INDERMAUR'S
EPITOME OF
COMMON LAW CASES

TENTH EDITION

ILLUSTRATED BY

E. T. REED

LEADING COMMON LAW CASES

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AN EPITOME

OF

LEADING COMMON LAW CASES

WITH SOME SHORT NOTES THEREON

CHIEFLY INTENDED AS

A GUIDE TO SMITH'S "LEADING CASES"

BY

JOHN INDERMAUR

SOLICITOR (FIRST PRIZEMAN, MICH. TERM, 1872)

TENTH EDITION

BY

ERNEST A. JELF, M.A.

MASTER OF THE SUPREME COURT

WITH ILLUSTRATIONS

BY

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What the Common Law is. A collection of decisions by Judges. Each Judge decided as he thought right and just in the particular case. Each decision was followed by the next Judge whenever the facts were the same. This is the best kind of law, as the Judges cared for nobody and nothing except justice. Leading cases are those which establish principles. The other cases are particular applications of these principles.

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Also on principal and agent. *Paterson* v. *Gandesequi* shows that if the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give the credit to such agent, he cannot recover the value against the known principal; but it seems that if the principal be not known at the time of the purchase by the agent, the seller may elect which to sue, unless there is a trade usage to the contrary. The notes follow the next case.

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MONTAGUE *v.* BENEDICT 87

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LVIII.

VICARS *v.* WILCOCKS 94

Certain damage cannot be recovered as too remote. *Vicars* v. *Wilcocks*—a case as to which later decisions have introduced qualifications—decided that where special damage is necessary to sustain an action for slander it is not sufficient to prove a

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mere wrongful act of a third person induced by the slander, such as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted. The notes follow at the end of the next case.

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LXII.

FROST *v.* KNIGHT 105

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COMMON LAW CASES.

INTRODUCTION.

The following pages are intended to form an epitome of some of the Leading Cases in the Common Law of England. There is much in the old reports of these cases which the student will find it difficult to understand without some elementary knowledge of the history of that Common Law, of the Courts in which it was administered, and of the procedure which was followed in them. For some of the language employed is highly technical: and although the principles established by the cases—even the oldest of which is of practical importance in every day work in our own time—are extremely simple, it is of course essential to understand the words in which they are expressed.

The Common Law of England is a thing apart: there is nothing else quite like it in the world. In principle, its history begins with the history of our island. Even in Chaucer's time, the ideas connoted by the words "Common Law" were already old: and we read of the Sergeaunt-at-Lawe, one of the Canterbury Pilgrims, that

> "in termes of lawe had he the judgements all
> which from the tymes of King Wil were falle."

The Statutes of the Realm—like those of other countries—have been framed for all sorts of reasons with which justice has notoriously nothing to do: they are fashioned to please that part of the community which happens to have most power: and at the present day, when the mob is influential, they have popularity for their chief aim.

But the Common Law has arisen upon quite different lines. It is simply a collection of the decisions of the Judges, who do

not care at all for any Government or any section or anything in the world but right and wrong. They merely look to do justice between man and man. The Judges are more permanent than the Governments with which they have to do and they have no fear of anybody.

Ever since the Year-Books of Edward I. these decisions have been recorded in writing; the leading cases are those which lay down the basic principles : the rest are those which define their special applications. Each case tends to be a little different in some respect for those which go before; the Judges seek to follow the decisions given by their predecessors, making allowances for new circumstances and the advance of civilisation : and thus, "slowly broadening down from precedent to precedent," the Common Law stands where it does to-day—the nearest approach to perfection which a body of single-minded and intellectual men have been able in the centuries to evolve.

For those of his Majesty's Judges who administer the Common Law to-day are following out the same traditions, holding substantially the same offices, bearing the same titles, wearing almost to a button the same robes as those gentlemen in the Middle Ages who, under the ægis of the Christian Church and guided by its elevated morality, sought to do justice between man and man and followed the precedents of those who went before them and so built up the Common Law.*

In the reign of Edward I. the "Superior Courts of Common Law" received a constitution which endured unchanged almost until our own time.

These "Superior Courts of Common Law" were three in number; and the student must remember their names, for allusions to them will meet him on almost every page of the reports of the leading cases.

The first was the Court of Exchequer, originally intended principally to order the revenues of the Crown and to recover the King's debts and duties, but it afterwards became an ordinary Court of Common Law, administering justice not only

* Much of the foregoing is taken from the Editor's address to the Conference of the International Law Association held at Portsmouth in 1920—in which he sought to commend the Common Law of England as the model which the future international law of the world ought to follow.

between Crown and subject, but between subject and subject. Its Judges were called "Barons" and were presided over by the Lord Chief Baron.

The Court of Common Pleas was the fixed Court sitting at Westminster and not following the movements of the King. It was also called the Common Bench. It decided all controversies between subject and subject.

The Court of King's Bench—in which in theory the King himself is present—had a very high jurisdiction, keeping all inferior jurisdictions within the bounds of their authority, superintending civil corporations and protecting the liberty of the subject. But this Court too came to enjoy a general jurisdiction, administering justice between subject and subject.

From 1487 to 1641 the Star Chamber, exercising the authority of the King's Council, usurped many of the powers of the Superior Courts of Common Law. It was composed of the Chancellor, the Treasurer, the Keeper of the Privy Seal, the President of the Council, a Bishop and the Chief Justices. But in 1641 it was abolished by statute and never afterwards revived.

The Court of Exchequer Chamber was the Court of Appeal in which the decisions of the Superior Courts of Law could be questioned.

The House of Lords was the Supreme Court to which final appeals were brought.

The system called "equity" was administered by the Court of Chancery.

But by the Judicature Act, 1873, law and equity were fused into one and were to be concurrently administered in every cause by every Judge. The "High Court of Justice" was created, consisting of five divisions—the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce and Admiralty Division.

By Order in Council under this Act, in 1880 the Common Pleas Division and the Exchequer Division were abolished as separate Divisions and became part of the Queen's Bench Division (now the King's Bench Division).

From all of these there is an appeal to the Court of Appeal, and a final appeal lies from that Court to the House of Lords.

So much for the Courts.

The system of pleading which prevailed in the Superior Courts of Common Law before the Judicature Acts was as follows :—

Each party pleaded his own version of the facts.

The plaintiff began with the "declaration." It was intituled of the proper Court and of the day of the month when pleaded. The venue in the margin showed the county in which the plaintiff laid the action. The declaration then proceeded to allege in short and precise terms the circumstances of the plaintiff's complaint so as to show him entitled to maintain his action, and it concluded with an allegation of the amount of damages claimed.

The defendant might "demur" to the declaration and allege that it disclosed no cause of action, and the Court then tried the demurrer.

If he did not demur he had to plead. His plea might be either "dilatory" or "in bar." Dilatory pleas were those not connected with the merits : pleas in bar stated facts which afforded a defence.

The plaintiff might demur to the plea, or he might deliver a "replication" stating new facts which afforded an answer to the plea—only there must not be a "departure" or statement of facts inconsistent with the declaration.

What was a good "declaration," "plea" or "replication" was thus a test of what the Common Law was. And Bullen and Leake's "Pleadings" (1868 edition), containing the accepted collection of these pleadings, must be studied by every person who desires to understand the old Common Law on any point.

The present system of pleading is much more loose, and the "statement of claim," the "defence" and the "reply" substantially reproduce the ideas underlying the "declaration," the "plea" and the "replication" of former times.

Such in bare outline is the history of the English Common Law. The learned volumes known as "Smith's Leading Cases" should be carefully studied in the light of it. And many of the most important of them will be found epitomised in the following pages.

I.

TWYNE'S CASE (1601).

ON FRAUDULENT DEBTORS AND THE STATUTE OF ELIZABETH.

(1 Sm. L. C. 1; 3 Coke, 80.)

IN THE STAR CHAMBER.

INFORMATION against Twyne, for making and publishing a fraudulent gift of goods. Pierce was indebted to Twyne in £400 and to C. in £200. Pending an action by C. against Pierce, Pierce, being possessed of goods to the value of £300, by deed of gift conveyed them to Twyne in satisfaction of his debt, but Pierce continued in possession of the goods. He sold some of them. He shore the sheep and marked them with his mark. C. obtained judgment against Pierce, and issued a *fi. fa.*, and Twyne resisted execution.

Resolved:—That the gift was fraudulent within 13 Eliz. c. 5, on the following grounds:—

1. The gift was perfectly general, it included all Pierce had.

2. The donor continued in possession, and thereby could get credit as the ostensible owner.

3. It was made in secret.

4. It was made pending the writ.

5. There was a trust between the parties, and fraud is always clothed with a trust.

6. The deed contained an allegation that the gift was honestly and truly made, which was an inconsistent clause.

Notes to Twyne's Case.

It is, of course, a matter of the greatest difficulty for any man to ascertain when he may safely give credit to another. That other may be in apparent possession of property which is not his own, or the property may be really his own at the time when credit is given and he may have assigned it to a third person before the time when the creditor is in a position to enforce the payment of his debt by levying execution upon that property.

"The Statute of Elizabeth" (as 13 Eliz. c. 5 is usually called) explains its purpose in a preamble as follows: "for the avoiding and abolishing of feigned covinous and fraudulent feoffments gifts grants etc. as well of lands and tenements as of goods and chattels, more commonly practised in these days than hath been seen or heard of heretofore, which feoffments etc. have been and are contrived of malice fraud covin etc. to delay hinder or defraud creditors or others of their just and lawful actions suits debts etc., not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing and chevisance between man and man, without the which no commonwealth or civil society can be held together."

Such being the purpose of the Statute, it enacts by section 1 that "all and every feoffment gift grant etc. of lands, tenements, hereditaments goods and chattels or any of them, or of any lease rent etc. out of the same lands tenements etc. or any of them by writing or otherwise and all and every bond suit judgment etc. to or for any intent or purpose before declared and expressed (*i.e.* those mentioned in the preamble) shall be from henceforth deemed and taken (only as against that person or persons his or their heirs successors executors administrators and assigns and every of them; whose actions suits debts etc. by such guileful covinous etc. devices and practices as aforesaid are shall or might be in any wise disturbed hindered delayed or defrauded) to be clearly and utterly void frustrate and of none effect: any pretence colour feigned consideration expressing of use or any other matter or thing to the contrary notwithstanding."

But by section 5 it is provided that "this Act or anything therein

contained shall not extend to any estate or interest in lands tenements hereditaments leases, rents, commons, profits goods or chattels had made conveyed or assured, or hereafter to be had made conveyed or assured which estate or interest is or shall be upon good consideration and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin fraud or collusion as is aforesaid—anything before mentioned to the contrary notwithstanding."

Such being the provisions of the statute, it fell to the Judges in the Star Chamber (see p. 3 above) to apply them to the particular facts disclosed in *Twyne's Case*. It was resolved by the whole Court that the gift in question was "fraudulent and of no effect" within the meaning of the statute for the reasons which appear in the case as epitomised above.

Never, then, since that day has a fraudulent transfer of property on the lines devised by Twyne availed at English law to defraud the transferor's creditors, as soon as the true facts became known. *Twyne's Case* was a criminal information, but, as a precedent, its practical value is to give the creditors redress in a Court of civil law.

Nevertheless the difficulty mentioned at the beginning of this note was not altogether disposed of. There were still cases in which credit might mistakenly be given to a man who seemed to be rich—cases where, when the goods which seemed to be his were wanted for execution by his creditors, the goods could be shown to belong in law to another man.

In the first place, neither the Statute of Elizabeth nor *Twyne's Case* nor any provision of the Common Law prevents a debtor from openly and intentionally preferring a particular creditor or particular creditors to the rest. See *Alton* v. *Harrison*, 4 Ch. 622, and *Glegg* v. *Bromley*, [1912] 3 K. B. 474.

But see now the Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 44, by which "every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for

any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors shall *if the person* making taking paying or suffering the same *is adjudged bankrupt* on a bankruptcy petition presented within three months of the date of making taking paying or suffering the same be deemed fraudulent and void *as against the Trustee in Bankruptcy.*

" (2) The section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

" (3) When a receiving order is made against a judgment debtor in pursuance of section 128 of this Act this section shall apply as if the debtor had been adjudged bankrupt on a bankruptcy petition presented at the date of the receiving order."

The main point to be remembered is that this provision against undue preference is strictly confined to bankruptcy and cannot be raised in an ordinary civil action.

Again, there was another way in which creditors might be hindered and defeated, so far as the Statute of Elizabeth and *Twyne's Case* and the other decisions of the Common Law are concerned, and that was by a conveyance which was secret but as to which no *mala fides* could be shown.

But so far as written documents conveying chattels are concerned they must now comply with the Bills of Sales Acts, which, amongst other things, provide that bills of sale must be registered in accordance with the Acts, so that secrecy is impossible.

But this applies to writings only, and if there is a completed oral transaction, this need not be registered, even if a receipt be subsequently given.

In this case also there is a provision of the Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 38 (*c*), which must be borne in mind. By that section, " In case of bankruptcy the property of the bankrupt divisible among his creditors comprises all goods being at the commencement of the bankruptcy in the possession order or disposition of the bankrupt *in his trade or business* by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof—provided that things in action other than debts due or growing due to the

bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section."

Another way in which creditors may still be defeated is by showing that the goods in question are merely hired by the debtor and so are not his property. This is, of course, subject in the case of bankruptcy to the section just cited.

The goods in question may also, of course, *bonâ fide* belong to some other person living in the same house—especially the debtor's wife—or to the trustees of a valid marriage settlement.

It therefore frequently happens that when property is seized under an execution as belonging to the debtor it is lawfully claimed by a third party.

But, as will be seen above, there are many safeguards in the law as it stands to-day to prevent dishonest devices such as those which the preamble of the Statute of Elizabeth mentioned.

II.

DUMPOR'S CASE (1601).

ON THE EFFECT OF A LICENCE TO ALIEN AT COMMON LAW (NOW ALTERED BY STATUTE).

(1 Sm. L. C. 35; 4 Coke, 119*b*.)

IN THE COURT OF KING'S BENCH.

Decided:—That where there is a covenant not to alien without licence, and that licence is once given, the licence applies to all future acts of a like nature, so that no alienation afterwards, though without licence, is a breach of the covenant.

Notes to Dumpor's Case.

A wise landlord is very careful as to the tenant whom he puts in possession of his house. He will trust that tenant: he knows him to be financially sound. But he does not wish a stranger, of whom he knows nothing, to enter into possession in his stead. The actual decision in this case has ceased to

be law. For, by the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 1, a licence to do an act which would otherwise create a forfeiture or give a right of re-entry under a condition or power contained in the lease shall (unless otherwise expressed) extend only to the permission actually given, or the actual matter thereby authorised, and shall not prevent forfeiture or re-entry for any subsequent breach of covenant or condition not thereby authorised. This Act did not apply to an *actual* waiver of a breach of a covenant, which under *Dumpor's Case* destroyed the condition of re-entry; but 23 & 24 Vict. c. 38, s. 6, enacts that any actual waiver by a lessor of the benefit of any covenant or condition in the lease taking place after the passing of that Act (July 23, 1860) shall *not* be deemed to extend to any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear. The Statute in this case seems to make a more just provision than the Common Law. A landlord may approve an assignment to A., who is a good tenant: and it is not just that this consent should, *ipso facto*, extend to an assignment to B., who may be a bad tenant.

The principle, however, which *is* true, is that "Cases of forfeiture are not favoured in law: and when the forfeiture is once waived the Court will not assist it," *per* Lord Mansfield, C.J., in *Goodwright* v. *Davids*, 2 Cowp. 803.

III.

SPENCER'S CASE (1583).

ON COVENANTS RUNNING WITH THE LAND.

(1 Sm. L. C. 62; 5 Coke, 16.)

IN THE COURT OF QUEEN'S BENCH.

This was an action of covenant by the lessors of certain property against the assignees thereof, for not building

a wall upon the property as the original lessee had covenanted to do. The principal discussion in the case was as to what covenants would run with the land, and the following were the chief points decided:

1. That where the covenant extends to a thing *in esse* parcel of the demise (*e.g.*, a covenant to repair the demised buildings), the covenant is appurtenant to the thing demised, and binds the assignee without express words, as if the lessee covenants to repair the house demised to him, during the term; but *not* so, if the thing is not in being at the time of the demise (*e.g.*, a covenant to build a wall on the property let).

2. That where the lessee covenants for himself "*and his assigns*," to erect something *upon the thing demised* (*e.g.*, to build a wall or a house), forasmuch as it is to be done upon the land demised, that binds the assignee.

3. But even though the lessee covenant for himself "*and his assigns*," yet if the thing to be done be merely collateral to the land, and does not in any way touch or concern the thing demised (*e.g.*, to build a house on other land of the lessor), then the assignee cannot be charged.

Notes to Spencer's Case.

When there has once been a valid assignment, the next important thing is to ascertain what the result will be as to the covenants into which the parties have entered in the lease. *Spencer's Case* shows the nature of the covenants which will run with leasehold land.

A covenant is said to run with the land if either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land. A covenant is said to run with the reversion if either the benefit or the burden of it passes to the assignee of the reversion.

As to leaseholds, the better opinion is that *at common law* covenants did run with the land but did not run with the

reversion, so that the assignee of the lessee could both sue and be sued on the covenants in the lease, but the assignee of the lessor could neither sue nor be sued.

The rule that covenants did not run with the reversion seems to have proceeded from the rule that, though an estate could be assigned, a contract could not; so that, if a lessee covenanted to keep the buildings in repair, and the lessor sold his interest, he could not assign the benefit of this covenant, and consequently on breach of the covenant the assignee of the lessor could not sue in his own name, but had to get permission from the original lessor to bring an action in his name against the lessee.

This rule was first altered by 32 Henry 8, c. 34, which enacts that the assignee of the reversion on a lease shall have the same rights as the original lessor had—(1) by entry, for non-payment of rent or for doing waste or other forfeiture, and (2) by action only, for non-performance of other conditions, covenants, or agreements in the lease; and that the lessee and his assigns shall have the same remedy against the assignee of the reversion (which was vested in the lessor at the date of the covenant, *Muller* v. *Trafford*, 1901, 1 Ch. 54), on any covenant in the lease as he had against the lessor. The reason for this Act was that the lands of dissolved monasteries had been vested in the Crown, and often regranted, and it was found that neither the Crown nor its grantees could sue the lessees of the monasteries on the covenants in their leases; so a public statute was passed to remedy the defect. But the Act was construed to extend only to covenants which touch and concern the thing demised and not to collateral covenants and only to leases made by deed (*Smith* v. *Eggington*, L. R. 9 C. P. 145).

This Act only applied to the original reversion. Thus if A., seised in fee, leased to B. for ninety-nine years, and B. underleased to C. for twenty-one years, and A. sold his reversion to D., and D. bought up B.'s lease, D. had no remedies against C. on C.'s covenants in the underlease (*Thrcr* v. *Barton*, Moore 94), for the merger of B.'s reversion in the fee destroyed its incidents. The Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28, s. 6), partly remedied this defect by providing that, if a lessee surrendered his lease to get a renewal, he should retain his rights against his underlessee. And the Real Property Act, 1845 (8 & 9

Vict. c. 106, s. 9), enacts that if the reversion on any lease is surrendered or merged, the owner of the next vested estate shall be deemed the reversioner and have the lessor's rights against the lessee.

The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), with regard to leases made on or after 1st January, 1882, also contains provisions on this subject which somewhat enlarge the provisions of the above Act of Henry 8. The enactments referred to are as follows :—"Rent reserved by a lease and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed and performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled (subject to the term) to the income of the whole or any part, as the case may require, of the land leased" (Sect. 10). "The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of the reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled" (Sect. 11). Hence, if a mortgagor in possession makes a lease binding on the mortgagee, and the mortgagee gives notice to the lessee to pay rent to him, the mortgagee thereupon becomes the reversioner, and can sue and be sued on the covenants in the lease (*Wilson* v. *Queen's Club*, 1891, 3 Ch. 522).

IV.

SEMAYNE'S CASE (1604).

ON THE RIGHT OF A SHERIFF TO BREAK A HOUSE IN CERTAIN CASES AND ON THE MAXIM "EVERY MAN'S HOUSE IS HIS CASTLE."

(1 Sm. L. C. 115; 5 Coke, 91.)

IN THE COURT OF KING'S BENCH.

The following were the most important points resolved in this case:—

1. It is *not* lawful for the sheriff at the suit of a common person, to break the defendant's house to execute process, but if a defendant flies to or removes his goods to another man's house, the privilege does not extend to protect him there, and, after denial on request made, the sheriff may break the house.

2. In all cases where the king is party the sheriff may break the defendant's house, after request to open the doors.

3. When a house is recovered in a real action, the sheriff may break the house to deliver possession.

Notes to Semayne's Case.

When the plaintiff in an action has obtained judgment against the defendant, he cannot enforce it personally. It is the sheriff's duty under a writ of *fieri facias* to enter the premises where the defendant's property lies if he can do so in a lawful manner and seize sufficient property to satisfy the judgment.

It must be remembered that, although the sheriff is justified in entering a third party's house to execute process of the law upon defendant or his property, yet if it happen that defendant

be not there, or have no property there, the sheriff is a trespasser. When the sheriff has once obtained entry he can break open the inner doors, and where a defendant after arrest escapes, the sheriff may break his house, or the house of any person to which he escapes, to retake him. "Breaking a house" includes not only the forcing open the door, but even the opening of an unbolted window, though if the window is already partly open it is justifiable to open it further to effect an entry (*Crabtree* v. *Robinson*, 15 Q. B. D. 312; 54 L. J. Q. B. 544). The sheriff may break into any outhouse, shop, or warehouse, which is not connected with a dwelling-house (*Hodder* v. *Williams*, 1895, 2 Q. B. 663); but no outer door of any building may be broken to distrain for rent (*Long* v. *Clarke*, 1894, 1 Q. B. 119), though the distrainor may scale the garden wall and then enter by an open window (*ibid.*).

Even though express licence under seal is given to break and enter premises, this does not justify such an entry, for such a licence is void in its inception, and any forcible ejection by the act of the party is illegal. (5 Rich. 2, st. 1, c. 8; *Newton* v. *Harland*, 1 M. & Gr. 644; *Edridge* v. *Hawkes*, 18 Ch. D. 199; 50 L. J. Ch. 577).

V.

CALYE'S CASE (1604).

ON AN INNKEEPER'S LIABILITY FOR LOSS OF GOODS IN A COMMON INN.

(1 Sm. L. C. 131; 8 Coke, 32.)

IN THE COURT OF KING'S BENCH.

Resolved:—That if a man comes to a common inn, and delivers his horse to the hostler, and requires him to put him to pasture, which is done, and the horse is stolen, the innkeeper shall not answer for it. To charge

an innkeeper on the custom or common law of the realm for the loss of goods:—(1) The inn ought to be a common inn. (2) The party ought to be a traveller or passenger. (3) The goods must be in the inn (and for this reason the innkeeper is not bound to answer for a horse put out to pasture). (4) There must be a default on the part of the innkeeper or his servants in the safe keeping of his guest's goods. (5) The loss must be to movables, and therefore if a guest be beaten at an inn, the innkeeper shall not answer for it.

Notes to Calye's Case.

The law of England relating to innkeepers is founded upon what is called the "Custom of England" upon the subject, which custom is older than the Common Law itself. Although it dates from a period when the state of the country from a traveller's point of view was very different from what it is to-day, the main principles have never been changed. The law of host and guest at an "inn" to-day practically depends for the most part upon case-law of early years: although the comparison of various recent decisions is of great importance for its elucidation and—as in all departments of law—necessary for its *accurate* statement.

An inn is defined as "a house where the traveller is furnished with everything he has occasion for on his way." An innkeeper is defined as "one who professes to supply lodgings and provisions for the night, for all comers who are ready to pay therefore"; and he is bound to receive a traveller into his house and provide properly for him upon his tendering a reasonable price for the same, unless the inn be full (*Browne* v. *Brandt*, 71 L. J. K. B. 367) or the traveller is drunk or suffers from an infectious disorder or is a known thief or a constable on duty. If the innkeeper fails in his duty he may be indicted at common law, or is liable to an action (*Fell* v. *Knight*, 10 L. J. Ex. 277). If all his bedrooms are occupied, the innkeeper is not bound to

let a new guest spend the night in a sitting-room (*Browne* v. *Brandt*, 1902, 1 K. B. 696). A person who stays at an inn long enough to lose the character of a traveller can be compelled to leave on a reasonable notice (*Lamond* v. *Richard*, 1897, 1 Q. B. 541). A person received into the inn for temporary refreshment (*e.g.*, dinner, *Orchard* v. *Bush*, 1898, 2 Q. B. 284) becomes a guest (*Medawar* v. *Grand Hotel Co.*, 60 L. J. Q. B. 209). A person who professes to let private lodgings only, or to supply provisions only, is not an innkeeper; and if a man come to an inn on a special contract to board and lodge there, the law does not consider him as a guest but as a boarder, and to render a lodging-house or boarding-house keeper liable for the wrongful act of his servant, he must have been guilty of such a misfeasance or gross misconduct as an ordinary person would not have been guilty of (*Clench* v. *D'Arenberg*, 1 C. & E. 42).

At common law an innkeeper was liable for all losses, unless they arose through the act of God, the king's enemies, or the fault of the guest or his servant; but now, by the Innkeepers Act, 1863 (26 & 27 Vict. c. 41), an innkeeper is not liable to make good any loss of, or injury to, goods beyond £30, except (1) for a horse or other live animal, or gear appertaining thereto, or any carriage; or (2) where stolen, lost, or injured through the wilful act, or the default or neglect, of the innkeeper, or any servant in his employ; or (3) where the goods are deposited expressly with him for safe custody. But to entitle the innkeeper to the benefit of the Act, a true printed copy of section 1 must be exhibited in a conspicuous part of the hall or entrance to the inn (*Spice* v. *Bacon*, 2 Ex. D. 463; 46 L. J. Q. B. 713).

The word "expressly" in this section is used to show that the intention of the guest must be brought to the mind of the innkeeper or his agent in some reasonable and intelligent manner so that he may, if so minded, insist on the precautions specified in the proviso (*Whitehouse* v. *Pickett*, 1908, A. C. 357).

VI.

THE SIX CARPENTERS' CASE (1610).

ON THE LAW OF "TRESPASS AB INITIO."

(1 Sm. L. C. 145; 8 Coke, 146*a*.)

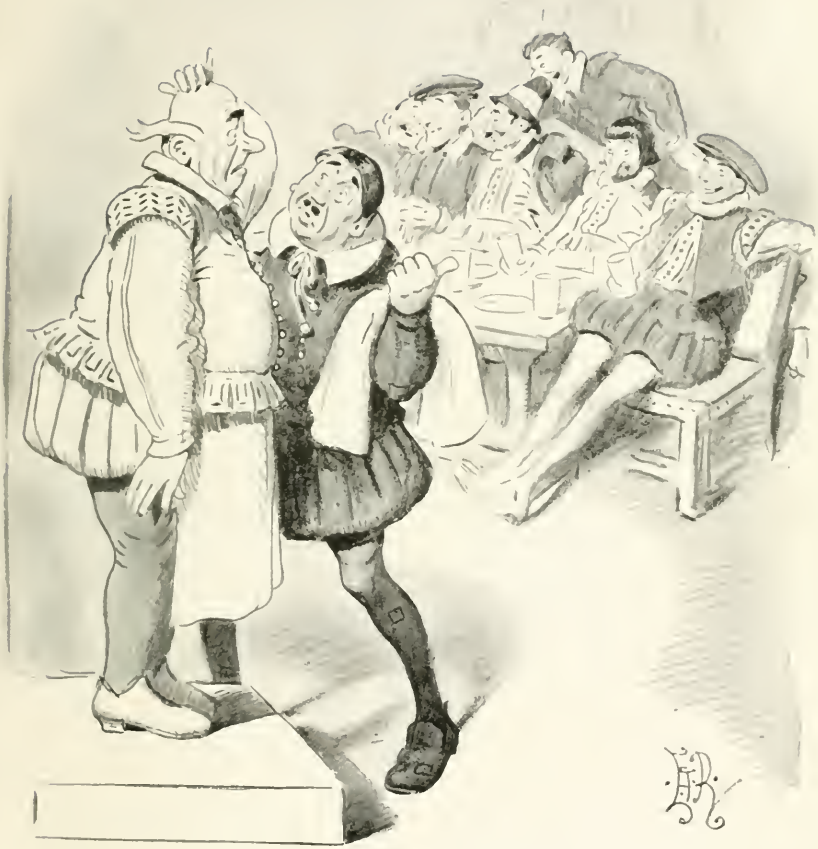
IN THE COURT OF KING'S BENCH.

Here six carpenters entered a tavern, and were served with wine for which they paid. They were afterwards, at their request, served with bread and more wine, which they consumed and then refused to pay for. Trespass was on these facts brought against the six carpenters, and the only point in the case was whether the non-payment made the entry into the tavern tortious. It was resolved (1) That if a man abuse an authority given by the law, he becomes a trespasser *ab initio*; but (2) Where the authority is given by the party and abused, there he is *not* a trespasser *ab initio*, but he must be punished for his abuse. (3) That non-feasance only cannot make the party who has the licence by law a trespasser *ab initio*, and therefore in this case the mere non-payment did *not* make the carpenters trespassers *ab initio*.

In the illustration Mr. Reed represents the serving man as saying: "Good master, doth not their non-payment render their entry tortious?" Mine host replies: "Beshrew me, varlet, but thou hadst best ask me another."

Notes to the Six Carpenters' Case.

The rule laid down in this case, that a man abusing an authority given him by the law becomes a trespasser *ab initio*, formerly applied to a distress. Distress by a landlord is a



Six Carpenters' Case.

Ye have trespassed with force and arms, ye Knaves
(The six be too strong for me),
But your tortious entry shall cost you dear,
And that the King's Court shall see.

—*Sir F. Pollock.*

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privilege of enormous importance. A landlord whose rent is unpaid need not bring an action for it : but he may distrain upon his tenant's goods. But, by the Distress for Rent Act, 1737, if any irregularity occurs in making a distress for rent justly due, the distrainor is not a trespasser *ab initio* (11 Geo. 2, c. 19, s. 19). If a landlord in distraining is not merely guilty of some irregularity, but distrains in an unauthorised way, he is then a trespasser from the commencement (*Grunnell* v. *Welch*, [1905] 2 Q. B. 650).

Distress by a landlord is not, however, the only kind of distress. See the note to the next case.

VII.

SIMPSON v. HARTOPP.

ON THINGS PRIVILEGED FROM DISTRESS.

1 Sm. L. C. 493; Willes, 512.

IN THE COURT OF KING'S BENCH.

Decided:—Implements of trade are privileged from distress for rent, if they be in actual use at the time, or if there be any other sufficient distress on the premises.

Notes to Simpson v. *Hartopp.*

A landlord's right to distrain gives him an important privilege. He need not proceed to sue for rent in arrear and obtain a judgment and put in the sheriff to execute that judgment. He may take personal chattels out of the possession of the defaulting tenant in order to procure satisfaction. Similar rights of distress obtain in certain other cases besides those of landlord and tenant, *e.g.*, in case of cattle damage-feasant and under some statutes (*e.g.*, for poor rates), and for omission to do service to the Lord's Court.

But to this right to distrain upon personal chattels there are many exceptions.

Willes, L.C.J., gave as the reason for the privilege enjoyed by implements of trade "because a man should not be left quite destitute of getting a living for himself and his family."

He also observed that whilst those implements were in the custody of any person, and used by him, it is a breach of the peace to take them.

For other things privileged from distress, see "Bullen on Distress," 1899 ed., p. 101.

VIII.

LAMPLEIGH v. BRAITHWAITE (1616).

ON CONSIDERATION FOR A CONTRACT.

(1 Sm. L. C. 159; Hobart 105.)

IN THE COURT OF COMMON PLEAS.

Decided:—That a mere voluntary courtesy will not uphold *assumpsit*, for to do so, it must be moved by a precedent request of the party who gives the promise, for then the promise, though it follows, yet is not alone, but couples itself with the request. Labour, though unsuccessful, may form a valuable consideration.

Notes to Lampleigh v. *Braithwaite.*

The law of England, which is in this respect different from certain other systems of law, definitely lays down that a contract cannot be supported without a valuable consideration. But it will be useful to observe here that such a consideration consists of either: "some benefit to the party making the promise, or to a third person by the act of the promisee, or some loss, trouble, inconvenience to, or charge imposed upon, the

party to whom the promise is made" (*Currie* v. *Misa*, L. R. 10 Ex. 162).

Considerations which, with reference to their nature, are divided into good and valuable, are also, with reference to time, called executed, executory, contemporaneous, and continuing. An executed or past consideration will not support an action unless founded upon a previous request expressed or implied; and this previous request will be implied in certain cases, of which the following are the chief :—

1. Where plaintiff has been compelled to do that which defendant ought to have done and was legally compellable to do.

2. Where plaintiff has voluntarily done that which defendant was legally compellable to do, and in consideration thereof the latter has afterwards expressly promised to repay or to indemnify him.

3. Where defendant has taken the benefit of the consideration.

4. Where the plaintiff has voluntarily done some act for the defendant which is for the public good—*e.g.*, in paying the expenses of burying a person in the absence of the one legally liable to pay the same.

IX.

COGGS v. BERNARD (1703).

ON THE LIABILITIES OF GRATUITOUS BAILEES.

(1 Sm. L. C. 191; 2 Lord Raymond, 909.)

IN THE COURT OF QUEEN'S BENCH.

Here the defendant had promised the plaintiff to take up several hogsheads of brandy then in a certain cellar, and lay them down again in a certain other cellar, safely and securely; and by the default of the defendant one of the casks was staved and a quantity of brandy spilt.

Verdict for plaintiff on a plea of not guilty, and on motion in arrest of judgment, *Decided:*—That if a man undertake to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for his pains. Lord Holt here classifies bailments as follows:—(1) *Depositum*, or a naked bailment of goods to be kept for the use of the bailor. (2) *Commodatum*, where goods are lent to the bailee gratis to be used by him. (3) *Locatio rei*, where goods are lent to the bailee for hire. (4) *Vadium*, pawn. (5) *Locatio operis faciendi*, where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee. (6) *Mandatum*, a delivery of goods to somebody who is to carry them or do something about them gratis.

X.

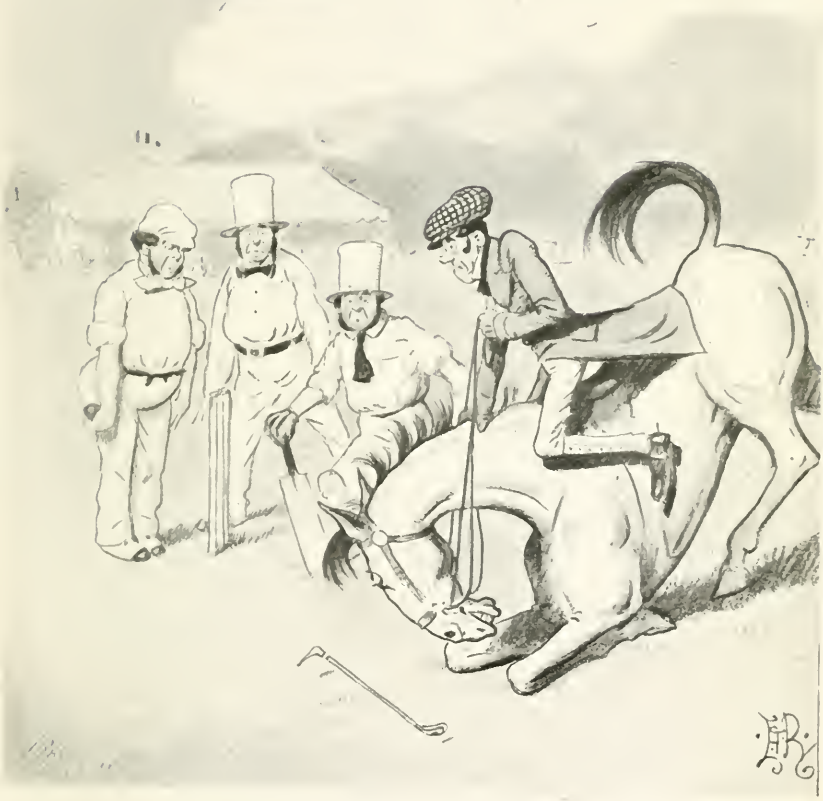
WILSON v. BRETT (1843).

ALSO ON THE LIABILITIES OF GRATUITOUS BAILEES.

(11 M. & W. 113.)

IN THE COURT OF EXCHEQUER.

Decided:—That a person who rides a horse, at the request of the owner, for the purpose of exhibiting and offering him for sale without any benefit to himself, is bound to use such skill as he possesses; and if proved to be conversant with and skilled in horses, he is equally liable with a borrower for an injury done to the horse, for he is bound to use the skill which he possesses.



Wilson v. Brett.

Brett conversant seemed to be
With our equine friend the "gee."
Hence a certain skill must show,
Such as horsy men do know.

—*W. Dennes.*

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Notes to Coggs v. *Bernard and Wilson* v. *Brett.*

A "bailment" may be defined as a delivery of personal chattels in trust, on a contract, express or implied, that the trust shall be duly executed and the chattels redelivered in either their original or an altered form as soon as the time or use for which they were bailed shall have elapsed or been performed (Halsbury, I., 524).

The principles above laid down extend beyond bailments.

These two cases are quoted together, the first as being the leading case on the subject, and showing the general principle that though a gratuitous bailee is not liable for nonfeasance, yet he is chargeable for misfeasance when it amounts to *gross* negligence; and the latter as somewhat altering this general principle, by deciding that if the gratuitous bailee is in such a situation as to imply skill in what he undertakes to do, then if in acting he omits to use that skill, such omission is imputable to him as gross negligence.

It may be stated generally thus : a gratuitous promisor is not liable for nonfeasance, but is liable for gross negligence in performance (*Skelton* v. *L. & N. W. Ry.*, L. R. 2 C. P. at 636); for the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in performance thereof (*Shillibeer* v. *Glynn*, 2 M. & W. 143). So in *Wilkinson* v. *Coverdale* (1 Esp. 75), where C. gratuitously promised to insure a house for W. and did it so carelessly that W. was not able to sue upon the policy, C. was held liable to W.

The principal case of *Coggs* v. *Bernard* should be studied *in extenso*. For there will be found a whole essay of learning by Holt, C.J., showing the six kinds of bailments, viz., *Depositum* (bailment without reward), *Commodatum* (lending gratis), *Locatio rei* (lending for hire), *Vadium* (pawn), *Locatio operis faciendi* (goods entrusted to be safely kept or carried or to have some work done upon them for hire or reward), and *Mandatum* (goods delivered to somebody who is to carry them or do something about them gratis). And the notes to this case in "Smith's Leading Cases" form a valuable treatise on the whole subject of bailments.

XI.

ASHBY v. WHITE (1703).

ON THE MAXIM "UBI JUS IBI REMEDIUM."

(1 Sm. L. C. 266; 2 Lord Raymond, 938).

IN THE HOUSE OF LORDS.

At an election of burgesses for Parliament, the plaintiff, being entitled to vote, tendered his vote for two candidates; but such vote was refused, and notwithstanding those candidates for whom the plaintiff tendered his vote were elected, yet he brought this action against the constables of the borough for refusing to admit his vote. *Decided*:—That the action was maintainable, for it was an injury, though without any special damage.

Notes to Ashby v. *White.*

The above case decides that although a person has suffered no actual or real damage, yet if he has suffered a legal wrong or injury, capable in legal contemplation of being estimated by a jury, an action lies. But the decision in this case must be carefully distinguished from those cases in which damage is sustained by the plaintiff, which damage is not occasioned by anything which the law considers an injury. In such cases the party damaged is said to suffer *damnum sine injuria*, and can maintain no action.

In *Chapman* v. *Pickersgill*, 2 Wilson 146, which was an action for falsely and maliciously suing out a commission of bankruptcy, Pratt, C.J., in answer to the objection that the action was of a novel description, said :—"So it was said in *Ashby* v. *White*. I never wish to hear this objection again. This action is for a tort. Torts are infinitely various, not limited or confined. For there is nothing in nature but may be an instrument of mischief."

XII.

BIRKMYR v. DARNELL (1704).

ON THE STATUTE OF FRAUDS.

(1 Sm. L. C. 335; 1 Salkeld, 27.)

IN THE COURT OF QUEEN'S BENCH.

Decides:—That a promise to answer for the debt, default, or miscarriage of another person, for which that other remains liable, is within section 4 of the Statute of Frauds, but *not* if that other does not remain liable.

Notes to Birkmyr v. *Darnell.*

The 4th section of the Statute of Frauds speaks *inter alia* of "any special promise to answer for the debt, default, or miscarriage of another person," and requires writing in such a case. The fair result of the cases seems to be "that the question whether each particular case comes within this clause of the statute or not depends, not on the consideration of the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property except such as arises from his express promise (1 Wms. Saund., p. 233, approved by Cockburn, C.J., in *Fitzgerald* v. *Dressler*, 7 C. B. N. S. 374, 392).

XIII.

PETER v. COMPTON (1694).

ALSO ON THE STATUTE OF FRAUDS.

(1 Sm. L. C. 353; Skinner, 353.)

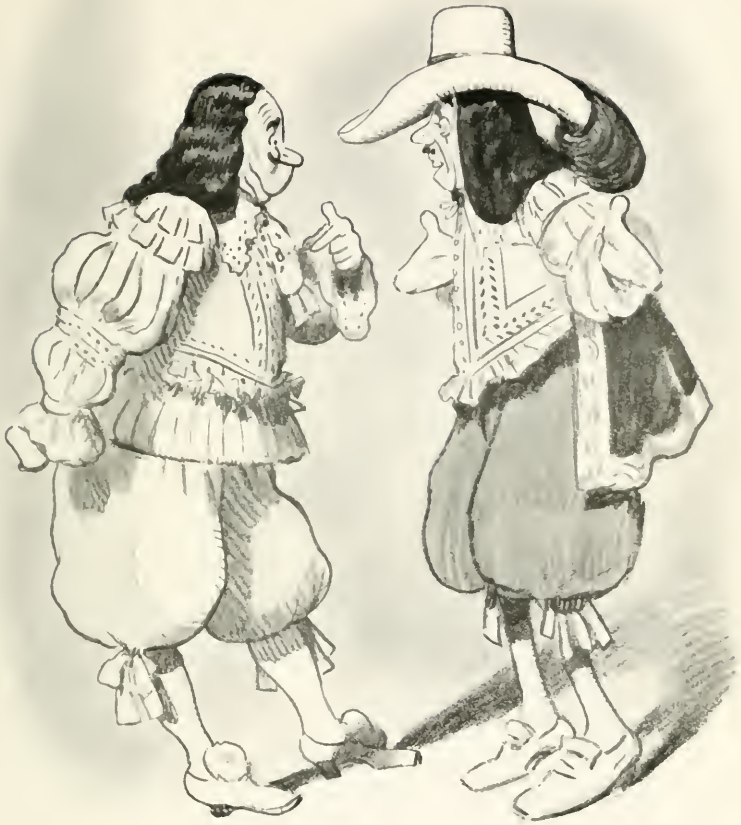
IN THE COURT OF KING'S BENCH.

This was an action upon an agreement of the defendant, in consideration of one guinea paid him, to give the plaintiff fifty on the day of his marriage. The marriage did not happen within a year, and the question was, whether or not the agreement must be in writing. *Decided:*—That "an agreement which is not to be performed within one year from the making thereof" means, in the Statute of Frauds, an agreement which, from its terms, is incapable of being performed within the year; and therefore the agreement in this case need not be in writing.

Notes to Peter v. *Compton.*

One of the most important practical studies for a student of law, intending to make it his profession, is the Statute of Frauds. It has a vast importance in thousands of the affairs of life. There is no subject upon which a layman is more certain to need advice from time to time than as to the effect of his omission to obtain a written acknowledgment from the man with whom he has made a bargain. The rules are highly artificial, but by no means arbitrary.

It is necessary first to read with the most scrupulous care the exact words of the 4th section of the Statute of Frauds (29 Car. 2,



Peter v. Compton.

"But marrying is a contract.
Which in writing need not be
For twelve months might have ample been
Though Pete took twenty-three."

—*A. J. Lamb.*

To face page 26.

c. 3) :—"No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement which is not to be performed within one year from the making thereof, *unless* the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

The above two cases are therefore on two of the agreements mentioned in this section, viz., guarantees and agreements not to be performed within a year. The case of *Birkmyr* v. *Darnell* is on the point of guarantee, deciding that if the original party remains liable, then the agreement is within the statute, and must be in writing; but if the original party does not, in fact, remain liable, then it is entirely a fresh agreement, and not within the statute; and a guarantee is therefore properly defined as a collateral promise to answer for the debt, default, or miscarriage of another for which that other remains primarily liable. The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), enacts in section 3 that the consideration for a guarantee need not appear on the face of the written instrument; and the same statute also (section 5) enacts that a surety who discharges the liability of his principal is to be entitled to an assignment of all securities held by the creditor, even although they may be deemed at law to be satisfied by his payment. The Partnership Act, 1890 (53 & 54 Vict. c. 39, s. 18), enacts that a continuing guarantee given either to a firm or to a third person in respect of the transactions of a firm is (unless otherwise agreed) revoked as to future transactions by any change in the constitution of the firm to which, or for which, the guarantee was given.

The case of *Peter* v. *Compton* well explains what is meant by an agreement not to be performed within one year from the making thereof, showing that where on the face of the agreement

it is capable of being performed within the year, then it is outside the statute, and need not be in writing; though where, from its very terms, it is incapable of being so performed, then it must be in writing. However, with regard to this case, there is this to be observed, that it might have been decided in the same way upon another ground, viz., that all which was to be done by one of the parties was to be done within a year (*Donellan* v. *Read*, 3 B. & Ad. 899). See also *McGregor* v. *McGregor* (21 Q. B. D. 424; 57 L. J. Q. B. 591), where it was held that an oral agreement between a husband and wife to separate, and that the husband should pay his wife £1 a week, was not within the statute, and need not be in writing. A contract made on one day for one year's service to commence on the next day is outside the statute and need not be in writing (*Smith* v. *Gold Coast Explorers*, 72 L. J. K. B. 235); but it would be otherwise if a contract is made on Monday for a year's service to begin on Wednesday (*Britain* v. *Rossiter*, 48 L. J. Q. B. 362).

Before this famous statute was passed all manner of frauds and perjuries multiplied and became daily more prevalent. "Be it enacted," says the preamble of the Act, "for the prevention of many fraudulent practices, which are *commonly endeavoured to be upheld by perjury and subornation of perjury*." The evils and dangers from this cause became so great as to interfere seriously both with the course of trade and with the administration of justice. The student should always regard the 29 Car. II. c. 3 as one of the most important of our Acts of Parliament, and should know its two special sections (4 and 17) by heart, and see that he has a thorough understanding of them.

XIV.

WAIN v. WARLTERS (1804).

ALSO ON THE STATUTE OF FRAUDS.

(1 Sm. L. C. 361; 5 East, 10.)

IN THE COURT OF KING'S BENCH.

Decided:—That by the word "agreement" in section 4 of the Statute of Frauds (29 Car. 2, c. 3), must be understood not only the promise itself, but also the consideration for the promise; so that a promise appearing to be without consideration on the face of the written agreement was held *nudum pactum*, and gave no cause of action.

Notes to Wain v. *Warlters.*

When does a promise "appear to be without consideration on the face of a written agreement?" It is sufficient if the consideration is capable of being implied from the writing, though it does not actually appear on its face; thus it is not necessary in a contract in writing for the sale of goods, that the price of the goods should be actually named, if in fact no specific price has been agreed on, for it will be implied that the contract is to pay a reasonable price. But if a specific price is agreed on, then that price must be mentioned in the contract, and oral evidence would be inadmissible (*Hoadley* v. *M'Laine*, 10 Bing. 482).

The decision in *Wain* v. *Warlters* is now subject to the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3, which provides that a guarantee shall not be invalid by reason only that a consideration does not appear in writing or by necessary inference from a written document. But of course there must even here be a consideration, though it need not appear in the written document.

In the case also of bills of exchange and promissory notes, by the custom of merchants it is not necessary that the consideration should appear on the face of the instrument.

XV.

PAGE v. MORGAN (1885).

ALSO ON THE STATUTE OF FRAUDS.

(15 Q. B. D. 228; 54 L. J. Q. B. 434.)

IN THE COURT OF APPEAL.

In this case the plaintiff had sold certain wheat by sample to the defendant, the contract being by word of mouth only and the price over £10. The plaintiff sent the wheat by barge to the defendant's mill, where it arrived late one evening, and the next morning the defendant had a portion of it taken into the mill, and after examining it he then rejected the whole of the wheat on the ground that it was not equal to sample. The plaintiff brought this action for the price, and the defendant set up that the provisions of the 17th section of the Statute of Frauds had not been complied with, and that therefore there was no good contract.

Decided:—That there was a good contract within the 17th section of the Statute, there having been an acceptance and receipt within the meaning of that section—that the only acceptance required by the Statute was such a dealing with the goods as could but have taken place upon admission of a contract, and that the defendant, acting as above stated, and his rejection on the above

ground, clearly amounted to a recognition of the contract.

Notes to Page v. *Morgan.*

We have now come to the other important section of the Statute of Frauds—the 17th. Strictly speaking, this section has been repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). But it has been re-enacted by section 4 of this last-named Act—so that for all practical purposes the 17th section of the Statute of Frauds and the cases decided thereunder still contain the law of the land.

Every word of it must be read with care. It runs as follows :—(1) "A contract for the sale of any goods of the value of £10 or upwards, shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent on that behalf. (2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract by actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery. (3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not."

It will be noticed that under this enactment, to render the contract actionable there must be either writing, earnest, part payment, or acceptance and receipt. The point of chief difficulty on the 17th section of the Statute of Frauds was as to what would amount to "acceptance and receipt," and the above case of *Page* v. *Morgan* decided that what was really required by the statute was a recognition of the contract, and that though acceptance and receipt are two distinct things, yet receipt under such circumstances as to import recognition of the contract is also the acceptance contemplated by the statute.

In this case there was a plain recognition of the contract, for if there was no contract, why did the defendant take the goods into his mill for examination? It will be observed that the third clause of section 4 of the Sale of Goods Act, 1893, practically declares the law to be as laid down in *Page* v. *Morgan*, and this case forms a good illustration of the meaning of that enactment. *Abbott* v. *Wolsey* (1895, 2 Q. B. 97; 64 L. J. Q. B. 587) is a case decided on section 4 of the Sale of Goods Act, 1893, is on the same point, and is even a stronger case than *Page* v. *Morgan*. In that case there was an oral contract for the sale of hay for more than £10. The hay was sent on a barge to the buyer's wharf, and the buyer went on to the seller's barge, looked at the hay, rolled some back to examine it, and ultimately refused to have it. It was held that there had been a sufficient recognition of the contract to satisfy the provisions of the statute.

XVI.

CUMBER v. WANE (1719).

ON SATISFACTION OF A DEBT.

(1 Sm. L. C. 376; 1 Strange, 426.)

IN THE COURT OF KING'S BENCH.

Decided:—(1) That giving a note for £5 cannot be pleaded in satisfaction of £15.

(2) If one party die while the Court is considering its judgment, a judgment may be entered *nunc pro tunc*.

Notes to Cumber v. *Wane.*

When a contract has once been made, the parties have, of course, certain rights under it. There is no "valuable consideration" in giving a man that to which he already has a right.

The principal decision in *Cumber* v. *Wane* means that a smaller sum cannot be given in extinguishment of a greater,

though something else might so operate; thus a horse might be given in discharge of a debt of £15, though it was not worth even £5. This would be a case of accord and satisfaction. It should be here observed that in the above case it does not appear that the note was a negotiable note, and it has since been decided that a *negotiable* security may operate, if so given and taken, in satisfaction of a debt of greater amount (*Sibree* v. *Tripp*, 15 M. & W. 23), the point being that where anything not actually money, but of a different value, is given, the Court will not enter into the question of its adequacy. This principle also applies to a cheque, so that where A. being indebted to B. in £125 7s. 9d. for goods sold and delivered, gave B. his own cheque for £100, payable on demand, which B. accepted in satisfaction, it was held that this amounted to a good accord and satisfaction (*Goddard* v. *O'Brien*, 9 Q. B. D. 37). Again, if there is any doubt or any *bonâ fide* dispute as to the amount due, a smaller sum may be a satisfaction of a larger amount claimed. A smaller sum may also be satisfaction of a greater if a receipt is given under seal; and under the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 18, a majority in number and three-fourths in value of all the creditors who have proved in bankruptcy proceedings may resolve to accept a composition which shall afterwards, when approved by the Court, bind all the creditors, and the payment of which composition will duly discharge the debtor. By the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 62, it is enacted that a bill or note is discharged if the holder at or after maturity absolutely and unconditionally renounces his rights against the acceptor or maker, either in writing or by delivering up the instrument; and in the same way the holder may renounce his rights against any party to the instrument before, at, or after maturity. But it seems that a bare agreement, even in writing, to take payment otherwise than as provided by the bill or note is no answer to a claim thereon.

Following out the principle of the above case, it has been held that an agreement between a judgment debtor and his judgment creditor, that in consideration of the debtor paying down part of the judgment debt and costs, and in consideration of his paying to the creditor the residue by instalments, the creditor

would not take any proceedings on the judgment, was *nudum pactum*, being without consideration, and did not prevent the creditor, after payment of the whole debt and costs, from proceeding to enforce payment of the interest upon the judgment (*Foakes* v. *Beer*, 9 App. Cas. 605; 54 L. J. Q. B. 130). This case was followed in *Underwood* v. *Underwood*, 63 L. J. P. 109, where the Divorce Court had ordered a husband to pay £40 a year alimony to his wife, and by a signed agreement between the husband and wife made when £16 arrears were due the wife agreed to give up the arrears and all future payments for £10 cash. The agreement was held void.

As to the second point decided by the principal case, it is founded on the maxim, *Actus curiæ nemini facit injuriam*. The practice only prevails in the case of delay by the Court (*Wilkes* v. *Perkes*, 5 Man. & Gr. 376).

XVII.

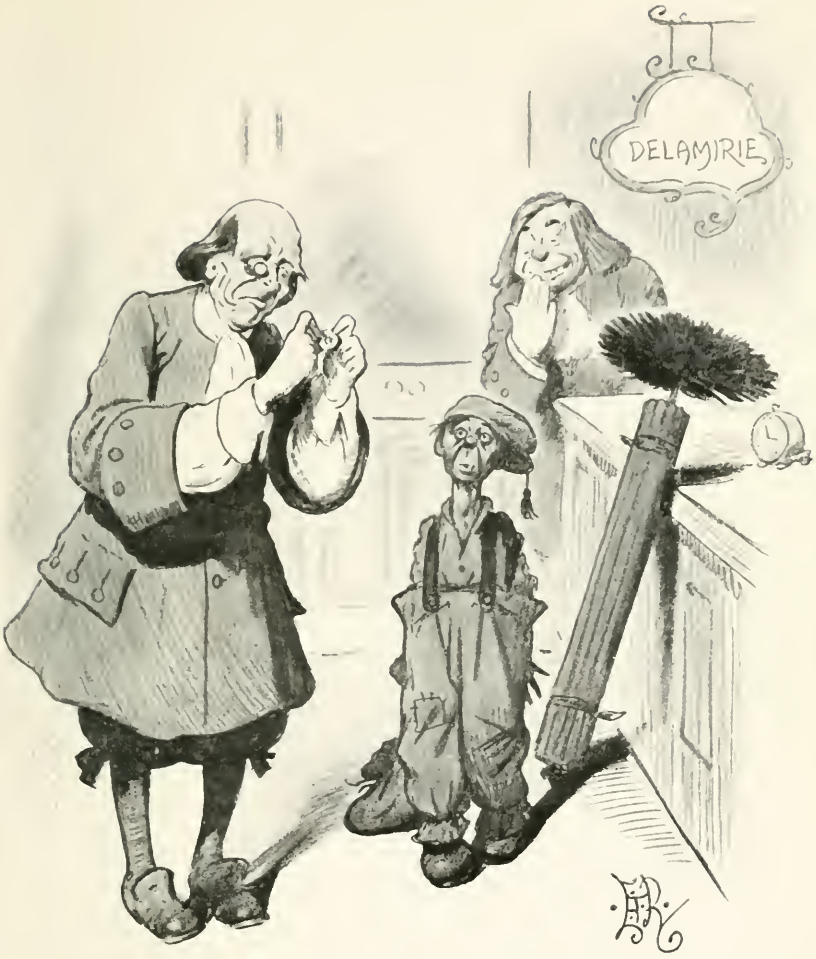
ARMORY v. DELAMIRIE (1722).

ON THE FINDER'S TITLE AGAINST A WRONGDOER.

(1 Sm. L. C. 396; 1 Strange, 504.)

IN THE COURT OF KING'S BENCH.

The plaintiff, being a chimney-sweeper's boy, found a jewel, and carried it to the shop of the defendant, who was a goldsmith, to know what it was. He delivered it to an apprentice, who took out the stone, and the master offered him three-halfpence for it. The plaintiff refused to take it, and insisted on having it returned, whereupon the apprentice delivered him back the socket without the stone; and so the plaintiff now brought an action of trover against the master. *Decided*:—(1) The finder of a



Armory v. Delamirie.

Armory by seeking trover,
Showed he wasn't mad,
For barring then the rightful owner,
His title wasn't bad.

—*A. J. Lamb.*

jewel may maintain an action for conversion thereof against the wrongdoer, for he has a good title against all but the right owner. (2) A master is liable for a loss of his customer's property intrusted to his servant in the course of his business. (3) When a person, who has wrongfully converted property, will not produce it, it shall be presumed as against him to be of the best description.

Notes to Armory v. *Delamirie.*

The incident upon which this case is founded is a good illustration of the working of the common law. The chimney-sweeper's boy, having had the luck to find something valuable, naturally resented the dishonest treatment which he received in the goldsmith's shop : and he went confidently to the Courts of his country for redress, knowing that he would receive there justice according to law exactly as the highest of his Majesty's subjects would have done. And it so happened that, out of this simple incident, three important points of law arose for argument, and judgment was given upon each of them.

The first was this : Bare possession is sufficient title against an entire stranger, *i.e.*, against one who can show no superior title. The goldsmith's apprentice doubtless reasoned that the jewel was not the boy's property. Nor was it. "Finding's keeping" *simpliciter* is not the law of England. The real owner might have recovered the jewel. But real owners in such cases are often not discoverable, and still more often are not discovered in fact. If a person to whom goods are offered for sale doubt the honesty of the person bringing them, he should inform the police. But even if he does not take any course intended to protect the real owner, he must know that as between himself and the finder the latter has the better title. The principle thus established is of immensely wide application, and applies not only to chattels but to land. Hence in actions of ejectment the plaintiff must recover by the strength of his own title, not the weakness of his antagonist's.

The second point in the principal case is that a master is answerable for the act or default of his servant in the course of his employment. If the act was in the scope of his employment it matters not that the master had forbidden the servant to do the particular act (*Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526, 539).

The third point in the case is an illustration of the maxim, *Omnia presumuntur contra spoliatorem.* See *Clunnes* v. *Pezzey*, 1 Camp. 8; where it appears that if goods are sold without any express stipulation as to their price, and the seller refuses to give any express evidence of their value, they are presumed to be worth only the lowest price for which goods of that description usually sell—unless the buyer himself be shown to have suppressed the means of ascertaining the truth, for then a contrary presumption arises and they are taken to be of the very best description.

XVIII.

THE DUCHESS OF KINGSTON'S CASE (1776).

ON THE DOCTRINE OF ESTOPPEL.

(2 Sm. L. C. 754; 20 Howell St. Tr. 537.)

IN THE HOUSE OF LORDS.

In this case there were two questions submitted to the Judges:—(1) Is the sentence of a spiritual court against a marriage, in a suit for jactitation of marriage, conclusive, so as to stop the counsel for the Crown from proving the said marriage in an indictment for bigamy? (2) Admitting such sentence to be conclusive upon such indictment, may the counsel for the Crown be admitted to avoid the effect of the sentence by proving the same to have been obtained by fraud or collusion?

Decided:—(1) That the sentence was *not* so conclusive. And (2) That even admitting that it were, yet it might be avoided by showing fraud or collusion.

XIX.

COLLINS v. BLANTERN. (1767.)

ALSO ON THE DOCTRINE OF ESTOPPEL.

(1 Sm. L. C. 412; 2 Wilson, 341.)

IN THE COURT OF COMMON PLEAS.

In this case the plaintiff sued on a bond executed by certain parties, of whom the defendant was one, the obligation of which was £700 conditioned for payment of £350. The defendant pleaded the following facts, which showed that the consideration though not appearing on the face of the bond was illegal: Certain parties were prosecuted for perjury by one John Rudge, and pleaded not guilty. According to an arrangement the plaintiff gave his promissory note to the prosecutor, John Rudge, he to forbear further prosecuting, and as part of the arrangement the bond on which plaintiff sued was executed to indemnify him. The question was whether such a plea was good. *Decided:*—That the plea was good, for illegality may be pleaded as a defence to an action on a bond.

Notes to the Duchess of Kingston's Case and Collins v. *Blantern.*

"Estoppel" may be defined as "an admission, or something treated by the law as equal to an admission, of such a high and conclusive character, that the party whom it affects is not permitted to answer or offer evidence against it." Estoppel is of three kinds, (1) By matter of record, (2) By deed, (3) *In*

pais, which means matter of fact or circumstances, *e.g.*, where an infant makes a lease, and accepts rent after he comes of age, or where any person stands by and allows a thing to be done. The first of the above two cases deals with the subject of estoppel by matter of record. The second deals with estoppel by deed, and particularly shows that the doctrine does not apply where fraud or illegality exists.

XX.

MERRYWEATHER v. NIXAN (1799).

ON THE LAW OF CONTRIBUTION.

(1 Sm. L. C. 443; 8 T. R. 186.)

IN THE COURT OF KING'S BENCH.

Decided:—That if A. recover *in tort* against two defendants and levy the whole damage on one, that one cannot recover a moiety against the other for his contribution; though it is otherwise in assumpsit.

Notes to Merryweather v. *Nixan.*

The rule that there is "No contribution between tort-feasors" seems to result from the maxim, *Ex turpi causâ non oritur actio*, and the whole decision may be shortly expressed by saying that as between defendants *ex contractu* the law allows contribution, but not between defendants *ex delicto*. An exception was created by the Directors Liability Act, 1890 (53 & 54 Vict. c. 64), which provides (section 5) that in case of untrue representations made by directors of companies whereby they become liable to pay damages under the Act, each director shall be entitled to contribution *as in cases of contract* from any other person who, if sued separately, would have been liable. (See now the Companies (Consolidation) Act, 1908, s. 84.)

In considering this subject, reference should also be made to the Libel Act, 1888 (51 & 52 Vict. c. 64), s. 5, which provides for

the consolidation of different libel actions in respect of the same or substantially the same libel, and that the damages shall then be assessed in one sum; but that the damages shall be apportioned, and the result be generally the same as if the actions had been tried separately.

In an action of tort against several defendants who appear together, the proper judgment is against them all for the entire amount of the damages and costs; but when the defendants sever in their defences, then, though each defendant is liable for the whole damages and the general costs of the action, yet the costs of and incidental to the separate defence are to be taxed against each individual only, and not against the others (*Stumm* v. *Dixon*, 22 Q. B. D. 529; 58 L. J. Q. B. 183).

Where a person instructs another to do an act manifestly illegal in itself, and that other does it, he has no right to be indemnified by the person so instructing him although he had undertaken to indemnify him from the consequences; but it is otherwise if the act is not manifestly illegal, and he did not know it to be so. Thus where A. ordered firebricks to be made by B. with a certain mark on them, which A. knew, but B. did not know, was C.'s trade-mark, and C. got an injunction with damages and costs against B., it was held B. could recover those damages and costs from A. (*Dixon* v. *Fawcus*, 30 L. J. Q. B. 137). In *Burrows* v. *Rhodes* (68 L. J. Q. B. 545) a person who had been induced, by the fraud of the defendant, to do a criminal act in the belief that it was innocent, was allowed to recover from the defendant all losses he had sustained.

Where an action is brought against a person who has by reason of contract, or on some equitable principle, a claim for contribution or indemnity over against some other person or persons, a special course is now given for his protection, whereby he can bring such third parties in, in that action, bind them by the proceedings, and actually recover his contribution or indemnity in that action. See Rules of the Supreme Court, Order XVI., Rules 48—55.

XXI.

MITCHELL v. REYNOLDS (1711).

ON RESTRAINT OF TRADE.

(1 Sm. L. C. 458; 1 P. Wms. 181.)

IN THE COURT OF QUEEN'S BENCH.

Here the defendant had assigned to the plaintiff a bakehouse, and had executed a bond not to carry on the trade of a baker within the parish for a period of five years, under a penalty of £50. This action was now brought on the bond, and the defendant pleaded that it was void at law. *Decided:*—That the bond was good, as it only restrained the defendant from trading in a particular place, and was on a reasonable consideration, but that it would have been otherwise if on no reasonable consideration, or to restrain a man from trading at all.

XXII.

MALLAM v. MAY (1843).

ALSO ON RESTRAINT OF TRADE.

(11 M. & W. 653.)

IN THE COURT OF EXCHEQUER.

By articles it was agreed that defendant should become assistant to the plaintiffs in their business of surgeon-dentists for four years; that plaintiffs should instruct him in the business of a surgeon-dentist; and that after the expiration of the term the defendant should not carry on that business in London, or in any of the towns or

places in England or Scotland where the plaintiffs might have been practising before the expiration of the said service. *Decided:*—That the stipulation not to practise in London was valid, the limit of the City of London not being too large for the profession in question, but that the stipulation as to not practising in towns where the plaintiffs might have been practising during the service was an unreasonable restriction, and therefore illegal and void; and, finally, that the stipulation as to not practising in London was not affected by the illegality of the other part.

Notes to Mitchell v. *Reynolds and Mallam* v. *May.*

It is often very reasonable to make certain stipulations in restraint of trade. It is of no use to buy an established business if the vendor may start a business of his own in such a way as to make it likely that he will win back the very business he has sold.

In *Mitchell* v. *Reynolds* it was held that all contracts in general restraint of trade were void, because they tended to discourage industry, enterprise, and competition, and this is generally the case even now; but there may be exceptional cases under which a restraint without limit may be held good. This has been established by *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (1894, A. C. 535; 63 L. J. Ch. 908), in which it was laid down that a contract in restraint of trade which is even general in its nature is not necessarily invalid (though it usually is); but the true test of the validity of such a contract is whether it is or is not unreasonable, and that a covenant of this kind may be unlimited, provided that it is not more than is reasonably necessary for the protection of the covenantee and is in no way injurious to the interests of the public. The question of reasonableness or unreasonableness must mainly depend on the circumstances of each particular case, for naturally some trades or callings may require a wider limit than others, and it is therefore impossible to lay down any fixed rule as to when a restraint will be reasonable and when it will not. "The reasonableness of a

contract depends on its true construction and legal effect and is consequently a question for the Court and on such a question the opinion of witnesses is out of place." (*Haynes* v. *Doman*, 1899, 2 Ch. 13, 24.) In the *Nordenfelt Case*, a manufacturer of guns and ammunition for war sold his business and covenanted not to compete for twenty-five years in any part of the world, and this was held valid. (See also *Fitch* v. *Dewes* (House of Lords, 1921), 90 L. J. Ch. 436.)

The case of *Mallam* v. *May* plainly shows that agreements in restraint of trade are divisible, *i.e.*, part may be void while part remains good. But only if they can be put into separate and clearly defined divisions. (*Mason* v. *Provident Co., Ltd.*, 1913, A. C. 724; *Atwood* v. *Lamont*, 1920, 3 K. B. 571.) With regard to all contracts in restraint of trade, it is important to remember that to render them good they must always be founded on a valuable consideration, and this notwithstanding that the contract may be under seal, in which we find an exception to the rule that contracts under seal require no consideration.

When the goodwill of a business is sold, the vendor should always be reasonably restrained by agreement from carrying on a like business. If there is no prohibition of this kind, there is nothing to prevent the vendor setting up a similar business; but the vendor must not solicit the former customers (*Trego* v. *Hunt*, 73 L. T. 514, overruling *Pearson* v. *Pearson*, 27 Ch. D. 145; 54 L. J. Ch. 32); and of course such a vendor must not represent himself as still being in fact the old firm (*Pearson* v. *Pearson*, *supra*). Where the trustee of a bankrupt sells the bankrupt's business, if the bankrupt does not join and covenant against carrying on a like trade (and he cannot be compelled to do so), there is nothing to prevent him from setting up a similar business (*Walker* v. *Mottram*, 19 Ch. D. 355; 51 L. J. Ch. 108). A covenant in general terms not to carry on a business again "so far as the law allows," is bad as being too vague for the law to enforce (*Davies* v. *Davies*, 36 Ch. D. 359; 56 L. J. Ch. 962). A covenant by the vendor of goodwill not to enter into competition does not prevent the vendor's wife from doing so with her separate property (*Smith* v. *Hancock*, 63 L. J. Ch. 477).

XXIII.

MILLER v. RACE (1791).

ON THE PASSING OF THE PROPERTY IN A BANK NOTE.

(1 Sm. L. C. 525; 1 Burr. 452.)

IN THE COURT OF KING'S BENCH.

Decided:—That the property in a bank note passes like cash, by delivery; and a party taking it *bonâ fide, and for value*, is entitled to retain it as against a former owner from whom it was stolen.

Notes to Miller v. *Race.*

The general rule of the law of England is that no man can acquire a title to a chattel personal from anyone who has himself no title to it, except only by sale in market overt (*Peer* v. *Humphrey*, 2 A. & E. 495).

See also the Sale of Goods Act, 1893, ss. 21 and 22.

But this does not apply to coins of the realm. The true reason of this is, as Lord Mansfield, C.J., pointed out in the principal case, "upon account of the currency of it: it cannot be recovered after it has passed into currency"—though it can be recovered before it has passed into currency. See *Thomas* v. *Whip* (there cited).

It was ingeniously argued in the principal case that banknotes ought to be compared to goods or securities or documents for debts. It was decided that this was not so. "They are as much money," said Lord Mansfield, C.J., "as any current coin that is used in common payments as money or cash."

XXIV.

WIGGLESWORTH v. DALLISON (1779).

ON THE CROPS OF AN OUTGOING TENANT.

(1 Sm. L. C. 613; 1 Dougl. 201.)

IN THE COURT OF KING'S BENCH.

Decided:—That a custom that the tenant of land, whether by parol or deed, shall have the away-going crop, after the expiration of his term, is good, if not repugnant to the lease under which the tenant holds.

Notes to Wigglesworth v. *Dallison.*

"Custom"—which must be proved as a fact—is an important element in contracts when the circumstances are such that the parties may both be supposed to have known it and to have contracted on the basis of it. For the intention of the parties is all-important in the construction of contracts.

If a written contract contains a stipulation contrary to the custom, it is impossible to suppose that the parties contracted on the basis of that custom. If, therefore, a lease contains certain stipulations as to the mode of quitting, then, of course, that ousts the custom to a contrary effect, and the terms in the lease prevail, which is in accordance with the maxim, *Expressum facit cessare tacitum.* It may be stated as a general rule that whenever there is any certain well-known and established usage or custom, and parties contract on a matter connected with it, they will be presumed to have intended to make such usage or custom a part of their contract, and it will be deemed to be incorporated therewith, unless there is anything in the express contract to exclude its application.

If a custom is unreasonable or contrary to law, a person will not be deemed to have contracted with regard to it, and will not be bound by it, unless at the time he knew of it and expressly or

impliedly agreed to be bound by it (*Sweeting* v. *Pearce*, 9 W. R. 343; *Perry* v. *Barnett*, 15 Q. B. D. 388; 54 L. J. Q. B. 466).

It is enacted by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 55), that where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by usage, if the usage be such as to bind both parties to the contract.

XXV.

KEECH v. HALL (1778).

AS TO THE TENANTS OF A MORTGAGOR.

(1 Sm. L. C. 577; 1 Dougl. 21.)

IN THE COURT OF KING'S BENCH.

Decided:—That a mortgagee may recover in ejectment *without giving notice to quit*, against a tenant claiming under a lease from the mortgagor made after the mortgage without the privity of the mortgagee.

XXVI.

MOSS v. GALLIMORE (1780).

ALSO AS TO THE TENANTS OF A MORTGAGOR.

(1 Sm. L. C. 580; 1 Dougl. 279.)

IN THE COURT OF KING'S BENCH.

Decided:—That a mortgagee, after giving notice of the mortgage to a tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the

time of the notice, as well as to what accrues after, and he may distrain for it after such notice.

Notes to Keech v. *Hall and Moss* v. *Gallimore.*

A mortgage of land may be defined as a conveyance of the land as a security for the payment of a debt or the discharge of some other obligation for which it is given, the security being redeemable on the payment or discharge of such debt or obligation (Halsbury, XXI., 70).

The mortgagor when offering his land as a security for his debt cannot, of course, convey any greater rights than he has himself, and the mortgagee must therefore take it subject to all such restrictions as lie upon it at the date of the mortgage.

When the mortgage has been made, it is in accordance with the same principle that the mortgagor having mortgaged his property cannot himself (subject to the provisions of the Conveyancing Act, 1881, presently mentioned) grant a valid lease, and any such lease is in fact a nullity, and, being so, the mortgagee can of course avoid it altogether. But if the mortgagor before the mortgage made a lease, that is perfectly good, and the mortgagee cannot avoid it, but to obtain the full benefit of his security he can give notice to the tenant, and obtain not only accruing rents, but also rent in arrear, towards liquidation of the amount due on his security. The Judicature Act, 1873, though it does not alter this point, contains an important provision as to mortgagors' powers, viz., that a mortgagor entitled for the time being to possession, or to receipt of the rents, of any land as to which the mortgagee has given no notice of his intention to take possession, may sue for such possession, or for recovery of the rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person (36 & 37 Vict. c. 66, s. 25 (5)). This provision does not enable a mortgagor, who is in receipt of the rent under a lease made before the mortgage, to recover possession of the land from the lessee under a proviso for re-entry contained in the lease, for only the mortgagee as legal

reversioner can elect to enforce or waive such forfeiture (*Mathews* v. *Usher*, 69 L. J. Q. B. 856).

The different remedies which a mortgagee has, after default, to obtain payment of his mortgage money are as follows :— (*a*) Ejectment against the mortgagor and his tenants since the mortgage (except now tenants holding under leases made on or since Jan. 1, 1882, under the Conveyancing Act, 1881), as decided in *Keech* v. *Hall*. (*b*) Suing on bond or covenant. (*c*) Obtaining rents from tenants prior to the mortgage (or since, if holding under leases under the Conveyancing Act, 1881), by giving notice, as decided in *Moss* v. *Gallimore*. (*d*) Selling under the power of sale in mortgage deed, or under the power given by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41). (*e*) When in possession, cutting timber if the security is insufficient, and now under the Conveyancing Act, 1881 (s. 19), in any event if the mortgage is made on or since January 1, 1882, if in possession, and the timber is ripe for cutting. (*f*) Foreclosing : as to which Williams in his work on "Real Property," p. 491, says as follows :—"Indulgent as the Court has shown itself to the debtor, it will not allow him for ever to deprive the mortgagee of the money which is his due : and if the mortgagor will not repay him within a reasonable time equity will allow the mortgagee to retain the estate to which he is already entitled at law. For this purpose it will be necessary for the mortgagee to take proceedings for foreclosure, claiming an account of the principal and interest due, and that the mortgagor be directed to pay both with costs by a day to be appointed by the Court, and that in default thereof he may be foreclosed his equity of redemption."

If a mortgagee forecloses and then sues, the effect of suing is to reopen the foreclosure and give the mortgagor a renewed right to redeem; and therefore if a mortgagee forecloses and then sells, he cannot afterwards sue, because he no longer has the mortgaged estate ready to be restored to the mortgagor should he choose to redeem (*Lockhart* v. *Hardy*, 9 Beav. 349). But although this is so, yet a mortgagee, after selling *under his power of sale*, may sue on the covenant to pay (*Rudge* v. *Rickens*, 28 L. T. 537).

A mortgagee may exercise his different remedies as he pleases,

even concurrently. A mortgagee will not be entitled generally to add to his mortgage debt sums expended at his own motion for general improvement, but he will be allowed to add sums expended for necessary repairs, protecting the title, or renewing renewable leaseholds; and if a mortgagee whilst in possession has expended money in improving the property, in an action by the mortgagor to redeem, or after sale for accounts, the mortgagee is entitled to an inquiry whether the outlay has increased the value of the property, and if it has done so he is entitled to be repaid his expenditure so far as it has increased such value (*Shepard* v. *Jones*, 21 Ch. D. 469). Neither a mortgagee nor mortgagor is actually bound to renew a renewable leasehold in the absence of contract so to do.

The Conveyancing Act, 1881 (44 & 45 Vict. c. 41) contains an important provision with regard to leases by either mortgagor or mortgagee. It enacts (section 18) that either a mortgagor in possession or a mortgagee in possession can make an agricultural or occupation lease for not exceeding twenty-one years, and a building lease for not exceeding ninety-nine years. Such lease is to take effect within twelve months from its date; to be at the best rent that can be obtained; without fine; to contain a covenant for payment of rent; and a condition of re-entry on non-payment for not exceeding thirty days; and a counterpart to be executed by the lessee and delivered to the lessor. Building leases must be in consideration of houses or buildings having been erected or improved or repaired or to be erected or improved or repaired within five years from date, and a nominal or less rent than that ultimately payable may be reserved for the first five years or any part thereof. A mortgagor leasing under this provision must, within one month of making the lease, deliver to the mortgagee (or where more than one, then to the mortgagee first in priority) a counterpart of the lease duly executed by the lessee; and upon default the mortgagee's power of sale arises at once, although the lease is no way invalidated. All this is subject to the express provisions of the mortgage deed, and *applies only to mortgages made after* 1881, unless otherwise agreed. The Act enables a mortgagor to lease part of the property with sporting rights over the remainder (*Browne* v. *Peto*, 69 L. J. Q. B. 869). When the mortgagor makes the

lease, the mortgagee on giving notice to the tenants can enforce the covenants and conditions in the lease as reversioner (*Municipal Building Society* v. *Smith*, 58 L. J. Q. B. 61), and is bound by the lessor's covenants (*Wilson* v. *Queen's Club*, 60 L. J. Ch. 698).

The Tenants' Compensation Act, 1890 (53 & 54 Vict. c. 57, s. 2) protects a tenant occupying land under a contract of tenancy with the mortgagor, which is not binding on the mortgagee, by requiring the mortgagee to give him six months' notice to quit, and to pay the same tenant-right valuation on quitting as the mortgagor would have had to pay.

XXVII.

MOSTYN v. FABRIGAS (1775).

ON THE DISTINCTION BETWEEN LOCAL AND TRANSITORY ACTIONS.

(1 Sm. L. C. 662; 1 Cowp. 161.)

IN THE COURT OF KING'S BENCH.

This was an action against the Governor of Minorca for trespass and false imprisonment in Minorca, and after verdict for the plaintiff, the principal question on a bill of exceptions was whether any action could be maintained by a native of Minorca for an injury committed there. *Decided*:—That the action would lie, being of a transitory nature, but that if it had been strictly local no action could have been maintained in England.

Notes to Mostyn v. *Fabrigas.*

The distinction between local and transitory actions was once of immense importance in regard to fixing the "venue" or place of trial in England of an ordinary English action. But

the law as to "venue" is now contained in the Judicature Acts and the rules made thereunder.

The old rule distinguished between transitory matters, such as a contract which might take place anywhere, and local matters, such as trespass to realty, which could only happen in one particular place.

Our Courts still refuse to try questions of a local nature affecting property abroad, *e.g.*, trespass to land or ejectment actions, or to adjudicate upon a claim of title to foreign land in proceedings founded on the alleged invasion of the proprietary rights attached to it, and to award damages founded on that adjudication. No action of this kind can be maintained here, although both plaintiff and defendant are domiciled here (*British South Africa Co.* v. *Companhia di Moçambique*, 1893, A. C. 602; 63 L. J. Q. B. 70). But our Courts here have jurisdiction acting *in personam* to decree specific performance of an agreement relating to lands abroad, if the parties are here (*Penn* v. *Baltimore*, 1 Ves. Sen. 444).

An action to recover damages for a tort committed abroad lies in England, provided (1) defendant is in England to be sued, (2) the matter complained of is actionable by English law (*The Halley*, 37 L. J. Ad. 33), (3) it is wrongful in the place where committed (*Machado* v. *Fontes*, 66 L. J. Q. B. 542), and (4) it is a tort to person or goods and not to land, *supra*.

It is convenient to here notice the law as to venue or place of trial of an action. Prior to the Judicature practice, the rule was that if the action was a local one, such as an action of trespass to land, the venue must be laid in the place where the cause of action arose; but if the action was transitory, such as an action for debt, the plaintiff might lay the venue where he chose. This distinction as to venue has ceased to exist since 1875, and the subject is now governed (as above indicated) by Rules of the Supreme Court (made under the authority of the Judicature Act, 1873) Order XXXVI., rule 1, which provides that there shall be no local venue for the trial of any action except where otherwise provided by statute (passed since 1875, *Buckley* v. *Hull Dock*, 1893, 2 Q. B. 93); but in every action in every Division of the High Court the place of trial shall be fixed by the Court or a Judge.

XXVIII.

LICKBARROW v. MASON (1788).

ON STOPPAGE IN TRANSITU.

(1 Sm. L. C. 726; 2 T. R. 63.)

IN THE COURT OF KING'S BENCH.

Decided:—That the consignor of goods may stop the goods *in transitu* before they get into the hands of the consignee on hearing of the bankruptcy or insolvency of the consignee; but if the consignee has assigned the bill of lading to a third person for a valuable consideration *bonâ fide* without notice, the right of the consignor is gone.

Notes to Lickbarrow v. *Mason.*

"Stoppage *in transitu*" is a prevention of wrong by a mere personal act, consisting in the right which a vendor, having sold goods on credit, has to stop them on their way to the vendee, *before they have reached him*, on his becoming bankrupt or insolvent. The law on this subject is now codified by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). That Act provides (section 39) that, notwithstanding the property in goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law, in case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with possession of them. A seller is deemed to be unpaid when the whole of the price has not been paid or tendered, or when a bill of exchange or other negotiable instrument has been received as conditional payment and the condition has not been fulfilled (section 38); and a buyer is to be deemed insolvent when he has either ceased to pay his debts in the ordinary course of business, or cannot pay them as they become due, whether he has committed an act of bankruptcy or not (section 62). The Act also (section 45) specially deals with the point of

when goods are to be deemed in course of transit and when the transit is to be considered as having come to an end. Of course, if the goods have actually reached the vendee, or an agent on the part of the vendee, then the right is gone, as the very name "stoppage *in transitu*" imports. It may be stated generally that the goods are *in transitu* so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee, and also so long as they remain in any place of deposit connected with their transmission; but that if after their arrival at the place of destination they be warehoused with the carrier, whose stores the vendee uses as his own, or even if they be warehoused with the vendor himself, and rent be paid for them, that puts an end to the right to stop *in transitu*. It is not necessary, in exercising the right of stoppage *in transitu*, that the vendor should actually seize the goods, for notice to the carrier or other forwarding agent is enough (56 & 57 Vict. c. 71, s. 46).

The above case shows how the right of stoppage *in transitu* may be lost, although the goods are still in course of transit. In addition, it is enacted by the Sale of Goods Act, 1893 (s. 47), that where a "document* of title" to goods has been lawfully transferred to the buyer, and he transfers such document to a person who takes the same in good faith and for valuable consideration, then if such last-mentioned transfer was by way of sale the seller's right is defeated, and if by way of pledge or other disposition for value, the seller's right can only be exercised subject to the rights of the transferee. If the buyer pledges the bill of lading and goods of his own, the seller can marshal the assets and have the buyer's own goods exhausted before those comprised in the bill of lading (*Re Westzinthus*, 5 B. & Ad. 817).

The exercise of the right of stoppage *in transitu* does not rescind the contract of sale (Sale of Goods Act, 1893, s. 48), but is defined as a right to resume possession of the goods as long as they are in course of transit and retain them until payment or tender of the price (*ibid.* section 44). But the seller may

* This expression includes any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, &c. (Factors Act, 1889, s. 1; Sale of Goods Act, 1893, s. 62).

re-sell if the goods are perishable, or where he has given notice of his intention to re-sell, or where he has reserved a right to re-sell, and even if the seller re-sells, having no right to do so, yet a buyer taking *bonâ fide* without notice acquires a good title against the original buyer (*ibid.* section 48).

To defeat the right of stoppage the indorsement of the bill of lading must be *for value* (*Rodger* v. *Comptoir d'Escompte*, L. R. 2 P. C. 393).

XXIX.

PIGOT'S CASE (1615).

ON THE EFFECT OF ALTERATIONS IN A DEED. (THIS CASE IS NO LONGER LAW.)

(11 Rep. at fol. 27A.)

IN THE COURT OF KING'S BENCH.

Decided:—That if an obligee himself alters a deed, either by interlineation, addition, erasing, or by drawing a pen through the line, &c., although it is in words not material, yet the deed is void; but if a stranger without his privity alters the deed by any of the said ways in any points not material, it shall not avoid the deed.

XXX.

MASTER v. MILLER (1791).

ON THE EFFECT OF ALTERATIONS IN A BILL OF EXCHANGE AFTER ACCEPTANCE.

(1 Sm. L. C. 803; 4 T. R. 320.)

IN THE COURT OF KING'S BENCH AND IN THE EXCHEQUER CHAMBER.

Decided:—That an unauthorised alteration in a bill of exchange after acceptance, whereby the payment would

be accelerated, avoids the instrument, and no action can be maintained upon it, even by an innocent holder for valuable consideration.

XXXI.

ALDOUS v. CORNWELL (1868).

ON THE EFFECT OF IMMATERIAL ALTERATIONS IN A BILL OF EXCHANGE.

(L. R. 3 Q. B. 573; 37 L. J. Q. B. 201.)

IN THE COURT OF QUEEN'S BENCH.

Here a promissory note made by defendant expressed no time for payment, and while it was in the possession of the payee (the plaintiff) the words "on demand" were added without the assent of the maker. This action was now brought on the note, and the defendant pleaded that he did not make it. *Decided:*—That as the alteration only expressed the effect of the note as it originally stood, and was therefore immaterial, it did *not* affect the validity of the instrument.

Notes to Pigot's Case, Master v. *Miller, and Aldous* v. *Cornwell.*

Pigot's Case related only to deeds, but *Master* v. *Miller* extended its doctrine, as far as regarded material alterations, to bills of exchange, and subsequent cases have applied it indiscriminately to all written instruments, whether under seal or not. However, *Pigot's Case* is not now entirely good law, for such an immaterial alteration in a deed or other writing as filling in a date where a blank is left, though done by the party, does *not* at all vitiate it. *Aldous* v. *Cornwell* is cited as plainly showing that a mere immaterial alteration in a negotiable instrument does *not* affect it. The case of *Master* v. *Miller* must now be considered in connection with the provision on the subject of alterations in bills, notes, and cheques, contained in the Bills of Exchange Act, 1882. This statute

provides that where any such instrument is materially altered without the assent of all parties liable thereon it is avoided, except as against a party who has himself made, authorised or assented to the alteration, and subsequent indorsers : provided, however, that where the instrument has been materially altered, but the alteration is not apparent, and the instrument is in the hands of a holder in due course, such holder may avail himself thereof, as if it had not been altered, and may enforce payment of it according to its original tenor (45 & 46 Viet. c. 61, s. 64 (1)). See hereon *Scholfield* v. *Earl of Londesborough*, 1896, A. C. 514, where the defendant having accepted a bill for £500 the drawer fraudulently altered the bill so that it purported to be for £3,500. The alteration was not apparent. It was held that the defendant was not liable to a holder in due course for more than £500, and that it was immaterial that in accepting the bill he had innocently left blank spaces.

As to what will be a material alteration, reference may be made to *Suffell* v. *Bank of England* (9 Q. B. D. 555; 51 L. J. Q. B. 401), deciding that the alteration of a Bank of England note, by erasing the number upon it, and substituting another, is a material alteration, which avoids the instrument. Note also that the provision in the Bills of Exchange Act, 1882, above referred to, as to the effect of alterations which are not apparent, does not apply to Bank of England notes (*Leeds and County Bank* v. *Walker*, 11 Q. B. D. 84; 52 L. J. Q. B. 590).

XXXII.

WAUGH v. CARVER (1794).

AS TO WHAT CONSTITUTES A PARTNERSHIP—THE OLD RULE THAT COMMUNITY OF PROFITS CONSTITUTES A PARTNERSHIP. (THIS CASE IS NO LONGER LAW.)

(2 H. Blaekstone, 235.)

IN THE COURT OF COMMON PLEAS.

Here certain ship agents at different ports entered into an agreement to share in certain proportions the profits

of their respective commissions, and the discount on the bills of tradesmen employed by them in repairing the ships consigned to them, &c. *Decided:*—That by this agreement they became liable as partners to all persons with whom either contracted as such agents, though the agreement provided that neither should be answerable for the acts or losses of the other, but each for his own; for he who takes the general profits of a partnership must of necessity be made liable to the losses, and he who lends his name as a partner becomes as against all the world a partner.

XXXIII.

COX v. HICKMAN (1860).

ALSO AS TO WHAT CONSTITUTES A PARTNERSHIP.

(8 H. L. Ca. 268.)

IN THE HOUSE OF LORDS.

Here S. & S. becoming embarrassed had executed a deed assigning their property to trustees, whom they empowered to carry on the business under the name of the Stanton Iron Company, and do all necessary acts, with power to the majority of the creditors assembled at a meeting to make rules for conducting the business, or to put an end to it, and after the debts had been discharged the property was to be re-transferred by the trustees to S. & S. Two of the creditors, C. and N., were named amongst the trustees; C. never acted; N. acted for six weeks and then resigned. Some time afterwards the other trustees who continued to carry on the business became indebted to H., and gave him bills accepted by themselves "per proc. the Stanton Iron Company." *Held:*—That there was no partnership

created by the deed, and that consequently C. and N. could *not* be sued on the bills as partners in the company.

XXXIV.

WALKER v. HIRSCH (1884).

ALSO AS TO WHAT CONSTITUTES A PARTNERSHIP.

(27 Ch. Div. 460; 54 L. J. Ch. 315.)

IN THE COURT OF APPEAL.

In this case the plaintiff had been a general clerk of the defendant, and by an agreement made in 1883 it was arranged that, instead of his former position, he should receive a salary of £180 a year, and in addition one-eighth share of the net profits, and that he should bear one-eighth part of the losses of the business. He was also to put £1500 in the business at 5 per cent. interest, and this arrangement was to continue in force until after notice in writing from either side. The plaintiff was never introduced to customers as a partner, and he continued apparently to occupy the same position, and in fact to perform the same duties as before. On disputes arising, the defendant gave notice determining the arrangement, and excluded the plaintiff from the office; and this action was brought for a declaration that the plaintiff was a partner, for the winding up of the partnership affairs, and for an injunction to restrain the defendant from excluding him from the premises, and from dealing with the partnership assets, and for a receiver.

Decided:—That there was no partnership existing. That the question of partnership depended upon the

intention of the parties, and it appeared clear that the intention was that the plaintiff should only remain a clerk to the defendant.

Notes to Waugh v. *Carver, Cox* v. *Hickman, and Walker* v. *Hirsch.*

In several special subjects Parliament has reduced the Common Law of England to a code—carefully based upon the result of the decided cases.

The law of partnership is an instance of this, and the student should therefore read the codifying Act. But the cases on which the code was based are often most illuminating, as showing the underlying principles of the law.

The law of partnership was codified by the Partnership Act, 1890 (53 & 54 Vict. c. 39), and the student is referred to it. Partnership is by that Act (section 1) defined as the relation subsisting between persons carrying on a business in common with a view of profit, but does not include a company or association which is (*a*) registered under the Companies Act, 1862, or (*b*) formed under any other statute or letters patent or royal charter, or (*c*) working mines in the Stannaries. See also, further rules for determining the existence of a partnership in section 2, and in particular observe that by sub-section 3, although receipt of profits is *primâ facie* evidence of partnership, yet it does not of itself make the recipient a partner, and in particular, (*a*) receipt of a debt by instalments or otherwise out of accruing profits, (*b*) remuneration of a servant or agent by a share of profits, (*c*) receipt by a widow or child of a dead partner of a portion of profits by way of annuity, (*d*) loan of money on a contract signed by all parties that the lender shall receive interest varying with the profits, or a share of the profits, or (*e*) receipt of a portion of profits (*Re Gieve*, 80 L. T. 737) in consideration of the sale of goodwill, does not of itself create either the rights or the liabilities of a partner. But by section 3 it is provided as regards cases (*d*) and (*e*) above mentioned—*i.e.*, the lender and the vendor of a goodwill on such terms—they are both postponed to all other creditors for value if the borrower or buyer is

adjudged bankrupt or arranges to pay less than 20s. in the £, or dies insolvent.

The principal cases above quoted must be regarded thus :— *Waugh* v. *Carver* shows the old idea that community of profits constituted a partnership, and is not now law. *Cox* v. *Hickman*, in fact, demonstrates this, and shows that the question of partnership or not turns on intention, and *Walker* v. *Hirsch* shows this much more forcibly. Now we have the Partnership Act, 1890, but that only lays down general principles, and *Cox* v. *Hickman* and *Walker* v. *Hirsch* are still useful cases, as illustrative of what will and what will not be deemed to constitute a partnership.

A dormant partner is one who, though not appearing as a partner, yet in reality is one, and he is liable in common with other partners. A nominal partner is one who, without participating in the profits, yet lends his name to the firm, and he is liable to third parties if his holding himself out as a partner has come to their knowledge, and they gave credit upon the strength of his name. Though partners are jointly interested, yet, on the death of one his share forms part of his own personal estate, and though on the death of one the legal interest in choses in action survives to the others, yet they are in equity but constructive or implied trustees of the share of the deceased partner. The power of one partner to bind the other or others depends on the ordinary principles of agency, and in the same way that a general agent binds his principal by all contracts coming within the scope of his agency, so one partner binds the other or others by all such transactions as are within the scope of the partnership dealings, though the partners may have privately agreed that no such power shall exist. Thus, in mercantile partnerships one partner can bind the others by a bill of exchange; but one member of a firm of solicitors would have no such power, though he could bind his partners by drawing a cheque in the name of his firm, notwithstanding that the articles of partnership provided that all cheques should be signed by not less than two partners, for the drawing of cheques comes within the scope of any ordinary partnership business; but this does not apply to a post-dated cheque, which must in effect be considered as a bill payable so many days after date (*Forster* v. *Mackreth*,

L. R. 2 Ex. 163). A partner cannot bind his firm by a deed unless he is authorised by deed so to do; nor by giving a guarantee; nor by submitting a dispute to arbitration. A partner is not liable on contracts entered into before he became a member of the firm. (See generally hereon 53 & 54 Vict. c. 39, ss. 5, 18).

A partnership may be dissolved :—

1. If for a fixed term, by expiration thereof.
2. If for a single adventure, or undertaking, by the termination thereof.
3. If for an undefined time, by notice.
4. By death.
5. By bankruptcy.
6. At the option of the others, by the share of a partner being seized for his separate debt.
7. By any event which makes it unlawful for the business to be carried on, or for the members of the firm to carry it on in partnership.
8. By judgment of the Court, which may be on any of the following grounds :—(*a*) If a partner is found lunatic by inquisition; (*b*) If a partner other than the partner suing becomes in any way permanently incapable of performing his part of the contract; (*c*) If a partner other than the partner suing has been found guilty of such conduct as the Court thinks, having regard to the nature of the business, is calculated to prejudicially affect the carrying on of the business; (*d*) If a partner other than the partner suing wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in partnership matters that it is not reasonably practicable for the other partners to carry on the business in partnership with him; (*e*) If the business can only be carried on at a loss; (*f*) If circumstances arise which in the opinion of the Court render a dissolution just and equitable (53 & 54 Vict. c. 39, ss. 32—35).

XXXV.

FLETCHER v. RYLANDS (1868).

ON THE MAXIM "SIC UTERE TUO UT ALIENUM NON LAEDAS."

(1 Sm. L. C. 882; L. R. 1 Ex. 265, L. R. 3 H. L. 330.)

IN THE HOUSE OF LORDS.

The plaintiff in this case was possessed of certain mines and veins of coal, which communicated with certain old coal workings under the defendants' land. The defendants were not aware of these old workings under their land, and they constructed on their land a reservoir. The reservoir was properly constructed, but as soon as it was filled with water it gave way, by reason of the cavities beneath, and the water found its way into and flooded the plaintiff's mines. *Decided:*—That the defendants were liable in that, though not guilty of negligence, they had brought on to their land what was likely to do mischief if it escaped, and it was therefore there at the defendants' peril.

Notes to Fletcher v. *Rylands.*

Every man may use his own lands as he thinks fit for any lawful purpose, subject only to the maxim, *Sic utere tuo ut alienum non lædas* (use your own rights so that you do not hurt those of another). The defendants were quite entitled to collect water on their land, but it was at their risk. So equally a man is entitled to collect wild animals on his land, but they are there at his risk, and he is liable if they escape and do injury. (Cf. *Ballard* v. *Tomlinson*, 29 Ch. D. 115.) See also

Crowhurst v. *Amersham Burial Board* (4 Ex. D. 5; 48 L. J. Q. B. 109), where the owner of the land had thereon a yew-tree, the branches of which projected on to his neighbour's land, and the neighbour's horse ate some of the leaves and was poisoned thereby and the owner of the land on which the tree was growing was held liable. But where the same thing happened, except that the branches of the yew-tree did not project, but the plaintiff's horse reached over the fence and ate the leaves, it was held that the defendant was not liable (*Ponting* v. *Noakes*, 1894, 2 Q. B. 281; 63 L. J. Q. B. 549).

If thistles grow naturally on my land and the seeds blow on to my neighbour's land and do damage, I am not liable (*Giles* v. *Walker*, 29 Q. B. D. 656). When the defendants pumped brine in large quantities from salt beds lying under their land, with the result that percolating water filling the place of the brine dissolved a portion of the salt rock under the plaintiffs' land, it was held that no action lay (*Salt Union* v. *Brunner*, 1906, 2 K. B. 822).

A person who stores electricity which escapes and does harm is liable (*South African Telegraph Co.* v. *Cape Town Tramways*, 1902, A. C. 381), unless he acts under statutory powers and is guilty of no negligence (*National Telephone Co.* v. *Baker*, 62 L. J. Ch. 699).

A person who keeps an animal of the class *feræ naturæ* keeps it at his peril, *e.g.*, an elephant (*Filburn* v. *People's Palace Co.*, 59 L. J. Q. B. 471), or a monkey (*May* v. *Burdett*, 9 Q. B. 101). But if the animal is of the class *domitæ*, either scienter or negligence must be proved, though to this there is a statutory exception when a dog does injury to cattle (Dogs Act, 1906, s. 1). Cattle for this purpose includes horses, mules, asses, sheep, goats, and swine.

The above principal case should be compared with and distinguished from *Nichols* v. *Marsland* (2 Ex. D. 1; 46 L. J. Ex. 174). In that case an escape of water that had been collected on the defendant's land occurred from the effects of a flood which could not reasonably have been anticipated, and it was held that the defendant was not liable, on the principle that what occurred was really *vis major*. Further, in *Box* v. *Jubb*, 48 L. J. Ex. 417,

the owner of a reservoir who had used all reasonable means to prevent water escaping, was held not liable for an escape due to the act of a third person which he could not control or prevent.

XXXVI.

CUTTER v. POWELL (1795).

ON INCOMPLETED CONTRACTS.

(2 Sm. L. C. 1; 6 T. R. 320.)

IN THE COURT OF KING'S BENCH.

Here the defendant gave to one Cutter, deceased, a note as follows:—"Ten days after the ship *Governor Parry*, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool. Kingston, July 31, 1793." Cutter died during the voyage, and this action was brought by his representatives. *Decided:*—That deceased not having proceeded, continued, and done his duty for the whole voyage, nothing could be recovered by his representatives.

Notes to Cutter v. *Powell.*

"Few questions," say the learned editors of "Smith's Leading Cases," "are of so frequent occurrence and at the same time so difficult to solve as those in which the dispute is whether an action can be brought by one who has entered into a special contract, part of which remains unperformed."

The question is resolved into two branches:—(1) in what cases an action may be brought in what was formerly called "special *assumpsit*," that is to say, upon the contract itself; (2) in what cases it may be brought in *indebitatus assumpsit*—*i.e.*, for a

fair remuneration for the part of the contract actually performed.

The student is advised to read the whole of the notes to this case in "Smith's Leading Cases."

As to the first branch, it may be shortly stated that when promises on each side are dependent, then performance, or readiness to perform, is a condition precedent to the action, but when promises on each side are independent, performance is not a condition precedent to the right (1 Wms. Saund. 548; 2 Wms. Saund. 742). The question is to be solved not by technical rules, but by ascertaining, if possible, the intention of the parties (*Hotham* v. *East India Company*, 1 T. R. 645).

As to the second branch, the general rule is that while the special contract remains unperformed, no action of *indebitatus assumpsit* can be brought for anything done under it. Thus it has been held that where there is a contract to do specific work upon certain premises for a sum payable on completion of the work, and before completion the premises are destroyed without fault on either side, though further performance of the contract is excused, yet no action lies for the work actually done (*Appleby* v. *Myers*, L. R. 2 C. P. 651).

But if a special contract has been abandoned or rescinded by the parties, then an action will lie for what has been done, by the person suing on a *quantum meruit*—that is, for as much as it is worth; and if A. and B. enter into a special contract, and A. refuses to perform his part of it, or renders himself absolutely unable to do so, it is open to the other party to at once rescind such special contract, and immediately sue on a *quantum meruit* for whatever he has done under the contract previously (see *Planché* v. *Colburn*, 8 Bing. 14).

When work has been done under a contract, but not in strict accordance therewith, and the other party has accepted benefit from it, he must pay a fair price for the work actually done (see *per* Parke, J., in *Read* v. *Rann*, 10 B. & C. 438).

XXXVII.

BICKERDIKE v. BOLLMAN (1786).

ON THE EFFECT OF NOT GIVING NOTICE OF DISHONOUR OF A BILL.

(1 T. R. 405.)

IN THE COURT OF KING'S BENCH.

Decided:—That notice of dishonour of a bill is not necessary at common law if the drawer had no effects in the hands of the drawee, so that he could not be injured for want of notice.

Notes to Bickerdike v. *Bollman.*

The result of this decision may be illustrated thus :— A. draws a bill on B., who accepts it for A.'s accommodation, and on presentment to B. for payment the bill is dishonoured; to entitle the holder to sue A. (the drawer), it is *not* necessary to give him any notice of dishonour, because, as he had no assets in B.'s hands, he cannot possibly be injured. Were it an ordinary acceptance, of course the drawer could not be sued unless notice of dishonour was duly given to him. But it has been decided that the principle of this case must not be extended, and notice must be given if the drawer have reason to expect that some third party will provide for payment of the bill; and if the drawer had effects in the drawee's hands at the time when the bill was drawn, he does *not* lose his right to notice, although before the time of payment he may have ceased to have any.

Although this case is still left standing in this edition, it must be borne in mind that the subject of bills of exchange is now entirely governed by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). See sections 46 to 50 and 72. By section 48 if a bill is dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer

and to each indorser or he will be discharged; but the omission to give notice of dishonour by non-acceptance shall not prejudice the rights of a subsequent holder in due course; and after notice of dishonour by non-acceptance, notice of dishonour by non-payment is not necessary unless the bill has meantime been accepted. By section 49 notice of dishonour must be given in accordance with the fifteen rules in that section in order to be valid and effectual. Section 50 of the Act provides that notice of dishonour shall be dispensed with: (*a*) where notice cannot be given or does not reach the party; (*b*) where the giving of notice is either antecedently or subsequently waived; (*c*) As regards the drawer in the following cases: (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) *where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill*, (5) where the drawer has countermanded payment; (*d*) As regards the indorser, in the following cases: (1) where the drawer is a fictitious person, or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation. The position expressed in the italicised lines above includes the case of *Bickerdike* v. *Bollman*.

When notice of dishonour is necessary, the time for giving it when the person lives at or near the place of dishonour, or where the giver of notice himself received notice, is such a time that it may be received by the expiration of the day after the dishonour, or after the time when the giver of the notice himself received notice, for each indorser "has his day" for giving notice. When the person is not living at or near the place, it is enough to give notice by the post of the next post day, or when it is a foreign bill by the next ordinary conveyance. When the bill is at a banker's, the banker has a day to give notice to his customer, and the customer another day to give notice to the prior parties.

XXXVIII.

I'ANSON v. STUART (1785).

ON THE DIFFERENCE BETWEEN LIBEL AND SLANDER AS TO WHAT IS AN ACTIONABLE IMPUTATION.

(1 T. R. 748.)

IN THE COURT OF KING'S BENCH.

Decided:—That to print of any one that he is a swindler, is a libel and actionable, for it is not necessary, in order to maintain an action for libel, that the imputation should be one which if spoken would be actionable as a slander.

Notes to I'Anson v. *Stuart.*

The legal point to remember in this case is that writing may constitute a cause of action as a libel when the words if only spoken would not, without proof of special damage. Words which are slanderous in themselves, *i.e.*, will support an action without any proof of special damage, are words which impute, (1) some offence punishable by the criminal law, or that a man has been actually convicted; or (2), some misconduct or incapacity in the plaintiff's trade, profession, or office; or (3), that the plaintiff actually labours under a contagious or infectious disorder, the imputation of which may exclude him from society; or (4), that impute unchastity or adultery to a woman (54 & 55 Vict. c. 51).

Such is the law of slander—the law of the spoken word.

The law of libel—the law of the written word—is subject to no such strict limitation. In libel it is enough to prove that the plaintiff has been held up to "hatred, ridicule or contempt" (see "Odgers on Libel," p. 17). "Libel is a tort which consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it"—per Lord Loreburn, L.C., in *Hulton & Co.* v. *Jones*, 1910, A. C. 23.

XXXIX.

TILLETT v. WARD (1882).

ON INEVITABLE ACCIDENTS WITHOUT NEGLIGENCE.

(10 Q. B. D. 17; 52 L. J. Q. B. 61.)

IN THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE.

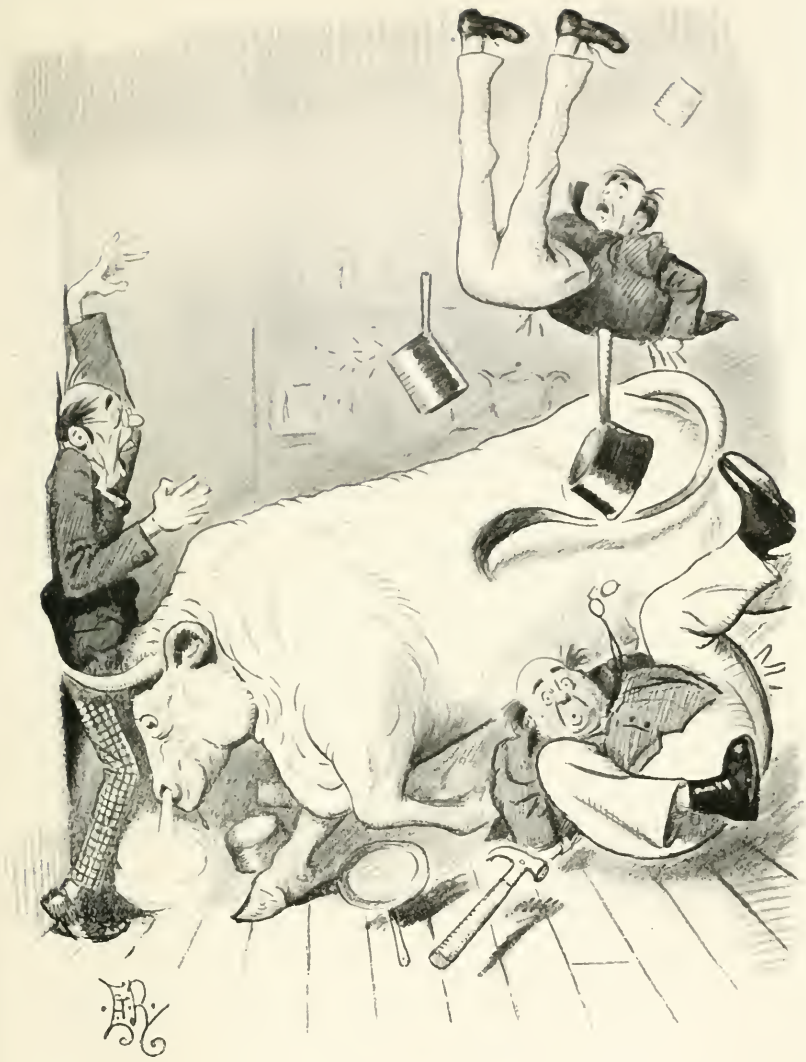
An ox belonging to the defendant, while being lawfully driven to market through a street in the town of Stamford, escaped, without there being any negligence on the part of the defendant or the drover, into a shop of the plaintiff, an ironmonger, the doorway of which was open to the street, and there did damage.

Decided:—That the defendant was not liable.

Notes to Tillett v. *Ward.*

This case was decided upon the principle that there was no evidence of any negligence to render the defendant liable; it belongs in fact to the class of cases involving the point of inevitable accident. No doubt a person must ordinarily keep his cattle from trespassing, and this case furnishes a direct exception to that rule, showing that where a person is using a highway in a proper manner he is not liable if his cattle trespass on premises immediately adjoining the highway, there being no negligence on the part of the owner of such cattle.

It is a clearly-established principle that where an act is what may be termed an inevitable accident, then there is no right of action by the party injured. On this point note the decision in the case of *Vaughan* v. *Taff Vale Ry. Co.* (5 H. & N. 679; 29 L. J. Ex. 247), that a railway company authorised by the Legislature to use locomotive engines is not responsible for damage by fire occasioned by sparks emitted from an engine travelling on the railway, provided the company has taken all



Tillett v. Ward.

A Highway Ox. (No negligence):
Had damaged Tillett's doorway;
No negligence was Ward's defence.
And the Court said "That's the Law-Way."

—*E. P. Field.*

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reasonable precautions to prevent injury from fire and is not guilty of negligence in the management of the engine. The mere fact, however, that the company has not adopted the latest inventions of scientific discovery is not sufficient to render it liable (*National Telephone Co.* v. *Baker*, 1893, 2 Ch. 186; 62 L. J. Ch. 699). But the principle of *Vaughan* v. *Taff Vale Ry. Co.* does not apply to injury done by a steam traction engine being driven along a highway, for it is being thus driven certainly under a statutory permission, but at the party's own risk (*Powell* v. *Fall*, 5 Q. B. D. 597; 49 L. J. Q. B. 428). It has been held that even in the case of a steam traction engine, or an electrical tramcar, or anything of a similar character run under statutory authority, if an injury that happens is the natural incident of the exercise of the statutory powers (*e.g.*, a horse being frightened, or a telephone system interfered with by the discharge of an electrical current into the earth), the proprietors are not liable, as such things must be deemed to have been in the contemplation of the Legislature when it gave its authority (*National Telephone Co.* v. *Baker*, *supra*). See also *Hammersmith Ry. Co.* v. *Brand*, L. R. 4 H. L. 171.

XL.

ABRATH v. NORTH EASTERN RAILWAY (1883).

ON PROOF OF WANT OF REASONABLE AND PROBABLE CAUSE IN CASES OF MALICIOUS PROSECUTION.

(11 App. Cas. 247; 55 L. J. Q. B. 457.)

IN THE HOUSE OF LORDS.

Decided:—That in an action for malicious prosecution, the burden of proof lies on the plaintiff to establish the facts which the jury have to find with a view to the decision of the judge on the question of reasonable and probable cause, namely, whether the defendant took

reasonable care to inform himself of the true state of the case, and whether he honestly believed the case which he prosecuted.

Notes to Abrath v. *North Eastern Railway.*

Malicious prosecution is a tortious act, consisting in the unjust and malicious prosecution of one for a crime, or the unjust and malicious making one a bankrupt, without any reasonable or probable cause. The points to be proved in such an action are : (1) Actual malice; (2) the absence of any reasonable or probable cause; and (3) that the prosecution was determined in the plaintiff's favour if from its nature it was capable of being so determined. The above case is on the second point, and shows that it is not for the defendant to excuse himself by showing the reasonable and probable cause, but for the plaintiff to prove the entire absence of anything of the kind. As to the functions of the Judge and the jury respectively in such an action, note that it is for the Judge to determine as a point of law whether the facts, as found by the jury, do or do not amount to reasonable and probable cause, whilst it is for the jury to deal with the question of malice.

XLI.

CHANDELOR v. LOPUS (1604).

ON MISREPRESENTATIONS WHERE THERE IS NEITHER WARRANTY NOR FRAUD.

(2 Sm. L. C. 58; Cro. Jac. 4.)

IN THE EXCHEQUER CHAMBER.

The defendant sold to the plaintiff a stone which he affirmed to be a bezoar stone, but which proved not to be so. This action was brought upon the case, and it

was held that no action lay against the defendant unless he either knew it was not a bezoar stone or warranted it to be a bezoar stone.

XLII.

PASLEY v. FREEMAN (1789).

ON ACTIONS OF DECEIT.

(2 Sm. L. C. 71; 3 T. R. 51.)

IN THE COURT OF KING'S BENCH.

Where the cause of action was the fraudulent statement by the defendant that Christopher was a person who could safely be trusted with credit for goods to a specified value,

Decided:—That a false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damages, is ground at common law for an action upon the case in the nature of deceit. In such an action it is *not* necessary that the plaintiff should be benefited by the deceit, or that he should collude with the person who is.

Notes to Chandelor v. *Lopus and Pasley* v. *Freeman.*

There is nothing in the law of greater importance to the commercial life of the country than the effect of a statement which turns out to be untrue.

The statement in the text giving the short effect of the decision in *Chandelor* v. *Lopus* is accurate. The full report, however, shows that the defendant was a goldsmith having skill in jewels and precious stones. This being so, it is difficult to

see why, though no action lay *unless* he knew it was not a bezoar stone or warranted it to be a bezoar stone, the facts did not show both these things.

As the learned editors of "Smith's Leading Cases" remark, the fact of defendant's being a jeweller would be almost irresistible evidence in these days that he knew the representation to be false.

Again, as to warranty the true doctrine is that every affirmation at the time of sale is a warranty if so intended—per Buller, J., in *Pasley* v. *Freeman*. Cf. *Heilbut* v. *Buckleton*, 1913, A. C. 30; overruling the dicta of A. L. Smith, M.R., in *De Lassalle* v. *Guildford*, 1901, 2 K. B. 221.

But the statement of the Common Law is the important thing. *Unless* fraud or warranty were proved, the action failed.

A contract may, however, be rescinded in equity on the ground of innocent misrepresentation if both parties can be placed in the position in which they were at the time of the contract.

The decision in *Pasley* v. *Freeman*, as stated in the text, correctly states the Common Law, but is now subject to Lord Tenterden's Act (9 Geo. 4. c. 14), s. 6, by which "no action shall be maintained whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person to the intent or purpose that such other person may obtain 'credit, money, or goods upon,' unless such representation or assurance be made in writing signed by the party to be charged therewith." An untrue representation signed by a bank manager in the course of his business does not make the bank liable (*Hirst* v. *West Riding Bank*, 1901, 2 K. B. 560). When the statute applies it adds signed writing to the essentials of an action for deceit.

In considering what is sufficient to enable an action in respect of fraud or deceit to be maintained the case of *Derry* v. *Peek* (14 App. Cas. 337; 58 L. J. Ch. 864) should be particularly observed. In that case it was held that in order to maintain an action for damages for fraud or deceit, the plaintiff must prove either that the defendant knew the representation to be

untrue, or did not believe it to be true, or made it recklessly without caring whether it was true or false, and for the purpose of inducing the plaintiff to act upon it; and that if a statement is honestly believed in, though in fact it is untrue, no action for damages will lie. This statement of the law must, however, as regards representations made in prospectuses of companies, be taken subject to the provisions of the Companies (Consolidation) Act, 1908, s. 84, where the liability of directors for untrue statements in prospectuses is made the matter of very special statutory enactments.

A warranty must be carefully distinguished from a false representation and also from a condition. A false representation precedes and induces the contract and gives the person to whom it is made a right to repudiate the contract, as also does breach of a condition forming an integral part of the contract. A warranty is made contemporaneously with the contract, and its breach does not vitiate it, but only gives a right to damages.

XLIII.

CLAYTON v. BLAKEY (1789).

ON LEASES VOID UNDER THE STATUTE OF FRAUDS AND THE RESULT.

(2 Sm. L. C. 118; 8 T. R. 3.)

IN THE COURT OF KING'S BENCH.

Decided:—That though by the Statute of Frauds (29 Car. 2, c. 3, s. 1) it is enacted that all leases by parol for more than three years shall have the effect of estates at will only, such a lease may be made to enure as a tenancy from year to year.

XLIV.

DOE d. RIGGE v. BELL (1793).

ALSO ON LEASES VOID UNDER THE STATUTE OF FRAUDS AND THE RESULT.

(2 Sm. L. C. 110; 5 T. R. 471.)

IN THE COURT OF KING'S BENCH.

Decided:—That, although a lease may be void by the Statute of Frauds (29 Car. 2, c. 3, s. 1), and therefore the tenant holds not under the lease, but as tenant from year to year, yet such holding is governed by the terms of the lease in other respects.

Notes to Clayton v. *Blakey and Doe d. Rigge* v. *Bell.*

The principle upon which the tenancy—which, by 29 Car. 2. c. 3, s. 1, is declared, not being created by writing, shall be only at will—is converted into a tenancy from year to year is that originally, in accordance with the statute, it is but an estate at will, but afterwards by the payment of rent, or from other circumstances indicative of an intention to create such yearly tenancy, it becomes converted into a tenancy from year to year, to which latter certain tenancy the Courts always lean in preference to the uncertain tenancy of an estate at will. For the rule to determine when a tenancy is at will, and when for years, see *Richardson* v. *Langridge* (4 Taunt. 128).

The decision in *Doe* d. *Rigge* v. *Bell*, that the holding is regulated by the other terms of the lease, arises rather as a matter of evidence than of law. In that case the lease itself was void, but the same rule applies to the case of a tenant holding over after the expiration of his term under a valid lease, for in such a case after there has been a payment and acceptance of subsequent rent, the law, in the absence of any evidence to the contrary, implies that he continues to hold on

such of the terms of the previous demise as are applicable to a tenancy from year to year.

Where a tenant goes into possession under an agreement for a lease, he is, at Common Law, strictly only a tenant at will until he pays rent referable to some aliquot part of a year, and then he becomes a tenant from year to year.

But since the Judicature Acts, which form the rules of law and equity, when a tenant has entered under an agreement which is void as a lease the matter is to be dealt with as if the lease had been actually granted if either party elects to insist on that equity and shows that he is entitled to specific performance. This was decided in the case of *Walsh* v. *Lonsdale*, 21 Ch. D. 9. The judgment of Jessel, M.R., in that case should be carefully read.

XLV.

ELWES v. MAWE (1802).

ON TENANTS' FIXTURES AND THEIR REMOVAL.

(2 Sm. L. C. 188; 3 East, 38.)

IN THE COURT OF KING'S BENCH.

Decided:—That although tenants may remove fixtures erected for the purposes of their trades, yet tenants in agriculture cannot at Common Law remove fixtures erected for the purposes of husbandry.

Notes to Elwes v. *Mawe.*

The law of fixtures has in recent times been altered by statutes, but, as the statutory rights are limited and restricted by certain conditions, it is still important to understand what is the position at Common Law.

The learned editors of "Smith's Leading Cases" use the word "fixtures" to denote anything annexed to the freehold. By the expression "annexed" is meant fastened to or connected with it. Mere juxtaposition or the laying of an object, however

heavy, on the freehold does not amount to annexation. Thus a barn erected on pattens and blocks of timber lying on the ground, but not fixed into the ground, are not fixtures. But the circumstances to prove an intention that the article should not become a fixture must be circumstances patent for all to see, showing the degree and object of its annexation to the freehold (*Hobson* v. *Gorringe*, 1897, 1 Ch. 182).

The most important of the statutory enactments above referred to are the Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), and the Agricultural Holdings Act, 1908 (8 Edw. 7. c. 28) The first Act (section 3) provides that buildings, engines, or machinery erected for agricultural purposes, with the consent in writing of the landlord, shall remain the property of, and be removable by, the tenant, so that he do no injury in the removal thereof; but before removal one month's notice shall be given to the landlord, who has the option of purchasing. The 1908 Act provides by section 21 that the tenant of a farm or market garden may remove any engine, machinery, fencing, fixture, or building for which he cannot claim compensation (although not erected with the consent in writing of the landlord); but a month's notice must be given prior to removal, and the landlord has the right of pre-emption, and before removal the tenant must pay all rent, and in removal he must do no avoidable damage, and if in removal he does any damage he must make that good. The provisions of the section apply to fixtures or buildings *acquired* since December 31, 1900, by a tenant in like manner as they apply to fixtures or buildings erected by him, but they do not apply to those erected before January, 1884.

The law, then, as to fixtures shortly stands thus : The tenant may remove (1) those erected for the purposes of trade, domestic use, or ornament; and (2) agricultural fixtures as provided by the above statute; but all such fixtures, other than agricultural fixtures, must be removed before the expiration of the term, or during such further period as the tenant holds under a right to consider himself as tenant, otherwise they become the property of the landlord, being considered as a gift in law to him. Agricultural fixtures may, under the Agricultural Holdings Act, 1908, be removed before, or within a reasonable time after, the determination of the tenancy.

The personal representatives of a tenant for life or in tail are entitled, as against the remainderman or reversioner, to fixtures put up for trade (*Ward* v. *Dudley*, 57 L. T. 20) and ornament (*Leigh* v. *Taylor*, 1902, A. C. 157). A devisee gets all fixtures; and the heir seems to get all fixtures, unless the mode and intention of annexation show no intent to make them part of the freehold (*Leigh* v. *Taylor*, *supra*). Things fastened to or connected with land or a building pass to the purchaser.

As between mortgagor and mortgagee, the rule is that fixtures pass to the mortgagee. The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31) enacts that a bill of sale of chattels capable of complete transfer by delivery (which has to be registered) extends to fixtures if they are separately assigned or charged, but not to fixtures when assigned together with a freehold or leasehold interest in any land or building to which they are affixed (except trade machinery). If by the same instrument any freehold or leasehold interest as aforesaid is so conveyed or assigned, then the fixtures are not to be deemed separately assigned or charged, only because assigned by separate words, or because power is given to deal with them apart from such freehold or leasehold interest. Trade machinery means (for the purposes of the Bills of Sale Acts, 1878 and 1882) the machinery used in or attached to any factory or workshop (exclusive of fixed motive power, fixed power machinery, and pipes for steam, gas and water). And if a mortgage of land or a building is made which does not mention the trade machinery, such machinery passes as incidental to the assignment of the premises, and the Bills of Sale Acts do not apply (*Re Yates*, *Batchelor* v. *Yates*, 38 Ch. D. 112; 57 L. J. Ch. 697; *Small* v. *National Provincial Bank of England*, 1894, 1 Ch. 686; 63 L. J. Ch. 270; *Johns* v. *Ware*, 1897, 1 Ch. 359). Practically this would now be the only way of mortgaging by one instrument premises and fixtures in the nature of trade machinery, for it has been decided that a bill of sale to secure the payment of money which expressly includes other property not within the Bills of Sale Acts is void as a bill of sale (*Cochrane* v. *Entwistle*, 25 Q. B. D. 116; 59 L. J. Q. B. 418). If a fixture (*e.g.*, a gas engine) is affixed to the premises *before* (*Hobson* v. *Gorringe*, 66 L. J. Ch. 114) or *after* (*Reynolds* v. *Ashby*, 72 L. J. K. B. 51) the mortgage under a hire-

purchase agreement, the mortgagee on taking possession can prevent the vendor removing it; but if the circumstances of annexation show the chattel (*e.g.*, hired chairs nailed to the floor of a circus) was not annexed for permanent improvement of the premises but only for the most convenient temporary enjoyment of it as a chattel, the mortgagee cannot claim it (*Lyon & Co.* v. *London, City and Midland Bank*, 1903, 2 K. B. 135).

XLVI.

DALBY v. INDIA AND LONDON LIFE ASSURANCE COMPANY (1854).

ON THE NATURE OF CONTRACTS OF LIFE ASSURANCE AND ON INSURABLE INTEREST.

(2 Sm. L. C. 241; 15 C. B. 365.)

IN THE COURT OF EXCHEQUER CHAMBER.

The plaintiff, as trustee for the Anchor Life Assurance Co., brought his action on a policy for £1,000 on the life of the Duke of Cambridge. The Anchor Co. had insured the Duke's life on four separate policies—two for £1,000 each and two for £500 each—granted by that company to Wright. They determined to limit their insurances to £2,000 on one life; and this insurance exceeding it, they effected a policy for £1,000 with the defendants by way of counter-insurance. At the time this policy was subscribed by the defendants they had unquestionably insurable interest to the full amount. Afterwards an arrangement was made between the office and Wright for the former to grant an annuity to Wright and his wife, in consideration of a sum of money and of the delivery up of the four policies to be cancelled, which was done;

but one of the directors kept the present policy on foot by the payment of the premiums till the Duke's death.

Decided:—(1) That the contract of life assurance is a contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, and that it is not a mere contract of indemnity, as are policies against fire and marine risks.

(2) That the interest necessary under 14 Geo. 3, c 48, s. 3, is an interest at the time of effecting the insurance, and not at the time of the recovery of money; therefore although at the time of recovery the interest is gone, yet if at the time of effecting the insurance the person effecting it had a proper interest he can recover.

XLVII.

HEBDON v. WEST (1863).

ON INSURABLE INTEREST.

(3 B. & S. 579.)

IN THE COURT OF KING'S BENCH.

Decided:—That, where there are several policies effected with different offices, the insured can recover no more from the insurers, whether on one policy or many, than the amount of his insurable interest.

Notes to Dalby v. *India and London Life Assurance Co. and Hebdon* v. *West.*

If the person effecting the insurance has an interest in the life or other risk insured it is an instrument of the greatest value to society—a cure for many of life's greatest uncertainties—whereas

if he has no such interest it is a mischievous gamble. Hence the statutes which provide that there must be an insurable interest.

The statute in question in this case is 14 Geo. 3. c. 48 : " An Act for regulating insurances upon lives and for prohibiting all such insurances except in cases where the persons insuring shall have an interest in the life or death of the persons insured."

The case of *Dalby* v. *India and London Life Assurance Company* distinctly overrules that of *Godsall* v. *Boldero*, 9 East, 72, where it had been, in fact, decided that life, like fire, assurance was but a contract of indemnity. The above case is one of the greatest importance, as plainly laying down the rule that if a person has an insurable interest at the time of effecting the life policy, he can afterwards recover, although his interest has gone; thus, if a creditor insures his debtor's life, although he is afterwards paid, yet he can recover from the insurance office.

It should be mentioned that the statute (14 Geo. III. c. 48) referred to in the above case does not extend to prevent individuals from effecting insurances upon their own lives, provided that it be done *bona fide*.

A wife has an insurable interest in the life of her husband, but a husband, parent, or child has no insurable interest in the life of the wife, child, or parent, unless he or she has some interest in property dependent on such life. By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11, a married woman may effect a policy of insurance upon her own life, or the life of her husband, for her separate use; and a policy of insurance by a married man on his own life, if so expressed on its face, may enure as a trust for the benefit of his wife and children, or any of them, and as a trust not be subject to the control of the husband or his creditors. But if the policy was effected for the purpose of defrauding creditors, they are entitled to receive out of the sum assured an amount equal to the premiums paid.

XLVIII.

GEORGE v. CLAGETT (1797).

ON THE LAW OF "SET OFF" WHERE A FACTOR SELLS GOODS AS HIS OWN.

(2 Sm. L. C. 130; 7 T. R. 359.)

IN THE COURT OF KING'S BENCH.

Decided:—That if a factor sells goods as his own, and the buyer does not know of any principal other than the factor, and the principal afterwards declares himself, and demands payment of the price of the goods, the buyer may set off any demand he may have on the factor, against the demand made by the principal.

Notes to George v. *Clagett.*

The learned editors of "Smith's Leading Cases" remark: "The decision in this case too clearly results from principles of natural equity to need much discussion. It has ever since been followed."

In *Sims* v. *Bond*, 5 B. & Ad. 389, Lord Denman said: "It is a well-established rule of law that there a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or principal may sue on it: the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party."

However, the latter part of this rule applies only when the one party does not know that the other party with whom he contracts is but an agent. If he has the means of knowing and, though not expressly told, must be supposed to know that he is dealing not with a principal but with an agent, the reason of the above rule ceases: and *Cessante ratione, cessat ipsa lex.* See *Baring* v. *Corrie*, 2 B. & Ald. 137.

XLIX.

ADDISON v. GANDESEQUI (1812).

ON THE LAW OF PRINCIPAL AND AGENT.

(2 Sm. L. C. 348; 4 Taunt. 574.)

IN THE COURT OF COMMON PLEAS.

In this case the defendant, being abroad and desirous of purchasing certain goods, came to England and went to his agents, L. & Co. These agents purchased the goods for him from the plaintiffs, he selecting them, and the plaintiffs debited the agents, L. & Co., with the price.

Decided:—That the plaintiffs could not now recover the price against defendant, having known who the principal was, and yet debited the agents.

L.

PATERSON v. GANDESEQUI (1812).

ALSO ON THE LAW OF PRINCIPAL AND AGENT.

(2 Sm. L. C. 341; 15 East, 62.)

IN THE COURT OF KING'S BENCH.

The facts in this case were of a similar nature to those of the previous one, and on the trial the plaintiff had been nonsuited. A rule *nisi* was afterwards obtained to set aside the nonsuit, and on argument it was made absolute, the Court considering that there was some doubt whether or not the plaintiff knew of the defendant

being the principal. But the following general principles were laid down, agreeing with the previous case:—That if the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give the credit to such agent, he cannot afterwards recover the value against the *known* principal; but if the principal be not known at the time of the purchase made by the agent, it seems that, when discovered, the principal or the agent may be sued, at the election of the seller; unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing, as particularly in the case of principals residing abroad.

LI.

THOMSON v. DAVENPORT (1829).

ALSO ON THE LAW OF PRINCIPAL AND AGENT.

(2 Sm. L. C. 355; 9 B. & C. 78.)

IN THE COURT OF KING'S BENCH.

Here, Davenport sold goods to one M'Kune, who told him he was buying them on account of another person, *but did not mention the principal's name*, and Davenport did not inquire for it, but debited M'Kune. M'Kune failed, and Davenport sued Thomson, who was the principal, for the price. The verdict was given for the plaintiff, and was now affirmed on writ of error, it being

decided:—That the seller might sue the principal for the price, he not having known who the principal was at the time.

Notes to Addison v. *Gandesequi, Paterson* v. *Gandesequi, and Thomson* v. *Davenport.*

The law of principal and agent is a branch of the law of contract. There may be clear evidence that a contract of agency existed between the principal and the agent *inter se.* But the position of a third party in the matter is often much more difficult to determine.

The above are the leading cases on the subject, and are usually cited together as being very closely connected and jointly bearing on the point. The case of *George* v. *Clagett* (*ante*, p. 81) is sometimes confused with these three cases, and for easy reference and consideration with them it is here placed immediately preceding them. That was a case where the *owner of the goods* employed an agent to *sell* them, and afterwards declared himself: but these three cases are where goods were *purchased* by an agent and the point is who is liable for the price.

An agent generally does not incur a personal liability, but it may be well to enumerate those cases in which, contrary to the general rule, he does so. They are as follows :—

1. Where, as shown in the above cases, the principal is concealed.
2. Where he acts without authority.
3. Where he exceeds his authority.
4. Where he specially pledges his own credit.
5. Where, though contracting as agent, he uses words to bind himself, *e.g.*, if he covenants personally for himself and his heirs.

As regards the cases above mentioned and numbered 2 and 3—if the agent honestly believed he had authority which he did not possess, he may be sued upon a warranty of authority (*Richardson* v. *Williamson*, L. R. 6 Q. B. 276; *Collen* v. *Wright*, 8 E. & B. 647; *Starkey* v. *Bank of England*,

1903, A. C. 114); and if he knew that he had not the authority which he assumed to possess, he may be sued in an action of deceit (*Polhill* v. *Walter*, 3 B. & Ad. 114). It should be observed that if an agent did not know of the determination of his authority, he is not personally liable; *e.g.*, where an action was brought for necessaries supplied to a woman after her husband's death, whilst on a foreign voyage, but before she knew of his decease, it was decided that she was not liable (*Smout* v. *Ilbery*, 10 M. & W. 1). See also *Salton* v. *New Beeston Co.*, 1900, 1 Ch. 43, where the authority of a solicitor to defend an action against a company was terminated by the company being dissolved.

Where a British agent contracts for a foreign principal he is usually personally liable; but there is no absolute rule to this effect, and it is a question of fact on the circumstances of each particular case (*Green* v. *Kopke*, 25 L. J. C. P. 297; *Armstrong* v. *Stokes*, 41 L. J. Q. B. 253; *Malcolm Flinn & Co.* v. *Hoyle*, 63 L. J. Q. B. 1).

Where a person signs a bill or note as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, he is not personally liable *thereon*, but the mere addition to his signature of words describing him as an agent does not exempt him from personal liability (45 & 46 Vict. c. 61, s. 26).

An agent's authority may be determined in any of the following ways :—

1. By the principal's revocation of it : and death will operate as a revocation.
2. By the agent's renunciation with principal's consent.
3. By the principal's bankruptcy.
4. By fulfilment of the commission.
5. By expiration of time.
6. Formerly when the agent was a *feme sole*, by her marriage, but not so now since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

In order to determine the agent's authority by revocation, means should be used to make known such revocation as fully as the employment was known. To correspondents express

notice should be given, and to strangers a general notice in the *Gazette*. With regard to death of the principal operating as a revocation, note, as to powers of attorney, the provisions of the Conveyancing Acts, 1881 and 1882 (44 & 45 Vict. c. 41, s. 47; 45 & 46 Vict. c. 39, ss. 8, 9).

LII.

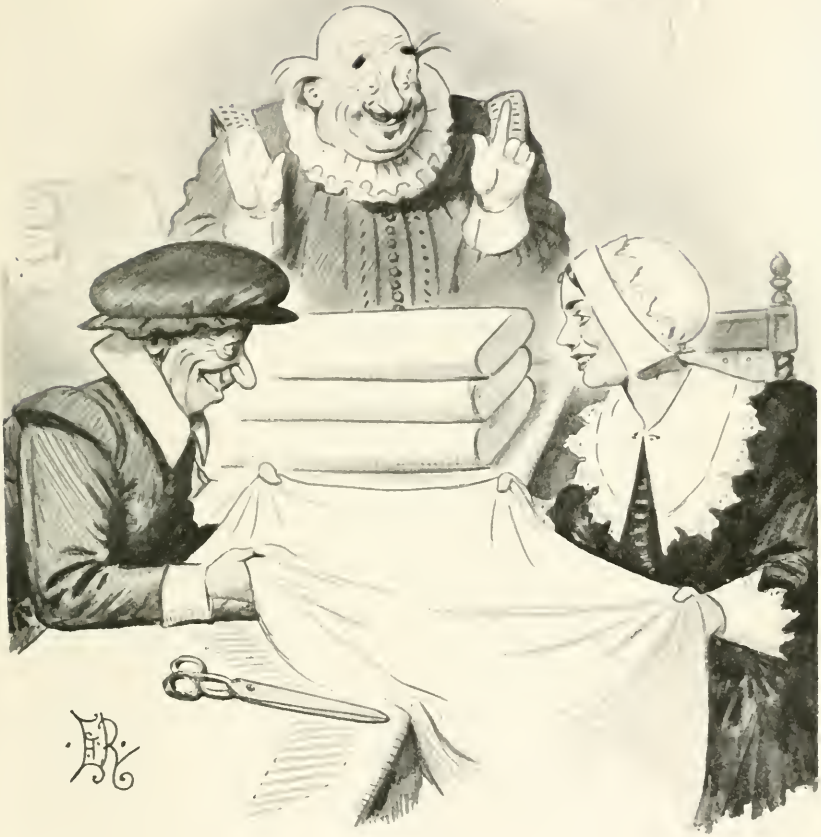
MANBY v. SCOTT (1659).

ON A HUSBAND'S LIABILITIES UNDER HIS WIFE'S CONTRACTS.

(2 Sm. L. C. 432; 1 Sid. 109.)

IN THE EXCHEQUER CHAMBER.

Where defendant's wife departed from him without his consent and lived twelve years separate from him and then returned, but he would not receive her nor allow her any maintenance, and discharged or forbade tradesmen, particularly the plaintiffs, from trusting her with any wares, and the plaintiffs, being mercers, sold to the wife wares at a reasonable price, and the things were fit for her quality. *Decided:*—That the husband was not bound.



Manby v. Scott.

"Manby sued the Baron Scott
Upon his bad wife's contracts.
But Manby lost, because the Scott
Had declined to meet her compacts."

—*A. J. Lamb.*

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LIII.

MONTAGUE v. BENEDICT (1825).

ALSO ON A HUSBAND'S LIABILITIES UNDER HIS WIFE'S CONTRACTS.

(2 Sm. L. C. 463; 3 B. & C. 631.)

IN THE COURT OF KING'S BENCH.

This was an action against a husband for certain goods—*not* necessaries—delivered to the wife of the defendant. *Decided:*—That as the goods were not necessaries, and there was no evidence to go to the jury of any assent of the defendant (the husband) to the contract made by his wife, the action could not be maintained.

LIV.

SEATON v. BENEDICT (1828).

ALSO ON A HUSBAND'S LIABILITIES UNDER HIS WIFE'S CONTRACTS.

(2 Sm. L. C. 469; 5 Bing. 28.)

IN THE COURT OF COMMON PLEAS.

This was an action against the same defendant as in the previous case. The claim was for certain goods which were in the nature of necessaries—delivered to the wife of the defendant. It was, however, shown that the defendant had supplied his wife's wardrobe well with all necessary articles. *Decided:*—That a husband who supplies his wife with necessaries in accordance with her

station is not liable for debts contracted by her without his previous authority or subsequent sanction.

Notes to Manby v. *Scott*, *Montague* v. *Benedict*, *and Seaton* v. *Benedict.*

The general principle established in *Manby* v. *Scott* is still good law; but it must be remembered that, with regard to necessaries supplied to the wife, it may not be essential to show any specific authority of the husband to charge him, for the wife from her position has an implied authority for that purpose unless the contrary appears; and in *Seaton* v. *Benedict* the contrary did appear, for the wife was sufficiently supplied with necessaries. It was also laid down in *Manby* v. *Scott*, *Debenham* v. *Mellon*, *infra*, and *Morel* v. *Westmoreland*, 1904, A. C. 11, that the husband is not liable for necessaries if he supplies the wife with sufficient means to buy them without pledging his credit.

It was decided in *Jolly* v. *Rees* (1863, 15 C. B. (N. S.) 628), that any agreement between husband and wife that she is not to pledge his credit, or the fact of the husband forbidding the wife to pledge his credit, though not communicated to tradesmen, will be a bar to any action against the husband. This decision was thoroughly confirmed in 1881 in *Debenham* v. *Mellon* (6 App. Cas. 24; 50 L. J. Q. B. 155), which decides that where husband and wife live together, and the husband has privately forbidden his wife to buy goods on credit, he is not liable for the price of articles of dress, although suitable to her rank in life, supplied to her by a tradesman with whom she has not dealt before, but to whom the fact that she was so forbidden has not been communicated.

It must be carefully borne in mind that *Jolly* v. *Rees* and *Debenham* v. *Mellon* only show that the presumption of the wife being the husband's general agent for necessaries may be rebutted; but where there is more than presumption, *i.e.*, if she has actually been constituted general agent by allowing her to contract, then the principle of these decisions does not apply, and to prevent the husband being liable it is necessary for him to show that he has communicated his prohibition to the tradesman.

It should be mentioned that if a man takes a woman to his house and lives with her as his wife, she stands in the same position with regard to her power to charge him as if she were actually married to him (*Ryan* v. *Sams*, 12 Q. B. 460).

The contract of the wife does not bind the husband if the tradesman, knowing of the marriage, gives credit exclusively to the wife (*Jewsbury* v. *Newbold*, 26 L. J. Ex. 247).

The whole power which a wife has to bind her husband for necessaries arises from the fact that during cohabitation there is a *presumption*, arising from the very circumstances of the cohabitation, of the husband's assent to contracts made by his wife for necessaries suitable to his degree and estate, which presumption is, however, as the cases of *Seaton* v. *Benedict*, *Jolly* v. *Rees*, and *Debenham* v. *Mellon* show, liable to be rebutted. But where the wife is living apart from the husband there is *no* presumption that she has any authority to bind him, and it must be shown that from the circumstances of the separation, or the conduct of the husband, she has such authority. When the husband and wife are living separate the law as to the husband's liability is as follows :—

Firstly : Where the husband unjustly expels his wife from the marital roof, or forces her to abandon it by his cruelty, she goes forth with an implied authority to bind him for necessaries.

Secondly : Where the wife unlawfully and against the husband's consent leaves him, as if she elopes and lives in adultery, she has no implied authority to bind him.

Thirdly : Where the separation is by mutual consent, the wife has an implied authority to bind her husband for necessaries, unless there is some express agreement between the husband and wife on the subject of the separation and the rights of the wife (see *Eastland* v. *Burchell*, 3 Q. B. D. 432; 47 L. J. Q. B. 500). In this third position it may be noticed that if under the agreement of separation a certain allowance is to be paid, which allowance is not kept up, the wife may bind her husband by contracting to the extent of it (*Nurse* v. *Craig*, 2 N. R. 148).

With reference to the husband's liability for the debts of his wife contracted before marriage, formerly he was always so liable, but by the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93, s. 12), where the marriage was on or since August 9,

1870, he was relieved from liability. An amending Act (37 & 38 Vict. c. 50), however, as regards marriages on or since July 30, 1874, renewed his liability, but only to the extent of any assets he had with his wife, and it enacted that the husband and wife must be sued together, a provision which gave rise to some injustice, as shown by *Bell* v. *Stocker* (10 Q. B. D. 129; 52 L. J. Q. B. 49). These two Acts have now been repealed by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), except as regards the rights and liabilities of persons married before January 1, 1883. Under the 1882 Act (sections 13, 14, 15), the husband is only liable to the extent of assets he has with his wife, and they may be sued together or separately. The liability of the husband under this Act is quite different from his liability at Common Law, for it is not a joint liability of the husband and wife, and therefore he cannot require her to be joined in the action. Further, if the wife is first sued, and judgment is obtained against her, and such judgment remains unsatisfied, an action may be maintained against the husband who received assets with his wife (*Beck* v. *Pierce*, 23 Q. B. D. 316; 58 L. J. Q. B. 516).

As regards debts created by a married woman which do not bind her husband, but are her own proper debts, she is liable, but only to the extent of her separate estate, and under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, s. 1 (4)), not only is separate estate which she is possessed of at the time liable, but also subsequently acquired separate estate. However, it was held under this provision that the plaintiff had to prove that at the time of contracting the debt she possessed some separate estate (*Palliser* v. *Gurney*, 19 Q. B. D. 519; 56 L. J. Q. B. 546); but this is so no longer, by reason of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63, s. 1). This 1893 Act provides that if a married woman makes any contract (otherwise than as agent) after December 5, 1893, it shall be deemed to bind her separate property whether she has any or not at the date of the contract, and shall bind all separate property which she has at the date of the contract or afterwards possesses, and can be enforced against property she afterwards owns when discovert; but no liability arising out of such contract can be enforced against property which, at the date of the

contract or at any subsequent date, she is restrained from anticipating. See as to the effect of this proviso, *Barnett* v. *Howard*, 69 L. J. Q. B. 955. The whole liability of a married woman is, in fact, not a personal one, but is a liability as regards her separate estate only, so that she cannot be committed to prison under the Debtors Act, 1869, as having means to pay (*Scott* v. *Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43). The proper course for a judgment creditor to take is to seize her separate property in execution, *e.g.*, by getting a receiver appointed, and though her property, which she is restrained from anticipating, cannot then be seized, it has been held that any income of such property actually due to her at the date of the judgment can be seized (*Hood Barrs* v. *Heriot*, 65 L. J. Q. B. 352; *Whiteley* v. *Edwards*, *ibid.*, 457).

A joint liability cannot be implied merely from the fact that the husband and wife are living together in the husband's house and the wife orders goods for the household and that both have property (*Morel* v. *Westmoreland*, 1904, A. C. 11). And when the remedy is not joint, but alternative, the plaintiff having signed judgment against the wife cannot afterwards recover against the husband (*Moore* v. *Flanagan*, 1920, 1 K. B. 919).

LV.

PRICE v. THE EARL OF TORRINGTON (1704).

ON NOTES MADE BY DECEASED PERSON IN COURSE OF BUSINESS AND IN DISCHARGE OF DUTY—AN EXCEPTION TO THE RULE AGAINST HEARSAY.

(2 Sm. L. C. 294; 1 Salk. 285.)

AT NISI PRIUS BEFORE HOLT, C.J., AT GUILDHALL.

This was an action for the price of beer sold and delivered, and the evidence given to charge defendant was that the drayman (since dead), in the usual course

of business, *and in discharge of his duty*, had made a note of the delivery of the beer, and set his hand thereto, and that he had since died. *Decided:*—That this was good evidence of a delivery.

LVI.

HIGHAM v. RIDGWAY (1808).

ON DECLARATIONS AGAINST INTEREST MADE BY DECEASED PERSONS—ANOTHER EXCEPTION TO THE RULE AGAINST HEARSAY.

(2 Sm. L. C. 301; 10 East, 109.)

IN THE COURT OF KING'S BENCH.

In this case it was necessary to prove the precise date of the birth of one William Fowden, and to prove this, an entry made by a man-midwife (since dead), who had delivered the mother, of his having done so on a certain day, referring to his ledger, in which he had made a charge for his attendance, *which was marked as paid*, was tendered. *Decided:*—That this was good evidence.

Notes to Price v. *Torrington and Higham* v. *Ridgway.*

The most elementary principle of the English law of evidence is that "hearsay" is not admissible. And even the death of a proposed witness does not of itself give sufficient reason for making any exception. Thus, if a proposed witness gives a proof of the evidence which he is prepared to give and signs it, but dies before he can be called, that proof is not admissible in evidence. The witness is dead. He cannot be cross-examined. And if the proof of a cause of action depends upon that man's evidence, the action must fail.

But there *are* exceptions to the rule against hearsay evidence, and two of the most important are those laid down in *Price* v. *Torrington* and *Higham* v. *Ridgway*. They are both of immense

importance : and they must be kept quite distinct; that of *Price* v. *Earl of Torrington* being that the entry was made in the ordinary course of business, and in the performance of duty (and here it must be observed that in this class of cases only so much of the entry as it was strictly the duty of the party to make can be received); whilst the ground of the decision in *Higham* v. *Ridgway* was that the entry was against the interest of the party who had made it (and in this class of cases the other facts stated in the entry, though not against the interest of the party making the entry, can be received). Had this not been so, the entry given in evidence in *Higham* v. *Ridgway* would have been inadmissible. The distinction is most important, and should be well observed. A modern instance of entry in course of duty will be found in the admission of a deceased surveyor's survey and report, *Evans* v. *Merthyr U.D.C.*, 1899, 1 Ch. 241.

LVII.

ROE v. TRANMARR (1757).

ON THE LIBERAL CONSTRUCTION OF DEEDS.

(Willes 682.)

IN THE COURT OF COMMON PLEAS.

Decided:—That a deed which could not operate as a release, as it attempted to convey a freehold *in futuro*, should nevertheless operate as a covenant to stand seised.

Notes to Roe v. *Tranmarr.*

The principle which this case carries out is one of great importance, forming, indeed, one of the first rules of construction of all written instruments, viz., "The construction shall be liberal; words ought to serve the intention, not contrarywise."

It appears convenient here to give some of the chief rules for the construction of deeds :—

1. A deed is to be expounded according to the intention, where that intention is clear, rather than according to the precise words

used, for *Verba intentioni debent inservire*, and *Qui hæret in literâ, hæret in cortice*.

2. To explain an ambiguity apparent on the face of a deed, no evidence *dehors* the deed itself is admissible.

3. The construction of a deed should be made upon the entire instrument, and so as to give effect, as far as possible, to every word that it contains.

4. The construction should be favourable, and such that *Res magis valeat quam pereat*.

5. When anything is granted, the means necessary for its enjoyment are also granted by implication; for it is a maxim that *Cuicunque aliquid conceditur, conceditur et id sine quo res ipsa non esse potuit*.

6. If there be two clauses in a deed so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected.

7. Ambiguous words shall be taken most strongly against the grantor, and in favour of the grantee: *Verba fortius accipiuntur contra proferentem*. But this being a rule of some strictness and rigour, is the last to be resorted to, and is never to be relied upon but when all other rules of exposition fail; and it does not apply to a grant by the Crown at the suit of the grantee.

LVIII.

VICARS v. WILCOCKS (1806).

ON THE REMOTENESS OF CERTAIN DAMAGE. (A CASE AS TO WHICH LATER DECISIONS HAVE INTRODUCED QUALIFICATIONS.)

(2 Sm. L. C. 513; 8 East, 1.)

IN THE COURT OF KING'S BENCH.

In this case it appeared that the plaintiff had been retained by J. O. as a journeyman, and that the defendant

had, in discourses with third persons, imputed to the plaintiff that he had maliciously cut the defendant's cordage in his rope-yard, and that in consequence of such imputation the said J. O. had discharged plaintiff from his service, and he had thus been much injured.

Decided:—That damage, to be actionable, must not be too remote; and that where special damage is necessary to sustain an action for slander, it is *not* sufficient to prove a mere wrongful act of a third person induced by the slander, such as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted; but the special damage must be a legal and natural consequence of the slander.

LIX.

HADLEY v. BAXENDALE (1854).

ON THE MEASURE OF DAMAGES.

(9 Ex. 341.)

IN THE COURT OF EXCHEQUER.

This was an action of assumpsit brought against the defendants as common carriers. The plaintiffs, the owners of a mill, finding one of the shafts broken, sent to defendants' office a servant, who informed the clerk there that the mill was stopped and that the shaft must be sent at once, and the clerk informing him that if sent any day before twelve o'clock it would be delivered the following day, the shaft was sent and the carriage paid. The neglect arose in the non-delivery in sufficient time, whereby the making of a new shaft was delayed several

days. Evidence was given of the loss of profits caused by the stoppage of the mill, which was objected to by the defendants as being too remote. *Decided:*—That the loss of the profits could not be taken into account in estimating the damages; and that the damages in respect of breach of contract should be such as might fairly and reasonably be considered either arising naturally or such as might reasonably have been supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

Notes on Vicars v. *Wilcocks and Hadley* v. *Baxendale.*

The learned editors of "Smith's Leading Cases" remark: "*Vicars* v. *Wilcocks* is retained as a leading case because it serves as a useful peg on which to hang a note on the doctrine that damage under certain circumstances may be too *remote* to form the subject-matter of an action. There are many modern cases in which the Courts have acted upon this principle. The actual decision in *Vicars* v. *Wilcocks* is, however, much qualified by the cases cited below, and should the same facts again arise probably no judge would now withhold the case from the jury." They then cite *Kelly* v. *Partington*, 5 B. & Ad. 645; *Morris* v. *Langdale*, 2 B. & P. 284; *Ashley* v. *Harrison*, 1 Esp. 48; *Chamberlain* v. *Boyd*, 11 Q. B. D. 407; *Speake* v. *Hughes*, 1904, 1 K. B. 138, and *Alsopp* v. *Alsopp*, 5 H. & N. 534. The student will do well to read these cases. But they also cite *Lynch* v. *Knight*, 9 H. L. C. 577, and this is the most important case upon the point. Lord Wensleydale strongly inclined to the view that "to make the words actionable by reason of special damage the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words,—not what would reasonably follow, or we might think ought to follow." He thought the rules laid down by Lord Ellenborough, C.J., in *Vicars* v. *Wilcocks* were too restrictive. The

two cases however both deal generally with the question of the proper measure of damages, and the subject being of very great importance, a few observations on it may be found useful.

Firstly. *In actions of contract.* The rule in assessing damages here is much more strictly confined than in actions of tort, and generally the primary and immediate result of the breach of contract only can be looked to; thus, in the case of non-payment of money, no matter what amount of inconvenience is sustained by the plaintiff, the measure of damages is the interest of the money only. The principle seems to be in these cases that in matters of contract the damages to which a party is liable for its breach ought to be in proportion to the benefit he is to receive from its performance (see "Mayne on Damages," 9th ed., p. 10). It is obviously unfair that either party should be paid for carrying out his bargain on one estimate of its value, and forced to pay for failing in it on quite a different estimate. This would be making him an insurer of the other party's profits without any premium for undertaking the risk.

Now, as to the grounds of damage which will in no case be admissible, they may be classed under the general head of remoteness. "Damage," says Mayne (p. 45), "is said to be remote when, although arising out of the cause of action, it does not so immediately and necessarily flow from it as that the offending party can be made responsible for it." And it is here that the case of *Hadley* v. *Baxendale* (which is one intended to settle the law upon the subject, and which has since been acted upon) comes in, laying down the rule as given above in that case, and which rule was shortly stated by Blackburn, J., in *Cory* v. *Thames Iron Works Co.* (L. R. 3 Q. B. 186), thus: "The damages are to be what would be the natural consequences of a breach under circumstances which both parties were aware of." If the damages are not within this rule, then they are too remote and cannot be recovered. There is, however, no doubt very often considerable difficulty in determining whether, when there are any special circumstances in a case, such special circumstances can or cannot be taken into account in arriving at the amount of the damages. The correct rule appears to be that where there are any special circumstances connected with a contract which may cause special damage to

follow if it is broken, mere notice of such special circumstances given to one party will not render him liable for the special damage unless it can be inferred from the whole transaction that he consented to become liable for such special damage, and that if the person has an option to refuse to enter into the contract but still enters into it, this will be evidence that he accepted the additional risk in case of breach. It will be noticed that, in the case of *Hadley* v. *Baxendale*, though the defendants had notice of special circumstances, yet they had no option to decline to enter into the contract, for they were common carriers.

A useful illustration of the additional damages that can be recovered by reason of notice of special circumstances is found in the case of *Grébert-Borgnis* v. *Nugent* (15 Q. B. D. 85; 54 L. J. Q. B. 511). There the defendants contracted with the plaintiff to deliver goods to him, of a particular shape and description, at certain prices, and by instalments at different times. When the contract was made, the defendants knew that, except as to price, it corresponded with and was substantially the same as a contract which the plaintiff had entered into with a French customer of his, and that it was made in order to enable the plaintiff to fulfil such last-mentioned contract. The defendants broke their contract, and there being no market for goods of the description contracted for, the plaintiff's customer recovered damages against him in the French Court to the amount of £28. It was held that the plaintiff was entitled to recover as damages the amount of profits he would have made had he been able to fulfil his contract with his customer, and also the £28 and costs. See also *Hammond* v. *Bussey*, 20 Q. B. D. 79, and *Agius* v. *G. W. Colliery*, 68 L. J. Q. B. 312.

As to the damages recoverable by a purchaser for breach of a contract to sell land, see *Bain* v. *Fothergill* (L. R. 7 H. L. 158), *Day* v. *Singleton* (68 L. J. Ch. 593).

Secondly. *In actions of tort.* The rule here as to damages is of a very much looser character than in actions of contract, and this is naturally so from the nature of the case. With the one exception of actions for breach of promise of marriage, the motives or conduct of a party breaking a contract, or any injurious circumstance not flowing from the breach itself, cannot be considered as damages where the action is on the contract.

But torts may be mingled with ingredients which will much increase the damages; thus a trespass may be attended with circumstances of insult, and generally, in an action of tort any species of aggravation will give ground for additional damages. Still it must be remembered that even in actions of tort, only such damages can be awarded as might reasonably be expected to ensue from the wrongful act; in other words, that here also the damages claimed must not be too remote. (*Kelly* v. *Partington*, 5 B. & A. 645; *Sharp* v. *Powell*, L. R. 7 C. P. 253; 41 L. J. C. P. 95). However, in some cases of tort, the jury are justified in giving damages quite beyond any possible injury sustained by the plaintiff, on the ground that the action is brought to a certain extent as a public example, and damages when so awarded are styled exemplary or vindictive damages. Thus, note an action of seduction as an instance.

In *Kelly* v. *Partington*, 5 B. & Ad. 651, damages were claimed for slander because another person had refused to take plaintiff into his service by reason of the words. Patteson, J., said : " If the words are not defamatory, the rejection of the plaintiff cannot be considered the natural result of speaking the words." In *Sharp* v. *Powell*, L. R. 7 C. P. 253, it was held that the defendant was not liable to the plaintiff for damage caused to his horse by slipping while passing over frozen water, which was the result of defendant's washing his van in the street, as such damage was too remote.

In *Sapwell* v. *Bass*, 1910, 2 K. B. 486, the plaintiff sued for breach of a contract by which the defendant agreed that his horse should serve the plaintiff's mare, and Jelf, J., held that it was impossible to know what the result would have been, and that the plaintiff was entitled to nominal damages only.

This was distinguished by the Court of Appeal in *Chaplin* v. *Hicks*, 1911, 2 K. B. 786, where a lady recovered substantial damages for breach of a contract to give her an opportunity of competing for a theatrical engagement.

As to the time to which any damages, whether in contract or tort, may be assessed, of course no damages can be given on account of anything before the cause of action arose, and as to damages subsequent to the cause of action, the result of the

decisions is stated on p. 102 of "Mayne on Damages" to be that such damages "may be taken into consideration where they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action." A plaintiff is, under the present practice, entitled to have damages assessed not merely up to the date of the issuing of the writ, but up to the time of the trial (Order XXXVI., r. 58).

In an action brought in this country for breach of a contract to be performed abroad the measure of damages is the loss in English currency to the plaintiff at the time when and the place where the contract ought to have been performed (*Di Ferdinando* v. *Simon Smits & Co.*, 1920, 3 K. B. 409).

LX.

NEPEAN v. DOE (1837).

AS TO PRESUMPTION OF DEATH.

(2 Sm. L. C. 575; 2 M. & W. 894.)

IN THE EXCHEQUER CHAMBER.

Decided:—That where a person goes abroad and is not heard of for seven years the law presumes the fact that such person is dead, but *not* that he died at the beginning or the end of any particular period during those seven years.

Notes to Nepean v. *Doe.*

Of course, this presumption of law is liable to be rebutted, and though there is no presumption of law as to the period of death, such a presumption may arise from particular circumstances; but this is matter of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the

establishment of which that fact is essential. There is also no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health on a certain day was alive a short time afterwards (*In re Phené*, L. R. 5 Ch. 139; see also *Hickman* v. *Upsall*, 4 Ch. D. 144; 46 L. J. Ch. 245).

Where a person has not been heard of for seven years, and during that period—that is, before the expiration of the seven years—a gift is made to him *by a deed*, he must, until the contrary is shown, be taken to have been in existence at the date of the gift, and if the contrary cannot be shown, there is no failure of the gift, but it will go to his representatives (*In re Corbishley's Trusts*, 14 Ch. D. 846; 49 L. J. Ch. 266). But if the gift be made *by will*, the gift fails unless it can be proved affirmatively that the devisee or legatee did survive the testator (*Re Phené*, *Re Corbishley*, *supra*).

There is no presumption of law arising from difference of age or sex as to survivorship when the death of several persons is occasioned by the same cause; nor is there any presumption of law that all died at the same time. The question is entirely one of fact depending on the evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined, the *onus probandi* being on the person setting up a survivorship (*Wing* v. *Angrave*, 8 H. L. C. 183).

This last-mentioned case is an instance of the maxim which declares that "hard cases make bad law." The plaintiff was to take the property in question if the husband survived the wife under one will, and also if the wife survived the husband under another will. They were both washed overboard by one wave, and so the plaintiff could prove neither survivorship. In the *particular* case it was very hard on the plaintiff: but the words of the wills were clear and the principle of law was also clear.

LXI.

HOCHSTER v. DE LA TOUR (1853).

AS TO BREACH OF CONTRACT.

(2 El. & Bl. 678.)

IN THE COURT OF QUEEN'S BENCH.

Here there was an agreement to employ the plaintiff as a courier from a day *subsequent* to the date of the writ, and before the time for the commencement of the employment defendant had refused to perform the agreement, and had discharged the plaintiff from performing it, whereupon he had brought this action. *Decided*:— That a party to an agreement may, before the time for executing it, break the agreement, either by disabling himself from fulfilling it or by renouncing the contract, and that an action will lie for such breach before the time for fulfilment of the agreement.

LXII.

FROST v. KNIGHT (1872).

ALSO AS TO A BREACH OF CONTRACT.

(L. R. 7 Ex. 111; 41 L. J. Ex. 78.)

IN THE EXCHEQUER CHAMBER.

In this case the defendant had promised to marry the plaintiff on the death of his father; and he had afterwards, during his father's life, announced his absolute determination never to fulfil his promise.

Decided:—That the plaintiff might at once regard the contract as broken, in all its obligations and consequences, and sue thereon.

Notes to Hochster v. *De la Tour and Frost* v. *Knight.*

The prineiple decided in *Hochster* v. *De la Tour* seems to be one of reason, for when a man is bound to do some act at a future day, and before that day he definitely declares he will not do it, and refuses to do it, or puts himself in such a position that he cannot do it (*Synge* v. *Synge*, 63 L. J. Q. B. 202), there seems no reason why the cause of action should be delayed until the arrival of that future day. This principle has been recognised and acted on in the case of *Frost* v. *Knight*, given above, overruling the decision of the Court below, which will be found reported in Law Rep. 5 Ex. 322.

In *Cort* v. *Ambergate Railway Co.*, 17 Q. B. 127, it was held that defendants were "ready and willing" to perform a contract to deliver chairs by a certain date, although on receiving notice from the plaintiff that the chairs would not be accepted they had ceased to make them.

In *General Billposting Co.* v. *Atkinson*, 1909, A. C. 118, where defendant was under terms not to engage in a similar business to that of his employers within a specified area, and when those employers wrongfully dismissed the defendant, it was held on similar principles that the plaintiffs had "evinced an intention not to be bound by the contract," and that the defendant was free (cf. *Measures Brothers, Ltd.* v. *Measures*, 1910, 2 Ch. 248).

But when a person is guilty of an anticipatory breach, the other party must make up his mind whether he will take advantage of it or not, for when he does not take advantage of the rescission, the contract still remains in fact in existence (*Avery* v. *Bowden*, 5 El. & Bl. 714; *Johnstone* v. *Milling*, 16 Q. B. D. 460; 55 L. J. Q. B. 162). If there is a contract containing several stipulations, *e.g.*, a lease with various covenants, the doctrine of *Hochster* v. *De la Tour* does not apply so as to enable a party to sue in respect of the anticipatory breach of one stipulation; in fact, it seems that the principle does not apply to any case where, upon a refusal by one party

to perform a particular stipulation, the other cannot put an end to the contract in its entirety (*Johnstone* v. *Milling*, *supra*).

McCardie, J., in *Hartley* v. *Hymans*, discussed in great detail the result of a waiver of a time condition in a contract (1920, 3 K. B. 475; 25 Com. Cas. 366).

As regards a contract to deliver goods by instalments, or to pay for goods by instalments, the Sale of Goods Act, 1893, provides as follows :—" Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of the contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated " (56 & 57 Vict. c. 71, s. 31). See *Mersey Steel and Iron Co.* v. *Naylor*, 9 A. C. 434; 53 L. J. Q. B. 497. In that case Lord Bramwell repudiated a dictum which had been attributed to him, ' that in no case when the contract had been part performed could one party rely on the refusal of the other to go on,' and the rule of law approved by both the Court of Appeal and the House of Lords was " that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract." The rule is cited from Lord Coleridge, C.J., in *Freeth* v. *Burr* (L. R. 9 C. P. 208).

The " intention of the parties " is the underlying test throughout the English Law of Contracts.

CONCLUSION.

When the student has read the foregoing pages and mastered their contents, he is advised to read the notes in "Smith's Leading Cases." They form a series of valuable legal treatises upon the subjects covered by the cases themselves.

After that, when the student passes to a larger course of reading, he should be able to fit the "leading cases" into their proper places in regard to their respective subject-matters.

Thus, when he reads about the Law of Torts he will not forget that the case of Ashby's vote, supporting the maxim *Ubi jus ibi remedium*, is the foundation of it all. He will read of Trespass, and think of the Six Carpenters and how their subsequent abuse of the hospitality of the house rendered their entry tortious *ab initio*. He will study the Law of Negligence and remember the negligence of Bernard in disposing of the casks of Coggs, and of Brett the horseman's carelessness in his riding of Wilson's horse; but he will not forget the possible defence of "inevitable accident"—for Ward's ox is decisive on that point. On the special liability of innkeepers he will consult the five rules laid down in *Calye's Case*. In learning the Law of Wrongful Conversion he will keep in mind the bad behaviour of Delamirie, the jeweller, to Armory, the chimney-sweeper's boy. He will know that there is "no contribution among tort-feasors" since Merryweather and Nixan fought out that issue once for all. Nuisance will suggest to him the damages recovered by Fletcher by reason of Ryland's faulty reservoir. The

Law of Defamation, he will recollect, is distinct in its two departments, since it was because he *wrote* of I'Anson as a swindler that Stuart had to pay him damages. Abrath's action against the North Eastern Railway Company will occur to his mind when Malicious Prosecution is discussed: and he will understand that it is for the *Judge* to say what is "reasonable and probable cause." The inaccurate statement of Lopus about the bezoar stone, and the lie which Freeman told Pasley about the credit which might be safely given to Christopher, will be recalled when he thinks about an action for Deceit.

It will be the same when he passes to the Law of Contracts. English law requires a "consideration" for a contract. Lampleigh's "voluntary courtesy" would not have been a consideration had it not been "moved by a precedent request." Wain's attempt to make a consideration out of a sum smaller than his debt deservedly failed. Miss Frost brought her action as soon as her false Knight announced that he meant to break his promise: and she succeeded. De la Tour refused to employ Hochster, the courier, whom he had engaged before the day came for employing him, with the like result. Lickbarrow and Mason decided when goods might lawfully be stopped *in transitu* on the insolvency or bankruptcy of the consignee. Cutter never completed his contract, and so his representatives could not recover from Powell. Contracts in general restraint of trade are usually void, but limited restraint, such as that in *Mitchell* v. *Reynolds*, is allowed. The covenant in *Mallam* v. *May* was partly good and partly bad, and the bad did not vitiate the good. *Twyne's Case* shows what contracts are void under the Statute of Elizabeth, and must be compared with the Law of Bankruptcy—from which,

however, it is essentially distinct. In contracts of insurance the question of "insurable interest" must always be considered with *Dalby* v. *The India and London Life Assurance Company* and *Hebden* v. *West* before his mind's eye.

Throughout the study of the Law of Contracts the Statute of Frauds must also be borne in mind, and all the cases upon it from the time of Charles II. until to-day. Phrases like "only when the principal remains liable" (*Birkmyr* v. *Darnell*) or "incapable of being performed within a year" (*Peter* v. *Compton*) or "the recognition of the contract" (*Page* v. *Morgan*) will linger in the memory—while the student will not forget the effect of later statutes upon the rules as to the necessity of a memorandum showing the consideration for a guarantee (*Wain* v. *Warlters*) and the avoiding of leases for want of writing (*Clayton* v. *Blakey* and *Doe* d. *Rigge* v. *Bell*).

The student will pass to the consideration of particular relationships, such as landlord and tenant, principal and agent, principal and surety, husband and wife, and partners. Once more he may group many of his propositions of law round the cases in this book.

Landlord and Tenant—*Dumpor's Case*, no longer law, but useful as enforcing the principle that "cases of forfeiture are not favoured in law"; *Spencer's Case* and its rules as to covenants running with the land; *Simpson* v. *Hartopp* about implements of trade privileged when in actual use or when other distress is to be had; *Clayton* v. *Blakey* and *Doe* d. *Rigge* v. *Bell* once more considered in the light of the Judicature Act; *Elwes* v. *Maw*, laying down the Common Law as to agricultural fixtures, to be qualified by Acts of Parliament referred to in the notes. And if there is a mortgage in the case, *Keech* v. *Hall* and

Moss v. *Gallimore*, emphasising that neither mortgagor nor mortgagee can grant greater rights than he himself possesses.

Principal and Agent—*George* v. *Clagett*, showing when debts owing by a factor may be set off against the principal's claim; *Addison* v. *Gandesequi*, when the principal was known but the agent debited; *Paterson* v. *Gandesequi*, where the result of the principal's being known was discussed; *Thomson* v. *Davenport*, where the principal had to pay although his name was unknown to the plaintiff at the time of the contract.

Principal and Surety—*Birkmyr* v. *Darnell* again with the rule "only where the principal remains liable," and *Wain* v. *Warlters*, as to the memorandum of the consideration and the overriding effect of the Mercantile Law Amendment Act, 1856.

Husband and Wife—Sir Edward Scott's successful defence against Manby after his particular warning that he would not be responsible for his wife's debts; *Montague* v. *Benedict*, as to the supply of unnecessary goods to the wife; *Seaton* v. *the same Benedict* (this appropriate name surely easily to be remembered), where the goods were necessary but the husband had adequately provided for his wife's necessities—all these three cases husbands' victories.

Partners—*Waugh* v. *Carver*, the old rule as to community of profits no longer law; *Cox* v. *Hickman* and *Walker* v. *Hirsch*, showing the true doctrine and the essential test, which, like that of all contracts, depends upon the "intention of the parties."

The Measure of Damages will for all time suggest the rules in *Hadley* v. *Baxendale* and the importance of the facts made known at the time of the contract. *Vicars* v.

Wilcocks, as to remoteness of damage, will remind the student that damage *may* be too remote, although the damages for the particular slander there considered would not be held too remote to-day.

Then there is Evidence. The Rule against Hearsay is the salient feature of the Common Law—the entries by a deceased man "in course of duty" (*Price* v. *The Earl of Torrington*), "against interest" (*Higham* v. *Ridgway*) being two of the exceptions. *Nepean* v. *Doe* speaks of "presumptions," and in all cases of evidence it is important to remember what will be the presumption if evidence is *not* given. *The Duchess of Kingston's Case* and *Collins* v. *Blantern* have to do with "Estoppel" where certain facts cannot be proved even though they may be true.

Money and negotiable instruments are the essential conditions of modern commerce. A bank note is regarded as money when it has passed into currency (*Mallam* v. *May*). The whole law as to negotiable instruments has been codified by the Bills of Exchange Act, 1882, so that, for instance, *Bickerdike* v. *Dollman* is not the last word as to notice of dishonour. Nevertheless, it is useful to understand how the matter stood at Common Law, as well as to appreciate *Master* v. *Miller* and *Aldous* v. *Cornwell* on alterations of the bill in view of the same code.

The final sanction of all the foregoing laws is Execution. When a judgment has been given, the sheriff will execute it. But "Every man's house is his castle" (*Semayne's Case*).

The human mind is so constituted that it is much easier to take an appreciative interest in concrete cases than in

abstract propositions of law. If, therefore, the law student can group his propositions round the foregoing cases, his reading will be more effortless.

Much more so when the day comes when real live clients are concerned in the propositions of law. When he studies under a practitioner, the law will seem much less "dry"—when perhaps he actually interviews a man with a grievance who wants to get out of a bad bargain and who seeks advice as to the effect of the Statute of Frauds upon his chances of escape—or a motorist may call to consult him upon the possibility of setting up the defence of "inevitable accident" after a collision—or perhaps, even, he may have a chance to air the learning which he has derived from the notes to *Mostyn* v. *Fabrigas* in "*Smith's Leading Cases*," where the incidents under discussion took place abroad.

Or, again, he may be present at a trial when victory or defeat may hang upon the question as to whether an entry by a deceased man is to be admitted as a "declaration against interest" (*Higham* v. *Ridgway*).

Or, once more, if the student becomes a conveyancer, the principles relating to "covenants running with the land" (*Spencer's Case*) will become a matter of practical moment to him. And cases like *Pigott's Case*—overruled in effect by *Aldous* v. *Cornwell*—as to alterations in a deed will be before him as he peruses Requisitions on Title, or *Roe* v. *Tranmarr* as to "the liberal construction of deeds."

In all such cases let him remain a law student always—studying the whole law of the subject in hand, but endeavouring to focus it upon the particular case. Sir Edward Fry, addressing law-students at the zenith of his career, said of himself, "I am a law student still."

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