, that if one party covenant to do one thing in consideration of the other party's doing another, each must be ready to perform his part of the contract at the time he charges the other with nonperformance. Here the question is, what was the intention of the parties; they clearly intended that something should be done by each at the same time. The corn was to be delivered at Shardlow to the plaintiff for a certain price to be therefore paid by him, that is, at the time of the delivery; then the readiness to pay should have been averred by the plaintiff.

LAWRENCE, J. It has been argued, on behalf of the plaintiff, that this must be considered as a declaration on mutual promises, and that as this is a demand on the defendant on the ground of some mutual promise made by him, and which was the consideration of the plaintiff's promise, it was not necessary to aver performance on his part: but if so, the declaration is not adapted to the truth of the case, in not stating that the defendant's promise was in consideration of the plaintiff's. But on this declaration I can only consider it as an agreement by the defendant to deliver the corn at Shardlow on being paid for it. The payment of the money was to be an act concurrent with the delivery; and then the case is like that of Callonel v. Briggs, which was on an agreement to pay so much money six months after the bargain, the plaintiff transferring stock; and there Lord Holt said, "If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender:" he did not say, that the not doing it should come from the defendant by way of excuse, but that the doing it must be alleged in the declaration; and that affords an answer to great part of the argument urged on behalf of the defendant in this case. The tendering of the money by the plaintiff makes part of the plaintiff's title to recover, and he must set out the whole of his title. The strongest case cited for the defendant was that of Merrit v. Rane, 1 Strange, 458: but that does not appear to me of sufficient weight to overturn the authority of the case of Callonel v. Briggs. I do not quite understand what the court there said, that it was not necessary to allege a tender, for that it should have come from the defendant by way of excuse; for as it was stated that the plaintiff's agent was ready to receive a transfer of the stock, but that the defendant did not attend, it would have been absurd to state a tender of the money to a person who was not present to receive it. There is however another case, not referred to in the argument, Lea v. Exelby, Cro. Eliz. 888, which is an authority to show that the plaintiff in this case should have averred a tender. There the plaintiff declared that in consideration that he had promised to pay the defendant (who was possessed of a lease for years, the inheritance of which

was in the plaintiff) a certain sum on such a day, the defendant promised on payment to surrender to him the lease; and that he had tendered the money at the time, but that the defendant had not surrendered; and on motion in arrest of judgment, because it was not alleged that the defendant refused as well as that the plaintiff tendered, the court held that the declaration was bad for that reason. Therefore, on the authority of that case, and of that of Callonel v. Briggs, I am of opinion that the declaration cannot be supported, and that the judgment must be arrested. Rule absolute.

DEY v. DOX et al.

(9 Wend. 129.)

Supreme Court of New York. May, 1832.

This was an action of assumpsit, tried at the Seneca circuit in June, 1830, before the Hon. Daniel Moseley, one of the circuit judges.

The plaintiff proved a contract signed by the defendants in these words: "We have this day bought of David Dey 1280 bushels of first quality merchantable wheat, to be delivered on board of boats, at or near the store house of David Brooks, at any time we may require the delivery of the same after the first day of April next, and are to pay seventy-five cents per bushel, payable the first of September next, and have paid him one dollar on account of the same; Geneva, 26th March, 1828;" and claimed to recover the price stipulated in the contract. The defendants insisted that the plaintiff was not entitled to recover, unless he proved a delivery of the wheat, or an offer or readiness to do so. The judge ruled that the promises of the parties were independent, and refused to nonsuit the plaintiff. The defendants then proved a tender of the price and a demand of the wheat, made about the middle of September, 1828, and the refusal of the plaintiff to accept the money and to deliver the wheat—this evidence was objected to by the plaintiff. The plaintiff then introduced the record of the judgment in favor of the defendants against the plaintiff, docketed the 15th January, 1830, as of January term, 1830, by which it appeared that the defendants had sued the plaintiff for the non-delivery of the wheat, and obtained a verdict against him for $1,670.92, being the full value of the wheat on the day it was demanded. In the record, however, there was a remittitur of $1,005.25, stated to be the value of the wheat at 65-100 per bushel, with the interest thereof, and judgment was taken for only $771.61, the balance of the verdict and the costs of increase. The plaintiff also proved the issuing of an execution on such judgment, which was delivered to the sheriff on the 16th January, 1830, directing the levy of $771.61, and that the same was returned satisfied; all which evidence in relation to the judgment and execution was objected to by the defendants. The suit in this case was commenced on the 11th January, 1830, previous to which time the plaintiff demanded of the defendants the price of the wheat, as stipulated in the contract; the defendants told him they would remit such price from their verdict, which the plaintiff said he would not accept, and that if they entered such remittitur, they would do so against his wishes and consent. The contract price of the wheat, with the interest thereof, was shewn to be $992.16, for which sum the jury found a verdict, notwithstanding the presiding judge in his charge to the jury expressed his opinion, that the plaintiff was not entitled to recover. The defendants now moved to set aside the verdict.

J. A. Spencer, for plaintiff. J. C. Spencer, for defendants.

NELSON, J. The plaintiff must fail upon principles too well settled to require examination, and the omission to avail himself of those principles, when prosecuted by the present defendants on the contract relative to this same subject matter, has no doubt given rise to the present suit; for, had they been applied, he would have had no cause of complaint. If a greater amount in damages for a breach of his agreement has been recovered against him than the well settled principles of law would warrant, it is his own fault, and cannot be heard or admitted as a sufficient reason to indulge him in a cross suit to right himself. But before inquiring to see if, upon principles of law and justice, the whole subject of litigation arising upon this agreement could not have been properly adjusted in the former suit, I will examine this case for the present as if the former suit was out of the question, and which is perhaps placing it upon the ground upon which it ought to have been litigated. It would then stand thus: the plaintiff, after being called upon to carry into execution the agreement on his part, peremptorily refused; and while persisting in such refusal, instituted a suit for damages, for the non-fulfilment of the agreement on the part of the defendants. There is certainly no principle upon which such an action can be sustained, nor have we been referred to any authority in support of it. It cannot be that the plaintiff seeks to recover damages in the strictest sense of that term for the breach of the contract on the part of the defendants, for his own conduct is conclusive to shew that he considers the fulfilment of it an injury to him, and has therefore preferred the hazard of responding in damages himself, rather than carry it into execution. Can he recover the whole consideration for the wheat? This would be unjust, for he has positively refused to deliver the wheat when demanded, unless, indeed, under the idea that they are independent agreements, the court is bound to afford to each party a specific performance, or its equivalent in damages. Suppose the court should do so, how would the case then stand? The plaintiff would recover the consideration to be paid for the wheat, and the defendants the same sum for the non-delivery of it, besides such damages as a jury would allow for the default in not delivering it. It is obvious from this view, that confining the remedy for a violation of this contract to a suit for damages against the party violating it, the result is exactly the same to both parties as that to which we arrive after the above circuity of action, and I apprehend that such is the well settled law of the case. It is true, where the covenants or agreements are mutual and independent, that is, mutual and distinct, one

party may maintain an action against the other without averring or shewing performance on his part, and the defendant in such case cannot plead the non-performance by the plaintiff in bar of the action. Wheat. Selw. 383; 1 Saund. 320, note. When this principle is rightly understood and applied, there can be no objection to it; and the sound reason given for it is, that the damages in each covenant or agreement may be very different, as where they are in the same instrument and the one not the consideration of the other, or where the covenants or agreements go only to part of the consideration on both sides, part having been executed, and the like cases; in all such the damages might be different, and a remedy must be sought in a suit by each party for a breach. So the terms of the instrument may be such that the covenants or agreements must necessarily be independent, without the existence of the reason above assigned; in such case, the court will carry into effect the agreement, according to the intent of the parties; but whether the covenants or promises are independent or not, where the agreement is wholly executory, and the one covenant or promise or performance is the consideration for the covenant or promise or performance of the other, it may be stated with confidence that there is no principle or authority which will maintain a suit at law by a party who has positively refused to fulfil his part of the agreement against the other to recover damages for a breach of it. Though the consideration of the defendants' covenant or promise cannot be said technically to have failed, the principle and reason of that rule have a strong application, but perhaps the best reason is, that this circuity of action, as I trust has already been shewn, is wholly unnecessary, and therefore should not be sanctioned by the court. The case of Van Benthuysen v. Crapser, 8 Johns. 257, I consider as containing the principle I am here applying to this case. See, also, 13 Johns. 365. Mr. Justice Marcy, in delivering the opinion of the court, when this agreement was before under consideration (3 Wend. 356), referred to Van Benthuysen v. Crapser, and distinguished it from that case; but the distinction taken confirms its application here.

It seems to be considered by the counsel for the plaintiff that if one of the promises in the agreement is independent, the other must be so also; and as it has been decided by this court (3 Wend. 356) that the plaintiff's promise to deliver the wheat was independent, therefore the defendants' promise to pay the money must be also independent. This is an entire mistake. In all cases (except concurrent promises, where the performance of both takes place at the same time) where the performance of one promise is a condition precedent, and must be performed or excused before the right of action exists for the breach of the other promise, the one is independent and the other dependent. The definition of a dependent covenant or promise shews this: If A. covenants to do or to abstain from doing a certain act, in consideration of the prior performance of some covenant on the part of B., A.'s covenant is termed a dependent covenant, because B.'s right of suing A. for a breach of this covenant depends upon the prior performance, or what is equivalent, of the covenant to be performed by B., which, from its nature, is termed a condition precedent. Now it is obvious that the covenant of B. is independent, because it must be performed without reference to the covenant of A., and for a breach of it, A. may recover damages without shewing a performance himself. Where the promises are. concurrent, there, either party seeking to enforce the agreement against the other must aver and prove performance on his part, or what is in law equivalent, before his right of action commences. There can be no doubt that the promise of the plaintiff in this suit was independent, upon the reasons and authorities given by the court (3 Wend. 356); but is not that of the defendant dependent? One of the rules of construction applicable to questions of this kind from the same high authority there referred to is, that "when a day is appointed for the payment of money, &c. and the day is to happen after the thing, which is the consideration of the money, &c. is to be performed, no action can be maintained for the money, &c. before performance. 1 Saund. 320b. In the case under consideration, by the terms of the agreement, the delivery of the wheat became due, and demandable on the first day of April, and the consideration money therefor was not to be paid until the first of September thereafter. Applying the above rule, the delivery of the wheat is a condition precedent, which must be performed, or that must be done which is equivalent in law, before this suit can be sustained for a breach of the agreement by the defendants. It may be remarked that this rule, and the one upon which the case in 3 Wend. was decided, so far as the dependency or independency of the promises was concerned, are conclusive to shew that one of the covenants or promises in an agreement may be dependent and the other independent. If the money is to be paid on a day fixed before the act is to be done for which it is the consideration, the payment of the money does not depend upon the performance of the act—the promise is independent; but the performance of the act may depend upon the payment of the money—that promise may be dependent. If the money is made payable after the act is to be performed, the performance of the act does not depend upon the payment of the money, but according to the rule I have above referred to, the payment of the money depends upon the performance of the act; that is, this case. The payment of the money was fixed at a day after the plaintiff was bound to deliver the wheat; by the terms of it, therefore, the defendants were not to trust to the credit or

personal responsibility of the plaintiff, but had a right to have possession of the wheat before they parted with their money. This may be no great matter here, where all parties are responsible, but the rule is no less valuable, and must be universal in its application.

The rule to which I have before referred, and which ought to have been applied to the defence on the former suit by the then defendant, and would have adjusted all the rights of the parties without further litigation upon principles of law and justice, and which has been very fully considered by this court, will be found in the case of Clark v. Pinney, 7 Cow. 681. The principle of that case is, that where the vendor is in default for not delivering goods or chattels in pursuance of the contract of sale, and no money has been advanced by the vendee, the true measure of damages is the difference between the contract price and the value at the time the article should have been delivered; and the reason of the rule is conclusive, to wit, that such damages, added to the contract price which the vendee has not parted with, will enable him to buy the article in the market. It is obvious, if this rule had been applied, the plaintiff here would have had no cause of complaint, and his omission to apply it cannot be remedied in this suit. This principle itself is sufficient to defeat this action without the interposition of any other, and settles, with the utmost exactness, all rights and remedies upon the agreement, with the least possible litigation.

The view I have thus taken of the case, renders it unnecessary to examine many of the questions raised; those which have been examined were raised upon the trial.

New trial granted, costs to abide the event.

GRANT v. JOHNSON.

(5 N. Y. 247.)

Court of Appeals of New York. 1851.

Covenant on articles of agreement for the sale of land, between the plaintiff (Grant) of the first part, and the defendant (Johnson) of the second part. "The party of the first part for the consideration of nine hundred and fifty dollars, to be paid as follows, to wit: two hundred dollars on the first day of April next, two hundred dollars on the first of April, 1847, the remainder in two annual payments of equal amount, to be paid on the first of April of the two succeeding years, together with interest from the first of April next, agrees to sell to the party of the second part, a certain piece of land lying in the town of Neversink," (describing it.) "And the party of the first part, agrees to give to the party of the second part, the quiet and peaceable possession of said premises on the first of November next, with the exception of certain privileges granted to Nicholas Wakeley, and certain other privileges granted to Teunis Misener," &c. "And the said party of the first part further agrees to give to the said party of the second part a good and sufficient deed for the same on the first of May next, if the above conditions are complied with."

The agreement contained a further stipulation, which it is unnecessary to mention, and was executed under the hands and seals of the parties, on the twenty-fourth day of August, 1845.

The declaration assigned as a breach, the non-payment of the second instalment of two hundred dollars, payable on the first of April, 1847; but it contained no averment of the tender of a deed of the premises, before, on, or subsequent to the first day of May, 1846, or a readiness or willingness to execute one, in accordance with the covenant of the plaintiff.

The defendant interposed several pleas, which, as no question arose upon them, it is unnecessary to mention more particularly.

At the trial the plaintiff proved the agreement, and rested. The defendant moved for a non-suit, on the ground that the plaintiff was bound to show the delivery or tender of a deed before he could recover the second instalment.

The judge decided that the covenants were independent, and that the plaintiff could recover without showing either a delivery or tender of a deed. To this decision the defendant excepted.

It was then admitted that the defendant had received possession of the premises according to the contract, and had paid the first instalment. He then offered to prove, that no deed of the premises in question had been tendered to him up to the fifteenth of July, 1846. The court rejected the evidence as not constituting a legal defence, and the defendant excepted. The jury, under the direction of the judge, found a verdict for the plaintiff for the amount of the second instalment, and interest. Upon a bill of exceptions presenting the above facts, a motion for a new trial was made before the supreme court in the third district, and denied. An issue of law arising upon a demurrer to the replication of the plaintiff presenting the same question, had previously been decided by the same court in favor of the plaintiff. The new trial was denied, and the defendant's demurrer overruled, upon the ground that the covenants were independent, and that the plaintiff could recover without averring or proving performance, or an offer to perform the covenant on his part. See 6 Barb. 337. From this decision the defendant appealed to this court.

N. Hill, Jr., for appellant. S. Beardsley, for respondent.

GARDINER, J. The question in this case is, whether the plaintiff can sustain an action for the second installment of the purchase-money secured by the agreement, without averring and proving the delivery, or an offer to deliver a deed of the premises.

The parties have declared that certain payments were to be made, and certain acts performed by them respectively, at the times specified in the agreement. They must be held to have intended the performance of these acts, when, and of course in the order of time indicated in their covenants. The plaintiff was to give the defendant possession on the 1st of November, 1845. The performance of this requirement preceded any thing to be done by the defendant, and it might consequently have been enforced without any offer upon the part of the defendant; but if no possession had been given, the plaintiff could not have recovered the $200 to be paid by the vendee on the 1st of April, 1846.

The possession, however, was given, and the first $200 paid, and on the 1st of May, 1846, the vendee was entitled to his deed, as the thing next to be done in the order prescribed by the parties in their agreement. It was not executed, nor a willingness to execute it either averred or proved. The payment of the $200 for which the suit is brought was fixed upon a day subsequent to that agreed upon for the delivery of the deed. The case is, therefore, brought directly within the letter and spirit of the 2d rule suggested by Sergeant Williams in his note to Pordage v. Cole, 1 Saund. 320b, that, "when a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration is to be performed, no action for the money can be sustained without averring performance."

The plaintiff relies upon the 3d rule of Sergeant Williams in his note to the case above cited, that "where a covenant goes only to a part of the consideration on both sides, and

a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained, without averring performance." The rule is not free from obscurity. It was given by Lord Mansfield originally in Boone v. Eyre, 1 H. Bl. 273, note a. The defendants in that suit, after having received a conveyance of the equity of redemption of a plantation, and the negroes upon it, when sued for a part of the consideration, set up a breach of a collateral covenant on the part of the plaintiff, relating to the title and possession of the negroes, in bar of the action. The warranty extended both to the estate and negroes. 4 Mees. & W. 311. The covenant of the plaintiff, it will be perceived, embraced the whole and every part of the subject conveyed. If the title failed to a single negro, or the defendant was evicted from an acre of the land, the covenant was intended to afford redress, and enable a jury to apportion the damages according to the agreement of the parties. A "breach of the plaintiff's covenant might be paid for in damages," because a failure of title as to any part of the consideration could be compensated according to the standard fixed by the parties. In other words, the consideration for the defendant's promise was divisible, and the damages arising from a breach of the covenant of warranty were apportioned to each parcel of that consideration, by the agreement itself. This, it is supposed, is what is meant by the expression above quoted, that the breach may be paid for in damages. 5 Mees. & W. 701. Accordingly it is stated in the note to Pordage v. Cole, supra, that "when the consideration for the payment of the money is entire and indivisible, so that the money payable is neither apportioned by the contract, nor capable of being apportioned by a jury, an action is not maintainable."

The doctrine is thus stated in Chanter v. Leese, 4 Mees. & W. 311, "The party contracting to pay his money is under no obligation to pay for a less consideration than that for which he has stipulated. If, indeed, he does accept a partial performance, and to a certain extent enjoys the benefit of that for which he has stipulated, it may become a question whether he may not be liable upon an implied contract to pay for what he has had. And when the consideration is in its nature capable of being divided, and the payment apportioned by the terms of the contract, there may be still a right to recover the portion due on the original contract." This decision was affirmed in the exchequer chamber (5 Mees. & W. 701), in 1839, and may be considered as the established doctrine in England at that day.

The rule of Lord Mansfield, according to its original application, and as expounded in the decision above mentioned, is reasonable. It brings us back to the contract to learn the intention of the parties. Courts are not required to speculate upon the inequality of loss to the parties, or to look beyond the agreement to its performance, in order to ascertain its character, as suggested by some judges and commentators. 1 Saund. 320a. These inquiries are proper where the question arises, whether the plaintiff has any remedy for what he has done, or parted with, or whether the defendant is not estopped by his acts subsequent to the agreement, from insisting upon a condition precedent in his favor. Much of the confusion in the books, it is believed, arises from confounding the doctrine of waiver by matters ex post facto, with a rule of construction applicable to the agreement as it came from the hands of the parties. Havelock v. Geddes, 10 East, 555. A defendant may waive the performance by the plaintiff, in case of a covenant clearly dependent, and thus render himself liable in some form of action (Mitchell v. Darthez, 2 Bing. N. C. 555; Lucas v. Godwin, 3 Id. 737), but it is only when the consideration is divisible, and the payments are apportioned by the agreement to the different parts of the consideration, that the covenant becomes independent, and a recovery can be had upon the original contract without averring performance, or an excuse for non-performance.

A covenant, therefore, which goes only to a part of the consideration, is not necessarily independent. Nor is it conclusive upon this point that the consideration is divisible in its own nature, or that a part of it has been received by the defendant; nor will the circumstance that one or any number of covenants in an agreement are independent, render others so. In Chanter v. Leese, 4 Mees. & W. 311, the agreement was, that the defendants should have the exclusive use and sale of six different patents, and they were to pay £400 in half-yearly payments, for one of which payments the action was brought. The defense was a failure of title as to one of the patents. The grant of the exclusive right was an independent covenant, which the defendants could have enforced without any averment; the consideration for the undertaking of the defendants was divisible in its own nature. The undertaking upon which the action was brought went only to a part of the consideration to be paid; and the court remarked, that although it had appeared affirmatively that the other five patents had been enjoyed by the defendants, the plaintiff could not have recovered on the contract. Terry v. Duntze, 2 H. Bl. 389, which was followed in our supreme court in Seers v. Fowler, 2 Johns. 272, in Havens v. Bush, Id. 387, and in Wilcox v. Ten Eyck, 5 Johns. 78, to the contrary, is not the law in this state or in England. The two cases in 2 Johns. were expressly overruled in Cunningham v. Morrell, 10 Johns. 203, and the court, in Wilcox v. Ten Eyck, observe, that that case could not be distinguished from Seers v. Fowler.

The decision in Bennet v. Pixley, 7 Johns.

249, is placed by the court on the same ground with that of Seers v. Fowler, and Terry v. Duntze, and the reasoning of the court in that case is overruled by Cunningham v. Morrell, and by Dey v. Dox, 9 Wend. 129. The case, I think, should be classed with Campbell v. Jones, 6 Term R. 570, and Tompkins v. Elliot, 5 Wend. 496, all of which fall within the principle of the first rule in Saunders, "that if a day be appointed for the payment of money, or part of it, or the doing of any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, an action may be brought for the money, or for not doing such other act before performance," etc. 1 Saund. 320a. The decisions in Term R. and in Wendell, were placed distinctly upon that ground (6 Johns. 572; 5 Wend. 499); and what fell from Lord Kenyon and Judge Savage, beyond a mere recognition of the rule laid down by Lord Mansfield, was no way necessary to the determination of those cases. The judgments were unquestionably correct for other reasons assigned by those judges.

The question then returns, was the consideration in this case divisible, and were the payments apportioned by the agreement to the different parts of the consideration within the principles above stated? According to the contract, the $950 to be paid by the defendant, as therein stipulated, was the entire consideration for a complete title to the premises. The possession was incident to the title, the whole of which the defendant was to receive as the consideration for his payments. He received one element of a complete title, to-wit, the possession, on the 1st of November, 1845. He then paid on the 1st of the following April all that he was to advance by the terms of the agreement, until the fee should be added to the possession by a conveyance from the plaintiff, and the title of the defendant be then perfected. The plaintiff refuses or neglects to convey, and yet by this action claims the purchase-money of the defendant.

If we assume that the consideration of the defendant's undertaking was divisible, yet by the terms of the agreement he was to receive both the possession and a deed of the premises before he could be called upon for the payment of the installment in controversy. These things were "to be done to him" according to the rule of Lord Holt, adopted in 10 Johns. 206. He was not to trust to the personal responsibility of the plaintiff. 9 Wend. 134. The plaintiff had covenanted that the thing stipulated should be performed before the defendant could be required to pay. Nor by the contract were the payments to be made by the defendant apportioned to any particular part of the consideration. He was not to pay any thing for the possession as distinguished from the fee of the land, but a gross sum for both by separate installments. If he had refused to accept a deed, all that the plaintiff could have recovered would have been the balance of the purchase-money with interest. On the contrary had the plaintiff refused to convey, the recovery on the part of the defendant would have been confined to the difference between the contract price and the actual value of the land with interest. In a word, the covenant sought to be enforced against the defendant in this action went to the whole consideration on the other side, and depended on it.

The judgment of the supreme court should be reversed.

FOOT, J. The question is, whether the covenants to pay the second and subsequent installments are dependent.

So many decisions have been made on the vexed question of what are, and what are not, dependent covenants, and so many of them are irreconcilable, that they rather perplex than aid the judgment in determining a given case. One rule is universal, and that is, that the intent of the parties is to control. On reading the covenant in this case, it is clear to my mind that giving the deed was to precede the payment of the second and subsequent installments. The parties have said so in so many words. The deed was to be given on the 1st of May, 1846; and the second and subsequent installments paid on the 1st day of April in the following years. If each had fulfilled his contract, the appellant would have had his deed when the second installment was payable. The clause "if the above conditions are complied with" can only apply to such conditions as were to be performed by the appellant before the deed by the terms of the contract was to be given. The possession is a mere incident which follows the title, and cannot be retained independently of it.

Judgment reversed.

NORRINGTON v. WRIGHT et al.

(6 Sup. Ct. 12, 115 U. S. 188.)

Supreme Court of the United States. Oct. 26, 1885.

In error to the circuit court of the United States for the Eastern district of Pennsylvania.

The facts fully appear in the following statement by Mr. Justice GRAY:

This was an action of assumpsit, brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington & Co., against James A. Wright and others, citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract: "Philadelphia, January 19, 1880. Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London: Five thousand (5,000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880, at forty-five dollars ($45.-00) per ton of 2,240 lbs. custom-house weight, ex ship Philadelphia. Settlement, cash, on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia. Edward J. Etting, Metal Broker."

The declaration contained three counts. The first count alleged the contract to have been for the sale of about 5,000 tons of T iron rails, to be shipped at the rate of about 1,000 tons a month, beginning in February, and ending in July, 1880. The second count set forth the contract verbatim. Each of these two counts alleged that the plaintiffs in February, March, April, May, June, and July shipped the goods at the rate of about 1,000 tons a month, and notified the shipments to the defendants; and further alleged the due arrival of the goods at Philadelphia, the plaintiff's readiness to deliver the goods and bills thereof, with custom-house certificates of weight, according to the contract, and the defendants' refusal to accept them. The third count differed from the second only in averring that 400 tons were shipped by the plaintiff in February and accepted by the defendants, and that the rest was shipped by the plaintiffs, at the rate of about 1,000 tons a month, in March, April, May, June, and July. The defendants pleaded non assumpsit. The material facts proved at the trial were as follows:

The plaintiff shipped from various European ports 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels in May, 1,000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment. The defendants received and paid for the February shipment upon its arrival in March, and in April gave directions at what wharves the March shipments should be discharged on their arrival, but on May 14th, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March, and April, gave Etting written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract; and in answer to a letter from him of May 16th, wrote him on May 17th, as follows: "We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances, and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you had ascertained that you did not intend to, or could not, make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have not performed your contract, as you certainly have not for the April shipments. There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18th Etting wrote to the defendants, insisting on their liability for both past and future shipments, and saying, among other things: "In respect to the objection that there had not been a complete delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for five thousand tons, it expressly stipulates that deliveries may be made during six months, and that they are only to be at the rate of about one thousand tons per month." "As to April, while it seems to me 'too plain to require any remark,' I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or for that matter, to make the delivery of precisely one thousand tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments, and, if so, upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You

say in your last paragraph that you shall avail yourselves of the advantage, if you are absolved from the contract; but, as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19th the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about one thousand tons, beginning in February, and that the six months' clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be; and certainly neither the February, March, nor April shipments are within the limits. As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to give, and cannot afterwards vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can it be changed now in order to make that a performance which was no performance within the time required." "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application." On June 10th Etting offered to the defendants the alternative of delivering to them one thousand tons strict measure on account of the shipments in April. This offer they immediately declined. On June 15th Etting wrote to the defendants that two cargoes, amounting to 221 tons, of the April shipments, and two cargoes, amounting to 650 tons, of the May shipments, (designated by the names of the vessels,) had been erroneously notified to them, and that about 900 tons had been shipped by a certain other vessel on account of the May shipments. On the same day the defendants replied that the notification as to April shipments could not be corrected at this late date, and after the terms of the contract had long since been broken. From the date of the contract to the time of its rescission by the defendants, the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes, and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial the plaintiff contended (1) that under the contract he had six months in which to ship the 5,000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1,000 tons in any one month; (2) that, if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff. But the court instructed the jury that if the defendants, at the time of accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about 1,000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them. The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

Samuel Dickson and J. C. Bullitt, for plaintiff in error. Richard C. McMurtrie, for defendants in error.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. Behn v. Burness, 3 Best & S. 751; Bowes v. Shand, 2 App. Cas. 455; Lowber v. Bangs, 2 Wall. 728; Davison v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. 346.

The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments, or deliveries of so many distinct quantities of iron. Mersey S. & I. Co. v. Naylor, 9 App. Cas. 434, 439. The further provision that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such a loss, the quantity to be delivered and paid for. The times of shipment, as designated in the contract, are "at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one-sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during

those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances,—such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill,—in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight." Brawley v. U. S., 96 U. S. 168, 171, 172. The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfill the contract on his part in respect to these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission. The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of Lyon v. Bertram, 20 How. 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract. The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

In the leading case of Hoare v. Rennie, 5 Hurl. & N. 19, which was an action upon a contract of sale of 667 tons of bar iron, to be shipped from Sweden in June, July, August, and September, and in about equal portions each month, at a certain price payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiffs that they would not accept the rest. The defendants pleaded that the shipment in June was of about 20 tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one-fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross-action. But judgment was given for the defendants, Chief Baron Pollock saying: "The defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that, in the events that have happened, one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract,—they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action." 5 Hurl. & N. 28. So in Coddington v. Paleologo, L. R. 2 Exch.

193, while there was a division of opinion upon the question whether a contract to supply goods, "delivering on April 17th, complete 8th May," bound the seller to begin delivering on April 17th, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

On the other hand in Simpson v. Crippin, L. R. 8 Q. B. 14, under a contract to supply from 6,000 to 8,000 tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for 12 months, the buyer sent wagons for only 150 tons during the first month; and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in Brandt v. Lawrence, 1 Q. B. Div. 344, in which the contract was for the purchase of 4,500 quarters, 10 per cent. more or less, of Russian oats, "shipment by steamer or steamers during February," or, in case of ice preventing shipment, then immediately upon the opening of navigation, and 1,139 quarters were shipped by one steamer in time, and 3,361 quarters were shipped too late, it was held that the buyer was bound to accept the 1,139 quarters, and was liable to an action by the seller for refusing to accept them. Such being the condition of the law of England as declared in the lower courts, the case of Bowes v. Shand, after conflicting decisions in the queen's bench division and the court of appeal, was finally determined by the house of lords. 1 Q. B. Div. 470; 2 Q. B. Div. 112; 2 App. Cas. 455. In that case, two contracts were made in London, each for the sale of 300 tons of "Madras rice, to be shipped at Madras or coast for this port during the months of March and/or April, 1874, per Rajah of Cochin." The 600 tons filled 8,200 bags, of which 7,120 bags were put on board, and bills of lading signed in February; and for the rest, consisting of 1,030 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the house of lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months. In the opinions there delivered the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

Lord Chancellor Cairns said: "It does not appear to me to be a question for your lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." 2 App. Cas. 463. "If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning,—it is no observation which can dispose of, or get rid of, or displace, that literal meaning,—to say that it puts an additional burden on the seller without a corresponding benefit to the purchaser; that is a matter of which the seller and purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled." Pages 465, 466. "It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross-action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months." "The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfillment of the contract." Pages 467, 468.

Lord Blackburn said: "If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might

have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it." 2 App. Cas. 480, 481.

Soon after that decision of the house of lords, two cases were determined in the court of appeal. In Reuter v. Sala, 4 C. P. Div. 239, under a contract for the sale of "about 25 tons (more or less) black pepper, October and/or November shipment, from Penang to London, the name of the vessel or vessels, marks, and full particulars to be declared to the buyer in writing within 60 days from date of bill of lading," the seller, within the 60 days, declared 25 tons by a particular vessel, of which only 20 tons were shipped in November, and five tons in December; and it was held that the buyer had the right to refuse to receive any part of the pepper. In Honck v. Muller, 7 Q. B. Div. 92, under a contract for the sale of 2,000 tons of pig-iron to be delivered to the buyer free on board at the maker's wharf "in November, or equally over November, December, and January next," the buyer failed to take any iron in November, but demanded delivery of one-third in December and one-third in January; and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as canceled by the buyer's not taking any iron in November.

The plaintiff in the case at bar greatly relied on the very recent decision of the house of lords in Mersey Co. v. Naylor, 9 App. Cas. 434, affirming the judgment of the court of appeal in 9 Q. B. Div. 648, and following the decision of the court of common pleas in Freeth v. Burr, L. R. 9 C. P. 208. But the point there decided was that the failure of the buyer to pay for the first installment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract, and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the house of lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first installment. The lord chancellor said: "The contract is for the purchase of 5,000 tons of steel blooms of the company's manufacture; therefore, it is one contract for the purchase of that quantity of steel blooms. No doubt, there are subsidiary terms in the contract, as to the time of delivery,—'delivery 1,000 tons monthly, commencing January next,'—and as to the time of payment,—'payment net cash within three days after receipt of shipping documents,'—but that does not split up the contract into as many contracts as there shall be deliveries for the purpose of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfillment of the unfulfilled part of the contract by the delivery of the undelivered steel." 9 App. Cas. 439.

Moreover, although in the court of appeal dicta were uttered tending to approve the decision in Simpson v. Crippin, and to disparage the decisions in Hoare v. Rennie and Honck v. Muller, above cited, yet in the house of lords Simpson v. Crippin was not even referred to, and Lord Blackburn, who had given the leading opinion in that case, as well as Lord Bramwell, who had delivered the leading opinion in Honck v. Muller, distinguished Hoare v. Rennie and Honck v. Muller from the case in judgment. 9 App. Cas. 444, 446.

Upon a review of the English decisions, the rule laid down in the earlier cases of Hoare v. Rennie and Coddington v. Paleologo, as well as in the later cases of Reuter v. Sala and Honck v. Muller, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of Simpson v. Crippin and Brandt v. Lawrence, and to accord better with the general principles affirmed by the house of lords in Bowes v. Shand, while it in no wise contravenes the decision of that tribunal in Mersey Co. v. Naylor. In this country there is less judicial authority upon the question. The two cases most nearly in point that have come to our notice are Hill v. Blake, 97 N. Y. 216, which accords with Bowes v. Shand, and King Philip Mills v. Slater, 12 R. I. 82, which approves and follows Hoare v. Rennie. The recent cases in the supreme court of Pennsylvania, cited at the bar, support no other conclusion. In Shinn v. Bodine, 60 Pa. St. 182, the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, "coal to be delivered on board vessels as sent for during the months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In Morgan v. McKee, 77 Pa. St. 228, and in Scott v. Kittanning Coal Co., 89 Pa. St. 231, the buyer's

right to rescind the whole contract upon the failure of the seller to deliver one installment was denied, only because that right had been waived, in the one case by unreasonable delay in asserting it, and in the other by having accepted, paid for, and used a previous installment of the goods. The decision of the supreme judicial court of Massachusetts in Winchester v. Newton, 2 Allen, 492, resembles that of the house of lords in Mersey Co. v. Naylor.

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1,000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See Busk v. Spence, 4 Camp. 329; Graves v. Legg, 9 Exch. 709; Reuter v. Sala, above cited.

Judgment affirmed.

The CHIEF JUSTICE was not present at the argument, and took no part in the decision of this case.

WOOTEN v. WALTERS et al.

(14 S. E. 734, 110 N. C. 251.)

Supreme Court of North Carolina. March 15, 1892.

Appeal from superior court, Lenoir county; E. T. Boykin, Judge.

Action by Simeon Wooten against John D. Walters and others to avoid a contract for the sale of real and personal property, and to recover such property. Exceptions were taken to the report of a referee, and from a judgment modifying the report, sustaining an exception of defendants and overruling plaintiff's exceptions, plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by MERRIMON, C. J.:

The following is a copy of the case settled on appeal: "The facts found by the referee are as follows: (1) That in the year 1889 the plaintiff and defendants formed themselves into a company and were incorporated under the name of the 'Kinston Oil-Mill Company,' for the purpose of manufacturing cotton-seed oil. (2) The plaintiff and each of the defendants agreed to take one-fourth each of the capital stock, and the company was organized, and the defendant J. D. Walters was elected president of the company, and was the general superintendent of the business in erecting buildings, machinery, and making the necessary preparation for commencing the manufacture of the oil. (3) That no certificates or other evidence of stock were ever issued by said company. (4) In November of said year 1889, and before the company was ready to commence operation, the plaintiff agreed with the defendant J. D. Walters to sell to him his stock of merchandise and two stores and lots, all being in La Grange, and was to take in payment therefor the interests of the said J. D. Walters and the defendant Alex. Sutton in the said oil-mill, the difference to be paid as it should appear on estimation. (5) The contract above mentioned was as follows: Walters was at the store of Wooten, and a proposition to trade was made, by which party is uncertain, and whether the stores were then named or not is uncertain. They agreed to meet again that night. At night Walters went to Wooten's store, and after a while they agreed that the goods were worth twenty per cent. less than their original cost. They then immediately began to talk about the price of the stores, but did not agree as to their price. They then began to talk about the price of the oil-mill property. Walters said it was worth dollar for dollar for what had been put into the mill. Wooten thought he ought to make some reduction. Walters refused to do so. Then they began to talk again about the stores, but did not agree as to the price. At this point Walters said to Wooten, 'Do we understand each other?' Wooten said he thought so. Walters said, 'You are to take the oil-mill property at what it cost us, and I am to take the goods at 20 per cent. off first cost.' Wooten made no reply, but walked off to attend to some matter, came back, and they walked out of the store, and went to the pump, and got some water. Walters again spoke about the stores; Wooten asked $3,000; Walters offered $2,500. Before they separated they agreed on the price of the stores at $2,750, and Wooten then asked Walters when he wanted to take an inventory of the goods. (6) The contract was not reduced to writing, nor any note or memorandum thereof. (7) An inventory of goods was taken, and they amounted to $9,514.38. This amount, reduced six and one-fourth per cent., would be the first cost of the goods, which is $8,919.73, (first cost.) This, reduced by 20 per cent., would leave $7,135.79, the price Walters was to pay Wooten for the goods. (8) After the inventory was completed, Wooten delivered the stores and goods into the possession of Walters. (9) Wooten took possession of the oil-mill property, completed the erection of machinery, etc., and operated the mill about two weeks, and then stopped running the mill, and about a week after informed Walters he should not carry out and complete the contract, and offered to return to him the mill property, and demanded of Walters the return of the stores and goods. (10) Walters has always been willing and able to perform his part of the contract, and several times so informed Wooten. (11) Wooten, after he stopped running the mill, sold off cotton-seed and other material, which belonged to the company before he and Walters traded, to the value of $1,834.18. (12) The mill, machinery, etc., can be put in as good condition as it was when Wooten took charge of it, at a cost of about $12. (13) The amount of mill property bought by Wooten from Walters, at the price agreed on, is $8,107.11. Therefore the accounts stand thus:

Wooten to Walters,	Dr.	
To mill property.........	$8,107 11	
By merchandise		$7,135 79
By two stores and lots...		2,750 00
To amount due by Walters	1,778 68	
	$9,885 79	$9,885 79

Wooten refusing to convey the stores, and deducting their value, Wooten will be due Walters.............. $ 971 32

—(14) Walters had sold a considerable quantity of the goods before Wooten demanded their return. The stock of goods has been replenished with other goods, which, or a part of which, cannot now be separated from the original stock turned over by Wooten to Walters. Conclusions of law from the foregoing facts: (1) That the contract for the sale of the stores and the goods is an entire contract, and cannot be divided or apportioned. (2) That the plaintiff, Wooten, is entitled to recover the possession of the two stores and lots mentioned in the pleadings. (3) That the plaintiff, Wooten, is not entitled to recover the goods, or the value of them, from the defendants. (4) That the defendants are not entitled to have the contract enforced as to the

stores and lots. (5) That the defendants are entitled to recover of the plaintiff $971.32, it being the amount paid plaintiff over the value of goods received from plaintiff."

The court sustained the defendants' exception to the first conclusion of law, and "adjudged that the said contract is divisible." The plaintiff filed exceptions as follows: "(1) Plaintiff excepts to conclusion of law No. 3, that the plaintiff is not entitled to recover the goods, or the value of them, from the defendant, whereas he ought to have found that the plaintiff was entitled to recover the value of the goods, as he has found that the goods had been sold by the defendant J. D. Walters. (2) Plaintiff excepts to conclusion of law No. 5, wherein he finds that the defendants are entitled to recover $971.32 from plaintiff, whereas he ought to have found that the plaintiff was entitled to recover of the defendant John D. Walters the value of the goods, to wit, $7,134.78, and interest thereon." The court overruled these exceptions, and gave judgment as follows: "It is further adjudged that the report of the referee, as above modified, be and is confirmed. It is further adjudged that the plaintiff recover of the defendants the two stores and lots mentioned in the pleadings; that the defendants retain possession of the stock of goods and general merchandise; and that the defendants recover of the plaintiff the sum of nine hundred seventy-one and 32/100 dollars, the amount found due by the referee, with interest on the said amount from December 1, 1889, till paid; and, further, that the plaintiff recover of the defendants his costs of this action, to be taxed by the clerk." The plaintiff assigned as error that the court sustained the defendant's exception above mentioned, and overruled his exceptions above set forth, and appealed to this court.

Geo. Rountree, for appellant. G. V. Strong and W. R. Allen, for appellees.

MERRIMON, C. J. (after stating the facts.) A contract is entire, and not severable, when, by its terms, nature, and purpose, it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other, and interdependent. Such a contract possesses essential oneness in all material respects. The consideration of it is entire on both sides. Hence, where there is a contract to pay a gross sum of money for a certain definite consideration, it is entire. and not severable or apportionable, in law or equity. Thus, where a particular thing is sold for a definite price, the contract is an entirety, and the purchaser will be liable for the entire sum agreed to be paid. And so, also, when two or more things are sold together for a gross sum, the contract is not severable. The seller is bound to deliver the whole of the things sold, and the buyer to pay the whole price, in the absence of fraud. Hence it has been held that, where a cow and 400 pounds of hay were sold for $17, the contract was entire. Mr. Justice Story says that "the principle upon which this rule is founded seems to be that, as the contract is founded upon a consideration dependent upon the entire performance thereof, if for any cause it be not wholly performed, the casus fœderis does not arise, and the law will not make provision for exigencies against which the parties have neglected to fortify themselves." 1 Story, Cont. (5th Ed.) § 26. Such contracts are enforceable only as a whole. On the other hand, a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. Hence an action may be maintained for a breach of it in one respect, and not necessarily in another, or for several breaches, while in other material respects it remains intact. In such a contract, the consideration is not single and entire as to all its several provisions as a whole until it is performed; it is capable of division and apportionment. Thus, though a number of things be bought together without fixing an entire price for the whole, but the price of each article is to be ascertained by a rate or measure as to the several articles, or when the things are of different kinds, though a total price is named, but a certain price is affixed to each thing, the contract in such cases may be treated as a separate contract for each article, although they all be included in one instrument of conveyance, or by one contract. Thus where a party purchased two parcels of real estate, the one for a specified price and the other for a fixed price, and took one conveyance of both, and he was afterwards ejected from one of them by reason of defect of title, it was held that he was entitled to recover therefor from the vendor. Johnson v. Johnson, 3 Bos. & P. 162; Miner v. Bradley, 22 Pick. 459. So, also, it was held, where a certain farm and dead stock and growing wheat were all sold together, but a separate price was affixed to each of these things, that the contract was entire as to each item, and was severable into three contracts, and hence a failure to comply with the contract as to one item, did not invalidate the sale, and give the vendor a right to reject the whole contract. In such case, the contract may be entire or several, according to the circumstances of each particular case, and the criterion is to be found in the question whether the whole quantity—all of the things as a whole—is of the essence of the contract. If it appear that the purpose was to take the whole or none, then the contract would be entire; otherwise it would be severable. It is sometimes difficult to determine whether the contract is entire or severable in such cases, and there is great diversity of decision on the subject, "but, on the whole, the weight of opinion and the more reasonable rule would seem to be that,

where there is a purchase of different articles, at different prices, at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter or by the act of the parties." This rule makes the interpretation of the contract depend on the intention of the parties as manifested by their acts and the circumstances of each particular case. Brewer v. Tysor, 3 Jones, (N. C.) 180; Niblett v. Herring, 4 Jones, (N. C.) 262; Brewer v. Tysor, 5 Jones, (N. C.) 173; Dula v. Cowles, 7 Jones, (N. C.) 290; Jarrett v. Self, 90 N. C. 478; Chamblee v. Baker, 95 N. C. 98; Lawing v. Rintels, 97 N. C. 350, 2 S. E. 252; Pioneer Manuf'g Co. v. Phœnix Assur. Co., 14 S. E. 731 (decided at the present term); Story, Cont. (5th Ed.) §§ 21–25; 3 Pars. Cont. 187; Whart. Cont. §§ 338, 511, 748.

Applying the rules of law thus stated to the case before us, we are of opinion that the contract to be interpreted, treated as executory, is severable, and the sale of the goods therein mentioned was not necessarily an inseparable part of the sale of the land embraced by this contract. Although it is single, it embraces the sale of two distinct things, each having a certain price affixed to it, and the price paid for the whole being susceptible of apportionment. Neither by the terms of the contract settled by the findings of fact, nor by its nature and purpose, does it appear that the store-house lot of land and stock of goods, distinct things, were both necessary parts of an entire contract. These things were not necessary parts of each other; they were entirely capable of being sold separately. Nor does it appear that they were sold as a single whole. On the contrary, they were spoken of and treated as different subjects of sale, a specified price was affixed to the land, and a distinct, definite price affixed to the goods. Wherefore this distinction? Why was the price fixed as the separate and distinct subject of sale? As we have seen, the two things were not necessary to each other, and nothing was said or done by the parties, nor does anything appear to show that the parties would not have made the contract unless it embraced both the sale of the land and the stock of goods. The sale of the stock of goods was not part or parcel of the sale of the land, nor dependent upon it, although the sale of both was made at the same time, and embraced by the same contract, severable in its nature and purpose. They were treated as distinct subjects of sale, the price of each being definitely fixed. The mere fact that the plaintiff was about to change the character of his business did not imply that the store-houses and the land on which they were situate must be sold with the goods, else the goods would not be sold. Such things are valuable to let for rent. There is the absence of anything that shows a purpose to sell the two things as an inseparable whole. When, therefore, the plaintiff avoided the contract, not reduced to writing as to the land, as he might do under the statute pertinent, he did not avoid the contract as to the stock of goods. The contract was severable, and, as to the goods, was valid and remained of force and continued to have effect. It seems that really the contract was executed as to the goods, and the sale might, on that ground, be upheld without reference to the ineffectual sale of the land; but no question in that aspect of the case was raised. Judgment affirmed.

BAST v. BYRNE.

(8 N. W. 494, 51 Wis. 531.)

Supreme Court of Wisconsin. March 24, 1881.

Appeal from circuit court, Green county.

January 19, 1870, the defendant, Byrne, agreed in writing to pay the plaintiff, Bast, $360 for one year's work in his store, and to let him have all the goods he needed for himself at cost, with 10 per cent. added, during the time, and reserving to himself the privilege of dismissing Bast at the end of six months if he should no longer need his services; and Best agreed therein and therefor to work strenuously in the store for Byrne's interest. The complaint alleged the substance of the agreement, and performance by the plaintiff, and admitted payment of $148.54 in goods, $53.29 in cash, etc., and loss of time amounting to $9, and claimed a balance of $149.29. The defendant offered and tendered judgment for $120, with costs of action, which the plaintiff refused to accept. The answer alleged payment, and that the plaintiff had forfeited his wages by leaving his employ many times without leave, and by altogether absenting himself from the defendant before he had completed the working of his year. On the trial in the circuit court the defendant objected to any evidence under the complaint, on the ground that it appeared from the complaint that the plaintiff agreed to work a year, but had failed to work out his time; which objection was overruled by the court and the defendant excepted. The undisputed evidence shows that the plaintiff began work under the contract January 26, 1878, and quit on the evening of January 25, 1879; that the plaintiff had lost at different times in the aggregate nine and a half days. At the close of the plaintiff's testimony the defendant moved for a nonsuit, which was overruled, and the defendant excepted. There was evidence tending to show that there was an attempt and failure to settle on the evening that he quit, and some dispute about the amount he had received, and whether his time was out, or would not be out, until the following day. At the close of the testimony and the arguments of counsel, the court charged the jury. Thereupon the jury retired and returned a verdict for the plaintiff of $147.32, which the defendant moved to set aside and for a new trial, which motion was overruled by the court, and the counsel for the defendant excepted. No exception was taken to any portion of the charge, and no instructions were refused or requested.

A. A. Douglass, B. Dunwiddie, and S. U. Pinney, for appellant. P. J. Clawson, for respondent.

CASSODAY, J. There is no dispute but what it was a year from the time the plaintiff began the work until he quit. Had he lost no time he would have fully complied with his contract. It is urged, however, that whenever the plaintiff, from his own fault or necessity, lost any time, it became optional with the defendant to allow him to resume work or not, and that when he did "choose to allow him to resume work" then the plaintiff became bound to make up the days so lost by working after what would have otherwise been the end of the year. In other words, it is claimed that the clause, "agrees to pay * * * the sum of $360 for one year," does not refer to a definite period of time, but a definite number of days of service, and that until the number of days of service were in fact rendered, either during the year or subsequently, no recovery could be had upon the contract. In support of this theory we are referred to Winn v. Southgate, 17 Vt. 355, and Lamburn v. Cruden, 2 Man. & G. 253. In Winn v. Southgate the contract was that the plaintiff should labor six months for the defendant. He commenced work May 17th, and during the term, with the consent of the defendant, was absent on a journey 16 days, but returned October 5th, and continued to work until October 30th, when he quit, being 17 days before the end of the six months, and then insisted that his time was out, claiming that 24 working days was a month, and thereupon sued for the balance of his wages, and the court held that he could not recover. It is evident from this statement that the question here involved did not there arise. In Lamburn v. Cruden the plaintiff had been engaged by the defendant at a yearly salary, payable quarterly. The last year of service ,expired September 29, 1837, and his salary up to that time had been duly paid. Before the expiration of the year a misunderstanding had arisen. October 20th the plaintiff tendered his resignation, which was accepted December 13th. In the meantime he had performed no service, except upon one occasion, and then against the assent of the defendant. The action was for services between September 29th and December 13th, but the plaintiff was nonsuited, and the rule for a new trial was made absolute, on the ground, that the court should have submitted to the jury the question as to whether there was a new agreement.

The question there involved seems to have been foreign to the question here presented. There the subsequent services were claimed under a new agreement; here subsequent services were demanded by virtue of the old agreement. Of course it was competent for the parties in this case to have made a new agreement whereby the plaintiff should work a certain number of days in lieu of the nine and one-half days which he had lost, but there is no claim that any such new agreement was ever made, and the question is, can the court expand an agreement which by its terms was limited to "one year," so as to require a party under it to render services after the expiration of the year, in lieu of certain days of service which he failed to

perform during the year? No case has been cited going to that extent, and we have no disposition to furnish one. A party contracting to labor for a limited period cannot be required, after the expiration of the period, to render additional services under such contract, without any new agreement, merely because he had lost certain days during the term. The court charged the jury on the theory that it was competent for the defendant, during the contract, to waive a strict performance of any particular day's work, and that when the plaintiff from time to time lost a day, and the defendant, with knowledge of the fact, received him back into his employ, it was such waiver; at least to the extent of preventing the defendant from enforcing a forfeiture of payment for the services actually performed. It is true the charge in this respect is not very full or explicit, but if the defendant desired to have it more definite he should have so requested. We are convinced that the theory upon which the cause was submitted to the jury was correct. Such acts of the defendant, without objection, we regard as a prima facie waiver of the breach. They presume condonation. The loss of a half day, a day, or two days, at intervals, and long prior to the termination of the contract, without objection on the part of the defendant, should not, upon principle, operate so harshly as to work a forfeiture of payment for services subsequently rendered in good faith, and with no notice that such forfeiture would be insisted upon.

There may be adjudged cases going to that extent, but we should be very slow to follow them. In Ridgway v. Hungerford, 3 Adol. & E. 171, Lord Denman, C. J., declared that where the servant was guilty of misconduct in June, and the master, knowing it, retained him until November, "a condonation might be presumed." This was dicta, to be sure, but we think it was good law. In Prentiss v. Ledyard, 28 Wis. 131, although the contract was for no definite time, yet it was held that, "where the employé was to receive payment at a specified rate, if he continued temperate and faithful in the employer's service, the fact that he was occasionally intemperate and discontinued the service for short periods would not prevent his recovering the stipulated rate for the time actually spent in such service, if he was received back into it, and continued therein, without any new arrangement being made, or any intimation given that the old one was terminated." We see no difference in principle between the waiver of the conditions of a contract in respect to personal habits, and in respect to interruptions of service, or any other stipulation. The question of waiver of the breach, by the retention of the employé for 11 or 12 days after the master's knowledge of the existence of the causes, was held properly submitted to the jury in McGrath v. Bell, 33 N. Y. Super. Ct. 195. It is certainly equitable, and, we think, according to well-established principles of law, to hold that where an employé, for a fixed period and without any fault of his employer, absents himself for a short time, and then the employer, with knowledge of the fact, receives him back into his service without objection, and retains him until the termination of the contract, he thereby waives the right to declare the contract forfeited as to the services actually rendered. This is not going as far as the opinion of the court in Britton v. Turner, 6 N. H. 481. It is true, that case has frequently been disapproved, but it is also true that it has been frequently approved. Elliot v. Heath, 14 N. H. 131; Laton v. King, 19 N. H. 280; Davis v. Barrington, 30 N. H. 517; Pixler v. Nichols, 8 Iowa, 106; Byerlee v. Mendel, 39 Iowa, 382, and cases there cited, in which last case it was held that "where a party hires himself to another for a fixed period of time, and leaves the service before the expiration of the term, without any fault on the part of the employer, the former may recover the value of his services performed as upon a quantum meruit, without showing that he left the service of his employer for good cause." Britton v. Turner, was also followed in Fenton v. Clark, 11 Vt. 560; Gilman v. Hall, Id. 510; Blood v. Enos, 12 Vt. 625. There are strong equitable reasons to sustain the doctrine of the above cases, but they would seem to be in conflict with the weight of authority, and we therefore cite them merely because they furnish strong reasons in favor of the conclusions which we have reached in this case.

There is still another reason why this judgment should be sustained. Prior to the first trial there was a dispute as to the amount due, and the defendant offered and tendered judgment for the amount which he considered due, with costs of action. Such offer and tender were competent evidence, and authorized a verdict of waiver of all forfeiture under the contract. Cahill v. Patterson, 30 Vt. 592; Seaver v. Morse, 20 Vt. 620; Patnote v. Sanders, 41 Vt. 66; Boyle v. Parker, 46 Vt. 343. A party who proposes to insist upon a technical forfeiture should act promptly, and consistently with the right claimed.

The judgment of the circuit court is affirmed.

SUPERINTENDENT & TRUSTEES OF PUBLIC SCHOOLS OF CITY OF TRENTON v. BENNETT et al.

(27 N. J. Law, 513.)

Supreme Court of New Jersey. June Term, 1859.

Argued at Feb. term, 1859, before GREEN, C. J., and OGDEN, VREDENBURGH, and WHELPLEY, JJ.

E. W. Scudder and Mr. Dutcher, for plaintiffs. Mr. Gummere and W. L. Dayton, for defendants.

WHELPLEY, J. This case presents the naked question whether, where a builder has agreed, by a contract under seal, with the owner of a lot of land, "to build, erect, and complete a building upon the lot for a certain entire price, but payable in arbitrary installments, fixed without regard to the value of the work done, and the house before its completion falls down, solely by reason of a latent defect in the soil, and not on account of faulty construction, the loss falls upon the builder or the owner of the land."

The case comes before the court, upon a certificate from the Mercer circuit, for the advisory opinion of this court.

The covenant of Evernham and Hill was to build, erect, and complete the school-house upon the lot in question for the sum of $2610; the whole price was to be paid for the whole building; the division of that sum into installments, payable at certain stages of the work, was not intended to sever the entirety of the contract, and make the payment of the installments payments for such parts of the work as might be done when they were payable: this division was made, not to apportion the price to the different parts of the work, but to suit the wants of the contractor, and aid him in the completion of the work; the consideration of the covenant to complete the building was the whole price, and not the mere balance that might remain after the payment of the installments: it cannot be pretended that the contractor, after payment of a part of the installments, might refuse to go on and complete the building, and yet retain that part of the price he had received. Haslack v. Mayers, 26 N. J. Law, 284.

No rule of law is more firmly established by a long train of decisions than this, that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; therefore, if a lessee covenant to repair a house, though it be burned by lightning, or thrown down by enemies, yet he is bound to repair it. Paradine v. Jayne, Alleyn, 26; Walton v. Waterhouse, 2 W. Saund. 422a, note 2; Brecknock Co. v. Pritchard, 6 Term R. 750. This case was an action upon a covenant to build a bridge, and keep it in repair: the defendant pleaded that the bridge was carried away by the act of God, by a great and extraordinary flood, although well built and in good repair. The plea was held bad on demurrer.

To the same effect are Bullock v. Dommit, 6 Term R. 650; Phillips v. Stevens, 16 Mass. 238; Dyer, 33a. And there is no relief in equity. Gates v. Green, 4 Paige, 355; Holtzapffell v. Baker, 18 Ves. 115. Chancellor Walworth, in Gates v. Green, in denying relief in equity against a covenant to pay rent after the destruction of the demised premises, admits the rule to be against natural law, and not to be found in the law of other countries where the civil law prevails; yet says it is firmly established, notwithstanding the struggles of some of the early English chancellors against it.

In Beebe v. Johnson, 19 Wend. 500, it was held by Nelson, C. J., delivering the opinion of the court, that the defendant was not excused from performing his covenant to perfect, in England, a patent granted in this country, so as to insure to the plaintiff the exclusive right of vending the patented article in the Canadas, because the power of granting such an exclusive privilege appertained not to the mother country, but to the provinces, and was never granted, except to subjects of Great Britain and residents of the provinces; and the plaintiff and defendant were both American citizens.

The court said, if the covenant be within the range of possibility, however absurd or improbable the idea of execution may be, it will be upheld, as where one covenants it shall rain tomorrow, or that the pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished; for if it be only improbable, or out of the power of the obligor, it is not deemed in law impossible. 3 Comyn, Dig. 93. If a party enter into an absolute contract, without any qualification of exception, and receives from the party with whom he contracts the consideration of such engagement, he must abide by the contract, and either do the act or pay the damages; his liability arises from his own direct and positive undertaking.

In Lord v. Wheeler, 1 Gray, 282, where a workman had agreed to repair a building for an entire sum. and after the owner had moved in, it was burned up before the repairs were completed, it was held that where one person agrees to expend labor upon a specific subject, the property of another, as to shoe his horse, or slate his dwelling-house, if the horse dies, or the dwelling-house is destroyed by fire, before the work is done, the performance of the contract becomes impossible, and with the principal perishes the incident. The case was clearly distinguish-

ed from the ordinary contract of one to erect a building upon the lands of another, performing the labor and supplying the materials therefor; where, if before the building is completed or accepted, it is destroyed by fire or other casualty, the loss falls upon the builder, he must rebuild. The thing may be done, and he has contracted to do it. Nichols v. Adams, 19 Pick. 275; Brumby v. Smith, 3 Ala. 123; 2 Pars. Cont. 184; 1 Chit. Cont. 568.

No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundations in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather the law leaves it where the agreement of the parties has put it; the law will not insert, for the benefit of one of the parties, by construction, an exception which the parties have not, either by design or neglect, inserted in their engagement. If a party, for a sufficient consideration, agrees to erect and complete a building upon a particular spot, and find all the materials, and do all the labor, he must erect and complete it, because he has agreed so to do. No matter what the expense, he must provide such a substruction as will sustain the building upon that spot, until it is complete and delivered to the owner. If he agrees to erect a house upon a spot where it cannot be done without driving piles, he must drive them, because he has agreed to do everything necessary to erect and complete the building. If the difficulties are apparent on the surface, he must overcome them. If they are not, but become apparent by excavation or the sinking of the building, the rule is the same. He must overcome them, and erect the building, simply because he has agreed to do so —to do everything necessary for that purpose.

The cases make no distinction between accidents that could be foreseen when the contract was entered into, and those that could not have been foreseen. Between accidents by the fault of the contractor, and those where he is without fault, they all rest upon the simple principle—such is the agreement, clear and unqualified, and it must be performed, no matter what the cost, if performance be not absolutely impossible.

The case of a bailment of an article—locatio operis faciendi—is not analogous to the case before the court; there, if the article intrusted to the workman is lost without his fault, the owner sustains the loss; not because he is the owner, but because the contract of bailment is well defined by the law; there is no express agreement to return the article to the owner in a finished state; but the agreement is an implied agreement, a duty imposed by the law upon a bailee, because the chattel has been bailed to him, to use his best endeavors to protect the bailment from injury. Parsons states the obligation of the workman to be, to do the work in a proper manner, to employ the materials furnished in the right way. These obligations grow out of the act of bailment; they are its legal consequences, and the law declares them to be so, not because the parties have actually so stipulated, but because they are equitable and fair; and in the absence of express agreement such will be implied.

The case of Menetone v. Athawes, 3 Burrows, 1592, was relied upon by defendants' counsel to show that when the failure to perform the contract was not the fault of the contractor, he can recover. It was the bailment of a ship, to be repaired while in the shipwrights' dock, for the use of which the owner paid £5. The vessel was burned when the repairs were nearly completed; the action was for these repairs. It was like the case of Lord v. Wheeler, before cited. The right to recover was put upon the ground that the plaintiff was not answerable for the accident, which happened without his default, unless there had been a special undertaking; that this liability did not grow out of the law of bailments.

The cases of Trippe v. Armitage, 4 Mees. & W. 689; Woods v. Russell, 5 Barn. & Ald. 942; Clarks v. Spence, 4 Adol. & E. 448,—have no application; they are all cases arising under the bankrupt laws, involving the question when, under the circumstances of each case, the property in an incomplete chattel in process of manufacture passed out of the bankrupt, so as not to belong to his assignees. They are inapplicable, because the rights of the parties to this suit do not turn upon the question whether the property in an incomplete building is in the owner of the land or the builder, or whether the owner would derive a partial benefit from partial performance, but upon what was the express contract between the parties. The question upon whom the loss is to fall, occasioned by an inevitable accident, is not to be settled by determining what is equitable, what is right, or by the application of the maxim, res perit domino, or by any nice philosophical disquisitions whether the owner or the builder shall bear the loss. These considerations—this maxim—have their full application in cases where the rights of the parties have not been fixed by contract, but are to be settled by the law upon facts of the case; where resort is to be had to an implied contract, to a legal obligation raised by the law out of the natural equities of the case, in the absence of an express agreement.

Neither the destruction of the incomplete building by a sudden tornado, nor its falling by reason of a latent softness of the soil which rendered the foundation insecure, necessarily

prevented the performance of the contract to build, erect, and complete this building for the specified price; it can still be done, for aught that was opened to the jury as a defence, and overruled by the court.

The whole defence was properly overruled, because it did not show the performance of the covenant impossible, or any lawful excuse for non-performance of the contract.

I am also of opinion that the damage occasioned by the destruction of the building by the gale of wind must be borne by the defendants, for the reasons before given, and that the circuit court be advised accordingly.

Cited in Brown v. Fitch, 33 N. J. Law, 422; Insurance Co. v Hillyard, 37 N. J. Law, 483; Coles v. Manufacturing Co., 39 N. J. Law, 327; Dermott v. Jones, 2 Wall. 8.

YERRINGTON v. GREENE et al.

(7 R. I. 589.)

Supreme Court of Rhode Island. Sept. Term, 1863.

Assumpsit against the defendants, as administrators on the estate of William W. Keach, for the recovery of damages for the breach of a contract by which the said Keach agreed to employ the plaintiff, at a salary, for three years, in his business.

At the trial of the case, under the general issue, at the March term of this court, 1863, before the chief justice, with a jury, it was proved by letters interchanged between the plaintiff, who then resided in Boston, and the intestate, who was a manufacturing jeweller, in Providence, that on the 19th day of March, 1860, the former agreed to serve the intestate, and the latter agreed to employ the plaintiff, as a clerk and salesman, having charge of the intestate's office, or place of sale, in New York, and as agent in his business in making occasional trips for him to Philadelphia for the term of three years from the first day of April, 1860, or as soon thereafter as the plaintiff could obtain a release from his employment in Boston, at a salary of twelve hundred dollars, for the first year, of thirteen hundred dollars, for the second year, and of fifteen hundred dollars, for the third year; that on the sixteenth day of April, 1860, the plaintiff entered into the service of the intestate, under this contract, and continued to serve him under it until the first day of April, 1861, when the said Keach died; that the defendants, as administrators of said Keach, continued to employ the plaintiff, at the stipulated salary, until the sixteenth day of June, 1861, when, having discontinued the office in New York, and removed what goods were there to Providence, where Keach had another place of sale, they declined longer to employ the plaintiff, or to pay him his salary, though from that time to the date of the writ, he had been ready and willing to serve in said business, and had tendered his services in it to them, and had been unable to procure other employment; that the defendants, as administrators of Keach, wound up his business by selling the goods removed from New York, with other goods of his, at Providence, and had been allowed by the court of probate, for their services as administrators, the sum of three thousand dollars.

Upon this state of facts, the chief justice instructed the jury, that the death of Keach terminated this contract of service, and that no recovery of damages could be had of the defendants, as his administrators, for their refusal to employ the plaintiff under it afterwards; whereupon, the jury having returned a verdict for the defendants, the plaintiff, having duly excepted thereto, now moved for a new trial, on the ground of error in law in said instruction.

Mr. Browne, for plaintiff. James Tillinghast, for defendants.

AMES, C. J. It is, in general, true, that death does not absolve a man from his contracts; but that they must be performed by his personal representatives, or their non-performance compensated, out of his estate. An exception to this rule, equally well established, at both the civil and common law, is, that in contracts in which performance depends upon the continued existence of a certain person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. The implication arises in spite of the unqualified character of the promissory words, because, from the nature of the contract, it is apparent that the parties contracted upon the basis of the continued existence of the particular person or chattel. The books afford many illustrations of this reasonable mode of construing contracts, de certo corpore, as the civil law designation of them is, in furtherance of the presumed and probable intent of the parties. The most obvious cases are, the death of a party to a contract of marriage before the time fixed by it for the marriage; the death of an author or artist before the time contracted for the finishing and delivery of the book, picture, statue, or other work of art; the death of a certain slave promised to be delivered, or of a horse promised to be redelivered, before the day set for the delivery or redelivery; and the death of a master or apprentice before the expiration of the term of service limited in the indenture. The bodily disability from supervening illness, as of an artist, from blindness, to paint the picture contracted for, or of a scholar to receive the instruction his father had stipulated should be received and paid for, has been held, for the like reason, to excuse each from the performance of his contract. Hall v. Wright, 1 El., Bl. & El. 746; Stewart v. Loring, 5 Allen, 306. The cases in support of these and other illustrations of the exception to the general rule are set down in the defendants' brief, and it is unnecessary to repeat them. Both at the civil and the common law, it is necessary, that the party who would avail himself of this excuse for non-performance of the contract, should be without fault in the matter upon which he relies as an excuse. The latest and most instructive case, upon this subject, so far as the discussion of the principle of decision is concerned, is that of Taylor v. Caldwell, decided by the queen's bench, in May last, 8 Law T. Rep. 356. In that case it was held, that the parties were discharged from a contract to let a music hall for four specified days for a series of concerts, by the accidental destruction of the hall by fire before the first day arrived. The full and lucid exposition by Mr. Justice Blackburn, who delivered the opinion of the court, of the

prior cases and of the principle upon which they have been decided, leaves nothing further to be desired upon this subject.

Does the case at bar fall within the general rule, or within the exception we have been considering? This must depend upon the nature of the contract, whether one, requiring the continuing existence of the employer, Keach, for performance on his part, or one which could, according to its spirit and meaning, be performed by the defendants, his administrators. The contract was, to employ the plaintiff as clerk and agent of the intestate, in his business, in New York and Philadelphia; and it seems to us undoubted, that the continued existence of both parties to the contract for the whole stipulated term, was the basis upon which the contract proceeded, and if called to their attention at the time of the contract, must have been contemplated as such by them. The death of the plaintiff within the three years would certainly have been a legal excuse from the further performance of his contract; since it was an employment of confidence and skill, the duties of which, in the spirit of the contract, could be fulfilled by him alone. If this be the law in application to a covenant for ordinary service (Shep. Touch. 180), how much more in application to a contract for service of such confidence and skill as that of a clerk and agent for sale. On the other hand, this employment could continue no longer than the business in which the employer was engaged, and the plaintiff retained. The intestate, when living, could, by the contract, have required the services of the plaintiff in no other business than that in which he had engaged him, and with no other person than himself. It would seem, then, necessarily to follow, that when the death of the employer put a stop to this business, and left no legal right over it in the administrators, except to close it up with the least loss to the estate of their decedent, they were, by the contract, bound no longer to employ the plaintiff, any more than he to serve them. The act of God had taken away the master and principal,—the law had revoked his agency, and stopped the business to which alone his contract bound him,—and if he would serve the administrators in winding up the estate, it must be under a new contract with them, and under renewed powers granted by them. Any other result than that this contract of service was upon the implied condition that the employer, as well as the employed, was to continue to live during the stipulated term of employment, would involve us in the strange conclusion, that the administrators might go on with the business of their intestate, in which the plaintiff must continue with powers unrevoked by the death of his principal, or, that he, with new powers from them, was bound by the contract to serve them as new masters, and in a different service, and that they were bound to grant him such powers, and employ him for the stipulated time in such service. The novelty of such a claim, and the contradiction of well-settled principles necessary to maintain it, justify the ruling of the judge who tried the cause; and this motion must be dismissed with costs, and judgment entered upon the verdict.

VAN VLEIT et al. v. JONES et al.

(20 N. J. Law, 340.)

Supreme Court of New Jersey. Feb. Term, 1845.

This was a certiorari to the common pleas of Hudson county to remove certain proceedings, had in that court, under the "Act to secure to creditors an equal and just division of the estates of debtors, who convey to assignees for the benefit of creditors."

The facts of the case appear in the opinion of the court delivered by

RANDOLPH, J. The papers come before us in rather an irregular form;—there being two statements of the case sent up by different branches of the court below; and under a rule to take proof as to what were the facts in evidence before the court of common pleas, there have been two sets of affidavits taken; and each of these statements and affidavits differs from the other. Such a course of proceedings may have grown out of the situation of the court and the parties and the circumstances of the case; but it certainly is not to be commended for a precedent, nor yet can this court reject the proceedings, if there shall appear to be sufficient on which to found their judgment. The case according to the papers, is this. Some time prior to December, 1841, Samuel Bridgart of Hudson county, made an assignment for the benefit of his creditors, amongst whom were the plaintiffs in certiorari, Van Vliet and Wikoff, who filed their account pursuant to law, amounting to $2103; to which Jones and the other defendants in certiorari, who were also applying creditors of Bridgart, filed their exceptions; and this claim and the exceptions thereto coming before the court of common pleas for trial, neither party demanding a jury, the court disallowed the account on the ground that Van Vliet and Wikoff had taken a bond and mortgage of Bridgart for the same account. Although there is much discrepancy as to what was proved before the court, fortunately as to this bond and mortgage, both the statements and affidavits substantially agree; and from these sources it appears to have been proved before the court below, that Bridgart had an account with the plaintiffs for goods bought of them, and that as a collateral security both as to that account and also a further running account all of which is embraced in the present claim, the bond and mortgage were given,—a small note was also included in the account and covered by the security. The mortgage was on a house and lot in Jersey City, being the third in priority, and a bill to foreclose was filed by one of the prior mortgagees and the plaintiffs made parties, who also became the purchasers of the property, on its being sold under a decree, for fifteen dollars less than the amount of the prior incumbrances. There can be no doubt, as a general rule, that the taking of a bond and mortgage or other security of a higher nature extinguishes a debt arising from mere matter of account; yet this will depend on the intention of the parties. If the higher security was given as the future evidence of the debt, to which the party was to look for payment, then the less security would merge in the greater; but, if the higher security was to be merely additional or collateral to the less, showing that the intention of the parties was to keep the latter open, to be looked to for payment in any event—then the less is not extinguished by the greater security. This doctrine is familiar, and may be found in most of the elementary works and cases that treat upon this subject, particularly in Chit. Cont. 607, and authorities there cited. The defendant's counsel admitted the position, but insisted that it must appear upon the face of the instrument itself, that it was an additional or collateral security, and the works that treat on this subject and cases adduced, seem to give countenance to this idea; for in the former it is usually stated as an exception to the general doctrine of merger, that if it appear upon the face of the instrument that it is intended to be a further or collateral security, then the rule of merger does not apply, and the cases referred to by counsel, are of the description where the matter appeared upon the face of the instrument. But these authorities, although they show very clearly that when the matter does so appear the general rule of extinguishment does not apply, yet they do not therefore prove that when it does not so appear the rule does apply; and if such cases do exist the labors of counsel and the researches of the court have failed to produce them. Deciding the case then upon principle rather than precedent, the question of extinguishment or not is one of intention. What did the parties mean by the transaction? Did they intend that the old security should remain open and the new one be merely collateral or additional; or did they intend to extinguish the former? This intention is of course to be collected from the face of the instrument itself, where it so appears; and, if it does not so appear, then from the next best evidence: the only difference being, that in the former case the security itself proves the exception to the rule, and also the intention of the parties, whilst in the latter, the party alleging the exception must prove it. And in this no evil can arise, there is no parol contradiction of a written instrument, but only an explanation as to the object for which it was given. A contrary doctrine would prohibit parol proof of the payment of a collateral security, by the payment of the original claim, unless it appeared upon the face

of the collateral that it was such. In this particular the court of common pleas erred, and their proceedings should be reversed.

Judgment reversed.

NEVIUS, J., and WHITEHEAD, J., concurred. HORNBLOWER, C. J., and CARPENTER, J., did not hear the argument, and gave no opinion.

WOOD v. STEELE.

(6 Wall. 80.)

Supreme Court of the United States. Dec., 1867.

Error to the circuit court for the district of Minnesota.

Mr. Justice SWAYNE delivered the opinion of the court.

The action was brought by the plaintiff in error upon a promissory note, made by Steele and Newson, bearing date October 11th, 1858, for $3720, payable to their own order one year from date, with interest at the rate of two per cent. per month, and indorsed by them to Wood, the plaintiff.

Upon the trial it appeared that Newson applied to Allis. the agent of Wood, for a loan of money upon the note of himself and Steele. Wood assented, and Newson was to procure the note. Wood left the money with Allis to be paid over when the note was produced. The note was afterwards delivered by Newson, and the money paid to him. Steele received no part of it. At that time, it appeared on the face of the note, that "September" had been stricken out and "October 11th" substituted as the date. This was done after Steele had signed the note, and without his knowledge or consent. These circumstances were unknown to Wood and to Allis. Steele was the surety of Newson. It does not appear that there was any controversy about the facts. The argument being closed, the court instructed the jury, "that if the said alteration was made after the note was signed by the defendant, Steele, and by him delivered to the other maker, Newson, Steele was discharged from all liability on said note." The plaintiff excepted. The jury found for the defendant, and the plaintiff prosecuted this writ of error to reverse the judgment. Instructions were asked by the plaintiff's counsel, which were refused by the court. One was given with a modification. Exceptions were duly taken, but it is deemed unnecessary particularly to advert to them. The views of the court as expressed to the jury, covered the entire ground of the controversy between the parties.

The state of the case, as presented, relieves us from the necessity of considering the questions,—upon whom rested the burden of proof, the nature of the presumption arising from the alteration apparent on the face of the paper, and whether the insertion of a day in a blank left after the month, exonerates the maker who has not assented to it.

Was the instruction given correct?

It was a rule of the common law as far back as the reign of Edward III, that a rasure in a deed avoids it. The effect of alterations in deeds was considered in Pigot's Case, 11 Coke, 27, and most of the authorities upon the subject down to that time were referred to. In Master v. Miller, 4 Term R. 320, 1 Smith, Lead. Cas. 1141, the subject was elaborately examined with reference to commercial paper. It was held that the established rules apply to that class of securities as well as to deeds. It is now settled, in both English and American jurisprudence, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. The materiality of the alteration is to be decided by the court. The question of fact is for the jury. The alteration of the date, whether it hasten or delay the time of payment, has been uniformly held to be material. The fact in this case that the alteration was made before the note passed from the hands of Newson, cannot affect the result. He had no authority to change the date.

The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed: another is substituted without his consent; and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may well plead that it is not his deed; and if it be not under seal, that he did not so promise. In either case, the issue must necessarily be found for him. To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument, as to the party sought to be wronged.

The rules, that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong, must bear the loss, and that the holder of commercial paper taken in good faith and in the ordinary course of business, is unaffected by any latent infirmities of the security, have no application in this class of cases. The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as little reason to anticipate one as the other. The law regards the security, after it is altered, as an entire forgery with respect to the parties who have not consented, and so far as they are concerned, deals with it accordingly.

The instruction was correct and the judgment is affirmed.

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See "Reformation."

Alteration of the date of a note without the consent of the party sought to be charged extinguishes his liability.—Wood v. Steele, 622.

The fact that an alteration in a note is made by one of the parties signing it before it passed from his hands does not alter its effect of releasing one who had signed previously.—Wood v. Steele, 622.

APPRENTICES.

Code Md. art. 6, § 20, provides a method by which a father may bind his son as apprentice until he reaches the age of 21. A mother entered into a written agreement with defendants to bind her son, then 20 years of age, as apprentice for 5 years. *Held*, that the contract was void.—Baker v. Lauterback, 218.

ASSIGNMENTS.

See "Assignments for Benefit of Creditors."
Of mortgage, see "Mortgages."
Right of assignee to disaffirm contract made by infant, see "Infants," § 6.

One who acquires title to real estate from the owners thereof after a contract of sale by the latter to others cannot maintain an action on the contract.—McGovern v. Hern, 183.

A contract in restraint of trade, running to a corporation, "its successors and assigns," is assignable to and enforceable by a corporation who succeeds to the business and property of such obligee.—Diamond Match Co. v. Roeber, 461.

Manufacturers of a certain machine made a contract for the sale of a number of them, to be paid for by the notes of the purchasers. It was provided by the contract that the purchasers were to sell such machines within a given territory, receiving in payment either cash, which was to be applied in payment of their notes, or notes, which were to be delivered to the manufacturers as collateral security. *Held*, that the purchasers cannot assign the contract, so as to compel the manufacturers to take the notes of other persons, in lieu of the purchasers', in payment of the machines, as Code Iowa, §§ 2082–2087, declaring all contracts assignable, only authorize the transfer of the assignor's rights in possession or in action under such contracts, but not of his obligations thereunder.—Rapplye v. Racine Seeder Co., 534.

A written promise to pay bearer a sum of money provided a certain ship arrives at a European port of discharge free from capture and condemnation by the British is not assignable.—Coolidge v. Ruggles, 538.

A court of equity will not entertain a bill by the assignee of a strictly legal right, merely because he cannot bring an action at law in his own name, where he has a complete legal remedy.—Walker v. Brooks, 539.

Defendant contracted to deliver 10,000 tons of lead ore from its mines to the firm of B. & E., at their smelting works, the ore to be delivered at the rate of 50 tons per day, and to become the property of B. & E. as soon as delivered. The price was not fixed, but as often as 100 tons had been delivered the ore was to be assayed by the parties, or, if they could not agree, by an umpire; and after that had been done, and according to the result of the assay, and the proportions of lead, silver, silica, and iron thereby proved to be in the ore, the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore and the ascertainment of the price, defendant had no security for its payment, except in the character and solvency of B. & E. *Held*, that the contract was personal in its nature, and that plaintiff, claiming as assignee, could not compel defendant to continue delivering the ore.—Arkansas Val. Smelting Co. v. Belden Min. Co., 542.

After a part of the ore had been delivered, the firm of B. & E. dissolved, and the contract was assigned to B., to whom thereafter defendant continued to deliver ore under the contract. *Held*, that this fact did not put defendant under any obligation to deliver ore to plaintiff, an entire stranger to the contract, to whom B. had assigned it without defendant's consent.—Arkansas Val. Smelting Co. v. Belden Min. Co., 542.

An attaching creditor without notice of the assignment acquires a lien on the debt as valid

as the title of a purchaser.—Vanbuskirk v. Hartford Fire Ins. Co., 545.

Where one assigned a claim against an insurance company, and before notice to the company a creditor of the assignor attached it, such assignment would not defeat the attachment.—Vanbuskirk v. Hartford Fire Ins. Co., 545.

To perfect an assignment of a chose in action, notice of such assignment must be given to the debtor within a reasonable time.—Vanbuskirk v. Hartford Fire Ins. Co., 545.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

A creditor who, by a secret agreement not to assert his claim, induced an assignee for the benefit of creditors and other creditors to release the debtor, cannot maintain an action against the assignee for the dividend on his debt.—Frost v. Gage, 509.

Where the purchasers under a contract to buy certain machines to be sold, and the proceeds paid to the vendors on account, become insolvent, and make an assignment for the benefit of creditors, the manufacturers may refuse to complete the contract.—Rapplye v. Racine Seeder Co., 534.

Where a party to an executory contract becomes insolvent before performance, it is the duty of the assignees within a reasonable time to elect whether or not to proceed under the contract, and notify the other party thereto accordingly.—Hobbs v. Columbia Falls Brick Co., 566.

Where the assignees held the assigned property for more than three months, and took no action with reference to an executory contract made between the assignors and defendant, but gave defendant to understand they were not going to claim under it, a reconveyance of the assigned property to the assignors gave them no right of action on the contract.—Hobbs v. Columbia Falls Brick Co., 566.

ATTACHMENT.

Validity as against assignment, see "Assignments."

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See "Breach of Trust"; "Champerty and Maintenance."
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BANKS AND BANKING.

A deposit of money to remain in a bank for a certain time being illegal and void under Rev. St. c. 36, § 57, no action can be maintained by the depositor on such contract.—White v. Franklin Bank, 520.

The parties to an illegal deposit in a bank not being in pari delicto, the depositor may maintain an action for the money.—White v. Franklin Bank, 520.

BASTARDY.

A joint plea of the infancy of one defendant in an action on a joint and several bastardy bond is bad in substance, as in proceedings under the bastardy act the infancy of the reputed father is no defense, when he is legally chargeable in exoneration of the public.—Township of Bordertown v. Wallace, 281.

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A bond of a public officer voluntarily given to the United States, although not prescribed or required by law, is binding on the parties to it.—United States v. Tingey, 276.

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BREACH OF MARRIAGE PROMISE.

Defendant, who was a suitor of plaintiff, an unmarried woman, solicited her to have sexual intercourse with him, and on her refusal agreed that if she should yield to his wishes, and thereby become pregnant, he would at once marry her, to which she assented, and did have sexual intercourse with defendant, from which pregnancy resulted, and from which a child was born to plaintiff. *Held*, that an action for the breach of the contract to marry would not lie, the contract being based on an immoral consideration.—Saxon v. Wood, 444.

BREACH OF TRUST.

A contract by which an attorney takes a claim against an intestate for collection, and to that end agrees to administer the estate, is void.—Spinks v. Davis, 452.

BROKER.

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A common carrier cannot stipulate for exemption from responsibility for the negligence of himself or servants.—Railroad Co. v. Lockwood, 480.

CHAMPERTY AND MAINTENANCE.

A contract by which an attorney agrees to institute and prosecute suits at his own expense, and receive as his only compensation a portion of the property recovered, is void.—Thompson v. Reynolds, 440.

Defendant was a devisee, under a will, of certain real estate, and the validity of the will was threatened in proceedings instituted in the surrogate's court. He sought and retained plaintiff as attorney, and gave him a deed of the undivided half part of the property, taking back his covenant to conduct the defense, paying all costs and expenses, and indemnifying defendant against liability. *Held*, that this did not constitute champerty, and the statute did not condemn such an agreement.—Fowler v. Callan, 442.

The New York Code contemplates a case in which the action might never have been brought but for the inducement of a loan or advance offered by the attorney, and by which the latter, by officious interference, procures the suit to be brought, and obtains a retainer in it.—Fowler v. Callan, 442.

The old rules regarding champerty are abrogated except as preserved by the statutes. The attorney may agree upon his compensation, and it may be contingent upon his success, payable out of the proceeds of the litigation.—Fowler v. Callan, 442.

A champertous and illegal contract between plaintiff and his attorney can only be set up by the client against the attorney when the champertous agreement itself is sought to be enforced.—Courtright v. Burns, 443.

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§ 1. Necessity.

An administratrix, who promises to pay a debt of her intestate, cannot be held liable in her personal capacity, where made without consideration, although in writing.—Rann v. Hughes, 224.

§ 2. Adequacy.

An agreement by A. to perform a contract and rent B.'s store 10 days before the contract required is sufficient consideration for a promise by B. not to engage in the grocery business for five years in a certain town.—Doyle v. Dixon, 150.

Refraining from the use of liquor and tobacco for a certain time at the request of another is a sufficient consideration for a promise by the latter to pay a sum of money.—Hamer v. Sidway, 220.

Giving up a guaranty for advances on behalf of one party is sufficient consideration for a promise by the guarantor to pay acceptances of the first party.—Haigh v. Brooks, 226.

Where one had received something which at the time he considered valuable, in consideration of a promise, he cannot excuse a breach of the promise because the thing was not of the value he supposed.—Haigh v. Brooks, 226.

An agreement made by a father, in consideration of the surrender to him of his son's note, to pay the amount of the note, is founded on a valid consideration, though the son at the time of such agreement may have been dead, and the note may, to the knowledge of both parties, have been uncollectible because of the insolvency of his estate.—Judy v. Louderman, 227.

The law will not enter into an inquiry as to the adequacy of the consideration for a promise, but will leave the parties to be the sole judges of the benefits to be derived therefrom, unless the inadequacy of consideration is so gross as of itself to prove fraud or imposition. —Judy v. Louderman, 227.

A consideration of one cent will not support a promise to pay $600.—Schnell v. Nell, 230.

A promise by a husband to legatees to pay legacies given by his wife, she having no property to pay them with, is not binding on him. —Schnell v. Nell, 230.

§ 3. Mutual promises.

Plaintiff's promise to account to defendant for one-half of the profits is supported by defendant's obligation to share one-half of the losses.—Coleman v. Eyre, 232.

A promise to refund in case of a deficiency is consideration for a promise to pay for an excess over what is called for in a deed.—Seward v. Mitchell, 233.

Where the agreement of plaintiff and defendant to abide by an award are not concurrent, the promise of defendant is not binding on him. —Keep v. Goodrich, 236.

An agreement by an indorser to pay a note not yet matured is a valid consideration for an agreement to pay for the money paid by him upon it.—L'Amoreux v. Gould, 238.

A verbal agreement by plaintiffs to work in defendant's mine, and to receive $1.50 per ton for all the ore they produced, "as long as they could make it pay," is not enforceable as an executory contract, because of its uncertainty and want of mutuality.—Davie v. Lumberman's Min. Co., 240.

§ 4. Forbearance.

An agreement by a creditor to forbear prosecuting his claim, and an actual forbearance, is

good consideration for a note by a third person to the creditor.—Robinson v. Gould, 398.

Compromise of a claim is good consideration for a promise, although litigation has not been actually commenced.—Cook v. Wright, 242.

The abandonment by the sole heir at law of a testator of opposition to the probate of the will, at the request of the executor, is a sufficient consideration for the promise of the executor to pay a named sum to a third person, though such payee had no interest in the estate under the will, or otherwise.—Rector, etc., of St. Mark's Church v. Teed, 246.

Forbearance to sue on an honestly asserted claim for damages arising out of a trade of property is sufficient consideration for a promise to pay, whether such damages could have been recovered or not.—McKinley v. Watkins, 248.

Forbearance of suit to enforce a disputed claim or right, where the claim or right is honestly asserted under a belief that it is substantial, although it is in fact wholly unfounded, is a good consideration for a promise to pay money.—Rue v. Meirs, 249.

§ 5. **Natural affection.**

The love a husband bore his wife is no consideration for a promise to legatees to pay legacies left by the wife.—Schnell v. Nell, 230.

Natural love and affection is not a sufficient consideration for a promissory note given by father to son.—Fink v. Cox, 253.

§ 6. **Moral obligation.**

Services by a wife in the acquisition of her husband's property are no consideration for his promise to legatees to pay legacies left by her. —Schnell v. Nell, 230.

A promise by a father to repay strangers for expenses incurred in caring for his son, who was of full age, and not a member of his family, cannot be enforced.—Mills v. Wyman, 254.

§ 7. **Impossible promises.**

A contract by which one bound himself that certain land, belonging to another, should sell for a certain amount or more on a certain day, is void.—Stevens v. Coon, 256.

§ 8. **Doing what one is bound to do.**

Promise of a captain of a ship to divide the wages of deserting members of the crew among the remainder is void.—Stilk v. Myrick, 257.

Plaintiff agreed by an instrument under seal to erect a building at a fixed price, which was inadequate, and refused to proceed, but, on defendant's parol promise to pay for the material and work, finished the building. *Held*, that he might recover on the promise.—Munroe v. Perkins, 258.

Where one contracted to do work, and receive in payment of an installment an assignment of a mortgage, the completion of the work by him is no consideration for a guaranty of the mortgage by the assignor.—Vanderbilt v. Schreyer, 260.

The receipt of a part of a debt in full satisfaction being void, the fact that a similar agreement was made with all the creditors, without its appearing that they had been paid, or had released their debts, or signed any composition deed, does not alter the case.—Wheeler v. Wheeler, 264.

The receiving of a part of a debt, then due, in full satisfaction, is no legal defense to an action to recover the balance.—Wheeler v. Wheeler, 264.

Where a creditor accepts his debtor's notes secured by a chattel mortgage for part of the debt due, in satisfaction of the whole, the whole debt is extinguished.—Jaffray v. Davis, 266.

§ 9. **Past consideration.**

Transfer of an unenforceable bargain for the purchase of land, not made at the request of the maker, is not consideration for a note.—Ehle v. Judson, 269.

An oral contract by defendant's testator with plaintiff to purchase land, and on its resale to pay plaintiff the increase over the original purchase price, in consideration of which plaintiff agreed to pay an old debt he owed testator, and to pay the taxes, insurance, etc., on the land, and keep it in good repair, though void under the statute of frauds, its performance by plaintiff was sufficient to uphold a subsequent promise by testator, after a resale of the land, to pay plaintiff the amount realized over the original purchase price.—Pool v. Horner, 271.

If the consideration, even without request, moves directly from the plaintiff to the defendant, and inures directly to the defendant's benefit, the promise is binding though made upon a past consideration.—Boothe v. Fitzpatrick, 272.

Plaintiff had guarantied repayment of advances made to defendant, and defendant, who became a bankrupt, after the fiat was issued promised to repay plaintiff if he was compelled to pay the advances. *Held* made on good consideration.—Earle v. Oliver, 274.

CONSTRUCTION.

Effect of custom, see "Custom and Usage."
Parol evidence to vary or alter terms, see "Evidence."

§ 1. **General rules of construction.**

In the construction of contracts the first rule to be regarded is, to make them speak the intention of the parties, as gathered from the entire transaction. All other rules are subordinate to this one, and when they contravene it are to be disregarded.—Gray v. Clark, 556.

Nice grammatical construction is not always to be regarded, especially when instruments are inexpertly drawn.—Gray v. Clark, 556.

When a term or phrase is equivocal in regard to the subject to which it refers, resort may be had to the circumstances under which the contract was executed, and the contemporaneous exposition of the parties, as evidenced by possession and other similar acts.—Gray v. Clark, 556.

§ 2. **Parties.**

The purchaser of a business, who delivers goods to one contracting with the original owner, without informing such person of the change, cannot recover for the goods.—Boston Ice Co. v. Potter, 524.

A factor who promised the consignor to accept a draft drawn against cotton consigned to him when he received the bill of lading is not liable to the payee on such promise, or for the proceeds of the cotton.—Exchange Bank v. Rice, 526.

Plaintiff may enforce a promise made by defendant to a third person for his benefit, although not privy to the consideration, nor cognizant of the promise when made.—Lawrence v. Fox, 529.

§ 3. **Nature of contract.**

A contract to manufacture and furnish articles for the especial, exclusive, and peculiar use of another, with special features which he

requires, and which render them of value to him, but useless and unsalable to others,—articles whose chief cost and value are derived from the labor and skill bestowed upon them, and not from the materials of which they are made,—is a coutract for work and labor, and not a contract of sale.—Beck & Pauli Lithographing Co. v. Colorado Milling & Elevator Co., 558.

§ 4. **Time.**

In a contract by a lithographing company to furnish, "in the course of the year," designs of certain buildings of a manufacturing company, with sketches of its trade-marks, to execute engravings, and to embody them on large amounts of stationery, to engrave a vignette of one of the firm's plants, and to furnish a certain number of hangers, after approval of proofs, the stipulation as to time is not of the essence of the contract so as to justify a repudiation thereof because of a delay in delivery till eight days after the close of the year.—Beck & Pauli Lithographing Co. v. Colorado Milling & Elevator Co., 558.

In contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence; and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation.—Beck & Pauli Lithographing Co. v. Colorado Milling & Elevator Co., 558.

In contracts of merchants for the sale and delivery or for the manufacture and sale of marketable commodities, a statement descriptive of the subject-matter, or some material incident, such as the time of shipment, is a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.—Beck & Pauli Lithographing Co. v. Colorado Milling & Elevator Co., 558.

Under a contract made in Philadelphia for the sale of "5,000 tons of iron rails, for shipment from a European port or ports, at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880, at $45 per ton of 2,240 lbs. custom-house weight, ex ship Philadelphia; settlement, cash, on presentation of bills accompanied by custom-house certificate of weight; sellers not to be compelled to replace any parcel lost after shipment,"—the sellers are bound to ship 1,000 tons in each month, from February to June inclusive, except that slight and unimportant deficiencies may be made up in July; and if only 400 tons are shipped in February, and 885 tons in March, and the buyer accepts and pays for the February shipment on its arrival in March, at the stipulated price, and above its market value, and in ignorance that no more has been shipped in February, and is first informed of that fact after the arrival of the March shipments, and before accepting or paying for either of them, he may rescind the contract by reason of the failure to ship about 1,000 tons in each of the months of February and March.—Norrington v. Wright, 604.

CONSTRUCTIVE CONTRACTS.

See "Judgment."

A constructive contract is a fiction of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied.—Hertzog v. Hertzog, 5; Sceva v. True, 8.

CONTINGENT FEES.

See "Champerty and Maintenance."

CONTRACTS UNDER SEAL.

Delivery, see "Deeds."

§ 1. **Consideration.**

It is not a good defense to a promise in writing under seal to pay money, for value received, that it was voluntary.—Aller v. Aller, 110.

A seal implies a consideration sufficient to support a promise by a convenantor to convey lands upon the payment of the consideration therein named.—McMillan v. Ames, 113.

§ 2. **Revocation of offer under seal.**

An instrument under seal, unilateral in form, wherein a party promises to convey lands upon the payment of the consideration therein named on or before a future day, is obligatory upon him as a covenant, subject to the performance of the condition by the covenantee.—McMillan v. Ames, 113.

CONVEYANCE.

See "Deeds"; "Fraudulent Conveyances."

CORPORATIONS.

A corporation cannot ratify a contract, made by its agent, which it could not lawfully authorize.—Downing v. Mt. Washington Road Co., 342.

Corporations have no powers except such as are given by their charter and such as are incidental and necessary to effect the purpose of their creation.—Downing v. Mt. Washington Road Co., 342.

A contract by which a railroad company renders itself incapable of performing its duties to the public, or attempts to absolve itself from its obligation without consent of the state, is void.—Thomas v. Railroad Co., 345.

A lease by a railroad company of all its road, rolling stock, and franchise, not authorized by its charter, is void.—Thomas v. Railroad Co., 345.

A private corporation having power to borrow money and give notes therefor cannot avoid liability on the notes because the money borrowed was used in a business beyond its powers.—Bradley v. Ballard, 350.

A corporation created to construct a railroad mav borrow money and execute a note for its payment.—Union Bank v. Jacobs, 352.

A foreign corporation may enforce its contracts by action in the state of New York.—Diamond Match Co. v. Roeber, 461.

A vendor of stocks to a banking company, receiving in payment notes on time, which the corporation is forbidden by law to issue, may recover for the stocks.—Tracy v. Talmage, 497; State of Indiana v. Leavitt, Id.

CORRESPONDENCE.

See "Offer and Acceptance," § 7.

COVENANT.

Of feme covert, see "Married Women."

CRIMINAL LAW.

Contracts to commit offense, see "Obstructing Justice."

CUSTOM AND USAGE.

Where a contract for excavation is silent as to whom the material excavated should belong, a custom that it belongs to the excavator may be shown as evidence of the contract.—Cooper v. Kane, 555.

DAMAGES.

An agreement by a vendor not to engage again in the same business for a certain time on forfeiture of a certain sum is for stipulated damages for breach of the agreement, and not for a penalty.—Jaquith v. Hudson, 561.

In cases where damages for breach of contract are stipulated, whether the sum is in fact a penalty will be determined by the magnitude of the sum in connection with the subject-matter.—Jaquith v. Hudson, 561.

Where, from the nature of the contract and the subject-matter of the stipulation for the breach of which a sum is provided, the actual damages from a breach are uncertain, the parties may provide in the contract for such damages.—Jaquith v. Hudson, 561.

DEATH.

Operating as discharge of contract, see "Performance or Breach," § 7.
Revocation of offer by death, see "Offer and Acceptance," § 11.

DECEIT.

See "Fraud."

DEEDS.

See "Escrow."
Effect of duress, see "Duress," § 1.
Effect of undue influence, see "Undue Influence."
Of infant, see "Infants," § 4.
Of insane person, see "Insane Persons."
Of wife, see "Married Women."

Where the owner of real estate executes a deed to her daughters, from whom she takes back a life lease of the premises, and some months later the owner, with one of her daughters, delivers to a third party a package containing the deed and lease, and inscribed with directions to deliver the same to the owner, and in case of her death to one of the daughters, and afterwards speaks of the deed as "the girls' deed," and occupies the premises under the lease till her death, the facts show a present delivery of the deed to the daughters.—Martin v. Flaharty, 106.

DELIVERY.

Of deed, see "Deeds."

DEPOSITARIES.

A third person, who receives money from one party for another on a contract, cannot set up the illegality of the contract as a defense to an action for the money.—Woodworth v. Bennett, 511.

Where an illegal contract has been fully executed, and money paid thereon remains in the hands of a depositary, it may be recovered.—Woodworth v. Bennett, 511.

DEPOSITS.

See "Banks and Banking."
With third person under illegal contract, see "Depositaries."

DISCHARGE.

See "Alteration"; "Modification and Merger"; "Novation"; "Payment."

DRUNKARDS.

A contract made when the obligor is so intoxicated as to be deprived of the exercise of his understanding is voidable.—Barrett v. Buxton, 329.

DURESS.

See "Pleading."

§ 1. Of the person.

A deed procured through fear of loss of life produced by threats of the grantee may be avoided for duress.—Brown v. Pierce, 394.

§ 2. Of property.

Where the owner of perishable goods going rapidly to destruction, in order to get the goods, in addition to the amount due, is compelled to release one in possession under a fraudulent attachment from all damages for his wrongful acts, the release is void.—Spaids v. Barrett, 396.

§ 3. Of third person.

It is no defense to a promissory note made by one party to another that it was given to release a third person from an unlawful arrest. —Robinson v. Gould, 398.

§ 4. By third person.

In suit on a promissory note made by defendant and her husband to plaintiff's order, that her signature thereto was obtained by duress and threats on her husband's part is immaterial, where plaintiff did not know when he received it that it was so signed.—Fairbanks v. Snow, 400.

ESCROW.

Where the owner of real estate executes a deed to her daughters, from whom she takes back a life lease of the premises, and some months later the owner, with one of her daughters, delivers to a third party a package containing the deed and lease, and inscribed with directions to deliver the same to the owner, and in case of her death to one of the daughters, the leaving of the papers with the depositary did not constitute an escrow; there being no condition to be performed before delivery.—Martin v. Flaharty, 106.

ESTOPPEL.

A defendant who has violated a contract with a corporation is not in a position to complain that the contract is ultra vires of such corporation, after he has received the benefits of the contract.—Diamond Match Co. v. Roeber, 461.

EVIDENCE.

A contract may be proved by circumstantial evidence.—Heffron v. Brown, 95.

A contract cannot be created by adding to the written communication additional facts by parol evidence.—Moulton v. Kershaw, 99.

The burden of proof is on one affirming the completion of a contract to show that the signing of the written draft thereof was not necessary to its completion.—Mississippi & Dominion Steamship Co. v. Swift, 101.

The testator in consideration of the conveyance of a farm to him, upon which the plaintiff, at the request of the testator's grantor, had erected a barn, promised to pay the plaintiff the cost of said barn. The grantor's deed to the testator was for the expressed consideration of $300; and the testator gave to the grantor a bond and mortgage, providing for his support, and the payment of specified sums to his daughters. *Held*, that though the bond might be the only evidence as to the extent of any personal claim in favor of the grantor, yet that it would not prevent the plaintiff from showing the existence of an additional and suppletory agreement by parol, in his own favor, as entering into and constituting a part of the consideration expressed in the deed.—Wait v. Wait's Ex'r, 123.

The defendant sold the plaintiff certain stock, and executed to her at the time a written contract that he would repurchase it, if she desired, after a certain time at a stipulated price, and he afterwards did repurchase it at such price. *Held*, in an action by the plaintiff for fraudulent representations and concealment by the defendant in regard to the value of the stock in connection with its repurchase, that parol evidence of what was said between the parties at the time the written contract was made, was admissible for the purpose of showing such a confidential relation of the parties as rendered fraudulent the course of the defendant in making the repurchase.—Mallory v. Leach, 390.

Parol evidence is admissible to show that a written contract, regular in form, and purporting to be for the purchase and actual future delivery of cotton, was in fact entered into for the sole purpose of speculating in futures, and with no intention to deliver the cotton purchased, but to pay the difference between the contract price and the price on a future named day; but, the terms of the contract implying good faith, the burden of proof is on the party resisting to show the illegal purpose. —Beadles v. McElrath, 448.

Where one has sold an article giving a written warranty but omitting soundness, evidence of a parol warranty of soundness is inadmissible.—Smith v. Williams, 552.

Where nothing has been omitted from or inserted in a written contract through fraud, accident, or mistake, parol evidence is inadmissible to vary its terms.—Smith v. Williams, 552.

EXECUTORS AND ADMINISTRATORS.

Agreement to administer estate and collect claims, see "Breach of Trust."
Promise within statute of frauds, see "Statute of Frauds," § 3.

FALSE REPRESENTATIONS.

See "Fraud."

FORBEARANCE.

See "Consideration," § 4.

FRAUD.

See "Breach of Trust"; "Statute of Frauds."
Liability of infants for fraud, see "Infants," § 2.
Parol evidence, see "Evidence."
Pleading fraud, see "Pleading."

§ 1. Representations in general.

In order to establish a case of false representation, it is not necessary that things which are false shall have been stated as if they were true, but where the presentation of that which is true creates an obvious impression which is false, as to one who seeks to profit by the misapprehension he has thus produced, it is a case of false representation.—Lomerson v. Johnston, 379.

One who was surety for another's payment of trust funds stated to the latter's wife that her husband had been guilty of embezzlement, and might be imprisoned therefor. She understood that her husband was in imminent danger of arrest, though such was not the fact, and the surety did not so state, but he was aware that he had produced this impression. She thereupon executed to him a mortgage to indemnify him for the payment of the trust fund, and to avert her husband's arrest. *Held*, that the mortgage was secured by false representations. —Lomerson v. Johnston, 379.

A representation by defendant that plaintiff could have possession of a certain building on property leased to plaintiff on a certain date, several months after the making of such representation, is not actionable, though such event did not occur, in that it relates to a future and not to a past or present event.—Sheldon v. Davidson, 382.

§ 2. False representations made in ignorance.

It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false, if such party made the false representation not knowing whether it was false or not.—Stimson v. Helps, 384.

The law holds a contracting party liable as for a fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury.—Stimson v. Helps, 384.

§ 3. Concealment.

Defendants, knowing that accepted drafts were not drawn against funds, but for accommodation of acceptor, sold them without informing the purchaser of the origin and consideration of the paper. *Held* no fraud.—People's Bank v. Bogart, 376.

The defendant, being desirous of purchasing certain stock of the plaintiff, of the value of which he knew she was ignorant, for the purpose of misleading her and inducing her to sell the stock at less than its value, told her of a fact calculated in itself to depreciate the value of the stock, but omitted to disclose other facts within his knowledge which would have given her correct information of such value, and by this course succeeded in obtaining the stock at much less than what it was worth. *Held*, that the course of the defendant, under the partic-

ular confidential relations subsisting between the parties, was fraudulent and actionable.—Mallory v. Leach, 390.

Held, also, that if the defendant was aware that the plaintiff placed confidence in him to inform her fully of the value of the stock, and acted in reliance upon his representations, in regard to its value at the time of his repurchase of it, and if this confidence was solicited by him, it was fraudulent in him to purchase it of her without communicating to her all the material knowledge he possessed in regard to it.—Mallory v. Leach, 390.

The allegation of only a part of the truth, with the view of deceiving the other party, and inducing him to act differently from what he otherwise would, is equivalent to a false representation, and will avoid a contract thereby induced.—Mallory v. Leach, 390.

§ 4. Matters within knowledge of adverse party.

False representations as to the quality and productiveness of soil and the number of acres contained within the boundaries truly pointed out will not invalidate a note given for the purchase price of land.—Gordon v. Parmelee, 380.

§ 5. Matters of opinion.

A representation by defendant that plaintiff could have possession of a certain building or property leased to plaintiff on a certain date, several months afterwards, is not actionable, being a mere opinion, on which plaintiff had no right to rely.—Sheldon v. Davidson, 382.

§ 6. Rescission.

On rescission of a contract for fraud whatever has been received under the contract must be returned.—Cobb v. Hatfield, 386.

A fraudulent purchase of goods, accompanied by delivery, is voidable by the vendor, and until avoided the vendee can make a valid sale to a bona fide purchaser without notice.—Rowley v. Bigelow, 388.

A party to a contract has a right to rescind it on account of the fraud of the other party as soon as he discovers the same; but, if he elect to proceed and take his rights under the contract, he may still maintain an action against the other party for the damages occasioned by his fraud.—Mallory v. Leach, 390.

FRAUDULENT CONVEYANCES.

See "Pleading."

An attorney who obtains an assignment from a client of an interest in land, to defraud a creditor of the assignor promising to reconvey when the creditor is settled with, will be compelled to reconvey to the client.—Ford v. Harrington, 517.

A fraudulent conveyance by a joint obligor will not be set aside as long as there is a legal remedy against the other joint obligors.—Eller v. Lacy, 549.

FUTURES.

See "Gaming."

GAMING.

One cannot recover for property won of another on a wager that a certain chaise was the property of A. B.—Collamer v. Day, 447.

Appellants made a contract to buy for appellee a certain quantity of cotton for future delivery. It appeared that appellants were members of the New Orleans Cotton Exchange; that they had bought in the year preceding this contract 300,000 bales of cotton, and were under contract to take 60,000 bales, worth $200,000, at the time of this contract, while they were worth only $75,000. *Held*, that these circumstances showed the cotton contracted to be bought for appellee was on speculation only, and no future actual delivery was intended, and therefore void, notwithstanding a rule of the exchange provided that actual delivery of the cotton might be exacted.—Beadles v. McElrath, 448.

If money is lent with the mere knowledge or belief on the part of the lender that it is to be used for gambling purposes, and without any participation on his part in the illegal act, an action can be maintained for its recovery.—Tyler v. Carlisle, 508.

Where money is lent for gambling purposes, even if the lender participates in the purposes of the borrower, he may recover the money of the borrower, if demanded before it has been actually used. In minor offenses the locus penitentiæ continues until the execution of the illegal act.—Tyler v. Carlisle, 508.

GOVERNMENT.

Capacity of government to contract, see "United States."

GUARANTY.

Debt of another, see "Statute of Frauds," § 4.

GUARDIAN AND WARD.

Conveyance to guardian, see "Undue Influence."

HUSBAND AND WIFE.

Contract of wife, see "Married Women."

ILLEGALITY OF OBJECT.

See "Breach of Marriage Promise"; "Breach of Trust"; "Champerty and Maintenance"; "Fraudulent Conveyances"; "Gaming"; "Injury to Public Service"; "Intoxicating Liquors"; "Libel and Slander"; "Monopolies"; "Obstructing Justice"; "Public Policy"; "Restraint of Marriage"; "Restraint of Trade"; "Sunday"; "Usury."

Agreements in fraud of creditors, see "Assignments for Benefit of Creditors."

Illegal deposits in banks, see "Banks and Banking."

Limiting liability for negligence, see "Carriers."

Partial invalidity of mortgage, see "Mortgages."

Rescission for illegality, see "Rescission and Abandonment."

Recovery by actor for services in unlicensed theater, see "Theaters."

—— for goods sold for illegal purpose, see "Sales."

Right of depositary of money to assert invalidity of contract, see "Depositaries."

Where parties to a contract prohibited by statute, but not malum in se, are not pari delicto, the less guilty party may have relief.—Tracy v. Talmage, 497; State of Indiana v. Leavitt, Id.

Where the recovery of money paid in performance of an illegal contract requires enforcement of some unexecuted provisions of the illegal contract, an action cannot be maintained.—Woodworth v. Bennett, 511.

IMPLIED CONTRACTS.

A sick man handed his wife a sum of money for safe-keeping until he should be well enough to put it in the bank, and died shortly after. *Held*, that his executor could recover the money. —Lawson v. Lawson, 3.

Where a son continues in the employ of his father after his majority, the law implies no contract by the father to pay for the services. —Hertzog v. Hertzog, 5.

A contract implied by law is a legal fiction invented and used for the sake of the remedy to enforce performance of a legal duty.—Sceva v. True, 8.

Interest is given on a judgment not as on the principle of implied contract, but as damages, the measure of which is the statutory rate.—O'Brien v. Young, 11.

A promise to pay for a party wall cannot be implied from the fact that it was built with defendant's knowledge and that defendant used it.—Day v. Caton, 28.

There is no implied warranty or representation on the part of the vendor of a bill valid in the hands of an indorsee that it was drawn against funds, or was not accommodation paper.—People's Bank v. Bogart, 376.

INFANTS.

See "Apprentices."

Liability on bond in bastardy proceedings, see "Bastardy."

§ 1. **Necessaries.**

An infant may bind himself by an express contract for necessaries if the form of the contract is such that the consideration may be inquired into.—Stone v. Dennison, 116.

A minor son of a baronet having a large allowance is not liable for the price of jeweled solitaires and an antique vase intended for a present.—Ryder v. Wombwell, 282.

Where a guardian in good faith acting for the best interests of the infant ward furnishes means suitable to her age and station in life with reference to her estate, the ward is not liable for money advanced to her for traveling expenses, even as necessaries.—McKanna v. Merry, 286.

An infant is liable for necessaries furnished him, but only for such an amount as is actually needed.—Johnson v. Lines, 287.

§ 2. **Fraud.**

An infant who secures and retains personal property of an adult, who has acted in good faith, and exercised care and diligence, upon a false representation that he is of full age, is liable for the value of the property.—Rice v. Boyer, 315.

§ 3. **Ratification.**

Acknowledgment by one, after coming of age, that a note given in infancy was owing, and a promise to try and pay it, is a sufficient ratification.—Whitney v. Dutch, 278.

Ratification by an infant, after coming of age, of a partnership note, given by his partner during infancy, will bind him.—Whitney v. Dutch, 278.

Recognition by an infant, on coming of age, of the fact of a conveyance during nonage is not per se proof of a confirmation of it.—Tucker v. Moreland, 295.

An infant cannot retain the benefits of his contracts, after becoming of age, and plead infancy to avoid the payment of the purchase money.—Henry v. Root, 301.

An infant who has purchased real estate ratifies the contract of purchase by taking and continuing in possession and exercising acts of ownership after becoming of full age.—Henry v. Root, 301.

§ 4. **Disaffirmance.**

An infant having a general guardian may maintain trover before coming of age for a horse sold, but not delivered with his own hands, without demanding the horse.—Stafford v. Roof, 290.

The sale and actual delivery of a personal chattel by an infant is voidable before he attains the age of 21 years.—Stafford v. Roof, 290.

Deed conveying real estate, executed by minor, must be disaffirmed within a reasonable time after he comes of age, or he will be barred of his right to do so.—Goodnow v. Empire Lumber Co., 292.

Reasonable time within which minor must disaffirm deed is a question for the court, and a delay of three years and a half, unexplained, is unreasonable.—Goodnow v. Empire Lumber Co., 292.

Where an infant executed a deed of his realty, and after coming of age deeded the same property to another, the second deed is a disaffirmance and avoidance of the first.—Tucker v. Moreland, 295.

Where an infant purchased a stock of drugs which were afterwards taken on execution against a third party, the infant may on disaffirmance of the contract maintain an action for the recovery of the purchase money, even though he took no steps to recover the property thus wrongfully taken.—Lemmon v. Beeman, 313.

The contract of an infant is voidable, and may be repudiated during nonage, so as to effectually destroy the contract for all purposes. —Rice v. Boyer, 315.

§ 5. **Performance of contract.**

An infant contracting to labor until of age for his board, clothing, and education, which was approved by his guardian, where the contract has been fully performed cannot recover on quantum meruit.—Stone v. Dennison, 116.

§ 6. **Personal privilege.**

The defense of infancy being a personal privilege, a joint plea of the infancy of one defendant in an action on a joint and several bond is bad on demurrer.—Township of Bordentown v. Wallace, 281.

Under an assignment by an insolvent, including "all his rights of action for goods or estate, real or personal," the assignee will not be permitted to disaffirm a mortgage made by the insolvent while under age, and not ratified or affirmed by him after attaining his majority; the right to avoid such a contract is a personal privilege of the infant.—Mansfield v. Gordon, 294.

INJUNCTION.

Where a bond was given providing liquidated damages in the sum of $15,000 for a breach of this covenant, the obligee is not confined to his remedy by way of damages for the breach of contract, but upon defendant's violation thereof, is entitled to an injunction restraining him from continuing to disregard his covenant.—Diamond Match Co. v. Roeber, 461.

It is not necessary that, before a preliminary injunction issue restraining violation of an

agreement not to engage in a certain business in a certain place, the rights of the parties be established by a judgment at law.—Carll v. Snyder, 465.

INJURY TO PUBLIC SERVICE.

An assignment by a public officer of the future salary of his office is contrary to public policy and void.—Bliss v. Lawrence, 425; Same v. Gardner, Id.

An agreement for compensation for procuring a contract from the government cannot be enforced.—Providence Tool Co. v. Norris, 428.

A contract to take charge of a claim before congress, and prosecute it as an agent and attorney for claimant, is void.—Trist v. Child, 430.

Professional services by an attorney in procuring the allowance of a claim by congress may be recovered for when they are not blended with services which are forbidden.—Trist v. Child, 430.

INSANE PERSONS.

A deed executed by a person when non compos mentis is voidable only, and may be ratified by him when he is of sane mind by acceptance of the benefits.—Allis v. Billings, 319.

The deed of an insane person not under guardianship, which has never been ratified or affirmed, may be avoided by his heirs.—Hovey v. Hobson, 322.

An obligation entered into by an insane person to repay money loaned, of which he had the benefit, is valid.—Mutual Life Ins. Co. v. Hunt, 325.

Declaring a person insane on inquisition taken subsequent to an agreement to repay money loaned does not affect such agreement.—Mutual Life Ins. Co. v. Hunt, 325.

It is no defense to trover for a note pledged by plaintiff while insane that defendant did not know of, and had no reason to suspect, such insanity, and that he acted without fraud. —Seaver v. Phelps, 326.

The liability of the estate of an insane person over 21 years of age and under guardianship for necessary nursing and care furnished in good faith and under justifiable circumstances is not changed by Rev. St. c. 67, § 22. —Sawyer v. Lufkin, 328.

INSOLVENCY.

See "Assignments for Benefit of Creditors."

INTENT.

Contractual intention, see "Offer and Acceptance," § 12.

INTEREST.

See "Implied Contracts"; "Usury."

INTOXICATING LIQUORS.

One who sells liquor without a license in violation of the excise law cannot recover of the purchaser.—Griffith v. Wells, 416.

JUDGMENT.

See "Pleading."

A judgment is not a contract.—O'Brien v. Young, 11.

KNOWLEDGE.

As affecting false representations, see "Fraud," § 2.

LAPSE.

Of offer or acceptance, see "Offer and Acceptance," § 11.

LETTERS.

Acceptance by letter, see "Offer and Acceptance," § 7.

LIBEL AND SLANDER.

A journalist cannot protect himself from the consequences of publishing a libelous article by assurances of its truthfulness, and by a contract of indemnity from the writer of the libel. The case comes within the rule that there can be no contribution or indemnity between joint wrongdoers.—Atkins v. Johnson, 412.

Nor will such contract avail the publisher, though renewed after the publication of the libel, and made in consideration that he would not disclose the name of the writer on its being demanded by the victim of the article.—Atkins v. Johnson, 412.

A contract between an author, intending to write an autobiography, and a publisher, whereby the author agrees "to accept full responsibility for all matter contained in said work, and to defend at his own costs any suits which may be brought against the publisher for publishing any statement contained in said work, and to pay all costs and damages arising from said suits," does not show on its face that the parties contemplated the publication of scandalous or libelous matter, so as to prevent the publisher from recovering for the author's refusal to permit it to publish the work after it was written.—Jewett Pub. Co. v. Butler, 414.

LICENSES.

Sale of liquors without license, see "Intoxicating Liquors."
To enter lands, see "Statute of Frauds," § 6.

MAINTENANCE.

See "Champerty and Maintenance."

MARRIAGE.

See "Breach of Marriage Promise"; "Restraint of Marriage."
Agreement in consideration of marriage, see "Statute of Frauds," § 5.

MARRIED WOMEN.

A covenant entered into by a feme covert, except as to her separate property or property subject to exclusive control, is void.—Martin v. Dwelly, 331.

A deed of lands belonging to a feme covert, executed by her with her husband, but not

acknowledged by her pursuant to the statute, is not such an agreement to convey as will be enforced against her heirs.—Martin v. Dwelly, 331.

A wife is not liable on a note as a feme sole, unless her husband has voluntarily separated from and abandoned her with an intent to renounce de facto the marital relation.—Gregory v. Pierce, 335.

A debt of a married woman, contracted for accommodation of another, without consideration to her, will not be enforced against her separate estate, unless expressly made a charge thereon.—Willard v. Eastham, 336.

A married woman is bound by a charge created by her own express agreement for a good consideration, though for a purpose not beneficial to her separate estate.—Owen v. Cawley, 339.

A married woman is liable for services rendered by her procurement for the benefit of her separate estate.—Owen v. Cawley, 339.

A married woman may avail herself of the agency of her husband as if they were not married.—Owen v. Cawley, 339.

A married woman may bestow her separate estate upon her husband.—Osburn v. Throckmorton, 374.

MASTER AND SERVANT.

No recovery can be had on a quantum meruit, for services rendered in the grocery part of the business under a contract to work for agreed wages as bartender and clerk for a dealer in groceries and liquors, the sale of the latter being prohibited when the contract was made and the services rendered.—Sullivan v. Hergan, 490.

MEMORANDUM.

Sufficiency under statute, see "Statute of Frauds," § 9.

MERGER.

Of oral agreement in writing, see "Offer and Acceptance," § 12.

MINORS.

See "Infants."

MISTAKE.

§ 1. Of law.

Where wife transfers her separate estate to her husband, she cannot avoid the transaction because of her ignorance of the law.—Osburn v. Throckmorton, 374.

§ 2. Of fact.

One who indorsed a bill of exchange on the representation that it was a guaranty, and believing it to be a guaranty, is not liable as indorser.—Foster v. MacKinnon, 358.

Where one ordering goods signed his name so that it resembled the name of a reliable firm, and the goods were directed to the firm, though to his address, there was no contract with him, and a sale by him conveyed nothing. —Cundy v. Lindsay, 360.

A factor who sold corn in ignorance of the fact that it had already been sold to another is not liable for the price.—Couturier v. Hastie, 363.

One who has exchanged land for land in another state, with which both parties are unacquainted, but whose value is stated to them by a third person, under a mistake as to the identity of the land, can, on learning of the mistake a few months after the deeds have been made and delivered, rescind by tendering back a deed of the land and the notes and mortgage received by him to boot, on the ground of mutual mistake, since he cannot be considered negligent in relying on the third person's statements.—Irwin v. Wilson, 366.

Where defendants had sold a blooded cow for 5½ cents per pound, supposing her to be sterile, *held* that they were justified in rescinding the sale before delivery on finding her to be in calf.—Sherwood v. Walker, 370.

MODIFICATION AND MERGER.

Release of a party from performance of a contract is sufficient consideration for his promise to account with the other party for moneys paid by the latter under the contract.—Cutter v. Cochrane, 567.

A lesser security merges in and is extinguished by a higher security, taken for the same debt, unless taken as further collateral security.—Van Vleit v. Jones, 620.

MONEY HAD AND RECEIVED.

Recovery from depositary under illegal contract, see "Depositaries."

MONEY LENT.

Recovery of money lent for gambling, see "Gaming."

MONOPOLIES.

Where coal companies having control of certain coal regions enter into an agreement to control the output, a bill drawn by one company on another to equalize prices on a settlement under the contract cannot be recovered.—Morris Run Coal Co. v. Barclay Coal Co., 469.

An agreement between several parties, severally engaged in the business of manufacturing and selling balance shade rollers, for the purpose of avoiding competition, organize themselves into a corporation, and severally enter into an agreement with the corporation, so organized, that all sales of the shade roller shall be made in the name of the corporation, and at once reported to it; that, when either party shall establish an agency in any city for the sale of a roller made exclusively for that purpose, no other party shall take orders for the same roller in the same place; and that the prices for rollers of the same grade, made by the different parties, shall be the same, and shall be according to a schedule contained in the contract, subject to changes which may be made by the corporation upon recommendation of three-fourths of the stockholders,—is not void as in restraint of trade.—Central Shade-Roller Co. v. Cushman, 473.

An agreement by a patentee to allow an association and its members the exclusive use and sale of inventions patented by him is not illegal as creating a monopoly or being in restraint of trade.—Good v. Daland, 474.

An association of stenographers, formed to establish and maintain uniform rates of charges, and to prevent competition among its members under certain penalties, is illegal, as in restraint of trade and against public policy, and one member cannot maintain an action

against another for damages occasioned by the latter underbidding the former, in violation of the rules of the association.—More v. Bennett, 476.

MORAL OBLIGATIONS.

See "Consideration," § 6.

MORTGAGES.

Notes were given, secured by mortgage, the consideration being the good will, fixtures, and stock of a business, the two latter specified in inventories upon which each article with its price was separately carried out. A part of the stock sold and specified in the inventory was lager beer, cider, ale, porter, and alcohol, the sale of the ale, porter, and alcohol being illegal. On petition to foreclose by an assignee for value and without notice of the notes and mortgage, *held* that, the articles illegally sold and their value being certainly ascertainable, the contract is divisible, and mortgage may be foreclosed for the amount of the legal sales.—Shaw v. Carpenter, 491.

An assignee of a bona fide assignee of a mortgage, whose assignment was not registered, is not affected by registry, after the first assignment and before the second, of a prior conveyance to a cestui que trust under a secret trust.—Mott v. Clark, 546.

Assignee of a mortgagee takes subject to the equities of the mortgagor, but not as to latent equities of cestuis que trustent of the mortgagor or other persons.—Mott v. Clark, 546.

MUTUAL PROMISES.

See "Consideration," § 3.

NECESSARIES.

Infant's contracts for, see "Infants," § 1.

NEGLIGENCE.

Limitation of carrier's liability, see "Carriers."

NOVATION.

Where a debtor left money in the hands of a third person, who agreed to pay a debt, the creditor having never accepted such person as his debtor, or released the original debtor, cannot maintain an action against such third person.—Butterfield v. Hartshorn, 568.

OBSTRUCTING JUSTICE.

A creditor of one who has sold all his property, and fled from the country, agreed with complainant that if he would procure the affidavits and testimony of the debtor, and of two other witnesses, showing that no consideration was paid for said property, and that the purchaser knew of the debtor's insolvency, he would give complainant a share of whatever he recovered upon a creditors' bill filed by him against the debtor and said purchaser. *Held*, that the agreement was illegal, as leading to subornation of perjury.—Goodrich v. Tenney, 434.

A creditor of one who had sold all his property, and fled from the country, agreed with complainant that if he would procure the affidavits and testimony of the debtor, and of two other witnesses, showing that no consideration was paid for said property, and that the purchaser knew of the debtor's insolvency, he would give complainant a share of whatever he recovered upon a creditors' bill filed by him against the debtor and said purchaser. *Held* that, the contract being illegal, the creditor, although he has recovered a large sum of money by help of it, will not be compelled by the courts to account therefor to complainant.—Goodrich v. Tenney, 434.

A promissory note given for compounding a public prosecution for a misdemeanor is founded on an illegal consideration.—Jones v. Rice, 439.

OFFER AND ACCEPTANCE.

Acceptance of goods within statute of frauds, see "Statute of Frauds," § 8.
Knowledge of offer of reward, see "Rewards."

§ 1. Necessity of offer and acceptance.

To constitute a binding contract, there must be a meeting of the minds of the parties.—Thurston v. Thornton, 14.

A document signed by the owner of property purporting to be an agreement to sell at a fixed price, with a postscript, "This offer to be left over until Friday, 9 a. m.," is only an offer.—Dickinson v. Dodds, 77.

§ 2. Effect of acceptance.

A contract is obligatory from the moment the minds of the parties meet, signified by overt acts, though such occurence is not known to both parties at the time.—Mactier's Adm'r v. Frith, 38.

Acceptance of an offer to sell constitutes a contract for sale only from time of acceptance.—Dickinson v. Dodd, 77.

§ 3. Necessity of communication—Offer.

One receiving a ticket on deposit of goods, in which the liability of the bailee is limited, is under no obligation to read the condition.—Parker v. Southeastern Ry. Co., 18.

§ 4. —— Acceptance.

Plaintiff, a builder, received a note stating that upon an agreement to finish work in certain time he might commence at once, to which he did not reply, but purchased lumber for the work, and commenced to prepare it. *Held* no acceptance.—White v. Corlies, 16.

§ 5. Manner of communication.

Communication of acceptance of an offer sent to a different place than that directed in the offer does not bind the party making the offer.—Eliason v. Henshaw, 24.

§ 6. Communication by conduct.

One not a subscriber, who takes a newspaper directed to him from the postoffice, and pays postage thereon, and continues doing so after demand of the subscription price, is liable therefor.—Fogg v. Portsmouth Atheneum, 26.

One who made no objection to work which he had reason to know was being done in expectation that he would pay for it, is liable therefor.—Day v. Caton, 28.

Plaintiff, seeking to establish a renewal of his policy, called a clerk of his agent as a witness, who testified that he asked defendant's agent to bind or renew the policy in question; that he received no reply, and the agent did nothing indicating either that he heard or intended to comply with the request. *Held*, that no inference could be drawn from such silence to impose a contractual obligation on defendant.—Royal Ins. Co. v. Beatty, 29.

§ 7. Communication by correspondence.

A contract is accepted by the posting of a letter declaring its acceptance.—Dunlop v. Higgins, 31.

Posting an answer to a letter containing an offer on the day of receiving the offer is sufficient.—Dunlop v. Higgins, 31.

Acceptance, by letter, of an offer made by letter before retraction, completes the contract, although the acceptance does not reach its destination until after death of acceptor.—Mactier's Adm'r v. Frith, 38.

A company allotted shares to defendant for which he had applied, and addressed to him, and posted a notice of the allotment, but which he never received. *Held*, that he was a shareholder.—Household Fire & Carriage Acc. Ins. Co. v. Grant, 58.

An offer by letter, requesting an answer by telegraph, and stating that, unless received by a certain date, the answer would be considered a refusal, is made dependent upon actual receipt of the telegram before such date.—Lewis v. Browning, 62.

A contract made by telegraph is completed when an acceptance of the proposition is deposited for transmission in the telegraph office.—Minnesota Linseed Oil Co. v. Collier White Lead Co., 87.

§ 8. General offer.

An advertisement offered to pay a certain sum to any one contracting influenza after using a certain remedy. *Held*, that one purchasing the remedy on faith of such advertisement, and using it, who contracted the disease afterwards, may recover the sum offered.—Carlill v. Carbolic Smoke Ball Co., 67.

§ 9. Character of acceptance.

Whatever amounts to a manifestation of determination to accept an offer, communicated, or put in a proper way to be communicated, to the other party, is an acceptance.—Mactier's Adm'r v. Frith, 38.

Where one is to decide on the happening of a certain event, whether he will accept an offer or not, happening of the event does not complete the contract until the decision is made.—Mactier's Adm'r v. Frith, 38.

A conditional acceptance of a proposition by letter does not constitute a contract.—Harris v. Scott, 63.

Defendants wrote plaintiff offering to sell a quantity of powder of different grades at a uniform price, but reserving to themselves the right to retain 1,500 pounds thereof, and also certain caps and fuse, ending the letter saying: "Should you decide to order these goods, you may give us indorsed note that we can use as cash, * * *" etc. Plaintiff replied: "* * * I will take 7,200 lbs. of the powder, leaving you the 1,500 lbs. in reserve, as you wish, * * * and on receipt of invoice will forward indorsed note, etc. You are too high on caps and fuse." *Held*, that there was no valid contract.—Thomas v. Greenwood, 65.

§ 10. Revocation of offer or acceptance.

Revocation of offer under seal, see "Contracts under Seal," § 2.

A bidder at an auction may retract his bid any time before the hammer is down.—Paine v. Cave, 74.

An offer to sell land at a certain price if taken within 30 days is a continuing offer, acceptance of which within the time limited and before retraction constitutes a valid contract.—Boston & M. R. R. v. Bartlett, 75.

Formal notice of withdrawal of an offer before acceptance need not be given. Knowledge by one to whom the offer is made of acts inconsistent with a continuance of the offer is sufficient.—Dickinson v. Dodds, 77.

Sale of property to a third person amounts to withdrawal of the offer, even though the party to whom the offer was first made had no knowledge of it.—Dickinson v. Dodds, 77.

Sale of property to a third person, which came to the knowledge of the person to whom an offer was made, is an effectual withdrawal of the offer.—Dickinson v. Dodds, 77.

Though the extension of an option for the sale of land is not binding when unsupported by a new consideration, the acceptance thereof, and tender of the price within the time named, constitutes a valid contract of sale.—Ide v. Leiser, 82.

§ 11. Lapse of offer.

Acceptance of an offer after the expiration of the time to which it is limited will not be binding.—Longworth v. Mitchell, 85.

Where the market in certain goods is subject to sudden and great fluctuations, an acceptance of a proposition by telegraph, after a delay of 24 hours, is not within a reasonable time.—Minnesota Linseed Oil Co. v. Collier White Lead Co., 87.

Where one has refused to accept an offer, but has made an offer himself, which has been refused, he cannot revive the first offer by afterwards accepting it.—Hyde v. Wrench, 89.

An offer in writing to subscribe to the capital stock of a railroad company, conditioned upon the construction of its line of road along a designated route, is revocable, at the option of the party making such offer, at any time before its delivery to and acceptance by such company; and his death before such delivery and acceptance works such revocation.—Wallace v. Townsend, 90.

§ 12. Contractual intention.

In an action by a cousin for services as housekeeper it must appear that when the services were rendered both parties expected that they should be paid for.—Heffron v. Brown, 95.

Letters which the parties intend only as preliminary negotiations, or as mere advertisements or business circulars, should not be construed as a contract.—Moulton v. Kershaw, 99.

Where the written draft of a contract is viewed as the consummation of the negotiations, there is no contract until it is finally signed.—Mississippi & Dominion S. S. Co. v. Swift, 101.

OFFICERS.

Assignment of future salary, see "Injury to Public Service."

OPINION.

As fraudulent representation, see "Fraud," § 5.

PARENT AND CHILD.

See "Implied Contracts."

PAROL AGREEMENT.

See "Statute of Frauds."

PARTIAL INVALIDITY.

Of contract of employment, see "Master and Servant."
Of mortgage, see "Mortgages."

PARTIES.

Construction as to parties, see "Construction," § 2.

An action cannot be maintained against one of three joint obligors, on allegation that the other two have paid their share.—Eller v. Lacy, 549.

An agreement by which "plaintiffs are to pay" is a joint obligation.—Eller v. Lacy, 549.

Where a sale is made by two joint owners, and the purchaser afterwards pays one of them his full share of the purchase money, the other cannot maintain an action in his own name for the balance, unless all parties have agreed to a severance of the joint contract, and the purchaser has made him a new promise.—Angus v. Robinson, 551.

PAST CONSIDERATION.

See "Consideration," § 9.

PAYMENT.

Part payment as consideration for release, see "Consideration," § 8.

A forged note or bill, which proves to be of no value, given in payment of goods, does not extinguish the debt.—Markle v. Hatfield, 571.

The acceptance by a creditor of the note of a third person, which he credits on an open account existing between him and the debtor, is not such evidence of payment as to prevent the creditor from suing on the account.—Cheltenham Stone & Gravel Co. v. Gates Iron Co., 573.

PENALTIES.

Penalty or liquidated damages, see "Damages."

PERFORMANCE OR BREACH.

See "Payment."
Part performance under statute of frauds, see "Statute of Frauds," § 10.

§ 1. Tender.

An agreement that directions shall be left by will or otherwise, whereby the survivor should have a prior right to purchase certain shares of stock, is fully complied with by the administratrix by an offer at the price for which they were finally sold, which was rejected.—Harris v. Scott, 63.

Where a note is payable in specific articles, tender of such articles at the time and place specified satisfies the contract.—Lamb v. Lathrop, 575.

Where a note is payable in specific articles, the promisor must tender such articles at the amount agreed to be paid.—Lamb v. Lathrop, 575.

§ 2. Conditions precedent.

A party who has refused to fulfill his part of an agreement cannot maintain an action for damages against the other party.—Dey v. Dox, 598.

Under a contract providing that one installment of the purchase money of land should be paid before and one after delivery of the deed, such delivery was a condition precedent to recovery of the second installment.—Grant v. Johnson, 601.

In a mercantile contract, a statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty or condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.—Norrington v. Wright, 604.

Plaintiff contracted to sell his stock of goods and his two stores and lots to defendants. Both goods and land were sold at the same time, and embraced in the same contract; but they were treated as distinct subjects of sale, the price of each being definitely fixed. *Held*, that the contract was divisible, and that an avoidance of the contract by plaintiff as to the land did not avoid the contract as to the stock of goods.—Wooten v. Walters, 610.

Plaintiff agreed to work for defendant one year, and defendant to pay him therefor a certain sum. During the year plaintiff lost time to the amount of nine days, but defendant allowed him to resume work without objection, and he continued at work until the expiration of a year from the original hiring. *Held*, that allowing plaintiff to continue work, after the loss of time, without objection, was a waiver of any right of forfeiture defendant might have therefor, and plaintiff was not bound, after the expiration of the year, and in the absence of special agreement, to make up the lost time.—Bast v. Byrne, 613.

§ 3. Conditions subsequent.

A sale of personal property on condition that the vendee may return it in a specified time becomes absolute if the vendee impairs its value by misuse during that time.—Ray v. Thompson, 577.

§ 4. Concurrent conditions.

Under a contract for the sale of corn, delivery of the corn and payment of the price are concurrent acts, to be done by the parties at the same time.—Morton v. Lamb, 594.

§ 5. Renunciation.

Where one party to a contract violates some of its substantial provisions, so as to deprive the other party of the benefits of the contract, and manifests an intention to continue such breaches, the other party may abandon further performance of the contract, and sue for future profits, although such breaches did not amount to a physical obstruction or prevention of performance by such other party.—Lake Shore & M. S. Ry. Co. v. Richards, 578.

The right to do so is not lost by a previous suit for damages for breach of the contract, where the breaches of the contract continue after the bringing of such suit.—Lake Shore & M. S. Ry. Co. v. Richards, 578.

§ 6. Impossibility caused by party.

Where defendant conveyed land to another, which he had promised to convey to plaintiff, plaintiff need not tender him the purchase price.—Newcomb v. Brackett, 592.

§ 7. Death of party.

Death of the employer before expiration of the stipulated term of service of a clerk and salesman excuses further performance of the contract.—Yerrington v. Greene, 618.

§ 8. **Destruction of subject-matter.**

Under a contract to erect a building for a certain entire price, payable in installments, where the building is destroyed before completion, the owner may recover the installments paid.—Superintendent and Trustees of Public Schools of Trenton v. Bennett, 615.

Under a contract to erect a complete building the loss falls on the contractor if the building falls before completion by reason of a latent defect in the soil.—Superintendent and Trustees of Public Schools of Trenton v. Bennett, 615.

PLEADING.

A complaint alleging that defendants are indebted to plaintiff in the sum of $3,000 for damages by reason of their failure to ship certain goods bought of them, is insufficient, as there is no consideration stated for the alleged agreement, and as it does not allege promise to pay any amount for which defendants were indebted to plaintiff, nor any promise by defendants to ship, nor tender of payment or performance by plaintiff, and fails to allege a valid contract of any kind.—Thomas v. Greenwood, 65.

A complaint praying specific performance of a contract for the sale of land need not allege that plaintiff has no adequate remedy in damages, nor that defendant is the owner of the land when the action is brought, where it does allege that he was such owner when be made the offer, and the complaint was filed on the day when plaintiff accepted it.—Ide v. Leiser, 82.

In an action on a joint and several bastardy bond, a joint plea of duress of unlawful imprisonment of one defendant is bad where the relationship, such as father, son, etc., is not averred in the plea.—Township of Bordertown v. Wallace, 281.

A complaint in an action for damages, alleging that defendant, in order to induce plaintiff to lease from him certain premises, fraudulently concealed the fact that a certain building thereon did not belong to him, but which fails to allege that defendant knew or had reason to know that plaintiff was ignorant of the fact that defendant did not own such building, and that the leasing of the premises by plaintiff was actually induced by such concealment, is demurrable for failure to state a cause of action.—Sheldon v. Davidson, 382.

In an action on the case by the seller of property for fraudulent representations and concealment by the purchaser in regard to its value, the price paid was set forth in the declaration less than it was proved on trial to have actually been. *Held* to be no variance.—Mallory v. Leach, 390.

A complaint seeking to set aside a fraudulent conveyance to satisfy a judgment, which merely alleges the recovery of judgment against defendant, without stating any facts to show the character and validity thereof, is insufficient.—Eller v. Lacy, 549.

An action setting up a judgment must state the amount and character and validity of the judgment sued on.—Eller v. Lacy, 549.

PRINCIPAL AND AGENT.

Husband for wife, see "Married Women."

PROPERTY.

Duress of property, see "Duress," § 2.

PUBLIC POLICY.

See "Breach of Trust"; "Monopolies"; "Restraint of Marriage"; "Restraint of Trade."
Limitation of carrier's liability for negligence, see "Carriers."
Right of sheriff to reward, see "Rewards."

Where owners of corporate stock agree to vote only for certain officers as directors, and that in case the salary of one is increased that of the other should also be increased, the contract is void as against public policy.—Harris v. Scott, 63.

QUANTUM MERUIT.

Recovery by servant under contract invalid in part, see "Master and Servant."

QUASI CONTRACTS.

See "Constructive Contracts"; "Implied Contracts."

RATIFICATION.

By infant, see "Infants," § 3.
Of contract made for corporation, see "Corporations."

RESCISSION AND ABANDONMENT.

Rescission for fraud, see "Fraud," § 6.

A decree rescinding a deed from a ward to her guardian need not require the refunding of the consideration when the guardian is indebted to the ward to a greater amount.—McParland v. Larkin, 406.

On rescinding a deed made by a ward to her guardian, the ward's estate should not be charged with improvements made by the guardian without the ward's authority.—McParland v. Larkin, 406.

A party to a contract prohibited by law, but not malum in se, may, while it remains executory, rescind it, and recover money advanced by him to the other party, who had performed no part of it.—Congress & Empire Spring Co. v. Knowlton, 513.

In an action on a contract for the sale and future delivery of brick by defendant to plaintiffs, it appeared that after the contract was made plaintiffs became insolvent, and made a voluntary assignment, of which they gave notice to defendant, and afterwards compounded with their creditors. No reference was made to the contract in the schedule filed, nor in the statement of assets made by plaintiffs to their creditors. Plaintiffs knew that the brick were to be made in Maine, but gave no notice to defendant that they would claim performance of the contract, and made no offer to pay or secure defendant till more than four months after the assignment, and after defendant had sold the brick. *Held*, that the question of abandonment of the contract by plaintiffs and acceptance by defendant should have been submitted to the jury.—Hobbs v. Columbia Falls Brick Co., 566.

Abandonment of an executory contract by plaintiffs, and acceptance thereof by defendant, constitute a defense to an action on such contract.—Hobbs v. Columbia Falls Brick Co., 566.

REFORMATION.

A contract will not be reformed which must be construed and carried into effect before

reformation exactly as it would be after it has been reformed.—Rue v. Meirs, 249.

RENUNCIATION.

Operating as discharge, see "Performance or Breach," § 5.

RESTRAINT OF MARRIAGE.

An agreement by defendant to pay plaintiff a certain sum if he should marry any other person than plaintiff is void.—Lowe v. Peers, 454.

RESTRAINT OF TRADE.

See "Monopolies."
Agreement within statute, see "Statute of Frauds," § 7.

A contract by defendant not to teach the French or German language, nor aid or advertise to teach them, nor to be connected with any person or institution teaching them, in the state of Rhode Island, for a year after leaving complainant's employ, is not void on the ground of public policy, simply because it applies to the entire state.—Herreshoff v. Boutineau, 458.

But where complainant offers to allow defendant to teach at a place in the state other than that at which complainant's school is established, and does not aver that such teaching would injure him, the fact that the contract applies to the entire state renders it unreasonable.—Herreshoff v. Boutineau, 458.

A contract made by a seller with the purchaser, that he will not, at any time within 99 years, directly or indirectly engage in the manufacture or sale of friction matches, excepting in the capacity of agent or employé of said purchaser, within any of the several states of the United States of America, or the territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the state of Nevada and in the territory of Montana, is not void as a covenant in restraint of trade.—Diamond Match Co. v. Roeber, 461.

An agreement not to engage in a certain business in a certain place is not invalid because not specifying any limit of time.—Carll v. Snyder, 465.

Defendant, who owned a factory for the manufacture of a certain kind of cheese, designated by a certain name, sold it, together with the secret of the manufacture, to plaintiffs, and covenanted that neither she, nor her husband, her father, nor her brother-in-law, who had all assisted her in running the factory, would impart the secret to any other person than plaintiffs, nor engage in the business of manufacturing or selling such cheeses. *Held*, that the covenant is not void as in restraint of trade.—Tode v. Gross, 467.

REVOCATION.

Disaffirmance of infant's contract, see "Infants," § 4.
Of offer or acceptance, see "Offer and Acceptance," § 10.
—— under seal, see "Contracts under Seal," § 2.
Of subscription, see "Subscriptions."

REWARDS.

Since it is the duty of a sheriff to make arrests, he cannot claim a reward offered therefor.—Stamper v. Temple, 93.

To entitle a party to a reward for an arrest, there must be an offer clearly intended as such, and knowledge of the offer by the other party at the time of the arrest.—Stamper v. Temple, 93.

SALES.

See "Intoxicating Liquors."
On Sunday, see "Sunday."
Rescission for mistake, see "Mistake," § 2.
Sale to third person as withdrawal of offer, see "Offer and Acceptance," § 10.
Within statute of frauds, see "Statute of Frauds," § 8.

A vendor may recover for goods sold, although he knew they were bought for an illegal purpose, where it was not part of the contract that they should be so used, and he has done nothing else in aid of it.—Tracy v. Talmage, 497; State of Indiana v. Leavitt, Id.

SEDUCTION.

Consideration for marriage, see "Breach of Marriage Promise."

SEPARATE ESTATE.

See "Married Women."

SHERIFFS.

Right to reward, see "Rewards."

SIGNATURE.

Of memorandum, see "Statute of Frauds," § 9.

SLANDER.

Agreement to publish libelous matter, see "Libel and Slander."

SPECIFIC PERFORMANCE.

See "Pleading."

STATUTE OF FRAUDS.

§ 1. Instruments under statutes.

An undertaking required by statute to give a right of appeal containing the requisite stipulation is valid, though it does not express a consideration, and is not under seal.—Thompson v Blanchard, 115.

Instruments created under and deriving their obligation from special statutes need not express consideration.—Thompson v. Blanchard, 115.

§ 2. Executed contracts.

A contract for services not to be performed within a year, but which has been fully performed on both sides, cannot be avoided because not in writing.—Stone v. Dennison, 116.

§ 3. Promise by executor or administrator.

The oral agreement of an executor to pay one of the testator's heirs at law a certain sum in consideration that he would forbear further opposition to the probate of the will is an original agreement, not within the statute; and the consideration is sufficient.—Bellows v. Sowles, 118.

§ 4. Promise to answer for debt of another.

An agreement by one person to pay for goods furnished to another is not a collateral promise to pay the debt or answer the default of another, within the meaning of the statute of frauds.—Larson v. Jenson, 120.

Where an agent, having, contrary to instructions of his principal, loaned money without security, and taken a note therefor, and, on being told by the principal that he will hold him responsible, guaranties the payment of the note, the guaranty is not a promise to answer for the debt of another, within the statute of frauds, so as to be void for failure to express the consideration.—Crane v. Wheeler, 122.

A parol promise to pay the debt of another in consideration of property placed by the debtor in the promisor's hands is an original promise, and binding upon the promisor, whether the liability of the original debtor continues or is discharged.—Wait v. Wait's Ex'r, 123.

Testator, in consideration of the conveyance of a farm to him, upon which plaintiff, at the request of testator's grantor, had erected a barn, promised to pay plaintiff the cost of said barn. *Held*, that this promise, being made upon a new consideration, was binding, though it was not in writing, and though the original liability of the grantor remained undischarged.—Wait v. Wait's Ex'r, 123.

One having a lien on property for repairs, who delivers it to the owner on the oral promise of a third party to pay for the repairs, cannot enforce the promise.—Mallory v. Gillett, 124.

§ 5. Agreements in consideration of marriage.

An antenuptial contract, by which each party is to retain the title of his or her property, and dispose of it as if unmarried, is a contract in consideration of marriage, within the statute of frauds (Gen. St. c. 22, § 1), and must be in writing.—Mallory's Adm'r v. Mallory's Adm'r, 138.

§ 6. Agreements relating to land.

A person sold land, representing it to have a certain frontage. The buyer paid for the land, but, finding it to have a less frontage, refused to accept a deed. The seller then agreed, if he would accept the deed, to repay the difference in value between the actual land and the land as represented. *Held* not an agreement for the sale of land, or of an interest in or concerning it, necessary to be in writing.—Haviland v. Sammis, 139.

A license to enter on lands of another to do a particular act or series of acts, without possessing an interest in the lands, need not be in writing.—Mumford v. Whitney, 140.

A parol agreement that a party may abut and erect a dam for a permanent purpose on lands of another is void.—Mumford v. Whitney, 140.

An agreement for the sale of growing trees, with a right to enter and remove them, must be in writing.—Green v. Armstrong, 145.

A sale of standing timber, whether or not the parties contemplate its immediate severance and removal by the vendee, is a contract concerning an interest in lands, within the meaning of the statute of frauds.—Hirth v. Graham, 147.

A parol agreement by a mortgagee to foreclose his mortgage, bid in the land, and hold it until it could be sold for its value, and, when sold, to pay the mortgagor the balance over the mortgage, cannot be enforced.—Wheeler v. Reynolds, 208.

A parol agreement in reference to lands, not authorized by the statute of frauds, is void as well in equity as in law.—Wheeler v. Reynolds, 208.

A parol agreement subsequent to a deed of land that the land should be surveyed, and any excess over what the deed called for should be paid for at a certain price, is valid.—Seward v. Mitchell, 233.

§ 7. Agreements not to be performed within a year.

A promise to save a co-surety harmless may be performed within a year, and need not be in writing.—Blake v. Cole, 149.

An agreement not to engage in a certain business at a particular place for a specified number of years is not within the statute of frauds.—Doyle v. Dixon, 150.

A contract to serve for one year, service to commence the second day after the contract was made, is within the statute of frauds.—Britain v. Rossiter, 213.

§ 8. Sale of goods.

A contract for the sale of promissory notes is within the statute of frauds.—Baldwin v. Williams, 151.

An executory agreement for the manufacture and sale of a specific chattel to be manufactured according to the terms of the agreement is not a contract of sale.—Goddard v. Binney, 153.

Defendants purchased lumber, pointed out the piles from which it was to be taken, and directed that when it was dressed and cut it should be placed on plaintiff's dock and notice given, which was done. *Held*, that there was no acceptance and receipt of the lumber.—Cooke v. Millard, 155.

Where a chattel verbally contracted for is in existence, but the vendor is to do some work on it to adapt it to the uses of the vendee, it is a contract of sale under the statute.—Cooke v. Millard, 155.

Defendants ordered from plaintiffs' salesman a bill of boots and shoes, to be manufactured by plaintiffs. The salesman made a copy of the order, signed it himself, and gave it to defendants. Before the order was shipped, it was countermanded by defendants. *Held*, that the contract was for the sale of "goods," within the meaning of Rev. St. 1879, § 2514, providing that "no contract for the sale of goods," etc., "for the price of $30 or upwards, shall be good, unless some note or memorandum thereof be made in writing, and signed by the party to be charged."—Pratt v. Miller, 163.

There must be a receipt and acceptance of the goods by the vendee in a parol contract to bind him, where no part of the purchase price is paid.—Caulkins v. Hellman, 166.

A purchaser's receipt and acceptance of goods sufficient to satisfy the statute of frauds may be constructive.—Garfield v. Paris, 168.

Receipt and acceptance of labels, furnished as part of a parol contract for the sale of liquor, satisfies the statute of frauds. — Garfield v. Paris, 168.

A contract for the sale of goods, which is void for failure to pay some part of the consideration as required by the statute of frauds, cannot be validated by an unaccepted offer of payment.—Edgerton v. Hodge, 172.

Subsequent payment by check, on a contract void under the statute of frauds, and a restatement of its essential terms, validates the contract.—Hunter v. Wetsell, 174.

§ 9. The memorandum in writing.

An option to sell land at an agreed price, a consideration for the option being stated, is a sufficient compliance with the Montana statute of frauds (Comp. St. div. 5, p. 652, § 219), which only requires that the memorandum of sale shall be signed by the seller.—Ide v. Leiser, 82.

On the 30th of June, A. bargained with B. for his cheese, amounting to over $40, but nothing was done to bind the bargain. The next day B. wrote to A., "I shall stand to it" (alluding to the contract), "but shall want you to pay me fifty dollars to bind it." The day following (July 2d) A. inclosed $50 in a letter, and sent it by mail to B., which he received on the 8th, and immediately returned it to A. *Held*, that B. had a right to decline to receive the money, and by so doing left the contract void under the statute of frauds.—Edgerton v. Hodge, 172.

Where parties in making a contract omit to do what the statute of frauds requires to be done to make a valid contract, it requires the consent of both parties to supply the thing omitted.—Edgerton v. Hodge, 172.

A paper stating the terms of the contract, signed by the party to be charged, and directed to a third person, may be deemed part of a sufficient memorandum, though not at the time known to the other party.—Peabody v. Speyers, 176.

A writing signed by defendant, directed to a bank cashier, to the effect that he would pay plaintiff a certain amount in currency for a certain sum in gold, and one by plaintiff that he would accept such currency for gold, is a sufficient memorandum.—Peabody v. Speyers, 176.

A verbal order for goods given to plaintiff's traveling salesman, entered in his memorandum book, and signed by him, a copy of which was forwarded to plaintiff, together with a letter written by defendant to plaintiff, countermanding the order, is a sufficient memorandum.—Louisville Asphalt Varnish Co. v. Lorick, 178.

A memorandum of a sale, which neither names nor describes the sellers, is not sufficient to satisfy the statute of frauds.—McGovern v. Hern, 183.

A memorandum of a contract for services, not containing the condition on which defendants were to pay and the subject-matter of the agreement, is insufficient.—Drake v. Seaman, 184.

An agreement signed by the vendor to deliver certain articles to the vendee at a specified price, cash on delivery, is a sufficient memorandum, and binds the vendor, although not signed by the vendee.—Justice v. Lang, 187.

A contract in writing for services for a term exceeding one year, at a stipulated salary, signed by the employer only, and containing no promise on the part of the employé to perform such services, is void, and the employé cannot recover if discharged before the expiration of the term.—Wilkinson v. Heavenrich, 199.

A memorandum written by a broker employed to make the purchase in his book in presence of the vendor, containing the names of the parties and terms of purchase, but not subscribed by the parties, is sufficient.—Clason v. Bailey, 201.

A letter from the vendor, confirming to the purchaser a sale of personal property at a certain price per pound, and inclosing an order on its keeper for delivery and weighing, is a sufficient memorandum.—Sherwood v. Walker, 370.

§ 10. Effect of noncompliance with statute.

The statute of frauds affects the remedy only, and not the validity of a contract.—Townsend v. Hargraves, 205.

Where there is a completed oral contract of sale of goods, acceptance and receipt of part of them takes the case out of the statute, although after the destruction of the rest of the goods while in the hands of the seller.—Townsend v. Hargraves, 205.

Where, in reliance on parol agreement within the statute of frauds, one party has so far partly performed that it would be a fraud on him unless performed, the agreement will be enforced.—Wheeler v. Reynolds, 208.

Plaintiff, one of several lessees of land for ten years, made an oral contract to transfer to defendant, an outsider, his interest in the lease for the remaining four years of the term, defendant agreeing to stand in plaintiff's stead and pay his share of the rent. Defendant occupied and paid the rent for the year, and abandoned his portion of the land. *Held*, in an action to recover the rent for the remainder of the term which plaintiff was compelled to pay, that the contract was invalid under the statute of frauds, and the equitable doctrine of part performance was inapplicable, the action being at law.—Nally v. Reading, 212.

A contract not enforceable by reason of the statute of frauds is an existing contract, and not void, and a new contract cannot be implied from acts done under it.—Britain v. Rossiter, 213.

The doctrine of part performance making a contract not in accordance with the statute of frauds enforceable in equity applies only to contracts relating to land.—Britain v. Rossiter, 213.

The mother of deceased attempted by writing to bind him, then 20 years of age, as apprentice to defendants, for 5 years, for a stipulated sum; $200 to be retained by defendants from the wages as a penalty if deceased left for any cause. The contract was not signed by defendants. Deceased remained with them after coming of age, until killed by accident. *Held*, that the contract was void, under the statute of frauds; but as deceased continued to work after coming of age, with knowledge of the terms, he would be bound to that rate of compensation, but the forfeiture could not be enforced.—Baker v. Lauterback, 218.

STATUTES.

Contracts in violation of statutes, see "Intoxicating Liquors"; "Sunday"; "Usury."

SUBSCRIPTIONS.

As consideration for other subscriptions, see "Consideration," § 3.

Until some action is taken on the basis of a subscription to a benevolent or other enterprise, it may be revoked.—Wallace v. Townsend, 90.

Where decedent signed a church subscription, the fact that the trustees made efforts to secure other subscriptions in order to fulfill the conditions on which the liability of the subscribers depended, but merely as individuals, and not because of any request by the decedent, constituted no consideration for his promise.—Presbyterian Church v. Cooper, 234.

Where defendant's intestate signed a subscription paper by which the signers agreed to pay to the trustees of plaintiff church the

amounts set opposite their names on condition that a certain fixed sum was subscribed, the fact that other persons signed such subscription on the faith of the signature of the decedent constituted no consideration for the promise of the latter, as between him and the payee.—Presbyterian Church v. Cooper, 234.

SUFFICIENCY.

Of consideration, see "Consideration," § 2.
Of memorandum within statute of frauds, see "Statute of Frauds," § 9.

SUNDAY.

A sale or exchange of horses, attended with the circumstances which usually attend those exchanges, is a secular labor or employment, within the meaning of the statute for the observance of the Sabbath.—Lyon v. Strong, 417.

No action can be maintained on a warranty made on the sale or exchange of horses on Sunday.—Lyon v. Strong, 417.

The court will not enforce a contract made on the Sabbath.—Lyon v. Strong, 417.

TELEGRAMS.

Acceptance by telegram, see "Offer and Acceptance," § 7.

TENDER.

Of performance, see "Performance or Breach," § 1.

THEATERS.

An actor may recover for his services in an unlicensed theatrical exhibition, unless he knew that his employer had no license.—Roys v. Johnson, 496.

TIME.

Disaffirmance of contract by infant, see "Infants," § 4.
Of acceptance, see "Offer and Acceptance," § 11.

TREES.

Parol sale of growing trees, see "Statute of Frauds," § 6.

TRUSTS

Where an uncle, who is indebted to his nephew for money due on the latter's twenty-first birthday, writes the nephew that he had the money in bank that he intended for him, and that the latter should certainly have it, adding that he would not interfere with the money until he thought the nephew capable of taking care of it, the relation of the parties is thereby changed from debtor and creditor to trustee and beneficiary.—Hamer v. Sidway, 220.

UNDUE INFLUENCE.

The fact that one of the parties to a contract is old, and relies upon and is the grandfather and employer of the other, does not raise a presumption of undue influence.—Cowee v. Cornell, 402.

Where a female ward, a few days after attaining her majority, and before her guardian has made his final report, conveys her land to the guardian's wife, who is her elder sister, and with whom she is living, the burden is on the guardian to show good faith and the absence of undue influence.—McParland v. Larkin, 406.

Where a conveyance of land was obtained in exchange for property of about half its value by taking advantage of the grantor's ignorance and unfounded apprehensions that if he did not convey it would be taken on a judgment, the transaction was *held* to be unconscionable, and the conveyance was set aside.—Wooley v. Drew, 410.

UNITED STATES.

The United States may, within the sphere of its constitutional powers, enter into a contract not prohibited by law, and appropriate to the exercise of such powers.—United States v. Tingey, 276.

USURY.

A deed granting a rent charge of $500 per year in consideration of $5,000, with an option in the grantor to obtain a release of the rent charge after five years by paying $5,000 and arrears of rent, *held* usurious and void.—Lloyd v. Scott, 421.

VENDOR AND PURCHASER.

Agreements relating to land, see "Statute of Frauds," § 6.
Offer under seal, see "Contracts under Seal," § 2.

WAGER.

See "Gaming."

WARRANTY.

Implied warranty, see "Implied Contracts."

WITHDRAWAL.

Of offer or acceptance, see "Offer and Acceptance," § 10.

YEAR.

Agreements not to be performed within a year, see "Statute of Frauds," § 7.

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