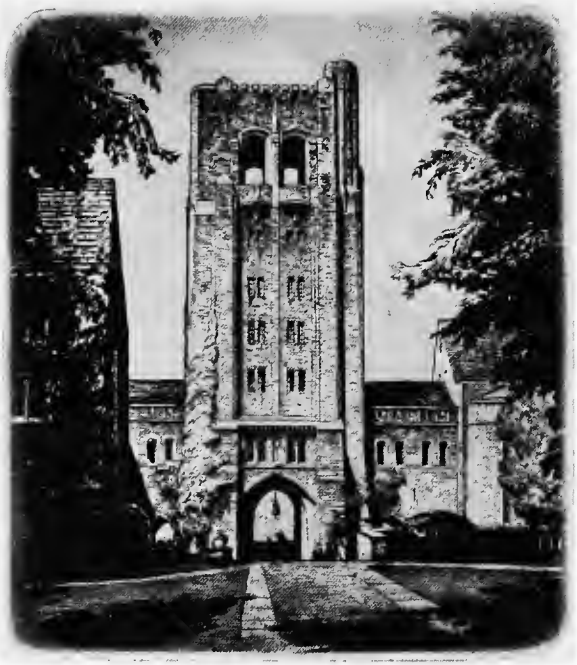

DATE DUE

A

SUMMARY

OF THE

LAW OF CONTRACTS.

BY

C. C. LANGDELL,

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.

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PREFACE TO THE SECOND EDITION.

THE following pages were first published as a supplement to the second edition of the writer's collection of Cases on Contracts. It was for that purpose that they had been written, and there was then no thought of issuing them in a separate form. It was soon found, however, that many persons who wanted the Summary did not care for the Cases, and hence the publishers felt compelled to furnish the former separately in some shape; and as it was not fit to be sold separately in the form in which it was first published, they decided to republish it in its present style.

It must be confessed that the title-page does not give a very correct idea of the contents of the volume. On the one hand, though called a Summary, it contains a much fuller development of the topics embraced in it than is contained in any treatise with which the writer is acquainted. On the other hand, though called a Summary of the Law of Contracts, it embraces only a part of the subject of Contracts, namely, so much of it as is covered by the Cases before referred to. While, therefore, a part of the

title leads the reader to expect less than he will find, the remainder of it leads him to expect more. Still, the writer has been unable to find a title which seemed less open to objection. As to the scope of the work, it seemed impossible to indicate its limits in a title-page. As to the term Summary, it has at least the recommendation of not leading the reader to expect too much; and it was suggested by the fact that, in its relation to the Cases to which it was designed as a supplement, the work was a Summary; that is, it was a concise statement and exposition of the doctrines involved in those cases.

The scope of the work is sufficiently indicated by the Table of Contents, but a reference to the volume of cases will render it still more clear. The cases are arranged in three chapters, entitled respectively Mutual Consent, Consideration, and Conditional Contracts. The following titles in the Summary, namely, Acceptance of Offer, Bidding at Auction, Mutual Consent, Offer, and Revocation of Offer, correspond to Chapter I. of the Cases; the title Consideration in the Summary corresponds to Chapter II. of the Cases; the following titles in the Summary, namely, Concurrent Conditions, Conditions, Conditions Precedent, Conditions Subsequent, Demand, Dependent and Independent Covenants and Promises, Notice, and Performance of Conditions, correspond to Chapter III. of the Cases; and the two remaining titles in the Summary, namely, Debt and Unilateral and Bilateral Contracts, treat of questions

which are common to all the subjects to which the Cases relate.

Since the book as a whole was to be only a fragment, it was not thought worth while to divide it into chapters and sections, to be arranged in consecutive order, but the easier method was adopted of treating the different subjects separately and independently, and arranging them in alphabetical order. The arrangement of the subjects, therefore, indicates nothing as to the order in which they should be read, and every reader must exercise his own taste and judgment as to the order in which he will read them, or whether he will read them in any order.

As the Summary was written for the sake of the Cases, and the two were designed to be companions, the Cases constitute the chief authority cited in the Summary. When other authorities are cited, it is for some special purpose, it being no part of the writer's object to make a collection of authorities upon the subjects discussed. For the same reason, the cases are constantly cited and discussed without any statement of them, it being always assumed that the reader has them before him, and that, if he is not already familiar with them, he will make himself so.

The present edition differs but little from the first edition, except in form. Even in the few instances in which the writer's views have undergone a change or modification since the first edition was printed, the text has generally been left as it was first written,

and the change of view has been indicated by a note. Instances of this will be found at §§ **48, 60, 77, 94, 177.** In one instance only the text has been materially changed, namely, in the last paragraph (**186**) of the first edition, which in the present edition has been rewritten and expanded into two paragraphs (**186, 187**).

CAMBRIDGE, June, 1880.

CONTENTS.

	Page
Acceptance of Offer	1
Bidding at Auction	24
Concurrent Conditions	26
Conditions	31
Conditions Precedent	37
Conditions Subsequent	53
Consideration	58
1. Adequacy of Consideration	67
2. Consideration and Motive	77
3. From whom the Consideration must move	79
4. To whom the Consideration must move	80
5. Mutual Consent as an Element of Consideration	82
6. Relation in Time of the Consideration to the Promise	87
7. Moral Consideration	89
8. Consideration Void in Part	101
9. Mutual Promises	102
10. Executed Consideration	112
Debt	123
Demand	131
Dependent and Independent Covenants and Promises	134

Mutual Consent 193
Notice 195
Offer 197
Performance of Conditions 205
Revocation of Offer 240
Unilateral and Bilateral Contracts . . . 248

INDEX 255

TABLE OF CASES CITED.

A.

SECTION

Adams *v.* Lindsell 10, 14, 15, 151, 181
Alcock *v.* Blofield 104
Alliance Bank *v.* Broom . . 79
Anonymous (Cowp. 128) . 48
" (cited in Dyer, 272) . . . 94
" (4 Leon. 50) . 33
" (2 Lil. Pr. Reg. 235) . . . 150
" (Palm. 160) . 66
" (2 Roll. 238) . 171
" (1 Sid. 31, pl. 9) 88
" (Y. B. 18 Edw. IV. 18 a, pl. 23) 150
" (Y. B. 1 Hen. VII. 5 a, pl. 8) 150
" (Y. B. 15 Hen. VII. 10 b, pl. 7) 126, 133, 140, 144
Armitage *v.* Insole 41
Atkins *v.* Hill 71, 75
Atkinson *v.* Settree . . . 54
Atkinson *v.* Smith 115
Austin *v.* Jervoyse . . . 23, 171
Averill *v.* Hedge . 14, 153, 154

B.

Bach *v.* Owen 112
Baily *v.* Croft 84
Bainbridge *v.* Firmstone . . 54
Ball *v.* Peake 22, 174
Banes's Case 56
Bankart *v.* Bowers . . . 39, 119
Banks and Thwaits' Case . 104
Barber *v.* Fox 48, 56
Barker *v.* Halifax . . . 92, 94
Barnard *v.* Simons 54
Barnes *v.* Hedley . . 68, 71, 76
Barton *v.* Shurley . . . 92, 94
Batterbury *v.* Vyse . . 36, 171
Baxter *v.* Read 94
Beany *v.* Turner . . 141, 144
Beaumont *v.* Reeve . . . 78
Beecher *v.* Conradt . 136, 176
Behn *v.* Burness 28, 33, 112, 119
Beresford *v.* Goodrouse . . 150
Best *v.* Jolly 80
Bettini *v.* Gye 162
Bettisworth *v.* Campion 119, 141
Bidwell *v.* Catton 58
Binnington *v.* Wallis . . . 78
Birks *v.* Trippet 104
Blackwell *v.* Nash . 140, 143, 144
Blandford *v.* Andrews . . . 171
Boone *v.* Eyre . . 38, 111, 112
Bornmann *v.* Tooke . . 164, 177
Bosden *v.* Thinne . . . 92, 94
Boston & Maine R. R. *v.* Bartlett . . . 152, 178, 179
Bourne *v.* Mason 62
Boydell *v.* Drummond . . 73
Bradburne *v.* Bradburne . 80
Bradbury *v.* Morgan . . . 4
Bradford *v.* Roulston . . . 93
Bradford *v.* Williams 163, 167, 168
Bradley *v.* Toder 150

Bragg *v.* Nightingale . . 37, 116
Braunstein *v.* The Accidental Death Ins. Co. . . 35, 36
Bret *v.* J. S. and Wife . 54, 84
British and American Tel. Co. *v.* Colson . . 6, 14, 15, 152
Brocas' Case . . . 23, 140, 144
Brooks *v.* Ball 54, 66
Bussey *v.* Barnett 183

C.

Cadwell *v.* Blake . . . 41, 113
Cage *v.* Acton 44
Caines *v.* Smith 171, 172
Callisher *v.* Bischoffsheim . 57
Callonel *v.* Briggs 22, 24, 118, 142, 144
Campbell *v.* Jones . . 110, 129
Capen *v.* Barrows 186
Carpenter *v.* Cresswell . 110, 129
Carter *v.* Ring 104
Case of an Hostler 104
Caton *v.* Dixon . . 140, 143, 144
Christie *v.* Borelly 107
Clarke *v.* Watson . . . 36, 157
Clerke *v.* Child 150
Clipsham *v.* Vertue . . . 164
Cock *v.* Curtoys 164
Coggs *v.* Bernard 101
Cole's Case 150
Cole *v.* Shallett . . 140, 144, 164
Collins *v.* Gibbs 22, 70
Colston *v.* Carre 80
Constable *v.* Cloberie . 164, 177
Cook *v.* Wright . . . 57, 76, 79
Cooke *v.* Oxley . 10, 11, 178, 182
Coombe *v.* Greene 41
Cort *v.* Ambergate, &c. Railway Co. 171
Cripps *v.* Golding 80
Crisp *v.* Gamel 80
Crisp and Golding 80
Crow *v.* Rogers 62
Crowther *v.* Farrer . 55, 87, 88
Cunningham *v.* Morrell . . 131
Cutler *v.* Southern . . . 150

D.

Dallman *v.* King 36
Davidson *v.* Gwynne . . . 164
Davis *v.* Dodd 78
Dawson *v.* Dyer . . . 33, 88
Dearborn *v.* Bowman . . . 78
Deeks *v.* Strutt 75
Dicker *v.* Jackson 122, 124, 145, 164, 177
Dickinson *v.* Dodds . 9, 178, 181
Dixon *v.* Adams 54
Docket *v.* Voyel 94
Doughty *v.* Neal 169
Dunham *v.* Gillis 186
Dunham *v.* Pettee . 133, 147, 158
Dunlop *v.* Higgins . . 14, 15, 152
Dunmore, Countess of, *v.* Alexander 14, 16
Dusenbury *v.* Hoyt . . . 72
Dutton *v.* Poole 62, 63

E.

Eastwood *v.* Kenyon 71, 74, 76, 79
Eccleston *v.* Clipsham . . 186
Edmonds' Case 72
Edwards *v.* Baugh . . . 56, 88
Eliason *v.* Henshaw . . . 17
Ellen *v.* Topp 41, 177
Elliott *v.* Blake 42
England *v.* Davidson . . . 54
Estrigge and Owles' Case 59, 104
Evans *v.* Powis 55
Exchange Bank *v.* Rice . . 63

F.

Ferry *v.* Williams 170
Field *v.* Dale 94
Fillieul *v.* Armstrong . . . 162
Fitch *v.* Snedaker 3
Fletcher *v.* Pynsett . . . 150
Flight *v.* Reed 76
Forth *v.* Stanton 56
Fothergill *v.* Walton . 122, 166
Franklin *v.* Miller 128
Freeman *v.* Taylor 164, 166, 167
Freeth *v.* Burr 128

G.

Gable *v.* Morse 150
Gale *v.* Golsbury 94
George *v.* Harris 186

Gibbons *v.* Prewde 144
Gibbs *v.* Southam 104
Giles *v.* Giles . . . 23, 135, 185
Glaholm *v.* Hays 33
Glazebrook *v.* Woodrow . . 136
Goodisson *v.* Nunn . . .143, 145
Gower *v.* Capper . . . 81, 141
Grafton *v.* Eastern Counties Railway Co. 33
Grant *v.* Johnson 122
Graves *v.* Legg 33
Gray's Case 146
Gray *v.* Gardner 44

H.

Haigh *v.* Brooks 54
Hall *v.* Cazenove 177
Hall *v.* Flocton 55
Harris's Case . . 6, 14, 15, 17
Harris *v.* Ewer 95
Harrison *v.* Cage 82
Harrison *v.* Mitford . . . 104
Hart *v.* Miles 68
Hatch *v.* Trayes 50
Havelock *v.* Geddes 110, 128, 177
Haverleigh *v.* Leighton . . 150
Hawes *v.* Smith 54, 70
Hawkes *v.* Saunders . . 71, 75
Hayes *v.* Warren . . . 93, 96
Haya *v.* Bickerstaffe . . 33, 38
Head *v.* Diggon 10, 11
Hebb's Case . . . 6, 11, 14, 15
Henderson *v.* Stobart . . . 88
Henning's Case 150
Herring *v.* Dorell 54
Hesketh *v.* Gray 157
Hill *v.* Wade 104
Hoare *v.* Rennie . . . 137, 164
Hodge *v.* Vavisor 94
Holder *v.* Taylor 33, 116, 140, 146
Holdipp *v.* Otway . 35, 171, 176
Holmes *v.* Twist 150
Holt *v.* Ward Clarencieux . 82
Hopkins *v.* Logan . . 50, 57, 93
Hotham *v.* East India Co. 43, 171
Household Fire Ins. Co. *v.* Grant 6
Howlet's Case 94
Hunlocke *v.* Blacklowe . 38, 110, 129
Hunt *v.* Bate 94
Hunt *v.* Livermore 117
Hyde *v.* Wrench 18

I.

Ilsley *v.* Jewett 78

J.

Jackson *v.* Thornell . . . 150
Janson *v.* Colomore . . . 94
Jennings *v.* Brown 77
Jeremy *v.* Goochman . . . 94
Jonassohn *v.* Young . 164, 177
Jones *v.* Ashburnham 56, 64, 77
Jones *v.* Barkley 23, 127, 133, 143, 171, 173, 176
Judson *v.* Bowden . 110, 116, 129

K.

Kane *v.* Hood 136
Kaye *v.* Dutton 93
Kelly, In the matter of . . 155
Kennedy *v.* Lee 9
Kent *v.* Pratt 54
King *v.* Atkins 150
King *v.* Mill 74
King *v.* Sears . . . 67, 80, 97
Kingston *v.* Preston 23, 127, 143

L.

Laird *v.* Pim 176
Lamb's Case 157
Lampleigh *v.* Brathwait 92, 94, 95
Lancashire *v.* Killingworth . 22, 171, 174, 176
Large *v.* Cheshire . 22, 171, 176
Lea *v.* Exelby 23, 141, 142, 144, 174
Lee *v.* Muggeridge . 71, 76, 79
Littlefield *v.* Shee . . . 71, 78
Llewellyn *v.* Llewellyn . . 88
Lock *v.* Wright 22, 117
Longridge *v.* Dorville . 54, 56, 88
Loring *v.* City of Boston 154, 155
Lowber *v.* Bangs 164
Lowe and Kirby 104
Loyd *v.* Lee 56
Lynn *v.* Bruce 88

M.

MacAndrew v. Chapple . . 164
Mactier v. Frith 7, 8, 14, 15, 152, 153
Makin v. Watkinson . . . 150
March v. Pigott 89
Marsden v. Moore 147
Marsh and Rainsford . . . 94
Martin v. Mitchell 11
Martin v. Smith 170
Martindale v. Fisher 107, 141, 144
Mason v. Harvey 33
Mattock v. Kinglake 124, 145, 146, 176
Mayne's Case . . 171, 172, 173
McCulloch v. Eagle Ins. Co. 14, 119
Merrit v. Rane 142
Meyer v. Haworth 78
Mills v. Wyman 74
Milner v. Field . . 36, 157, 171
Moggridge v. Jones . . . 117
More v. Morecomb . . . 157
Morgan v. Birnie 36
Morgan v. Gath 118
Morton v. Burn 56
Morton v. Lamb 123, 133, 143, 145
Munro v. Butt 165

N.

Nash v. Armstrong . . . 88
Neale v. Ratcliff . . 33, 37, 40, 70
Newson v. Smythies . . . 38
Nichols v. Raynbred . . 81, 141
Northrup v. Northrup . . 23, 133

O.

Offord v. Davies 4
Oldershaw v. King . . . 59, 79
Oliver v. Fielden 33
Oliverson v. Wood . . . 94, 96
Ollive v. Booker . . . 28, 33

P.

Payne v. Cave 11, 19
Payne v. Wilson . . . 59, 77
Pearle and Edwards . . 92, 94
Pecke and Mithwolde . . 104
Peeters v. Opie 23, 125, 140, 141, 144, 146, 171, 174, 176
Phillips v. Clift 109
Phillips v. Fielding . . 170, 174
Pickas v. Guile 64, 68
Pillans v. Van Mierop . 50, 79
Pool's Case 146
Poole v. Hill . . . 170, 174, 176
Pordage v. Cole 23, 140, 143, 145, 146, 147
Potter v. Sanders 9, 14
Poussard v. Spiers . 42, 158, 162
Powle v. Haggar 150
Price v. Easton 62
Pust v. Dowie 38

R.

Rae v. Hackett 41
Raffles v. Wichelhaus . . . 148
Ramsgate V. H. Co. v. Goldsmid 154, 156
Rann v. Hughes . . . 50, 75, 93
Rawson v. Johnson 133, 143, 174
Raymond v. Minton . . . 109
Raynay v. Alexander . . 41, 171
Read v. Baxter 64
Reynolds v. Pinhowe . . 54, 88
Riches and Briggs . . 64, 68, 70
Riggs v. Bullingham . . 92, 94
Ripley v. M'Clure 171
Ritchie v. Atkinson . 163, 177
Roberts v. Brett . 127, 136, 177
Rolt v. Cozens 130
Roper v. Lendon . . . 33, 115
Roscorla v. Thomas . . . 93
Routledge v. Grant . 10, 17, 148
Rumball v. Ball 104

S.

S—— v. F—— 14, 15, 16, 151, 180
Sandhill v. Jenny 94
Sands v. Clarke 172
Saunders v. Johnson . . . 186
Scotson v. Pegg . . 54, 64, 84
Seeger v. Duthie . . . 35, 164
Selman v. King 104
Semmes v. Hartford Ins. Co. 43
Semple v. Pink 59, 79
Shadforth v. Higgin . . . 157

Shadwell *v.* Shadwell . 54, 68, 84
Shales *v.* Seignoret 140, 171, 174, 176
Shippey *v.* Henderson . . 72
Short *v.* McCarthy 73
Short *v.* Stone . . . 171, 172
Sibthorp *v.* Brunel 23, 145, 146
Sidenham and Worlington . 94
Simpson *v.* Crippin . 164, 167
Slade's Case 48
Slater *v.* Stone 37
Smart *v.* Chell 88
Smith's Case 64
Smith *v.* Algar 56, 80
Smith *v.* Monteith . . . 54, 58
Smith *v.* Wilson 176
Smyth *v.* Holmes 88
Spanish Ambassador *v.* Gifford 125, 144
Spencer *v.* Durant 186
Spiller *v.* Westlake . . . 117
St. Albans, Duke of, *v.* Shore 158, 159, 169, 170
Standley *v.* Hemmington . 170
Staunton *v.* Wood 134
Stavers *v.* Curling . . . 38, 164
Storer *v.* Gordon 23, 42, 122, 158, 166
Strangborough and Warner 81
Street *v.* Blay . . . 112, 119
Stubbs *v.* Holywell Railway Co. 43
Sturlyn *v.* Albany . . 48, 54, 66

T.

Tarrabochia *v.* Hickie . . 164
Tayloe *v.* Merchants' Fire Ins. Co. 14, 51, 119
Terry *v.* Duntze . . 34, 131, 164
Thomas *v.* Cadwallader 33, 108, 116, 140, 150
Thomas *v.* Thomas . 60, 64
Thompson *v.* Gillespy . . 119
Thompson *v.* Leach . . . 2
Thompson *v.* Noel . . 140, 177
Thomson *v.* James 1, 4, 6, 11, 14, 15, 16, 27, 151, 152, 178, 180, 181
Thorpe's Case . . . 141, 144
Thorpe *v.* Thorpe 112, 140, 141, 144, 146, 176
Thurnell *v.* Balbirnie . . 41, 157
Tidey *v.* Mollett 38, 119, 157, 158
Townsend *v.* Hunt . . . 92, 94
Traver *v.* —— 54, 66
Trewinian *v.* Howell . . . 75
Trueman *v.* Fenton . . . 72
Tully *v.* Howling 163
Turner *v.* Goodwin . . 20, 142
Tweddle *v.* Atkinson . . . 62

U.

Ughtred's Case 146

V.

Valentine *v.* Foster . . . 78
Vassar *v.* Camp . . . 14, 15, 17
Victors *v.* Davies 96
Vivian *v.* Shipping . . . 144
Vyse *v.* Wakefield 150

W.

Wade *v.* Simeon 58
Wallis *v.* Scott 104
Ware *v.* Chappel . 108, 138, 144
Warlow *v.* Harrison . . . 19
Waterhouse *v.* Skinner . . 174
Watson *v.* Turner 74
Way *v.* Sperry 72
Wells *v.* Calnan . . 42, 158, 169
Wennall *v.* Adney . . . 71, 76
Wheatley *v.* Low . . . 64, 68
White *v.* Beeton 114
Wilks *v.* Smith . . . 124, 145
Whitehead *v.* Howard . . 73
Wilkinson *v.* Byers . . . 54
Wilkinson *v.* Oliveira . . 54, 70
Williams *v.* Carwardine . . 3
Williams *v.* Moor 72
Williamson *v.* Clements . 54, 70
Williamson *v.* Losh . . . 50
Winstone *v.* Linn 109
Withers *v.* Reynolds 128, 137, 172
Worsley *v.* Wood . . . 33, 157
Wotton *v.* Cooke 187

Y.

Young *v.* Ashburnham . . 92

SUMMARY

OF

THE LAW OF CONTRACTS.

ACCEPTANCE OF OFFER.

1. According to the popular apprehension of the term, a promise is the act of the promisor alone; but in truth it requires also an act of the promisee. Before any act by the promisee, the so-called promise is in law only an offer, called by the Romans a pollicitation. It is not until it is accepted by the promisee that it becomes in law a promise.[1] A promise is in this respect like a gift of property, which is commonly supposed to be the act of the donor alone, but which requires the acceptance of the donee to pass the title to the property.[2]

2. The acceptance of an offer, however, differs materially from the making of an offer. The former requires, it seems, a mental act only; and clearly it does not, like the making of an offer, require a communication from the person making it to the person to whom it is made. Indeed, it is well settled as to

[1] Grotius, Lib. 2, c. 11, § 14; Pothier, Traité des Obligations, Part. 1, c. 1, sect. 1, art. 1, § 2. Lord Stair, as cited in Thomson *v.* James, 18 Dunlop, 1, 17–18, Cas. on Contr. 125, 147, is *contra*.

[2] Grotius, Lib. 2. c 6, § 2.

a gift of property that no acceptance by the donee need be proved in order to complete the gift; for, as a gift is presumptively a benefit to the donee, the law will presume an acceptance of it by him in the absence of evidence to the contrary.[1] And there is no reason to doubt that the same rule is applicable to a promise made as a gift, though no such question can arise in our law as to an ordinary promise not under seal, since every such promise requires a consideration to support it, and hence can never constitute a gift. As to all such promises, therefore, there must be a physical act on the part of the promisee to complete them, namely, giving or performing the consideration; and, though the thing specified by the offerer as the consideration of his proposed promise may be given or done without accepting the offer, yet it will not in that case be given or done as the consideration (and hence will not inure as the consideration) of the proposed promise. Therefore, though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and, as the want of either is fatal to the promise, the question whether an offer has been accepted can never in strictness become material in those cases in which a consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration.

3. Thus the public offer of a reward for the discovery and conviction of the perpetrator of a crime is an offer to any person who will accept it and per-

[1] Thompson *v.* Leach, 2 Vent. 198, 203.

form the consideration; and the performance of the specified services will be *prima facie* evidence of a compliance with the offer in both respects; but it may be shown not to have been a compliance with it in either respect, *e. g.* by showing that the services were all performed in ignorance that the reward had been offered. In Fitch *v.* Snedaker[1] it appeared that a part of the services were performed in ignorance that the reward had been offered, and even before it was offered, and therefore that the consideration for the reward had not been performed, *i. e.* not the whole of it; but the performance of the remainder of the services after the offer of the reward became known to the plaintiffs would probably have shown an acceptance of the offer, though that fact would not have been material. In Williams *v.* Carwardine,[2] the finding of the jury showed that, though the plaintiff had fully performed the services specified in the offer, she had neither accepted the offer nor performed the consideration; and yet it was held (erroneously, *semble*) that she was entitled to recover.

4. As the performance of the consideration is what converts an offer into a binding promise, it follows that the promise is made in legal intendment at the moment when the performance of the consideration is completed. It also follows that up to that moment the offer may either be revoked, or be destroyed by the death of the offerer, and the offeree thus be deprived of any compensation for what he has done.[3]

[1] 38 N. Y. 248, Cas. on Contr. 118.

[2] 4 B. & Ad. 621, Cas. on Contr. 12.

[3] Offord *v.* Davies, 12 C. B. N. S. 748, Cas. on Contr. 33. Bradbury *v.* Morgan, 1 H. & C. 249, cited in Offord *v.* Davies, *supra*, is *contra*, but it must be deemed erroneous.

As this may cause great hardship and practical injustice, ingenious attempts have been made to show that the offer becomes irrevocable as soon as performance of the consideration begins;[1] but such a view seems to have no principle to rest upon. Besides, there may be hardship on the other side as well; for the offeree may at any stage refuse to proceed further in performing the consideration, or he may die, and then the offerer will confessedly be without remedy. The true protection for both parties is to have a binding contract made before performance begins, by means of mutual promises; and if they neglect this precaution, any hardship that they may suffer should be laid at their own doors. It may be urged that the offer is accepted (and thus converted into a promise) the moment the performance of the consideration begins; and though the promise at first is not binding for want of a consideration, yet, being a promise and not an offer, it is irrevocable; and in the event of the consideration being afterwards performed, it will become binding. Such a view, however, would be fanciful and unsound. It does not follow that an offer becomes a promise because it is accepted; it may be, and frequently is, conditional, and then it does not become a promise until the conditions are satisfied;[2] and in case of offers for a consideration, the performance of the consideration is always deemed a condition. A promise must have a consideration when it is made, or it can never have one. Besides, the view in question would not even serve the purposes of sub-

[1] See Offord *v.* Davies, *supra*.

[2] Lord Stair, cited in Thomson *v.* James, 18 Dunlop, 1, 17–18, Cas. on Contr. 125, 147.

stantial justice, as it would protect the offeree, while leaving the offerer wholly unprotected.

5. The time when the performance of the consideration is completed frequently depends upon a question of law; *e. g.* where the consideration is the sale of personal property, the promise being to pay the price, the passing of the title to the property is what completes the performance of the consideration; and hence it is at that moment that the promise to pay the price is made in legal contemplation. In the common case, where goods are ordered from a distance, to be forwarded by the seller to the buyer, the title to the goods passes and the contract is complete the moment when the goods pass from the hands of the seller into the hands of the carrier, the latter becoming the servant of the buyer, and the buyer being bound to pay for the goods, though they should be lost during the transit. All this of course assumes that the seller acts in conformity with the express and implied terms of the order; for the order is in the nature of an offer to buy goods of a certain description on certain terms, and the sending of the goods must be both an acceptance of the offer and a performance of the consideration specified in the offer in order to form a contract.

6. Sometimes the consideration for a promise is of such a nature that the promisor will have no sure means of knowing whether or not it has been performed unless he is informed by the promisee; and this will frequently be a sufficient reason for holding the offer to contain an implied condition that notice shall be given of the performance of the consideration within a reasonable time after it is performed. Such

a condition, however, will not suspend or postpone the making of the promise until the notice is given; for that is not necessary for the protection of the offerer, and it would work an injustice to the offeree. The promise, therefore, will arise (and hence the offerer's power to revoke will cease) the moment that the consideration is performed, but the liability of the promisor will depend upon his receiving notice pursuant to the implied terms of the offer. In other words, the condition contained in the offer will be imported into the promise.[1] Thus, if A offers to B to become guarantor for C to a certain amount, if B will give C credit to that amount, A will become guarantor as soon as the credit is given, but his guaranty may reasonably be held to be conditional upon his receiving notice within a reasonable time afterwards that the credit has been given. If, in such cases, the consideration of the promise consists in the transfer of property, it seems that the passing of the title to the property will be suspended until the notice is given; for otherwise, in the event of no notice being given in time, the promisor would acquire the property without paying for it. Yet when the title does pass, it will relate back to the time when the promise was made. Thus, an application for shares in a company about to be organized is an offer to purchase the specified number of shares on the terms announced in the company's prospectus. If the company accepts the offer, it passes a vote allotting the shares to the applicant. On ordinary principles, this allotment would complete the contract, the applicant thereby

[1] Lord Stair, cited in Thomson *v.* James, 18 Dunlop, 1, 17–18, Cas on Contr. 125, 147

becoming owner of the shares, and the company acquiring a right to the purchase-money. But the allotment being in its nature a secret transaction, it is held that the applicant is entitled to be notified of it; and the consequence is that, while the allotment fixes the rights of both parties so that neither can withdraw without the other's consent (and hence the decision in Hebb's Case [1] was erroneous), yet the passing of the title to the shares and the applicant's liability for the purchase-money are suspended until the condition of giving notice is either performed or waived. When either of these events happens, the title to the shares vests in the applicant, and his liability to pay the purchase-money (previously conditional) becomes absolute. Yet the title to the shares vests by virtue of the allotment, and not by virtue of the giving or the waiving of notice of it, and hence when it vests it relates back to the time of the allotment. As to how notice of the allotment must be given, there has been much conflict of opinion; but when the question is correctly understood, there would seem to be little room for controversy. Notice has to be given because the applicant is supposed to require it; and he is supposed to require it because it is convenient and desirable, not because it is absolutely necessary, that he should have it. Therefore he cannot be supposed to require more than due diligence on the part of the company; and this requirement will be satisfied by sending a notice by mail, properly directed, especially when that is the only diligence employed by the applicant to secure his

[1] L. R. 4 Eq. 9, Cas. on Contr. 42.

application's reaching the company. Harris's Case[1] is decided in accordance with this view. Br. & Am. Tel. Co. *v.* Colson[2] is *contra.*

7. It has been contended that every acceptance of an offer relates back to the time when the offer was first made, and hence that the time of making the offer is always, in legal contemplation, the time of making the contract. The doctrine of relation, as invoked by this proposition, is clearly a pure legal fiction, *i. e.* it has no foundation in actual facts to rest upon. It is the acceptance of the offer that makes the contract, as much as it is delivery that makes a deed. It is true that the offer is indispensable to the making of the contract, but so are writing and sealing indispensable to the making of a deed. It is not, however, a conclusive objection to a relation that it is fictitious, for the law does sometimes create such relations; but it only does so in order to promote justice, *i. e.* in order to prevent some injustice or some inconvenience which would otherwise arise. No such reason can be given in the case in question, certainly not in the absence of any evidence of intention that the contract should take effect at and from some other time than when it was made. But the proposition refutes itself by proving altogether too much; for, if it were true, it would follow that an offer could be accepted with effect, notwithstanding the death or insanity of the offerer, and it was actually so contended in Mactier *v.* Frith.[3] Nay, more, it would

[1] L. R. 7 Ch. App. 587, Cas. on Contr. 54. This case was followed in Household Fire Ins. Co. *v.* Grant, 4 Ex. D. 216.

[2] L. R. 6 Exch. 108, Cas. on Contr. 45.

[3] 6 Wend. 103, 111–113, Cas. on Contr. 77, 82–83.

follow that an offer never could be revoked to any purpose; for the acceptance, whenever in fact made, would always, in legal contemplation, precede the revocation.

8. In all the cases put in Mactier *v.* Frith, as well as in most other cases, the doctrine of relation is not a mere fiction, but has a substantial foundation of fact to rest upon. Thus, in the case of the ratification of a contract or conveyance made by an agent without sufficient authority, the ratification must relate back in order to have any effect whatever; for the ratification does not and cannot make the contract or conveyance; that must be made, if at all, by the act of the agent in the name of the principal. The principal may indeed disregard the unauthorized act of the agent, and make the contract himself anew; but that is not a case of ratification, nor is there in that case any relation. So in the case of the enrolment of a deed of bargain and sale, but for the statute of enrolment the deed would be complete and operative without any such ceremony; the statute interferes and makes the deed a nullity *unless* enrolled; but when enrolled, it is the deed and not the enrolment that conveys the land. The enrolment, therefore, must of necessity relate back. So in the case of a parol contract rendered invalid by the Statute of Frauds, where the statute is afterwards complied with by a memorandum in writing, or some other sufficient act, it is the parol agreement that makes the contract, and therefore the making of the contract must be referred to the time when the parol agreement was made.

9. If the writer be thought to require a justification

for saying so much in opposition to a view which admits of so little being said in its favor, such justification will be found in the fact that the view in question has not only been entertained in highly respectable quarters, but has been made the basis of actual decision. Thus, in Kennedy *v.* Lee,[1] Lord Eldon said that when an offer is made and accepted by letter, "the acceptance must be taken as simultaneous with the offer;" and this *dictum* (which seems to have been a deliberate one) has often been cited as a correct statement of the law. In Potter *v.* Sanders,[2] Wigram, V. C., seems to have assumed that the law was so, but he held that a fact necessary to raise the question had not been put in issue by the pleadings. In the very recent case of Dickinson *v.* Dodds,[3] it was admitted by the counsel for the defendant Allan that "if there had been an acceptance" by the plaintiff, "it would have related back, in point of date, to the offer;" and Bacon, V. C., not only declared the law to be so, but actually gave the plaintiff a priority over the defendant Allan on that ground; and though his decree was reversed on appeal, the reversal was upon a ground which did not impeach the soundness of the position above referred to.[4]

10. Perhaps Lord Eldon's *dictum* will admit of a different interpretation from the one which has been put upon it. He says "the acceptance must be taken

[1] 3 Mer. 441, 454.

[2] 6 Hare, 1, 8, Cas. on Contr. 15, 19.

[3] 2 Ch. Div. 463, 467, 470, Cas. on Contr. 61, 63, 66.

[4] It may be remarked that there was another reason in this case, as well as in Potter *v.* Sanders, why the acceptance could not properly be made to relate back, namely, that it would affect the rights of a person who was not a party to the contract.

as simultaneous with the offer;" and it is true that the acceptance and the offer must co-exist, for if the offer has ceased to exist when the acceptance is made, of course there can be no contract; and as some time must always elapse between the making of an offer and the acceptance of it, the acceptance must of necessity be carried back to the time of making the offer, or else the offer must be brought forward to the time of making the acceptance, *i. e.* the acceptance must operate by relation, or the offer must continue; and in either way the words of Lord Eldon would be satisfied. Between these two views there ought never to have been any doubt, for the latter is obvious and rational, carries out the intention of the parties, and does not require the invention of any fiction; and yet it seems never to have occurred to the English courts that an offer might continue indefinitely until the case of Adams *v.* Lindsell[1] (1818); and when the court declared in that case that "the defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs," the idea was a new one. When Cooke *v.* Oxley[2] (1790) was decided by the same court, it was supposed that an offer must be accepted, if ever, at the same interview at which it was made (*i. e.* in legal contemplation at the same moment at which it was made), and that an acceptance at any subsequent time would be only an offer in turn, which the original offerer might accept or reject at pleasure; and that it was immaterial that the acceptance in point of time came within the very

[1] 1 B. & Ald. 681, Cas. on Contr. 4.
[2] 3 T. R. 653, Cas. on Contr. 2.

terms of the offer. And even ten years after the decision of Adams *v.* Lindsell, the same court decided Head *v.* Diggon[1] (1828), under the influence of the old notion. So in Routledge *v.* Grant[2] (1828), another court was at a loss how to apply the doctrine of Adams *v.* Lindsell, thinking that it might involve the consequence of making an offer irrevocable during the period of its continuance. If, therefore, Lord Eldon's *dictum* meant what it has commonly been supposed to mean, it may be explained by the fact of his supposing (Adams *v.* Lindsell not having been decided till the year following) that in no other way could a contract be made by means of letters. If such was the origin of the opinion that an acceptance relates back to the time of making the offer, there need be the less hesitation in rejecting it on account of the authority by which it is supported.

11. Acceptance has hitherto been considered with reference to such offers only as contemplate unilateral contracts. When the contract is to be bilateral, though the principles are the same, the application of them is very different. It still remains true that the offer requires an acceptance and the giving of the consideration to convert it into a binding promise; but as the consideration consists of a counter-promise, so the giving of the consideration consists in making this counter-promise. It follows also that the original offer cannot become a binding promise until the counter-promise also becomes valid and binding, for until then the consideration is not given. Hence the familiar rules, that in bilateral contracts r either party

[1] 3 M. & R. 97, Cas. on Contr. 10.
[2] 4 Bing. 653, Cas. on Contr. 5.

will be bound unless both are bound,[1] and that both must become bound at the same moment of time; and these rules hold in the civil law, and in the law of Scotland, as well as in our law, for, although the former do not require a consideration to make a promise binding, yet an offer which contemplates a counter-promise is conditional upon the counter-promise being made.[2]

12. There are other important particulars in which a bilateral contract differs from one that is unilateral in respect to the acceptance of an offer: while in the latter the acceptance is merged and lost sight of in the performance of the consideration, in the former the giving of the consideration is merged and lost sight of in the acceptance; while in the latter the performance of the consideration necessarily implies an acceptance of the offer, in the former the acceptance of the offer necessarily implies the giving of the consideration. Therefore, a mere offer in terms and an acceptance in terms are sufficient to form a bilateral contract, but not a unilateral contract. So an acceptance in terms is a *sine qua non* in a bilateral contract, while in a unilateral contract an acceptance in terms may be, and commonly is, dispensed with. Again, in a unilateral contract the offer becomes a contract in consequence of what the offeree *does*, in a bilateral contract in consequence of what he *says*. The reason why an acceptance in terms is necessary, and why it

[1] Payne *v.* Cave, 3 T. R. 148, Cas. on Contr. 1; Cooke *v.* Oxley, 3 T. R. 653, Cas. on Contr. 2; Head *v.* Diggon, 3 M. & R. 97, Cas. on Contr. 10; Martin *v.* Mitchell, cited in Hebb's Case, L. R. 4 Eq. 9, 12, Cas. on Contr. 42, 44.

[2] Thomson *v.* James, 18 Dunlop, 1, 19, Cas. on Contr. 125, 149–150

also suffices, in a bilateral contract, is, that what is called an acceptance is in that connection also and chiefly a counter-promise.

13. But how is it, the reader may ask, that a mere offer on one side and an acceptance of it on the other can create a promise on each side? that what purports to be but one offer and one acceptance is in effect two offers and two acceptances? It is because everything except the original offer and the acceptance of it is implied. Thus, it generally appears from the nature and terms of an offer whether it requires a counter-offer, and, if it does, what the terms of such counter-offer must be; and therefore nothing need be said in the offer upon either of those points. Nor is it ever necessary for an offerer to say that he will accept a counter-offer, if made; for if his offer requires a counter-offer, it is necessarily implied that he will accept the latter. So the acceptance of an offer which requires a counter-offer need say nothing about the latter; for the acceptance necessarily implies the making of the counter-offer, as the former would be idle and nugatory without the latter, and the terms of the latter, having been fixed by the original offer, do not need to be repeated. Then, the counter-offer being thus made by implication, no further act of acceptance of it is necessary, for, the original offerer having by implication declared his intention to accept it, he is conclusively presumed to remain in that state of mind so long as his offer continues; and hence the counter-offer, by a conclusive presumption of law, is accepted the moment it is made.[1] The same principle

[1] Grotius, Lib. 2, c. 11, § 14

is familiar in transfers of property; for, while the acceptance of the transferee is necessary for the passing of the title, yet it may be, and frequently is, given in advance by soliciting the transfer.[1]

14. It has been seen that the acceptance of the original offer, in the case of a bilateral contract, must be expressed, *i. e.* must be made by words or signs; and that the reason for this is, that the acceptance contains a counter-offer. Moreover, the reason why the counter-offer makes it necessary that the acceptance should be expressed is, that communication to the offeree is of the essence of every offer. The acceptance, therefore, must be communicated to the original offerer, and until such communication the contract is not made.[2] When the parties are together and contract orally, no question can often arise as to communication; but when they are at a distance from each other and contract by letter, such a question frequently arises. The principle, however, is the same in both cases. In contracts *inter præsentes* the words or signs must be both heard or seen and understood;[3] in contracts *inter absentes* the letter must be received and read.[4] Upon this latter point, however, there has been much difference of opinion, and it has been supposed to be pretty well settled in England and this country that the contract is complete the moment the letter of acceptance is mailed.

[1] Grotius, Lib. 2, c. 6, § 2.

[2] *Per* Lord Curriehill, in Thomson *v.* James, 18 Dunlop, 1, 19, Cas. on Contr. 125, 149–150.

[3] S. *v.* F., Cas. on Contr. 156, 162. The original of this case will be found in Merlin, Répertoire de Jurisprudence, Tit. Vente, 1, Art. III. No. XI., *bis*.

[4] S. *v.* F., Cas. on Contr. 156, 159–160.

Most of the authority on the subject, however, consists of *dicta*, and these *dicta* may be explained by the fact that the nature of the question has been misunderstood. Of actual decision there is indeed very little. Of all the cases contained in the writer's collection of Cases on Contracts, the point in question seems to have been decided in only three, one of them (and the earliest) a Massachusetts case (McCulloch *v.* The Eagle Ins. Co.[1]), another a New York case (Vassar *v.* Camp[2]), and the third a Scotch case (Thomson *v.* James[3]). All the other cases turned upon some other question. Thus, in Adams *v.* Lindsell,[4] it was erroneously supposed that the offer had been revoked between the mailing and the receipt of the letter of acceptance (**181**), and hence that the case depended upon the time when the acceptance became complete. The only real question, however, was whether the acceptance came too late, the letter containing the offer having miscarried. In Potter *v.* Sanders,[5] the contract with Potter was entitled to priority in any view, since the Statute of Frauds was not satisfied as to the contract with Coates until April 27; and though the latter contract might relate back to the oral agreement as between the parties to it, it could not so relate as to a third person. In Dunlop *v.* Higgins,[6] the only question was whether the offer was accepted in time; and it was held that it was, whether the acceptance became complete on the

[1] 1 Pick. 278, Cas. on Contr. 72.
[2] 1 Kern. 441, Cas. on Contr. 110.
[3] 18 Dunlop, 1, Cas. on Contr. 125.
[4] 1 B. & Ald. 681, Cas. on Contr. 4.
[5] 6 Hare, 1, Cas. on Contr. 15.
[6] 1 H. L. Cas. 381, Cas. on Contr. 21.

mailing or on the receipt of the letter of acceptance.[1] In Hebb's Case,[2] in Br. and Am. Tel. Co. *v.* Colson,[3] and in Harris's Case,[4] the contract was unilateral (**6**), and hence those cases are not in point. In McCulloch *v.* Eagle Ins. Co.[5] the question was actually involved, and the decision was in favor of the view here contended for. In Mactier *v.* Frith,[6] the offer was to sell to Mactier an undivided half-interest in a cargo of brandy already in his possession. As soon, therefore, as Mactier accepted the brandy on the terms offered, the title passed, and he became indebted for the price.[7] No actual promise by him was necessary. It was not even necessary that he should write a letter of acceptance, still less that it should reach Frith. In Averill *v.* Hedge,[8] the only question confessedly was whether the letter of acceptance was mailed in time. In Tayloe *v.* Merchants' Fire Ins. Co.[9] the defendant's offer contemplated a unilateral contract (**117**), and this offer was accepted and the consideration paid the moment when the plaintiff sent his check for the premium. It was the same as if money had been sent. It is true that the plaintiff became liable to the defendant on his check, but that liability arose when the check was delivered, *i. e.* when the letter containing it was mailed. Vassar *v.* Camp[10]

[1] See Cas. on Contr. 47–49, 52, 53, 59–60.
[2] L. R. 4 Eq. 9, Cas. on Contr. 42.
[3] L. R. 6 Exch. 108, Cas. on Contr. 45.
[4] L. R. 7 Ch. App. 587, Cas. on Contr. **54.**
[5] *Supra.*
[6] 6 Wend. 103, Cas. on Contr. 77.
[7] See tit. DEBT.
[8] 12 Conn. 424, Cas. on Contr. 90.
[9] 9 How. 390, Cas. on Contr. 106.
[10] *Supra.*

must be admitted to be in point, but the effect of the decision was not such as to recommend it. Indeed, it is doubtful if it can stand in any view that can be taken of it; for, assuming that the contract was complete the moment the plaintiff's letter of acceptance was mailed, there is much ground for holding that the defendants' liability was conditional upon their receiving prompt notice of the acceptance of their offer.[1] This view may be fairly rested upon a necessary implication, though it is much aided by expressions in the defendants' offer. It also detracts from the authority of Vassar *v.* Camp, that the court regarded the question as already conclusively settled by Mactier *v.* Frith. Dunmore *v.* Alexander[2] is opposed to Vassar *v.* Camp, so far as it goes, but the point was not involved. Thomson *v.* James[3] agrees with Vassar *v.* Camp, but the reasoning by which the decision is supported is at least neutralized by the dissenting opinion of Lord Curriehill. The case of S. *v.* F.[4] contains a powerful argument by Merlin in support of the view adopted by McCulloch *v.* The Eagle Ins. Co., but the point was not decided.

15. It remains to notice the principal arguments which have been advanced in support of the view that the contract is complete the moment the letter of acceptance is mailed. 1. It is said that, if the contract is not made until the letter of acceptance comes to the knowledge of the offerer, it can never be made.[5] This proposition assumes that, if the contract cannot

[1] See tit. NOTICE.

[2] 9 Shaw & Dunlop, 190, Cas. on Contr. 121.

[3] *Supra.* [4] *Supra*, p. 15, n. (3).

[5] Adams *v.* Lindsell, 1 B. & Ald. 681, Cas. on Contr. 4, 5; Mactier *v.* Frith, 6 Wend. 103, 116–118, Cas. on Contr. 77, 85–86.

be made until the acceptance comes to the knowledge of the offerer, it must be because this knowledge of the offerer is one of the necessary elements of a contract. If the argument be stated in the form of a syllogism, it will stand thus: If the contract must become known to the offerer the moment it is made, it must equally become known to the offeree the moment it is made; but a contract *inter absentes* cannot become known to both parties at the same moment, and so not at the moment it is made; *ergo* it need not become known to the offerer the moment it is made. The fault of this syllogism is in the major premise, which is untrue. The reason why the contract must become known to the offerer the moment it is made is an accidental one; namely, because the contract is made the moment the counter-offer is made, and the counter-offer is made the moment the letter of acceptance comes to the knowledge of the original offerer. In other words, the letter of acceptance must come to the knowledge of the offerer for the same reason that the letter containing the original offer must come to the knowledge of the offeree. 2. It is said that an offer made through the mail impliedly authorizes an answer to be sent through the same channel; and therefore, when the offeree has mailed a letter of acceptance, he has done everything which the offer requires him to do.[1] It is true that he has done everything required of him as to the mode of communicating his counter-offer; but the offer also requires by a necessary implication that a counter-offer shall be made, and this cannot be done without communication. If, therefore, the offer should

[1] Dunlop *v.* Higgins, 1 H. L. Cas. 381, Cas. on Contr. 21, 30–32.

expressly declare that the contract should be complete immediately upon mailing a letter of acceptance, such a declaration would be wholly inoperative. 3. It is said that the offerer, by sending his offer by mail, makes the post-office his servant or messenger to receive and return an answer, and therefore that the mailing of an answer is a delivery of it to the offerer. It is unnecessary to question the correctness of this proposition,[1] for it may be fully admitted, without at all advancing the argument in support of which it is adduced. Even if the offerer should send his offer by his own servant, and the latter should bring back a letter of acceptance, though the delivery of the letter of acceptance to the servant would be a delivery to his master, and so vest the property in the letter in the master, it would not complete the contract.[2] If, indeed, the offerer should send his offer by a messenger, and should authorize the latter to receive a verbal acceptance as the offerer's agent, the case would be different; for the communication of the acceptance to the agent would be a communication of it to the principal, and the knowledge of the agent would be the knowledge of the principal.[3] 4. It has been claimed that the purposes of substantial justice, and the interests of contracting parties as understood by themselves, will be best served by holding that the contract is complete the moment the letter of acceptance is mailed; and cases have been put to show that the contrary view would produce not only unjust but

[1] But see Thomson *v.* James, 18 Dunlop, 1, 20–22, Cas. on Contr. 125, 152–155, *per* Lord Curriehill.

[2] S. *v.* F., Cas. on Contr. 156, 158–159, 162.

[3] See Hebb's Case, L. R. 4 Eq. 9, 12, Cas. on Contr. 42, 44.

absurd results.[1] The true answer to this argument is, that it is irrelevant; but, assuming it to be relevant, it may be turned against those who use it without losing any of its strength.[2] The only cases of real hardship are where there is a miscarriage of the letter of acceptance, and in those cases a hardship to one of the parties is inevitable. Adopting one view, the hardship consists in making one liable on a contract which he is ignorant of having made; adopting the other view, it consists in depriving one of the benefit of a contract which he supposes he has made. Between these two evils the choice would seem to be clear: the former is positive, the latter merely negative; the former imposes a liability to which no limit can be placed, the latter leaves everything *in statu quo*.[3] As to making provision for the contingency of the miscarriage of a letter, this is easy for the person who sends it, while it is practically impossible for the person to whom it is sent.[4]

16. Assuming it to be established that a letter of acceptance, in case of a bilateral contract, contains by implication a counter-offer, it follows that it is subject to revocation until the counter-offer is accepted, *i. e.* until the letter of acceptance reaches the original offerer.[5] And if a letter of revocation reaches the

[1] See Harris's Case, L. R. 7 Ch. App. 587, 594, Cas. on Contr. 54, 58–59, *per* Mellish, L. J.

[2] See Br. & Am. Tel. Co. *v.* Colson, L. R. 6 Exch. 108, 112, 118, Cas. on Contr. 45, 47, 51.

[3] See Vassar *v.* Camp, 1 Kern. 441, Cas. on Contr. 110, and compare § 14.

[4] See Br. & Am. Tel. Co. *v.* Colson, L. R. 6 Exch. 108, 118, Cas. on Contr. 45, 51, *per* Bramwell, B.

[5] But see Thomson *v.* James, 18 Dunlop, 1, 13, Cas. on Contr. 125, 140, *per* Lord President, *contra*.

original offerer at the same moment as the letter of acceptance, as there can be no presumption that the latter is read first, the former will render the latter inoperative.[1] So if a letter of acceptance be followed by another letter, not revoking but modifying the first, and the two be delivered to the original offerer at the same moment, the former will take effect only as modified by the latter; and hence, if the latter does not conform to the original offer, there will be no contract.[2]

17. An offer can only be accepted in the terms in which it is made. An acceptance, therefore, which modifies the offer in any particular, will go for nothing.[3] Otherwise a contract might be made without the assent of both parties to its terms. Thus, where an offer was made in writing to purchase a lease, possession to be given on the 25th of July, and the offeree answered in writing that he accepted the offer, and would give possession on the 1st of August, there was held to be no contract, though it appeared that the change of date was entirely unintentional.[4] An acceptance must conform to the offer also in respect to the time and manner in which it is given or made. Therefore, if an offer requires the acceptance to be by letter sent to a particular place, a letter of acceptance sent to another place will be of no avail.[5]

18. As offers are made only with a view to their

[1] Dunmore *v.* Alexander, 9 Shaw & Dunlop, 190, Cas. on Contr. 121; S. *v.* F., Cas. on Contr. 156.

[2] S. *v.* F., *supra.*

[3] See Harris's Case, L. R. 7 Ch. App. 587, 593, Cas. on Contr. 54, 57–58; Vassar *v.* Camp, 1 Kern. 441, 445, Cas. on Contr. 110, 113.

[4] Routledge *v.* Grant, 4 Bing. 653, Cas. on Contr. 5.

[5] Eliason *v.* Henshaw, 4 Wheat. 225, Cas. on Contr. 70.

being accepted, when an offer is rejected it is at an end; and an acceptance of it afterwards can only operate as a new counter-offer, which the original offerer may either accept or reject.[1] And if an offeree in terms neither accepts nor rejects the offer, but makes a different offer in turn, this will be deemed a constructive rejection of the original offer.[2]

See tits. MUTUAL CONSENT; OFFER; REVOCATION OF OFFER.

[1] Cas. on Contr. 15, n. 1.

[2] Hyde *v.* Wrench, 3 Beav. 334, Cas. on Contr. 13.

BIDDING AT AUCTION.

19. It was decided in Payne *v.* Cave [1] that a bid at an auction is in the nature of an offer, which is accepted by knocking down the hammer; and perhaps it is too late to question the correctness of the decision. On principle, however, it is open to much doubt. The true view seems rather to be, that the seller makes the offer when the article is put up, namely, to sell it to the highest bidder; and that, when a bid is made, there is an actual sale, subject to the condition that no one else shall bid higher. This view was urged by the plaintiff's counsel. If the bidder can retract at any time before the hammer falls, so also can the seller; and hence a bid will secure no right to the bidder, whether there is any higher bid or not. The article may be withdrawn, if the bidding is not satisfactory, though it were put up with the express announcement that it should be sold to the highest bidder.[2] That the decision in Payne *v.* Cave has not been acquiesced in by sellers at auction appears from the frequent attempts that have been made

[1] 3 T. R. 148, Cas. on Contr. 1.

[2] Compare Warlow *v.* Harrison, 1 El. & El. 295, 309.

to render bids irrevocable by a provision to that effect inserted in the conditions of sale.[1] That such attempts are unavailing is no argument in favor of Payne *v.* Cave, but rather the contrary.

[1] Dart on Vendors (5th ed.), 124.

CONCURRENT CONDITIONS.

20. A concurrent condition must consist of some act to be done by the covenantee or promisee, which can be done at the same moment that the covenant or promise is performed. Such conditions are found for the most part in bilateral contracts, and the act which constitutes the condition of one of the covenants or promises is commonly the subject of the counter-covenant or counter-promise; but a concurrent condition may consist of an act which the covenantee or promisee is under no obligation to perform, and hence such a condition may be contained in a unilateral contract. Indeed, in the earliest reported case in which a condition was held to be concurrent, the contract was unilateral.[1] The distinctions between express conditions, conditions implied by law, and conditions implied in fact (**32**), are as applicable to concurrent conditions as to conditions precedent, though much the greater number of concurrent conditions are implied by law, and are therefore contained in bilateral contracts. Concurrent conditions of this latter class are fully considered under another title.[2]

[1] Turner *v.* Goodwin, Fortescue, 145, cited in Cas. on Contr. 904.

[2] See tit. DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES.

21. Whether an express condition be concurrent or precedent will seldom depend upon the language in which it is expressed, as such language is generally as applicable to one as to the other. It will depend first and chiefly upon whether the act which constitutes the condition is capable of being performed concurrently with the covenant or promise to which it is annexed. If it is not, the condition must be precedent. If it is, the condition will be concurrent, if it has the other necessary qualities of concurrent conditions (**133**); otherwise it will be precedent.

22. In a unilateral contract, the only act which is likely to be the subject of a concurrent condition is the act which constitutes the consideration of the covenant or promise, and that cannot be the condition of a promise, as a promise cannot exist until the consideration is performed. Therefore, in Collins *v.* Gibbs,[1] and in Ball *v.* Peake,[2] the declaration stated no promise, but only an offer. A covenant, however, may be conditional upon the performance of the consideration, and such a condition will generally be concurrent: *e. g.* in Large *v.* Cheshire,[3] and in Lancashire *v.* Killingworth.[4] Moreover, if a covenant be given before the consideration for it is performed, and if there be no covenant to perform the consideration, the only way of securing its performance is by making the covenant expressly conditional on its performance. In such a case, therefore, the court will be astute to find an express condition. Thus, in Lock *v.* Wright,[5]

[1] 2 Burr. 899, Cas. on Contr. 462.
[2] 1 Sid. 13, Cas. on Contr. 791.
[3] 1 Vent. 147, Cas. on Contr. 795.
[4] 1 Ld. Raym. 686, 12 Mod. 529, Cas. on Contr. 796.
[5] 1 Stra. 569, Cas. on Contr. 456.

the defendant's covenant to pay for the stock was held to be expressly conditional upon the transfer of the stock, though it was difficult to find such a condition in the covenant; and if it had appeared that there was a covenant by the plaintiff to transfer the stock, the court would not have held that the transfer of it was an express condition of the defendant's covenant to pay for it. There is, indeed, reason to suspect that the plaintiff had covenanted to transfer the stock by a separate deed, and, if so, each deed constituted a separate unilateral contract, and each was independent of the other, unless expressly conditional upon the performance of the other.[1]

23. In a bilateral contract, if the covenant or promise on one side be expressly conditional upon the performance of the covenant or promise on the other side, the condition will be concurrent if the same act would constitute a concurrent condition by implication in the absence of any express condition; otherwise it will be precedent. Therefore, in Brocas' Case,[2] in Lea *v.* Exelby,[3] in Pordage *v.* Cole,[4] and in Sibthorp *v.* Brunel,[5] the conditions were all concurrent, whether express or implied, because there would have been mutual and concurrent conditions in each case by implication, in the absence of any express condition. So in Giles *v.* Giles,[6] the execution and delivery of the release by the plaintiff was a concurrent condition of the defendant's promise to pay the 200*l.*, the former being the consideration of the

[1] Compare Callonel *v.* Briggs, 1 Salk. 112, Cas. on Contr. 722.
[2] 3 Leon. 219, Cas. on Contr. 442.
[3] Cro. Eliz. 888, Cas. on Contr. 789.
[4] 1 Wms. Saund. 319, Cas. on Contr. 625.
[5] 3 Exch. 826, Cas. on Contr. 679.
[6] 9 Q. B. 164, Cas. on Contr. 744

latter. In Storer *v.* Gordon,[1] the delivery of the outward cargo would have been a condition precedent to the payment of the freight on it, had not the plaintiff had a lien on the cargo by virtue of which he was entitled to retain it until the freight was paid; but the latter fact made the condition concurrent. On the other hand, in Peeters *v.* Opie,[2] the condition of the defendant's promise was necessarily precedent, whether express or implied, as the plaintiff's promise was incapable of being performed at the same moment as the defendant's. So in Giles *v.* Giles,[3] the performance of the plaintiff's promises respecting the tenancy could not be a concurrent condition of the defendant's promise to pay the 200*l.*, as the former was not the consideration for the latter; and therefore it was necessarily a condition precedent. So in Jones *v.* Barkley,[4] the delivery of the assignment and release, and in Northrup *v.* Northrup,[5] the payment of the rent, could not be concurrent conditions for the reason stated in § **133**, and therefore they were precedent. In Austin *v.* Jervoyse,[6] it seems that the condition was rightly held to be precedent.[7]

24 It must not be inferred from what has been said that there can never be express concurrent conditions in a bilateral contract except where the law would imply them; for mutual promises contained in

[1] 3 M. & S. 308, Cas. on Contr. 639.

[2] 2 Wms. Saund. 350, Cas. on Contr. 792.

[3] *Supra.*

[4] Dougl. 684, Cas. on Contr. 901.

[5] 6 Cow. 296, Cas. on Contr. 721.

[6] Hobart, 69, 77, Cas. on Contr. 790.

[7] Compare Kingston *v.* Preston, cited in Jones *v.* Barkley, Dougl 684, 689, Cas. on Contr. 901, 905.

separate writings constitute a bilateral contract in which no conditions will be implied, and yet each promise may be expressly conditional upon the concurrent performance of the other. Callonel *v.* Briggs[1] is an example of this.

25. Concurrent conditions implied in fact do not often occur in practice, or, rather, questions do not often arise upon them. Such conditions always exist, however, where mutual covenants or promises are in their nature dependent on each other, *i. e.* where neither can be performed unless the other is performed at the same moment, *e. g.* mutual promises to marry. There are many mutual covenants and promises which are necessarily dependent on each other to a certain extent, but not to the full extent that they are dependent by implication of law. Thus, in the case of mutual promises to buy and sell, one party cannot buy unless the other will sell, and conversely; and, therefore, the buying and selling are necessarily dependent acts. But the payment of the price is not necessarily dependent upon the delivery or transfer of the property, nor conversely; and, therefore, these latter acts are dependent only by implication of law. It may be added that there is but little resemblance between concurrent conditions implied in fact, and those which are implied by law, and therefore what is elsewhere (**133**) said of the latter has little application to the former.

See tits. CONDITIONS; CONDITIONS PRECEDENT; CONDITIONS SUBSEQUENT; DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES; PERFORMANCE OF CONDITIONS.

[1] 1 Salk. 112, Cas. on Contr. 722.

CONDITIONS.

26. A covenant or promise is conditional when its performance depends upon a future and uncertain event. The futurity and uncertainty of the event have reference to the time when the covenant or promise is made. If the event has then ceased to be future and uncertain, though not to the knowledge of the covenantor or promisor, it will not constitute a condition. Nor is it sufficient that the event be future, unless it be also uncertain; and the uncertainty must not be merely as to the time when the event will happen, but as to whether it will ever happen. It is sufficient, however, that the event is uncertain, for then it must necessarily be future also. It may be an event over which neither of the parties has any control, or it may be one within the control of the covenantee or promisee, *e. g.* where it consists in his doing or not doing a certain act. It may also consist of an act to be done or not to be done by the covenantor or promisor, *e. g.* where one covenants or promises to do a specific thing, and in the event of his not doing it to pay $1,000; but it cannot depend upon the mere will and pleasure of the covenantor or promisor, for such an event would destroy the covenant or promise instead of making it conditional. Thus,

if A promise B to buy the latter's horse at such a price if he likes him after a week's trial, the promise will be void unless it can be interpreted as a promise, for example, to buy the horse unless a week's trial shall bring to light some fault in him of which the buyer was ignorant when he made the promise.[1]

27. A covenant or promise cannot be conditional unless it first exist; it is only the performance of it that the condition renders uncertain. An event, therefore, which must happen before a covenant or promise is made, does not make the covenant or promise conditional. If the event happens, the covenant or promise is absolute; if it does not happen, no covenant or promise is made. In such cases the condition is made when the offer is made, and the condition is annexed to the offer, and becomes a part of it; but before the covenant or promise is made, the event has ceased to be uncertain, and hence the condition has ceased to exist. In short, it is the offer, and not the covenant or promise, that is conditional. The consideration of every unilateral promise is necessarily a condition of this nature until it is given or performed, while the consideration of a unilateral covenant may be a condition of the covenant or of the offer, according to the intention of the covenantor.[2]

28. When the making of a covenant or promise depends upon whether a certain event has already happened, there is no condition of any kind. If the event has happened, the covenant or promise is abso-

[1] Pothier, Traité des Obligations, Part 2, c. 3, art. 1, § 2.

[2] See Lord Stair, cited in Thomson *v.* James, 18 Dunlop, 1, 17-18, Cas. on Contr. 125, 147.

lute from the beginning; if the event has not happened, there is no covenant or promise at all. Thus, in Ollive *v.* Booker,[1] the court having decided that the defendant's promise to take the vessel depended upon her "having sailed three weeks ago," and that event not having happened, it necessarily followed that the defendant had made no promise. So in Behn *v.* Burness,[2] the statement that the vessel was "now in the port of Amsterdam" being untrue, it followed from the decision of the court that the defendant had made no promise.[3] If the question had arisen, in either of these cases, whether the plaintiff was bound, it would have presented some difficulty. The presumption that, in a bilateral contract, neither party intends to be bound unless the other is also bound (**11**) would seem to have been effectually rebutted by the terms of the charter-party; but it would have been more difficult to answer the objection (the charter-party not having been under seal in either case) that the plaintiff's promise was without consideration (**89**).

29. As the event which is to render a covenant or promise conditional must not happen before the covenant or promise is made, so it must not happen after it is performed; for the effect of the condition must be to render the performance uncertain, whereas an event happening after performance cannot affect the covenant or promise in any manner. Conditions cannot therefore be divided into classes with reference to their relation in point of time either to the making

[1] 1 Exch. 416, Cas. on Contr. 501.

[2] 1 Best & S. 877, 3 Best & S. 751, Cas. on Contr. 556.

[3] See tit. NOTICE.

or to the performance of the covenant or promise; nor can they, with reference to the nature of the event, for any uncertain event which is to happen, if at all, between the making of the covenant or promise and its performance (or concurrently with the latter at latest) may constitute a condition of any kind. In truth, the division of conditions into conditions precedent, concurrent conditions, and conditions subsequent, is designed to mark the relation in point of time between the event which constitutes the condition and the obligation of the covenant or promise. What that relation is in any given case depends upon when the obligation of the covenant or promise is to arise, and that depends upon the intention of the covenantor or promisor. Thus, if the covenant or promise is not designed to impose any obligation or confer any right until the event happens, the condition is said to be precedent, *i. e.* it precedes the obligation in time. So, if the covenant or promise is designed to impose an obligation and confer a right from the moment when it is made, and so before the event happens, the condition is said to be subsequent, *i. e.* subsequent in time to the obligation. Finally, if the covenant or promise is designed to impose an obligation and confer a right at the moment when the event happens, the condition is said to be concurrent, *i. e.* concurrent in time with the obligation. In this last case the event which constitutes the condition always consists of some act to be done by the covenantee or promisee, and the object of having the obligation arise at the very moment when the event happens (rather than afterwards) is to enable the covenantee or promisee to insist upon performance of the covenant or promise at the same

moment that he performs the condition; and it is this right of the covenantee or promisee that constitutes the chief difference between conditions precedent and concurrent conditions. Hence the idea has naturally arisen that the relation in time between the performance of the covenant or promise and the performance of the condition is the cause, instead of the consequence, of the condition's being concurrent.

30. Between conditions precedent and conditions subsequent the differences are important and radical. In case of a condition precedent, as the obligation to perform the covenant or promise does not arise until the event happens, of course until then there can be no breach of the obligation, and hence no action can be brought; and when an action is brought, it is a necessary part of the plaintiff's case to allege and prove that the event has happened. In the case of a condition subsequent, on the other hand, as the obligation to perform the covenant or promise arises the moment that the latter is made, a breach of the obligation has no connection with the happening of the event, and may take place either before or after the event happens. When an action is brought, therefore, the plaintiff can make out his case without any reference to the condition; and if in truth the event has happened, and the defendant is in consequence not bound to perform his covenant or promise, the burden lies upon him to allege and prove that fact. A condition subsequent, therefore, is always a defence, and an affirmative one. While the performance of the covenant or promise depends upon the happening of the event in both cases, it depends upon it in a different sense in the one case from what it does in the other:

in case of a condition precedent, the covenant or promise is not to be performed *unless* the event happens; while, in the case of a condition subsequent, it is not to be performed *if* it happens. A condition precedent is an element in the creation of an obligation; a condition subsequent is one of the means by which an obligation is extinguished.

31. When it is said that, in the case of a condition subsequent, the obligation to perform arises immediately upon the making of the covenant or promise, it must not be inferred that peformance is necessarily to take place immediately. An obligation may exist now to do a thing at a future time, and it may or may not be certain when that time will arrive, provided it be certain that it will arrive some time; and yet the performance of that obligation may be liable to be defeated by a condition subsequent. It is possible. therefore, for an obligation to be extinguished by a condition subsequent before the time for performing the obligation arrives, and hence before any right of action accrues. Yet if an action be brought after the time for performance arrives, the plaintiff will be able to state and prove facts which will entitle him to recover, unless the defendant sets up and proves his defence arising from the condition subsequent.

See tits. CONCURRENT CONDITIONS: CONDITIONS PRECEDENT; CONDITIONS SUBSEQUENT; DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES; PERFORMANCE OF CONDITIONS.

CONDITIONS PRECEDENT.

32. Of the three classes into which conditions are divided, conditions subsequent seldom occur, and concurrent conditions are only a modified form of conditions precedent. The latter, therefore, constitute the typical class of conditions, and when the term "condition" is used without qualification, a condition precedent is supposed to be meant. Any uncertain event, which is capable of being a condition of any kind, may be a condition precedent, but generally the event consists of some act to be done by the covenantee or promisee. This act may be one which the covenantee or promisee is under no obligation to perform, as is always the case where there is only one unilateral contract between the parties; or it may be one which he binds himself to perform, as is commonly the case when the condition is contained in a bilateral contract. When there are two mutual covenants or promises, each of which is absolute in terms, and each of which is capable of being performed without the other, and yet one of them is subject to the condition of the other's being performed first, the condition is necessarily implied, there being no evidence of any actual intention to make the covenant or promise conditional. All other conditions are

founded upon the actual intention of the covenantor or promisor in each case, and they must, therefore, be contained in the covenant or promise to which they are respectively annexed. A condition, however, may be contained in a covenant or promise in two ways: it may be expressed in direct terms; or the covenant or promise may be of such a nature, or may be so worded, that it cannot be performed until something has been done by the covenantee or promisee. In the former case the condition is express; in the latter, it is neither express in the same sense as in the former, nor implied in the same sense as in the case first stated. All conditions, however, which are not expressed in terms may be properly said to be implied: when the implication is not founded upon anything contained in the covenant or promise, the condition is implied by law; when the implication is founded upon something contained in the covenant or promise, the condition is implied in fact. According to a distinction which seems to be well founded,[1] conditions implied by law are based upon the construction of the covenant or promise, while conditions implied in fact are based upon its interpretation. Conditions implied by law have been fully considered under another title.[2] It only remains, therefore, to consider the other two classes of conditions precedent.

33. When one of the parties to a contract wishes to secure the performance of some act by the other party, or the happening of some event supposed to be in the power of the other party, he may accomplish his object in either of two ways; namely, by requir-

[1] Lieber, Hermeneutics, c. 1, § 8, c. 3, § 2, cc. 4, 5.

[2] See tit. DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES.

ing from the other party a covenant or promise to do the act, or that the event shall happen, or by making his own covenant or promise expressly conditional upon the performance of the act or the happening of the event. If he adopts the former, he will refuse to covenant or promise at all unless the other party also covenants or promises at the same time; if he adopts the latter, he will refuse to make any covenant or promise except a conditional one, and unless the other party will accept the covenant or promise with the condition annexed to it, there will be no contract. When attention is called to it, the distinction seems very obvious between a promise by A to B to do a certain thing, and a promise by B to A on condition that A shall do the same thing; but it is a distinction which is very apt to be overlooked. When parties are making a contract, their attention is likely to be occupied with the things to be done by one party or the other, rather than with the security that each is to have for performance by the other; and the distinction between a covenant or promise to do a thing, and a condition that it shall be done, has to do with the latter exclusively. It is not uncommon, therefore, for contracts, especially those made without professional assistance, to contain a clause requiring a certain thing to be done by one of the parties, without indicating at all how the other is to compel its performance, *i. e.* without indicating whether the clause is intended to be a covenant or promise, or a condition. For example, if the subject of a contract be a certain voyage to be made by a certain vessel, and it be stated that the vessel shall sail (*i. e.* begin the voyage) on or before a certain day, it will be clear that the party

who is to navigate and control the vessel is the one who is to see that she sails by the day named; but what penalty he is to suffer in the event of her not so sailing, namely, whether he is to become liable in damages for a breach of contract, or to lose all rights under the contract against the other party by a breach of condition, will not appear with any certainty from the mere words, as they are consistent with either view. Fortunately, however, there is another clew to the true interpretation of such a clause. If it is the language of the party alone who is to do the act, it can only be a covenant or promise; if it is the language of the other party alone, it can only be a condition. The rule, therefore, that language is to be so construed, *ut res magis valeat quam pereat*, will be decisive. Moreover, the words of such a clause will have, in fact, a different meaning, according to the party who uses them. If they are used in a contract by the party who is to do the act, they plainly import that he binds himself to do it; while, if they are used by the party for whose benefit the act is to be done, they fairly mean that he will require it to be done, *i. e.* that his own obligation shall be conditional upon its being done. How then shall it be ascertained to whom the language of such a clause is to be imputed? If the contract be clearly unilateral (*e. g.* a policy of insurance), of course the answer to this question admits of no doubt. In such a contract only one party speaks, and that is the covenantor or promisor. Any clause, therefore, in a policy of insurance, requiring any act to be done by the insured, will be a condition of the covenant or promise of insurance, though its language may more naturally import a covenant or promise by

the insured.[1] This seems to be the true reason why the clauses in marine policies of insurance commonly called warranties have always been held to be conditions. But if the contract be bilateral, the question does not admit of so unqualified an answer, as any clause which the contract contains may be the language of either party. It seems, however, that a clause in a bilateral contract which simply states that a certain thing shall be done, or that a certain event shall happen, or has happened, must be taken *prima facie* to be the language of the party who is to do the act, or within whose knowledge or power the event is supposed to be. Such a clause clearly cannot be imputed to the other party, unless there is some special reason for so doing. It seems, therefore, that a clause which would be a warranty in a marine policy of insurance will *prima facie* be a stipulation by the ship-owner in a charter-party; *e. g.* in Glaholm *v.* Hays,[2] Ollive *v.* Booker,[3] Oliver *v.* Fielden,[4] and Behn *v.* Burness.[5] This view may be adopted without impeaching any of the foregoing cases, for the clause upon which the question arose in each of them, assuming it to be a stipulation on the part of the plaintiff, also constituted an implied condition of the covenant or promise sued on.[6] It seems that a bought note or a sold note, although in strictness a part of a bilateral contract (**118**), is to be

[1] Worsley *v.* Wood, 6 T. R. 710, Cas. on Contr. 472; Mason *v.* Harvey, 8 Exch. 819, Cas. on Contr. 530; Roper *v.* Lendon, 1 El. & El. 825, Cas. on Contr. 546.

[2] 2 M. & Gr. 257, Cas. on Contr. 492.

[3] 1 Exch. 416, Cas. on Contr. 501.

[4] 4 Exch. 135, Cas. on Contr. 505.

[5] 1 Best & S. 877, 3 Best & S. 751, Cas. on Contr. 556.

[6] Compare Grafton *v.* Eastern Counties Railway Co., 8 Exch. 699. Cas. on Contr. 527.

treated as a unilateral contract for the purposes of the present question. In other words, a bought note is the language of the buyer alone, as a sold note is the language of the seller alone; and, therefore, if a bought note requires anything to be done by the seller, or if a sold note requires anything to be done by the buyer, the doing of it will be an express condition.[1] In Graves *v.* Legg[2] it is not expressly stated that the contract declared on was contained in a bought note, but it may safely be assumed that it was, and therefore the clause upon which the question arose constituted an express condition. It may be added, that, in a bilateral contract, the same clause may be to some extent the language of both parties, and so be both a stipulation and an express condition; but it seems that that can only be where the clause contains some word or words importing a condition, and some other word or words importing a stipulation, *e. g.* in Holder *v.* Taylor,[3] where the word "provided" made an express condition, and the word "agreed" made a stipulation; but it seems that such a construction was not admissible in either of the cases previously cited (the words importing a stipulation only), nor in either of the following cases, the words importing a condition only: Thomas *v.* Cadwallader;[4] Neale *v.* Ratcliff;[5] Anon.;[6] Hays *v.* Bickerstaffe;[7] Dawson *v.* Dyer.[8]

[1] Per Tindal, C. J., in Glaholm *v.* Hays, 2 M. & Gr. 257, Cas. on Contr. 492, 495.

[2] 9 Exch. 709, Cas. on Contr. 532.

[3] 1 Rol. Abr. 518, Cas. on Contr. 620.

[4] Willes, 496, Cas. on Contr. 458.

[5] 15 Q. B. 916, Cas. on Contr. 510.

[6] 4 Leon. 50, Cas. on Contr. 443.

[7] 2 Mod. 34, Cas. on Contr. 630.

[8] 5 B. & Ad. 584, Cas. on Contr. 655.

34. When a bilateral contract consists on one side in doing (*faciendo*), and on the other in giving (*dando*) in payment, and the payment is to be made in instalments, a difference is to be observed between making the instalments payable at fixed dates, and making them payable respectively when certain portions of the other side of the contract have been performed; for in the former case the payments will be subject to no condition unless a condition can be implied, while in the latter case they are subject to an express condition. In all building contracts, therefore, and other similar contracts, in which payment is agreed to be made in instalments as the work progresses, each payment is subject to an express condition; *e. g.* in Terry *v.* Duntze,[1] where the words "as soon as" plainly made an express condition. Hence the reasoning of Buller, J., even if it had been correct with reference to implied conditions, had no tendency to establish the conclusion at which he arrived, namely, that the plaintiffs were "entitled to their action for the money without averring performance."

35. In Holdipp *v.* Otway[2] the words "as soon as" made the settling of the bills of costs, as therein provided for, a condition precedent to the defendant's obligation to pay. So in Seeger *v.* Duthie[3] the clearing of the vessel from London was an express condition of the defendant's promise to pay the 600*l.* So in Braunstein *v.* Accidental Death Ins. Co.[4] the defendant's promise to pay was upon the express condition that the amount to be paid be ascertained, in

[1] 2 H. Bl. 389, Cas. on Contr. 634.

[2] 2 Wms. Saund. 106, Cas. on Contr. 445.

[3] 29 L. J. C. P. 253, 30 L. J. C. P. 65, Cas. on Contr. 691.

[4] 1 Best & S. 782, Cas. on Contr. 827.

case of difference or dispute, by arbitration; and it would have been the same, though the contract had been bilateral, and there had been a mutual agreement to refer disputes to arbitration.

36. When a conditional promise is made to pay a debt, or when a conditional covenant is made to pay a debt which the covenant itself does not create, though no action will lie on the promise or covenant until the condition is satisfied, it does not follow that an action will not lie for the debt itself without regard to the condition. Indeed, as the promise or covenant does not create the debt, it follows that the debt will not be at all affected by any condition which is annexed to the covenant or promise merely. In such cases, therefore, it is necessary to see whether the condition is annexed to the debt itself as well as to the promise or covenant. For example, if in a lease a certain rent be reserved to the lessor without condition or qualification, and in another part of the lease the lessee covenant to pay the rent reserved upon a certain condition, it seems that the condition will not affect the lessor's right to recover the rent by an action of debt or by distress, since that right is not at all derived from the covenant. So in building contracts the owner's indebtedness for the price agreed upon is not created by his promise to pay it, but by the performance of the work. Such indebtedness will arise, therefore, and become payable the moment that the work is completely performed, unless it be expressly made conditional or the payment of it be expressly postponed; and it does not necessarily follow, because the owner promises to pay the debt upon a condition, *e. g.* upon the production of the architect's

certificate, that the debt itself is subject to the same condition. Such a condition is very harsh; for it not only makes the payment for work done dependent upon an event which has no necessary connection with the merit of the work, but upon an event which is absolutely within the power of a person employed and paid by the party who makes the condition. The court should not, therefore, give a condition such a construction, if it can fairly avoid doing so. It must be admitted, however, that a condition annexed to a promise to pay a debt will commonly, upon the true construction of the instrument in which it is contained, extend to the debt itself.[1] There is a difference also between a promise to pay a debt on a certain condition, and a proviso that the debt shall be payable only upon a certain condition; for the latter necessarily renders the debt itself conditional.[2] A condition which makes the payment of a debt dependent upon the will and pleasure of the debtor is repugnant to the debt itself, and hence it will either destroy the debt, or the condition itself will be void.[3] Therefore, a proviso in a contract that work shall not be paid for unless it be done to the satisfaction of the employer, will be construed to mean, *ut res magis valeat quam pereat*, unless it be done to his reasonable satisfaction.[4] But this principle is not applicable to a proviso that work shall

[1] See Morgan *v.* Birnie, 9 Bing. 672, Cas. on Contr. 487; Clarke *v.* Watson, 18 C. B. N. S. 278, Cas. on Contr. 572.

[2] Milner *v.* Field, 5 Exch. 829, Cas. on Contr. 516; Batterbury *v.* Vyse, 2 H. & C. 42, Cas. on Contr. 835.

[3] Dallman *v.* King, 4 Bing. N. C. 105; Pothier, Traité des Obligations, Part 2, c. 3, art. 1, § 2.

[4] Dallman *v.* King, *supra*; Braunstein *v.* Accidental Death Ins. Co., 1 Best & S. 782, Cas. on Contr. 827.

not be paid for unless it be done to the satisfaction of a third person, though such third person be employed and paid by the party who makes the proviso, and hence must be presumed to be in his interest.

37. In Slater *v.* Stone,[1] and in Bragg *v.* Nightingale,[2] the decision of the court illustrates the maxim, *Qui hæret in litera hæret in cortice.* In both cases alike the lessee's covenant to repair was clearly subject to the express condition that the lessor first repair; and in both cases alike the meaning clearly was that the lessor should deliver the premises to the lessee in good repair at the beginning of the term, and then that the lessee should keep them in good repair during the term, and deliver them up in good repair at the end of the term.[3]

38. An instance has been referred to already (**34**) in which the court overlooked or disregarded a condition plainly expressed; and there are other cases in which the same thing has happened. Thus, Boone *v.* Eyre [4] contained an express condition, which was not noticed by the court, but which ought, it seems, to have been deemed conclusive in the defendant's favor. So in Hays *v.* Bickerstaffe,[5] and in Dawson *v.* Dyer,[6] the defendant's covenant for quiet enjoyment was subject to the express condition of the plaintiff's performing the covenants in the lease on his part; yet, though it was admitted that the condition had not been performed, the defendant was held liable. In

[1] Cro. Jac. 645, Cas. on Contr. 444.
[2] 1 Rol. Abr. 416, pl. 15, Cas. on Contr. 623.
[3] Compare Neale *v.* Ratcliff, 15 Q. B. 916, Cas. on Contr. 510.
[4] 1 H. Bl. 273, n., Cas. on Contr. 838.
[5] 2 Mod. 34, Cas. on Contr. 630.
[6] 5 B. & Ad. 584, Cas. on Contr. 655.

the latter case it was conceded that an entry by the defendant to enforce a forfeiture would not have been a breach of the covenant for quiet enjoyment; but neither the covenant nor the condition made any distinction between an entry by the defendant and an entry by any other person claiming under him, nor between an entry upon the ground of forfeiture and an entry for any other cause; nor does the language of either the covenant or the condition admit of any such distinction or distinctions being made by construction. In Hunlocke *v.* Blacklowe [1] it was admitted that the words "in consideration of the performance thereof" would have made performance by the plaintiff a condition precedent to the payment of the annuity, but for the fact that it was "not possible for the plaintiff to perform his covenant in his lifetime." This, however, was assuming that "performance," in the clause quoted above, could only mean "entire performance," whereas the true construction appears to have been that performance by the plaintiff to the time when any annual sum became payable was a condition precedent to its payment (**129**). So in Stavers *v.* Curling [2] the words "on the performance of the before-mentioned terms and conditions on the part of the plaintiff" clearly made an express condition, and yet the court disregarded them, chiefly on the authority of Boone *v.* Eyre, and Hunlocke *v.* Blacklowe, and decided the case upon principles applicable only to conditions implied by law. The same thing was done in Newson *v.* Smythies,[3] though the

[1] 2 Wms. Saund. 156, Cas. on Contr. 627.
[2] 3 Bing. N. C. 355, Cas. on Contr. 876.
[3] 3 H. & N. 840, Cas. on Contr. 882.

condition was expressed as plainly as language could express it. In Pust *v.* Dowie,[1] the condition was equally plain, and it seems clear that it was annexed to the promise to pay freight, not to the promise to take the vessel; and if so, it was impossible to maintain an action on the former promise, if the condition had not been complied with; nor ought the plaintiff in that event to have recovered more than a *quantum meruit*, to which he was admitted to be entitled. The decision on appeal involved only a question of costs, as the plaintiff proved that the condition had been complied with.[2] The case of Tidey *v.* Mollett[3] might have been decided upon the short ground that the words "in consideration of these conditions being fulfilled" rendered the defendant's obligation to take the house expressly conditional upon the plaintiff's performing before the 14th of June everything that that was to be performed by him before that date.

39. Sometimes it will appear from the entire scope and object of a contract that a covenant or promise which is not conditional in terms was nevertheless intended to be conditional; and it seems that the condition should in such a case be deemed express. Thus, in Bankart *v.* Bowers,[4] it is evident that the promises contained in the fifth and seventh clauses of the agreement were intended to be conditional upon the completion of the purchase.

40. When the subject of a covenant or promise is divisible in its nature, and a condition is annexed to

[1] 32 L. J. Q. B. 179, 34 L. J. Q. B. 127, Cas. on Contr. 893.
[2] See 5 Best & S. 20.
[3] 33 L. J. C. P. 235, Cas. on Contr. 567.
[4] L. R. 1 C. P. 484, Cas. on Contr. 753.

the covenant or promise, the subject of which is also divisible, and when the component parts of the latter are capable of being apportioned to the component parts of the former, the question may arise whether the performance of the covenant or promise and the performance of the condition are by law divisible and apportionable to each other, so that the performance of any part of the covenant or promise may be enforced as soon as the corresponding part of the condition is performed. Such a question, however, must be answered in the negative. A covenant or promise is only what the covenantor or promisor makes it, and he makes it by means of words and acts. If the meaning of the latter is obscure or ambiguous, the subject about which they are employed may be resorted to as a means of interpreting them; but if their meaning is clear, it is conclusive. If, therefore, X covenants or promises to do two acts, A and B, upon the happening of two events, C and D, he is not bound to do either act until both events have happened; and it is immaterial that event C relates exclusively to act A, and event D exclusively to act B, for the meaning of the words is clear, and they do not admit of any interpretation which will make them mean that act A shall be done upon the happening of event C, and act B upon the happening of event D. Hence the case of Neale *v.* Ratcliff [1] should have been decided as it was, even if the leased property had consisted of two dwelling-houses, wholly separate and distinct from each other.[2]

41. A covenant or promise which cannot be per-

[1] 15 Q. B. 916, Cas. on Contr. 510.

[2] See Pothier, Traité des Obligations, Part. 2, c. 3, art. 1, §§ 4, 6.

formed except upon the happening of a certain event is necessarily conditional upon the happening of that event, and the condition may be said to be implied in fact. The necessity for making the implication may be found either in the language of the covenant or promise, or in its subject.[1] Thus, in Raynay *v.* Alexander[2] the defendant's promise, being to deliver to the plaintiff fifteen tods of wool to be chosen by the plaintiff out of seventeen tods in the defendant's possession, was necessarily conditional upon the plaintiff's making the selection. So in Thurnell *v.* Balbirnie[3] the defendant's promise, being to purchase the goods in question at a valuation to be made by the persons named, was necessarily conditional upon those persons making the valuation. So in Coombe *v.* Greene[4] the defendant's covenant, being to lay out 100*l.* "under the direction or with the approbation of some competent surveyor to be named by the plaintiff," could not possibly be performed until the plaintiff named a surveyor. In Rae *v.* Hackett[5] the defendant's promise was (*inter alia*) that the ship in question "should sail and proceed in ballast to a safe and convenient port near to Cape Town;" and, as the voyage was to be made on the plaintiff's account, it necessarily followed that the port was to be selected by the plaintiff, and not by the defendant; and, as the vessel could not sail direct to a port selected by the plaintiff near to Cape Town unless the port was

[1] See tit. NOTICE.
[2] Yelv. 76, Cas. on Contr. 443.
[3] 2 M. & W. 786, Cas. on Contr. 489.
[4] 11 M. & W. 480, Cas. on Contr. 497.
[5] 12 M. & W. 724, Cas. on Contr. 499.

selected and notice of it given to the defendant before the vessel sailed, it necessarily followed that the selecting of a port by the plaintiff, and giving notice of it to the defendant, was a condition precedent to the vessel's sailing. If it be said that the plaintiff might have gone in the vessel himself, or might have sent a supercargo, the answer is that the defendant did not agree to take a passenger, and hence it must be assumed that he would not do so. There might be good reasons also for the defendant's knowing before the vessel sailed what port she was expected to go to. For example, the plaintiff might select a port which the defendant would not consider as coming within the terms of the contract. In Armitage *v.* Insole[1] the defendant's promise, being to give the plaintiff yearly twenty tons of coal, "to be put free on board ship at Cardiff for the use of the plaintiff," could not be performed until a ship was provided by the plaintiff and notice of it given to the defendant. In Ellen *v.* Topp,[2] the defendant did not covenant that the apprentice should serve the defendant generally, but only as an apprentice to the trade which he was to be taught, namely, that of an auctioneer, appraiser, and corn-factor, and the apprentice could not so serve the plaintiff unless the latter continued to follow that trade, and the whole of it. Hence the following of that trade by the plaintiff was a condition precedent to the defendant's obligation that the apprentice should serve. In Cadwell *v.* Blake[3] the principle upon which conditions are implied in fact

[1] 14 Q. B. 728, Cas. on Contr. 508.
[2] 6 Exch. 424, Cas. on Contr. 520.
[3] 6 Gray, 402, Cas. on Contr. 609.

was very clearly stated, but it seems to have been misapplied to the facts of that case. In order to test the question, all the promises on the part of the plaintiffs must be left out of view, and the promise sued on must alone be considered. The plaintiffs' promises are material only to the question whether the promise sued on was subject to a condition implied by law, — a question which has been considered elsewhere (**113**). Limiting our view, then, to the defendants' promise to pay the plaintiffs $4,000 in paper manufactured by the process in question, it becomes clear that that promise was subject to no condition. There is no necessary implication, nothing more than a conjecture, that anything was to be done by the plaintiffs; the defendants took the whole burden of performance on themselves. If the defendants were unable to manufacture the paper without instructions from the plaintiffs, they should have made the giving of instruction an express condition; or they might have promised to pay in paper manufactured by them under the plaintiffs' supervision and direction, in which case there would have been a condition implied in fact. In truth, however, the clause of forfeiture contained in the contract gave the defendants ample protection against the consequences of any refusal to teach on the part of the plaintiffs.

See tits. CONDITIONS; CONCURRENT CONDITIONS; CONDITIONS SUBSEQUENT; DEMAND; DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES; NOTICE; PERFORMANCE OF CONDITIONS.

CONDITIONS SUBSEQUENT.

42. Conditions may be annexed to transfers of property as well as to covenants and promises. In transfers of property conditions subsequent are much more common and familiar than conditions precedent. The latter, indeed, seldom occur except in special instruments, such as wills and settlements, while the former are constantly found in the most common instruments of conveyance. For example, an ordinary mortgage, in its legal aspects, differs from an ordinary deed of conveyance only in containing a condition subsequent, namely, that the estate or interest conveyed shall cease upon the payment of the mortgage debt, with interest, on a day named. So, also, leases constantly provide that the term thereby created shall cease and determine in the event of the lessee's committing a breach of any of the covenants in the lease to be performed by him. In this respect, however, covenants and promises differ widely from transfers of property, for the conditions annexed to the former are in most cases either precedent or concurrent. Any event may indeed be made a condition subsequent as well as a condition precedent; but the only events which are in fact often made conditions subsequent, in case of covenants or promises, are those which render the

performance of the covenant or promise impossible, or at least impracticable. Moreover, it is only certain classes of covenants and promises which are liable to be so affected; for the impossibility and impracticability referred to have reference to the nature of the thing covenanted or promised to be done, and not to the ability of the covenantor or promisor. For example, the law supposes that a covenant or promise to pay money may be performed notwithstanding any event that can possibly happen, while the performance of a covenant or promise to render personal service will be made impossible by the death of the covenantor or promisor before performance, and may be made impossible or impracticable by his illness. So performance of a covenant or promise to transfer specific property will be impossible, if the property be destroyed before the transfer is made. In the two cases last put, the hardship of requiring a party to pay damages for non-performance is so great as to raise a presumption that the event would have been made a condition subsequent if it had been foreseen, and therefore the law will imply the condition.[1] In Elliott *v.* Blake [2] there was an express condition subsequent. It does not appear whether the goods were specified by the contract or not; if they were not, that is an instance of an event being made a condition subsequent which would presumably only render the performance of the covenant inconvenient. Other instances of express conditions subsequent will be found in the exceptions commonly introduced into charter-parties and bills of lading, by which the carrier's obligation

[1] See Poussard *v.* Spiers, 1 Q. B. D. 410, Cas. on Contr. 591, 594; Wells *v.* Calnan, 107 Mass. 514, Cas. on Contr. 615, 617.

[2] 1 Lev. 88, Cas. on Contr. 771.

to deliver the goods is to cease in the event of their being lost or destroyed by certain enumerated perils. Thus, in Storer *v.* Gordon,[1] the carrier was exempted from liability for not delivering the outward cargo by the exception in the charter-party.

43. The reasons which have been given for making certain events conditions subsequent of course have no application when the events happen after the covenant or promise is broken, and when the cause of action has already arisen; and no event so happening will constitute a condition by implication.[2] There is nothing, however, to prevent a covenantor or promisor from providing expressly that any liability which he may incur by a breach of the covenant or promise shall cease upon the happening of a certain event. Of this nature is the clause commonly inserted in policies of insurance against fire, by which it is provided that the liability of the insurer for any loss shall cease, unless an action be brought to enforce it within one year after the loss happens.[3] The event which constitutes the condition, namely, the not bringing of an action, is negative, but a negative event may constitute a condition as well as a positive one. The condition in this case is not indeed, strictly speaking, annexed to the covenant or promise, but rather to the cause of action arising from the breach of the covenant or promise. In like manner, a condition may be precedent, not because it precedes the obligation created by a covenant or promise, but because it precedes the right of action arising from a breach of the obli-

[1] 3 M. & S. 308, Cas. on Contr. 639.

[2] See Stubbs *v.* Holywell Railway Co., L. R. 2 Exch. 311.

[3] See Semmes *v.* Hartford Ins. Co., 13 Wall. 158.

gation. Such was the nature of the condition in Hotham *v.* East India Co.[1] The covenant by the defendant to furnish the vessel with a full cargo was unconditional, but the plaintiff's right to recover for a breach of that covenant was expressly conditional upon his first proving the short tonnage by a certificate and survey in the manner pointed out in the charter-party. That the court was wrong in holding the condition to be a subsequent one, seems to be very clear. The performance of a condition subsequent extinguishes a pre-existing right, while the performance of the condition in question created a new right. Nor can it be said that the condition here was negative, namely, the not procuring of a certificate and survey; for then it would follow that the plaintiff might have brought an action the moment the covenant was broken, and, so long as there was no default in the plaintiff in not performing the condition, there would have been no defence to the action. It is clear, however, that no action would lie until the condition was performed, or something happened to excuse its performance; and if an action had been brought, for example, before the vessel arrived in the Thames, and hence before a survey could be had in accordance with the charter-party, and that fact had appeared upon the face of the declaration, the latter would have been bad on general demurrer. Why? Because it would have appeared that a condition precedent to the right of action could not have been performed.

44. In an action upon a covenant or promise, the burden of alleging and proving the performance of a condition lies upon the plaintiff or defendant according

[1] 1 T. R. 638, Cas. on Contr. 779.

as the condition is precedent or subsequent, unless the covenant or promise provides otherwise. It is competent, however, for the parties to shift the burden by providing that the defendant shall have the burden of alleging and proving that a condition precedent has not been performed, or that the plaintiff shall have the like burden in case of a condition subsequent. The mere language of a condition will not indicate with certainty, therefore, whether it is precedent or subsequent. Thus, the condition of an ordinary bond is always subsequent in form, *i. e.* it provides that the bond shall be void on the happening of a certain event, and accordingly the obligor always has the burden of alleging and proving that the event has happened. In respect to the rights of the parties, however, the not happening of the event is clearly intended to be a condition precedent; for otherwise an action might be brought immediately upon every bond that is given. Both of the foregoing positions in regard to bonds, namely, that no action will lie upon them until the condition is broken, and that the defendant has the burden of alleging and proving performance of the condition, are established by uniform and immemorial practice.[1] Of the same nature was the condition in Gray *v.* Gardner,[2] and therefore it was rightly held that the defendant had the burden of proof; yet the not happening of the event in question was clearly a condition precedent to the plaintiff's right of action.

See tits. CONDITIONS; CONDITIONS PRECEDENT; CONCURRENT CONDITIONS; DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES.

[1] See Cage *v.* Acton, 1 Ld. Raym. 515, Cas. on Contr. 772.

[2] 17 Mass. 188, Cas. on Contr. 785.

CONSIDERATION.

45. The consideration of a promise is the thing given or done by the promisee in exchange for the promise.

46. It is a familiar rule of law that contracts not under seal require a consideration to make them binding, while contracts under seal are binding without a consideration; and hence it is commonly inferred that all contracts not under seal are alike in respect to consideration. In one sense this inference is correct, but in another sense it is incorrect. There are two kinds of consideration known to the law, and contracts not under seal may be divided into two classes, according as they are supported by the one or the other of these considerations; and yet either kind of consideration is sufficient to render any contract binding. In other words, all contracts not under seal are alike in respect to the consideration required to make them binding, but whether a contract belongs to the one or the other of the two classes above referred to depends upon the kind of consideration by which it is supported. These two classes of contracts are most easily distinguished by the actions by which they are respectively enforced, the action of debt being the original and proper remedy for one class, and the action of as-

sumpsit being the sole remedy for the other class. The former class has existed in our law from time immemorial; the latter class had no legal existence (*i. e.* they could not be enforced by law) until the introduction of the action of assumpsit, it having been originally the sole object of that action to enforce a class of contracts for which there was previously no remedy. In respect to consideration, the former class of contracts requires that the thing given or done, in exchange for the obligation assumed, shall be given or done to or for the obligor directly; that it shall be received by the obligor as the full equivalent for the obligation assumed, and be, in legal contemplation, his sole motive for assuming the obligation; and, lastly, that it shall be actually executed, *i. e.* that the thing to be given or done in exchange for the obligation be actually given or done, it not being sufficient for the obligee to become bound to do it. Unless there is a consideration which satisfies each of these requirements, debt will not lie; and this is equivalent to saying that there is no binding contract according to the ancient law. Whether there is a binding contract at all, or not, depends upon whether there is such a consideration as will support an action of assumpsit. This latter kind of consideration may be best described negatively, namely, by saying that it need not satisfy any one of the requirements before enumerated. If anything whatever (which the law can notice) be given or done in exchange for the promise, it is sufficient; and therefore, if one promise be given in exchange for another promise, there is a sufficient consideration for each. It is obvious that this more modern species of consideration was

derived directly from the more ancient; that in truth it is the ancient consideration relaxed and reduced to a minimum. How and why this relaxation took place, it is not difficult to see. The ancient consideration was required for the creation of a debt, because "debt" was the name given to the contract which had been borrowed from the Roman law. A debt (*i. e.* by simple contract) could be created, therefore, only in the mode in which a *real* contract was made by the Romans; and the consideration in case of a debt corresponded to the *res* which gave the name to the Roman contract.[1] The consideration, therefore, was of the very essence of a debt, — was in fact what created it. But when the action of assumpsit was introduced, and a new class of contracts came to be enforced, it was neither necessary nor possible to require the old consideration to make the new contracts binding. It was not necessary, because it was neither supposed nor claimed that the new contracts created or constituted debts; and it was not possible, because the very reason why a new action was required to enforce these contracts was that they had not a sufficient consideration to support an action of debt. Some relaxation, therefore, was indispensable from the beginning; and the process having begun, there was found to be no satisfactory stopping-place until the result already stated was reached. It may be urged that a more rational course would have been to apply the maxim, *Cessante ratione, cessat ipsa lex*, and to hold that the action of assumpsit required no consideration to support it. To this, however, it may be answered, that the courts could not change the law

[1] See tit. DEBT.

by their own authority; that the action of assumpsit was the creature of a statute,[1] and was limited to cases which were analogous to cases for which a legal remedy was already provided; that promises not under seal and without consideration were not analogous to any contracts which had ever been enforced, and that to have enforced such promises would have been to put parol contracts on the same footing with specialties.

47. But whatever may have been the merits of the question originally, it was long since conclusively settled in the manner stated above; and thus the action of assumpsit modified the old consideration instead of wholly superseding it; but so important were the modifications that the relationship of the new consideration to the old has been almost wholly lost sight of. Nay, the old consideration itself has been nearly lost sight of, though it is as necessary now as it ever was for the creation of a debt by simple contract. The reason is obvious. When the old consideration ceased to be necessary to the validity of any contract, it lost in a great measure its practical importance, except to lawyers; and when, by degrees, assumpsit had superseded debt upon simple contract, it ceased to attract the attention even of lawyers. The result is, that the term "consideration" has practically changed its meaning; having formerly meant the consideration necessary to create a debt, it now means the consideration necessary to support assumpsit. It is in this latter sense that it now constitutes an important branch of the law of contracts, and is the subject of the second chapter of the writer's collection

[1] 13 Edw. I. c. 24.

of Cases on Contracts. The old consideration, however, should never be lost sight of by the student, as it furnishes the best, if not the only, key to the intelligent understanding of the new.

48. It seems that there are promises which, though supported by a sufficient consideration, cannot be enforced even by the action of assumpsit. The object of that action having been to provide a remedy for cases which had hitherto been remediless, it was originally confined to cases of that description; and hence it was a rule that it would not lie where debt would lie, *i. e.* it would not lie on a promise to pay a sum of money which constituted a debt; and though it was extended by Slade's Case,[1] and by the fiction of implied promises, so as to embrace all cases of simple-contract debts, it seems that it will not lie to this day upon a promise to pay a debt of a higher nature than a simple contract. A promise, therefore, by a judgment debtor to pay the judgment, or by a tenant to pay his rent, or by a bond-debtor to pay the bond, will not, it seems, though made for a good consideration, support assumpsit.[2]

49. It has been said that every contract not under seal requires a consideration to support it, and this is strictly true as to contracts of common-law origin; but

[1] 4 Rep. 94 b.

[2] Sturlyn *v.* Albany, Cro. Eliz. 67, Cas. on Contr. 191; Anon., Cowp. 128, Cas. on Contr. 249. In Barber *v.* Fox, 2 Wms. Saund. 136, Cas. on Contr. 247, the action was on a promise by the defendant to pay the bond of his ancestor *de bonis propriis*, whereas an action of debt upon the bond would only have lain against the defendant as heir, and a judgment in such an action could have been satisfied only out of assets descended. For a similar reason an action of assumpsit will lie against an executor on a promise to pay, *de bonis propriis*, a bond of his testator.

there are certain contracts which owe their validity, in England and in this country, to the custom of merchants; which had their origin in countries governed by the civil law, and to which, therefore, the common law is wholly foreign. To this class of contracts belong bills of exchange and policies of insurance; and promissory notes are placed by statute on the same footing with bills of exchange. That these contracts are binding by their own force, and therefore do not require any consideration, is very clear upon principle. It must be confessed, however, that the generally received opinion among lawyers is otherwise, and that this opinion has generally found expression in the later judicial decisions whenever the question has been directly raised. It can easily be shown, however, that this opinion is irreconcilable with the nature of these contracts, even when judged by our law, still more when judged by the custom of merchants, and that the decisions by which it is supported, if they cannot be pronounced erroneous, must at least be deemed anomalous. It would not be proper to discuss such a question at length in this place, but neither is it proper to pass it over entirely; for though the opinion and the decisions in question derive their greatest importance from their bearing on the contracts to which they relate, yet much of the error and confusion which pervade the subject of consideration had their origin in vain attempts to find a consideration where none was necessary, and where there was none in fact.

50. Probably it would never have been held that bills of exchange and promissory notes require a consideration, but for the attempt of Lord Mansfield to

establish the doctrine that consideration was required only as evidence of deliberate intention on the part of the promisor, and hence that none was necessary when the promise was in writing.[1] It was with reference to this notion that Skynner, C. B., in delivering the opinion of all the judges in Rann *v.* Hughes,[2] used the oft-quoted words: "All contracts are, by the law of England, distinguished into agreements by specialty and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved." Since this opinion was delivered it seems to have been regarded as a foregone conclusion that bills of exchange and promissory notes must be classed with parol contracts, whatever might be the consequences. That no such view had previously prevailed, Pillans *v.* Van Mierop seems to furnish sufficient evidence. When it is said that a promise, which in common parlance is said to be in writing, is in law parol, the meaning is that the writing is mere evidence of the promise, which in legal contemplation is made orally (**118**). But it is impossible to hold that the contracts now in question are parol in any such sense. A bill of exchange is not evidence of a contract in any other sense than a deed is; it is the contract itself, and is binding by its own force. Proofs of this are innumerable, but the following will suffice for the present purpose: — **1.** Declara-

[1] Pillans *v.* Van Mierop, 3 Burr. 1663, Cas. on Contr. 177, 181, 182, 183; Williamson *v.* Losh, Chitty on Bills (9th ed.), p. 75, n. (*x*), Cas. on Contr. 186.

[2] 7 T. R. 350, n. (*a*), Cas. on Contr. 187.

tions in assumpsit on bills of exchange and promissory notes have always been founded on a promise implied by law, the plaintiff first stating the making of the instrument, with the other necessary facts, and then deducing therefrom the conclusion that the defendant became liable, and in consideration of his being so liable, he promised. There is but one possible way of supporting such a declaration, on the supposition that a consideration is necessary, namely, by holding that the law presumes a consideration, and thus throws upon the defendant the burthen of alleging and proving a want of consideration. But this would be merely to attempt to cure one error by committing another. 2. A promissory note, payable at a future day, and given in payment of a pre-existing debt already payable, would be invalid, on the supposition that it requires a consideration.[1] 3. The payee of a bill of exchange could never maintain an action against the acceptor, if the acceptance required a consideration; for he sues on a contract made directly with himself, and for which he gives no consideration. 4. If bills of exchange and promissory notes were mere parol promises, the holder could only sue on the original consideration for which they were given; and they could not by their own force create debts; the contrary of which is, however, well established.[2] 5. It is well established that a bill or note given for a debt operates as payment, unless default be made in paying it when it becomes due, the creditor not having transferred it, and not having been guilty of any laches; which shows that such an instrument is of a higher

[1] Hopkins *v.* Logan, 5 M. & W. 241, Cas. on Contr. 421

[2] Hatch *v.* Trayes, 11 Ad. & El. 702.

nature than a simple contract, and in the nature of a specialty. That it is not held to operate as an absolute payment merely shows that the courts have failed to carry a true doctrine to its full extent.

51. As to policies of insurance, the question whether they require a consideration seems not to have been the subject of express decision, though it has generally been supposed that they do. The following reasons, however, seem to be sufficient for believing that upon principle they do not: 1. Immediately upon the issuing of a policy, the premium, if not paid, becomes a debt. This debt must be created by the policy alone, for there is nothing else to create it; and yet this would be impossible if a policy were a mere parol promise.[1] 2. In all cases where the premium is not paid at the time of issuing the policy, there is no consideration in fact for the policy; for it is quite out of the question to hold that the consideration of the policy is a promise to pay the premium. A mutual agreement for an insurance is undoubtedly supported by the consideration of mutual promises, but that agreement is fully performed by the insurer when he issues the policy. To hold that there are mutual promises after the policy is issued would be to hold that the issuing of the policy does not at all change the legal relations of the parties. 3. The practice of resorting to equity to compel the issuing of a policy pursuant to agreement[2] cannot be accounted for except upon the theory that a policy of insurance is of a different nature from a mere promise to insure.

[1] See tit. DEBT.

[2] Tayloe *v.* Merchants' Fire Ins. Co., 9 How. 390, Cas. on Contr 106.

52. It must be borne in mind that the custom of merchants does not attach to a mere agreement to issue a policy of insurance or to give a bill or note; it only attaches to the instrument when issued. Nor must a want of consideration be confounded with a failure of consideration. To the latter the foregoing observations have no application.

53. Having disposed of the foregoing preliminary questions, it remains to consider in detail the requisites of a consideration to support assumpsit. This will be done under the following heads: — 1. Adequacy of Consideration. 2. Consideration and Motive. 3. From whom the Consideration must move. 4. To whom the Consideration must move. 5. Mutual consent as an element of Consideration. 6. Relation in Time of the Consideration to the Promise. 7. Moral Consideration. 8. Consideration void in part. 9. Mutual Promises. 10. Executed Consideration.

1. Adequacy of Consideration.

54. It has been seen that a consideration to create a debt must, in legal contemplation, be commensurate with the debt, but that anything which the law can notice will, so far as regards its extent or value, be sufficient to support assumpsit. Thus, it has been held by high authority that a piece of paper upon which a void contract has been written is a sufficient consideration for a guaranty of 10,000*l.*[1] So the execution and delivery of a deed of release or a deed of grant will be a sufficient consideration for a promise, though the promisee had nothing to release or to

[1] Haigh *v.* Brooks, 10 Ad. & El. 309, 323, Cas. on Contr. 210.

grant.[1] So the showing of a deed,[2] or entering into a contract,[3] or proving that the promisee has a right of action,[4] or stating an account,[5] or giving a bond of indemnity,[6] or making an affidavit,[7] or parting with a letter which belongs to the promisee,[8] or permitting boilers belonging to the promisee to be weighed,[9] will be a sufficient consideration. On the other hand, a verbal transfer of a thing which can be transferred only by deed (*e. g.* an incorporeal hereditament), or a verbal surrender of a thing which can be surrendered only by deed (*e. g.* a right of action), will not constitute any consideration.[10] For this reason it seems that the first ground upon which the decision in Haigh *v.* Brooks[11] was based is untenable. So a verbal surrender of a thing which is by law incapable of being surrendered (*e. g.* an estate at will) will not be a consideration.[12] So the doing of any act which the promisee would be liable to an action of tort for not doing (*e. g.* discharging a prisoner from illegal imprisonment) will not be a consideration; and it is immaterial whether the liability would be to the promisor or to some third person.[13] But the discharge

[1] See Barnard *v.* Simons, 1 Rol. Abr. 26, pl. 39, Cas. on Contr. 194
[2] Sturlyn *v.* Albany, Cro. Eliz. 67, Cas. on Contr. 191.
[3] Bret *v.* J. S., Cro. Eliz. 756, Cas. on Contr. 192.
[4] Traver *v.* ——, 1 Sid. 57, Cas. on Contr. 194.
[5] Hawes *v.* Smith, 2 Lev. 122, Cas. on Contr. 195.
[6] Williamson *v.* Clements, 1 Taunt. 523, Cas. on Contr. 197.
[7] Brooks *v.* Ball, 18 Johns. 337, Cas. on Contr. 200.
[8] Wilkinson *v.* Oliveira, 1 Bing. N. C. 490, Cas. on Contr. 208.
[9] Bainbridge *v.* Firmstone, 8 Ad. & El. 743, Cas. on Contr. 209.
[10] See Barnard *v.* Simons, 1 Rol. Abr. 26, pl. 39, Cas. on Contr. 194.
[11] 10 Ad. & El. 309, 323, Cas. on Contr. 210, 220.
[12] Kent *v.* Pratt, 1 Rol. Abr. 23, pl. 27, 28, Cas. on Contr. 198.
[13] Atkinson *v.* Settree, Willes, 482, Cas. on Contr. 196; Herring *v.* Dorell, 8 Dowl. P. C. 604, Cas. on Contr. 222.

of a prisoner from lawful imprisonment is a good consideration, though there were in truth no ground for the imprisonment, and the prisoner would eventually have obtained his discharge for that reason ; *e. g.* where a defendant is imprisoned in a civil action which is not well founded, and yet the imprisonment, not being malicious and without probable cause, is not illegal.[1] The same principle also applies to the discharge of property from a lawful attachment.[2] Again, the doing of a thing which the promisee is already bound to the promisor to do is clearly no consideration. Thus, payment of a judgment by the judgment debtor is no consideration for a promise by the judgment creditor.[3] And the same principle seems to apply when the promisee is under an obligation to a third person to do the thing in question ; for there is then a conclusive presumption of law that he does it in discharge of his previous obligation, and not as a consideration of a new promise. It seems, therefore, that the decision in Shadwell *v.* Shadwell,[4] and in Scotson *v.* Pegg,[5] cannot be supported. On the same principle, the performance of official duty can never be a consideration for a promise ; but in England *v.* Davidson,[6] it was properly held that the plaintiff's being a constable did not disable him from recovering a reward offered to any person who would give such information as should lead to the conviction of the perpetrator of a certain crime, it not being shown

[1] Smith *v.* Monteith, 13 M. & W. 427, Cas. on Contr. 225.
[2] Longridge *v.* Dorville, 5 B. & Ald. 117, Cas. on Contr. 285
[3] Dixon *v.* Adams, Cro. Eliz. 538, Cas. on Contr. 191.
[4] 30 L. J. C. P. 145, Cas. on Contr. 233.
[5] 6 H. & N. 295, Cas. on Contr. 240.
[6] 11 Ad. & El. 856, Cas. on Contr. 220.

that everything involved in giving such information came within the plaintiff's official duty. The payment of a well-founded claim will be a sufficient consideration for a promise, if the claim was unliquidated, or if for any other reason it does not appear that the full amount paid was due.[1] Where the consideration of a promise is the payment of money, it is of course no objection to the consideration that the promisee already owed the promisor the full amount paid, if the money was not paid in satisfaction of the previous debt. Therefore, there was a good consideration in Reynolds *v.* Pinhowe,[2] the 4*l.* not appearing to have been paid in satisfaction of the judgment. The smallest sum of money is a sufficient consideration for a promise to acknowledge satisfaction of a judgment for the largest sum.

55. There is one case in which the law makes no distinction between debt and assumpsit in respect to consideration, namely, when the consideration is the payment of money, and the promise also is to pay money unconditionally and upon request, *i. e.* immediately. One dollar is a sufficient consideration for a promise to pay one thousand dollars at some future day or upon the happening of some uncertain event; but it is only a sufficient consideration for a general and unqualified promise to pay one dollar. The reason of this distinction seems to be that the law has never in theory abandoned the principle that a consideration must be commensurate with the obligation which is given in exchange for it; that, though the smallest consideration will in most cases support the largest

[1] Wilkinson *v.* Byers, 1 Ad. & El. 106, Cas. on Contr. 203.

[2] Cro. Eliz 429, Cas. on Contr. 191.

promise, this is only because the law shuts its eyes to the inequality between them; and hence any inequality to which the law cannot shut its eyes is fatal to the validity of the promise. The value of most considerations, as well as of most promises, is a thing which the law cannot measure; it is not merely a matter of fact, but a matter of opinion. If, therefore, the promisor thinks the consideration is equal to the promise in value (*i. e.* if he is willing to give the promise for the sake of getting the consideration), the consideration will be equal to the promise in value for all the purposes of the contract. From this it is but an easy step to the conclusion that, whatever a promisor chooses to accept as the consideration of his promise, the law will regard as equal to the promise in value, provided the law can see that it has any value. But this reasoning is obviously inapplicable to a case in which the value both of the consideration and of the promise is conclusively fixed by law; and a promise to pay money in consideration of a payment of money is such a case, provided the elements of time and uncertainty be wholly excluded. Therefore, in such a case there must be in fact what there always is in theory, namely, a perfect equality in value between the consideration and the promise. That such equality always exists in theory seems to be pretty clear. In other words, the promise is in legal contemplation given and received in exchange for the consideration, and for no other purpose. Therefore, a promise can never constitute a gift from the promisor to the promisee as to any part of it. Nor can it operate as a satisfaction of any claim or demand which the promisee has against the promisor; for such must

still be considered to be the rule of law, notwithstanding some modern *dicta* to the contrary; *e. g.* in Crowther *v.* Farrer,[1] Evans *v.* Powis,[2] and Hall *v.* Flocton.[3] This also perhaps furnishes the best explanation of the rule that the consideration of a promise must move from the promisee. Regarded simply as an inducement to the promisor to make the promise, it is not material from whom the consideration comes; but if it comes from any other person than the promisee, the promise is not given in exchange for the consideration, but is in law a gift to the promisee. Therefore, such a consideration is not good.

56. Forbearing to prosecute a claim at law is a good consideration for a promise, if the claim be well founded, but not otherwise; for though one has the power to sue upon an unfounded claim, it is only upon the terms of fully indemnifying the defendant in costs. At least, the law regards the costs as a full indemnity, and must so regard them. When, therefore, forbearance to sue is the consideration of a promise, the plaintiff must show in his declaration, and prove upon the trial, that he had a good cause of action. For this reason the declaration in Edwards *v.* Baugh[4] was bad. So forbearance to sue an heir on the bond of his ancestor is not a good consideration, unless it appears that the heir was expressly named in the bond; for otherwise he is not liable.[5] So forbearing

[1] 15 Q. B. 677, Cas. on Contr. 301.
[2] 1 Exch. 601, 607.
[3] 16 Q. B. 1039.
[4] 11 M. & W. 641, Cas. on Contr. 290.
[5] Barber *v.* Fox, 2 Wms. Saund. 136, Cas. on Contr. 247.

to sue on a note given by a *feme covert* is no consideration, for such a note is void.[1] So forbearing to sue for a debt due from a person deceased is no consideration, unless it appears that there was some person (*e. g.* an executor or administrator) who could then be sued for it.[2] When the consideration is forbearance to sue an executor as such, it is not necessary to show that he had assets, for the law will presume that.[3] And even if it should be shown affirmatively by the defendant that the executor had no assets, it seems that the consideration would be sufficient, as an executor without assets may be sued, and a judgment may be recovered against him of assets *quando acciderint*.[4] It is not necessary to show that the person forbearing had a right of action in his own name; it is sufficient if he was the assignee of a *chose in action*, and as such had a right to sue in the name of his assignor.[5] Forbearing to sue for the smallest valid claim is of course a sufficient consideration for a promise to pay the largest sum; and it is no legal objection that the party forbearing claimed and threatened to sue for a larger sum than was due to him.[6] The case of Longridge *v.* Dorville[7] is generally supposed to have established the doctrine that "the giving up of a suit instituted for the purpose of trying a doubtful question" is a good consideration, though it should turn out that the suit was not well founded; and if so, the

[1] Loyd *v.* Lee, 1 Str. 94, Cas. on Contr 248.
[2] Jones *v.* Ashburnham, 4 East, 455, Cas. on Contr. 249.
[3] Banes's Case, 9 Rep. 93 b, Cas. on Contr. 244.
[4] Forth *v.* Stanton, 1 Wms. Saund. 210, n. (1).
[5] Morton *v.* Burn, 7 Ad. & El. 19, Cas. on Contr. 261.
[6] Smith *v.* Algar, 1 B. & Ad. 603, Cas. on Contr. 260.
[7] 5 B. & Ald. 117, Cas. on Contr. 285, 288.

forbearing to begin or to prosecute such a suit would also be a good consideration. But the case cited did not in fact involve any such question; for (1), the discharge of the vessel from attachment was a sufficient consideration; (2), the declaration did not allege that the suit involved any doubtful question of law or fact; and (3), the law (as will be seen presently) raised a presumption that the suit was well founded. The writer does not feel called upon wholly to deny the doctrine in question, but it clearly is not established by authority, and the application of it is attended with serious practical difficulties. It should, therefore, be received with much caution.

57. In Callisher *v.* Bischoffsheim [1] it was held that forbearance to sue constituted a sufficient consideration, if the promisee "*bona fide* believed he had a fair chance of success," so that he might have sued without bad faith; and that, as there is a legal presumption in favor of honesty and good faith, the plaintiff need only allege in his declaration that he made the claim and threatened to sue, and that the defendant, if he wished to show that the forbearance constituted no consideration, must plead and prove that the plaintiff knew that he had no cause of action. In view of what has already been said, it is scarcely necessary to add that this decision is alike repugnant to authority and principle. It professed, indeed, to follow Cook *v.* Wright,[2] but the decision in the latter case rests upon wholly different grounds, and if some of the reasons given for it countenance the decision in the former case, that only shows what mischief may be done by

[1] L. R. 5 Q. B. 449, Cas. on Contr. 281.

[2] Best & S. 559, Cas. on Contr. 308.

giving wrong reasons for correct decisions. In Cook *v.* Wright the decision turned upon the fact that the action was upon promissory notes. These notes would have had no common-law consideration to support them, even if the plaintiff's claim had been well founded; for the case would then have been that the defendant, being indebted to the plaintiffs in the sum of 30*l.*, gave his promissory notes, payable at a future day, in payment thereof. There is no doubt that such notes are valid, but there is also no doubt that an ordinary promise to the same effect, and under the same circumstances, would be without consideration.[1] It follows, therefore, that the notes in question did not require a common-law consideration to make them binding, and hence that it was immaterial whether the plaintiff's original claim was well founded or not. It is true that the giving of the notes suspended the plaintiff's remedy until the notes became due, but the notes were not, therefore, given in consideration of forbearance. It was the operation of the notes that suspended the plaintiff's remedy, they being of a higher nature than the original claim, and so operating as a payment of it. This explains the observations made by Crompton, J., during the argument (**50**).

58. When the consideration of a promise is forbearance to prosecute an existing suit, the plaintiff need not allege or prove that the suit was well founded, for the law presumes that it was; and if it was not well founded in fact, the defendant has the burden of alleging and proving that it was not.[2] The soundness

[1] See Hopkins *v.* Logan, 5 M. & W. 241, Cas. on Contr. 421.

[2] Bidwell *v.* Catton, Hobart, 216, Cas. on Contr. 245; Smith *v* Monteith, 13 M. & W. 427, Cas. on Contr. 225, 232, *per* Parke, B.

of this distinction has been questioned, but, it seems, without good reason. A suit is instituted in legal contemplation by the court itself; and a court must assume for all collateral purposes that its own proceedings have been properly and duly taken, until the contrary appears. Therefore the pleadings were correctly framed in Wade *v.* Simeon,[1] except that the plea ought to have stated facts showing that the suit in question was not well founded, instead of stating a mere conclusion of law. It seems that Maule's criticism upon the plea, viz. that it ought to have shown that the plaintiff was not entitled to recover upon the issues actually joined in the case, was not well founded. If the plaintiff might have recovered because the defendant had failed to avail himself of a defence which was open to him, that was matter for a replication. The learned judge seems to have been misled by Smith *v.* Monteith.[2]

59. When a promise is made in consideration of forbearance, it should always be specified how long the forbearance is to continue; and if it is to be perpetual, the contract must be bilateral, for a unilateral contract cannot be made in consideration of perpetual forbearance, as such a consideration can never be fully performed. Sometimes the terms of the promise will show how long the forbearance is to continue; *e. g.* if a promise be to pay a debt of a third person on a day named in consideration of forbearance, the meaning clearly is that the forbearance shall be until the day named.[3] If it is clear that the forbearance was

[1] 2 C. B. 548, Cas. on Contr. 265, 270–1.
[2] 13 M. & W. 427, Cas. on Contr. 225.
[3] Payne *v.* Wilson, 7 B. & Cr. 423, Cas. on Contr. 257.

not intended to be perpetual, and yet there are no means of fixing the time that it shall continue, it must continue for such a length of time as a jury shall think reasonable (**154**).[1] In Semple *v.* Pink[2] it was held that the consideration, in such a case as is supposed above, was void for uncertainty; but that was upon the supposition that the court must necessarily determine as a question of law how long the forbearance was to continue, whereas the very fact that the contract left the time indefinite showed that it was for the jury to say, not, indeed, how long the forbearance was to continue, but whether the plaintiff had in fact forborne for a reasonable length of time, taking into consideration all the circumstances of the case.[3]

2. Consideration and Motive.

60. In debt there is practically no distinction between consideration and motive, but in assumpsit the consideration need not in fact constitute the whole, or even any part, of the motive for making the promise. Thus, in the common case where the consideration is received by a third person and inures wholly to his benefit, it would be an abuse of terms to say that the consideration is the promisor's motive for making the promise, his true motive being a desire either to confer a benefit upon the person who receives the consideration, or to obtain from the latter some advantage for himself. But even when the consideration is received directly by the promisor, the latter

[1] Oldershaw *v.* King, 2 H. & N. 399, 517, Cas. on Contr. 274.

[2] 1 Exch. 74, Cas. on Contr. 272.

[3] See Estrigge and Owles' Case, 8 Leon. 200, Cas. on Contr. 950.

may be induced to make the promise by something wholly different. In other words, it may be clear that the promise would never have been made if the consideration had been the only inducement to make it. Thus in Thomas *v.* Thomas[1] the consideration for the defendant's promise was the plaintiff's promise,[2] but a desire to comply with the will of the defendant's testator was clearly the defendant's inducement to make the promise. So a promise may be made for a nominal consideration, *i. e.* the consideration may be given and received for the mere purpose of making the promise binding; and in all such cases there must of course be some motive for the promise besides the consideration.

61. It must not be supposed, however, that motive, as distinguished from consideration, can constitute any element of a contract, or that it is a thing of which the law can strictly take any notice. On the contrary, as every consideration is in theory equal to the promise in value, so it is in theory the promisor's sole inducement to make the promise. As the law cannot see any inequality in value between the consideration

[1] 2 Q. B. 851, Cas. on Contr. 164.

[2] Such, at least, is the only consideration disclosed by the agreement sued on. It seems, however, that in truth the defendant's promise was without consideration. It is true that the plaintiff made a promise to the defendant, but it was not to take the house; it was only to pay 1*l.* annually, and keep the house in repair, in the event of her taking the latter. The plaintiff might, therefore, have refused to take the house without incurring any liability to the defendant. If the plaintiff's promise was the consideration of the defendant's promise, the converse must also have been true; but the consideration of the plaintiff's promise was the conveyance of the house, and not the defendant's promise to convey it. In short, there was no bilateral contract between the parties.

and the promise, so it cannot see any motive for the promise except the consideration.

3. From whom the Consideration must move.

62. It was decided in Dutton *v.* Poole[1] (1677) that a daughter might maintain an action on a promise made to her father for her benefit, though it had previously been decided,[2] as it has been since (and uniformly in England),[3] that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise. This latter proposition is so plain upon its face that it is difficult to make it plainer by argument. A binding promise vests in the promisee, and in him alone, a right to compel performance of the promise, and it is by virtue of this right that an action is maintained upon the promise. In the case of a promise made to one person for the benefit of another, there is no doubt that the promisee can maintain an action, not only in his own name, but for his own benefit. If, therefore, the person for whose benefit the promise was made could also sue on it, the consequence would be that the promisor would be liable to two actions. In truth, a binding promise to A to pay $100 to B confers no right upon B in law or equity. It confers an authority upon the promisor to pay the money to B, but that authority may be revoked by A at any moment. Of course it follows that the distinction upon which

[1] 2 Lev. 210, Cas. on Contr. 170.

[2] Bourne *v.* Mason, 1 Ventr. 6, Cas. on Contr. 170.

[3] Crow *v.* Rogers, 1 Str. 592, Cas. on Contr. 172; Price *v.* Easton, 4 B. & Ad. 433, Cas. on Contr. 172.

Dutton *v.* Poole was decided is untenable; and accordingly that case has been overruled.[1]

63. What has been said in the preceding paragraph does not in strictness relate to the subject of "consideration;" but it was necessary to say it in this connection, because the case of Dutton *v.* Poole has given rise to the notion that the consideration of a promise need not move from the promisee, though that case really only decided that it need not always move from the person who sues on the promise. It is clear from the definition of consideration (**45**) that it must move from the promisee. Indeed, it is of the very essence of consideration that it be received from the promisee. What is received from one person cannot possibly be a consideration for a promise to another person. Such accordingly is the established doctrine in England and in Massachusetts;[2] and it is presumed that the contrary doctrine would not now be held anywhere except where it may be considered as already established by authority.

4. To whom the Consideration must move.

64. One of the most striking differences between debt and assumpsit in respect to consideration is, that in debt the consideration must inure to the benefit of the debtor, while in assumpsit it may inure to the benefit of the promisor, or of some third person, or to the benefit of no one. It was only by degrees, however, that this difference between debt and assumpsit

[1] Tweddle *v.* Atkinson, 1 Best & S. 393, Cas. on Contr. 174.

[2] Exchange Bank *v.* Rice, 107 Mass. 37.

was developed. Thus in Smith and Smith's Case[1] it was erroneously held in 1583 that the consideration was insufficient because it was not a benefit to the promisor, though it was a clear detriment to the promisee, *i. e.* the promisee did what he was under no obligation to do, and he did it in exchange for the promise. It seems to have been for the same reason that the courts formerly had so much difficulty in holding that a gratuitous bailment was a sufficient consideration for a promise.[2] Even to this day more or less misconception exists in consequence of applying to assumpsit ideas which belong exclusively to debt. Thus, it is frequently laid down as a rule, that a consideration must consist of some benefit to the promisor or some detriment to the promisee,[3] as if either one of these would do; and in applying this rule, it is a common practice to inquire first if there is a benefit to the promisor, as if an affirmative answer to that question would render all further inquiry superfluous, and as if that were the quality which every consideration ought to possess to place it entirely above suspicion. In Scotson *v.* Pegg,[4] Martin, B., said expressly, "that any act done whereby the contracting party receives a benefit is a good consideration for a promise by him." In truth, however,

[1] 3 Leon. 88, Cas. on Contr. 190. Compare Read *v.* Baxter, 3 Dyer, 272 *b*, note, Cas. on Contr. 435, n. (2).

[2] Riches and Briggs, Yelv. 4, Cas. on Contr. 389; Pickas *v.* Guile, Yelv. 128, Cas. on Contr. 390; Wheatley *v.* Low, Cro. Jac. 668, Cas. on Contr. 390.

[3] *Per* Patteson, J., Thomas *v.* Thomas, 2 Q. B. 851, Cas. on Contr. 164, 168; *per* Lord Ellenborough, C. J., Jones *v.* Ashburnham, 4 East, 455, Cas. on Contr. 249, 253–4.

[4] 6 H. & N. 295, Cas. on Contr. 240, 243.

benefit to the promisor is irrelevant to the question whether a given thing can be made the consideration of a promise, though it may be very material to the question whether it has been made so in fact. There may be a clear benefit to the promisor, and yet no consideration, *e. g.* where the benefit does not come from the promisee. On the other hand, detriment to the promisee is a universal test of the sufficiency of consideration; *i. e.* every consideration must possess this quality, and, possessing this quality, it is immaterial whether it is a benefit to the promisor or not.

65. The reason for this radical difference between assumpsit and debt is plain. In debt the consideration must be received by the debtor, because that is what creates the debt; and that was a principal reason why debt was so limited in its scope, and why a new remedy, not subject to such a limitation, was so loudly called for. Such a remedy was found in the action of assumpsit, because it was founded upon the theory that the defendant's obligation was created by his promise, and not by a consideration received.

5. Mutual Consent as an Element of Consideration.

66. The mutual consent necessary to every contract must extend to the consideration as well as to the promise. As the consideration always has to be performed by the promisee or on his behalf, the act of performance commonly carries with it the consent of the promisee, *i. e.* the circumstances under which the act is performed will commonly show clearly that it

is performed as the consideration for the promise, if such is the fact. Frequently also the performance of the consideration requires the co-operation of the promisor; and in that case the same evidence that proves the consent of the promisee will generally prove that of the promisor. In many cases, however, the act alleged to be the consideration may be performed without the participation or knowledge of the promisor, even when it inures to his benefit; and when it does not inure to his benefit, of course he is naturally a mere stranger to it. In all such cases, therefore, the consent of the promisor must be proved as an independent fact; but it may commonly be proved by the same evidence by which his consent to the promise is proved. Thus the original offer must, to be complete, specify the consideration as well as the promise, either expressly or by implication. If, therefore, the original offer comes from the promisor, he, in legal contemplation, requests the performance of the consideration; if the offer comes from the promisee, the promisor accepts the consideration when he makes the promise. Any act of the promisee, however, which may constitute a consideration, may also constitute a condition only; and hence, whether it constitutes one or the other, in a particular case, depends upon the intention of the parties. Of the intention of the promisee in this respect there will seldom be much doubt; but when the original offer is made by the promisor, it is frequently impossible to decide from the terms of the offer whether an act required to be performed by the promisee was intended to be the consideration of the promise or a mere condition. In such cases the nature of the act

and all the circumstances of the case must be carefully considered. For example, if the performance of the act inured to the benefit of the promisor, that will be a circumstance to prove that the promise was made in order to procure its performance, but the strength of the proof will depend greatly upon the expected value of the performance to the promisor. So if the performance of the act inured to the benefit of some third person, but it appears that the promisee would not perform it without the promise, the latter fact will be wellnigh conclusive proof that the performance was the consideration of the promise. On the other hand, if the act performed by the promisee be one in which the promisor had no interest prior to making the promise, and if he apparently required its performance, not because he desired it, but because he deemed it doubtful whether the promisee could or would perform it, the natural inference is that it was not intended to be a consideration for the promise, but a condition. Therefore the showing of the deed in Sturlyn *v.* Albany,[1] the proving of the debt in Traver *v.* ——,[2] and the making of the oath in Brooks *v.* Ball,[3] appear to have been (what the respective reports literally state them to have been, namely) conditions. In Anon.[4] it seems clear that the payment of 1*s.* was the consideration, and the making of proof a condition. It may be added that the decision in this case, and in Traver *v.* ——, cannot be supported in any view; for whether the making of proof

[1] Cro. Eliz. 67, Cas. on Contr. 191.
[2] 1 Sid. 57, Cas. on Contr. 194.
[3] 18 Johns. 337, Cas. on Contr. 200.
[4] Palm. 160, Cas. on Contr. 194, n. (1).

was a consideration or a condition, there was no right of action until proof was made.

67. The case of King *v.* Sears[1] furnishes a good illustration of the distinction between consideration and condition. The giving up of the bill of exchange which the plaintiff held as collateral security might of course have been made the consideration for the defendant's promise, but according to the declaration it was in fact made a condition, and to have made it the consideration would have been injurious to the plaintiff; for then he must either have given up the bill before he received his money, or have taken his chance of the defendant's paying on receiving the bill when the time came.

68. Sometimes an act is done by a promisee which he has obvious reasons for doing for his own benefit, and in which the promisor has no obvious interest. Such an act is presumptively neither a consideration nor a condition, though the promisor may make it either. Of this nature seems to have been the act of destroying the old securities in Barnes *v.* Hedley,[2] the plaintiff having done it voluntarily and for his own protection. This seems also to be the real difficulty in the way of holding a gratuitous bailment to be a consideration for a promise by the bailee. In the case of a bailee for hire, there is no doubt that the hire, paid or promised to be paid, is the sole consideration for the bailee's promise; yet the delivery of the property takes place in the latter case as well as in that of a gratuitous bailment. If a gratuitous bailee wishes to bind himself legally, he can do so by making

[1] 2 C. M. & R. 48, Cas. on Contr. 403.
[2] 2 Taunt. 184, Cas. on Contr. 327.

the delivery of the property to him the consideration for his promise; but, in the absence of evidence to that effect, there is but one reason for holding the bailment to be a consideration, namely, that there is no other way of sustaining the promise. This is a question, however, which will commonly have to be submitted to a jury, and a jury can seldom be induced to find in favor of a defendant upon the mere ground that his promise was without consideration. In all the cases given in the writer's collection of Cases on Contracts [1] the question arose upon the declaration, and the declaration stated expressly that the promise was made in consideration of the bailment. In Hart *v.* Miles it may be observed that the bailment of the two bills of exchange was the only consideration to support the first count. First, that was the consideration declared upon. Secondly, the receipt of the proceeds of the bills by the defendant would only support a count for money had and received, and a promise implied by law. Thirdly, the plaintiff's loss of the opportunity to get the bills discounted elsewhere was only a consequence of the bailment, and not an additional consideration.

In Shadwell *v.* Shadwell [2] the plaintiff's marrying may have been a condition of his uncle's promise (the annuity being intended as a provision for the support of a family), but there is no ground for saying that it was the consideration for it. If it was, it would

[1] Riches and Briggs, Yelv. 4, Cas. on Contr. 389; Pickas *v.* Guile, Yelv. 128, Cas. on Contr. 390; Wheatley *v.* Low, Cro. Jac. 668, Cas. on Contr. 390; Hart *v.* Miles, 4 C. B. N. S. 371, Cas. on Contr 391.

[2] 30 L. J. C. P. 145, Cas. on Contr. 233.

follow that the uncle's letter was a mere offer, which would not become a promise until the plaintiff married, and might of course be revoked in the mean time; but it is impossible to put such a construction upon the letter. If the uncle intended to become legally bound at all, he intended to be bound from the moment the letter was written. Nor was there anything in the terms of the letter or in the circumstances of the case to warrant the court in holding that the promise was given to induce the plaintiff to marry; in other words, that the uncle requested the plaintiff to marry. It may be that the plaintiff changed his position on the faith of the promise, but that would not constitute a consideration for the promise (**79**). Byles, J., seems to have taken the true view.

6. Relation in time of the Consideration to the Promise.

69. It has frequently been supposed that the performance of the consideration might be either past or future in respect to the time of making the promise; but that is a mistake. When the consideration creates a debt, there is no doubt that the debt arises the moment that the consideration is given and received; and the same rule holds when the consideration is only sufficient to support a promise, *i. e.* the promise must be made in legal contemplation the moment that the performance of the consideration is completed. If this were not so, it would not be true according to the definition (**45**), that the consideration is given in exchange for the promise.

70. A distinction is to be made, however, between a promise made before the consideration is performed

and one made afterwards. A promise made for a consideration to be thereafter performed, though it will be invalid as a promise, will take effect as an offer, and will therefore become a binding promise as soon as the consideration is performed, unless it has been revoked or has otherwise ceased to exist before that time; but a promise made for a consideration already performed is simply a promise without consideration, and hence it can never form an element of a binding contract. Therefore a declaration upon a promise as made for a consideration to be performed, though faulty as not stating facts according to their legal effect, yet will state a good cause of action if it avers performance of the consideration; but a declaration on a promise as made for a consideration already performed is fatally defective, and no averment can make it good. For this reason the declaration seems to have been bad in each of the following cases: Hawes *v.* Smith;[1] Williamson *v.* Clements;[2] Wilkinson *v.* Oliveira;[3] Riches and Briggs;[4] Neale *v.* Ratcliff.[5] When a promise is declared upon as made for a future consideration, care must be taken not to mistake the consideration for a condition, as seems to have been done in Collins *v.* Gibbs.[6] It was there assumed that it would have been sufficient for the plaintiff to aver a tender of the consideration; and if it had been a condition, that would have been true. But an averment of a tender and refusal of the con-

[1] 2 Lev. 122, Cas. on Contr. 195.
[2] 1 Taunt. 523, Cas. on Contr. 197.
[3] 1 Bing. N. C. 490, Cas. on Contr. 208.
[4] Yelv. 4, Cas. on. Contr. 389.
[5] 15 Q. B. 916, Cas. on Contr. 510.
[6] 2 Burr. 899, Cas. on Contr. 462.

sideration would have shown that the defendant's offer had been revoked, or at all events it would not have shown that it had ripened into a binding promise.

7. Moral Consideration.

71. Lord Mansfield appears to have entertained the opinion that a mere promise to do what the promisor was already under a moral obligation to do was binding. Whether his theory was that the antecedent moral obligation furnished a sufficient consideration for the promise, or that such a promise was binding without a consideration, may not be clear; but the former theory is the one that has commonly been attributed to him, and hence the moral obligation which was supposed to make the promise binding has acquired the name of moral consideration. The other theory, however, would have been less untenable, and less mischievous in its tendency. It would indeed have been liable to the serious objection of involving judicial legislation, but the theory of moral consideration was liable to the much greater objection, at least in a scientific point of view, that it could only succeed at the expense of involving a fundamental legal doctrine in infinite confusion. Lord Mansfield never attempted to enumerate or define the cases in which an antecedent moral obligation would render a promise binding. He frequently put the cases of a promise to pay a debt barred by the Statute of Limitations, of a promise by an adult to pay a debt contracted during infancy, and by a bankrupt to pay a debt from which he had been discharged; but he appears to have put these cases merely by way of illustration, and he

decided on two occasions that the same principle applied to a promise by an executor, having sufficient assets for the purpose, to pay a pecuniary legacy.[1] It was also decided several years after Lord Mansfield's death, but while his view upon this subject was still in vogue, that a promise to pay a debt void for usury,[2] and a promise to pay a bond void on the ground of coverture,[3] were supported by an antecedent moral obligation, and were therefore binding. The former of these cases was decided in 1809, the latter in 1813. Meanwhile, in 1804, Messrs. Bosanquet and Puller, in a note to Wennall *v.* Adney,[4] controverted the idea, which, they said, had prevailed of late years, "that an express promise, founded simply on an antecedent moral obligation, is sufficient to support an assumpsit." In 1831 Lord Tenterden observed,[5] "that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation." In 1840, in the case of Eastwood *v.* Kenyon,[6] the note to Wennall *v.* Adney was cited for the first time in an English court, and the conclusion there arrived at was declared to be correct; and since that date the notion of moral consideration has received no countenance from any quarter. Of the cases which had been supposed to rest upon that doctrine, such as cannot be sustained on other grounds must be considered as overruled.

[1] Atkins *v.* Hill, Cowp. 284, Cas. on Contr. 316; Hawkes *v* Saunders, Cowp. 289, Cas. on Contr. 323.

[2] Barnes *v.* Hedley, 2 Taunt. 184, Cas. on Contr. 327.

[3] Lee *v.* Muggeridge, 5 Taunt. 36, Cas. on Contr. 333.

[4] 3 B. & P. 249, Cas. on Contr. 347, n. (1).

[5] Littlefield *v.* Shee, 2 B. & Ad. 811, Cas. on Contr. 341, 342.

[6] 11 Ad. & El. 438, Cas. on Contr. 343.

72. In the cases of infancy, bankruptcy, and the Statute of Limitations, the subsequent promise, while necessary to enable the plaintiff to recover, does not constitute his ground of action. The contract of an infant, not being void, but merely voidable, can be ratified by the infant after he comes of age, and a new promise operates as a ratification. The action, however, must be brought on the original contract, and the new promise must be used simply to repel the defence of infancy in the event of its being pleaded.[1] It is upon this ground that Edmonds' Case[2] must rest. In the case of bankruptcy, the certificate of discharge does not extinguish the debt, but merely protects the defendant from an action by means of a positive statutory bar. This defence, however, being given merely for the bankrupt's benefit, may be waived by him (*quilibet potest renunciare juri pro se introducto*), and a new promise will operate as a waiver. In this case, therefore, as in that of infancy, the action must be founded upon the original debt; and if the defendant pleads his discharge, the plaintiff must reply the new promise.[3] Trueman *v.* Fenton[4] was not a case of the above description; it was a compromise of a debt before the debtor had obtained his discharge; the old notes were delivered up to be cancelled, and a new note given for a part of the sum due; the extinguishment of the old debt was abundant consideration for

[1] Williams *v.* Moor, 11 M. & W. 256.

[2] 3 Leon. 164, Cas. on Contr. 314.

[3] Shippey *v.* Henderson, 14 John. 178, Cas. on Contr. 368; Dusenbury *v.* Hoyt, 63 N. Y. 521, Cas. on Contr. 387; Way *v.* Sperry, 6 Cush. 238, Cas. on Contr. 384. For form of replication see 3 Ch Pl. (7th ed.) 428.

[4] Cowp. 544, Cas. on Contr. 318.

the new note, if a consideration were necessary; but if there had been nothing more than the giving of the new note, it would have been only the common transaction of giving a note in payment of an existing debt, and the note would have been valid.

73. The case of a promise to pay a debt barred by the Statute of Limitations stands upon a peculiar and anomalous ground. On the one hand, the action must be brought upon the old debt, and not upon the new promise.[1] On the other hand, if the defendant pleads the Statute of Limitations, the plaintiff cannot reply a new promise. To have sustained such a replication would have been directly in the teeth of the statute, which declared that no action should be brought after the expiration of the prescribed period, and made no provision for a new promise. The consequence was that a plea of the statute could not be repelled in any way by means of a new promise, except when the cause of action was a simple-contract debt, and the plaintiff declared on a promise implied by law to pay the debt.[2] In cases which came within the above exception the plaintiff tendered issue on the plea; and at the trial, upon the defendant's proving the debt to be more than six years old, the plaintiff proved a new promise within six years; and that was held to remove the bar of the statute sufficiently for the law again to raise a promise to pay the debt; and as this new implied promise supported the declaration equally well with the old one upon which the plaintiff was supposed to have declared, the issue had to be found

[1] Ilsley *v.* Jewett, 3 Met. 439, Cas. on Contr. 380.

[2] Boydell *v.* Drummond, 2 Campb. 157, 162; Short *v.* McCarthy, 3 B. & Ald. 626; Whitehead *v.* Howard, 2 Br. & B. 372.

in the plaintiff's favor. The true explanation of this highly artificial doctrine seems to be that it was an ingenious device for evading the statute, adopted and sanctioned at a time when the courts regarded it with much disfavor. However this may be, it is sufficient for the present purpose to show that an action will not lie upon the new promise.

74. There is another class of cases in which an express promise may render a person liable, and yet no action will lie on the promise itself, namely, where services have been rendered or money has been paid for a person without his authority, and he afterwards promises to pay for the services or to repay the money. In such cases the subsequent promise supplies the want of a previous authority, and thus makes the promisor a debtor by relation from the time when the services were rendered or the money was paid. The promise, therefore, is merely one of the elements out of which the debt is created; and though an action of assumpsit will lie, it must be founded on a promise implied by law to pay the debt. The declaration in such an action will properly take no notice of the actual promise, and the latter will be material only as evidence to prove the defendant's request, which the declaration must allege. It is upon this ground that the decision must rest in Watson *v.* Turner,[1] and in King *v.* Mill.[2] It seems that the plaintiff in Eastwood *v.* Kenyon[3] would have been entitled to recover upon this principle if he had joined the wife as a defendant. The promise of the wife after she came

[1] Bull. N. P. 129, Cas. on Contr. 315.
[2] 1 B. & Ald. 104, Cas. on Contr. 338.
[3] 11 Ad. & El. 438, Cas. on Contr. 343.

of age would, it seems, have performed the double office of supplying the want of a previous authority, and of repelling the defence of infancy. In Mills *v.* Wyman[1] the subsequent promise was not available, because the services were not rendered to the defendant, but to his son. The services were a consideration which inured to the benefit of the son, and created a debt against him from the time when they were rendered; by no possibility, therefore, could they ever create a debt against the father. If the son had been a minor and a member of his father's family, and if the services had been rendered on the credit of the latter, the decision would have been different.

75. It is not entirely clear upon what ground the case of Trewinian *v.* Howell[2] was decided; but it is impossible to support it upon any ground. First, the indebtedness of the defendant as executor was no consideration for an actual promise, and the law would only imply from it a promise coextensive with the debt, namely, to pay *de bonis testatoris*.[3] Secondly, the defendant was under no antecedent moral obligation; the only obligation that he was under was a legal one, namely, to pay *de bonis testatoris*. Thirdly, having assets might be a condition of the defendant's promise, but it could not possibly be a consideration for it, as it was not a thing given or done by the promisee, nor did it proceed from the promisee. Indeed, according to the report, it was only stated as a condition in the declaration. The cases of Atkins *v.*

[1] 3 Pick. 207, Cas. on Contr. 370.

[2] Cro. Eliz. 91, Cas. on Contr. 315.

[3] Rann *v.* Hughes, 7 T. R. 350, n. (*a*), Cas. on Contr. 187.

Hill,[1] and Hawkes *v.* Saunders,[2] went a step further in violation of principle than Trewinian *v.* Howell. In the latter, the defendant was liable as executor on an implied promise; in the two former he was not liable at law at all. No consideration was alleged for an express promise, and the reason alleged for an implied promise, namely, that the defendant had become liable by virtue of assets (*i. e.* liable at law), was untrue.[3] His position was simply that of holding a fund in which the plaintiff had an interest; which is a ground for a suit in equity to compel the application of the fund, but never imposes any liability at law except in those cases in which an action of account will theoretically lie. In other words, with the exception just stated, there is no remedy at law to recover a fund, or any interest in it. To hold an executor with sufficient assets personally liable for pecuniary legacies would be attended with two singular results: first, that it would be no defence for the executor that the assets had perished or been lost without his fault; secondly, that the legatee would be deprived of all remedy in equity against the assets, for if the receipt of assets renders the executor personally liable, of course it must be because the assets become his. In other words, under the guise of compelling payment of a legacy in a court of law, the court would be treating the legatee as if he had released his legacy to the executor, and the executor as if, in consideration of such release, he had promised to pay the legatee a sum equal in amount to the legacy out of his

[1] Cowp. 284, Cas. on Contr. 316.
[2] Cowp. 289, Cas. on Contr. 323.
[3] Deeks *v.* Strutt, 5 T. R. 690.

own estate. Of course there are cases in which such an arrangement would be agreeable to both parties, but there are also cases in which it would be the ruin of one of them.

76. Lee *v.* Muggeridge[1] was properly overruled by Eastwood *v.* Kenyon;[2] and Barnes *v.* Hedley[3] ought to have shared the same fate. Lord Denman says, indeed,[4] that the latter case is fully consistent with the doctrine laid down in the note to Wennall *v.* Adney; but if so, it must follow that that note is open to criticism. Barnes *v.* Hedley seems, if possible, open to greater objection than Lee *v.* Muggeridge; for in the latter case there was a clear moral obligation, which is more than a court of law could well say of the former in the face of the statute of usury. The cancellation of the old securities might, it seems, have been made a sufficient consideration, but it cannot be inferred from the report that it was a consideration in fact; for the cancellation seems to have been made after the promise was given, and rather for the benefit and protection of the plaintiff than as a consideration for the defendant's promise. Undoubtedly Barnes *v.* Hedley derives some support from Flight *v.* Reed.[5] In the latter case, however, the action was upon bills of exchange which had been accepted by the defendant. The decision, therefore, rests upon the same principle as in Cook *v.* Wright.[6]

[1] 5 Taunt. 36, Cas. on Contr. 333.
[2] 11 Ad. & El. 438, Cas. on Contr. 343.
[3] 2 Taunt. 184, Cas. on Contr. 327.
[4] 11 Ad. & El. 448, Cas. on Contr. 350.
[5] 1 H. & C. 703, Cas. on Contr. 359.
[6] 1 Best & S. 559, Cas. on Contr. 308.

The bills were a payment of the usurious loan. If payment had been made in money, no action would have lain to recover the money back; and for the same reason there was no defence to the bills (**50, 57**).

77. Jennings *v.* Brown[1] was an amicable suit, and it is not surprising that the court should have been astute to find a consideration; but it is impossible to support the decision upon principle. It was intimated by the court that the support of the child by the plaintiff was a sufficient consideration for the promise, and doubtless a binding promise by the plaintiff to take care of the child would have been a sufficient consideration; but the plaintiff did not declare upon mutual promises, nor did it appear from the evidence that the plaintiff had made any promise whatever. Regarding the promise as unilateral (and it was declared upon as such), and assuming that the support of the child was the consideration for it, the consideration had not been fully performed when the promisor died.[2] In truth, however, there was no consideration for the promise; the plaintiff neither did anything, nor was to do anything, in exchange for it; if it was binding at all, it was binding from the moment when it was made, and yet it could not be if the support of the child was the consideration for it.

[1] 9 M. & W. 496, Cas. on Contr. 353.

[2] If, however, the support of the child had been in truth the consideration of the defendant's promise, it seems that the consideration and the promise should have been taken distributively, the support of the child during each quarter being the consideration for the payment at the beginning of the next quarter. In other words, there would have been a separate contract as to each quarter's payment. Compare Jones *v.* Ashburnham, 4 East, 455, Cas. on Contr 249; Payne *v.* Wilson, 7 B. & Cr. 423, Cas. on Contr. 257.

Moreover, it seems clear from the evidence that the testator had no intention of binding himself legally.

78. Davis *v.* Dodd[1] did not involve any question of consideration. It was an action upon a bill of exchange, and the plaintiff failed because he was unable to produce the bill at the trial, the court holding that the defendant's promise to pay the bill, notwithstanding its loss, did not dispense with its production. If, however, the plaintiff had declared upon this latter promise, he would clearly have failed. Littlefield *v.* Shee,[2] and Meyer *v.* Haworth,[3] did not strictly involve any question of moral obligation. The plaintiff declared in both cases upon an indebtedness for goods sold and delivered, and as the defendants were married women at the time of the sale, the indebtedness was not proved. In Binnington *v.* Wallis,[4] Beaumont *v.* Reeve,[5] Valentine *v.* Foster,[6] and Dearborn *v.* Bowman,[7] the promises sued on had nothing more than an antecedent moral obligation to support them, and hence they were properly held not to be binding.

79. There is a class of cases in which promises without consideration have been enforced, not because there was an antecedent moral obligation to do the thing promised, but because the promise was made with the expectation that the promisee would act or refrain from acting on the faith of it, and with the

[1] 4 Taunt. 602, Cas. on Contr. 332.
[2] 2 B. & Ad. 811, Cas. on Contr. 341.
[3] 8 Ad. & El. 467, Cas. on Contr. 342.
[4] 4 B. & Ald. 650, Cas. on Contr. 339.
[5] 8 Q. B. 483, Cas. on Contr. 356.
[6] 1 Met. 520, Cas. on Contr. 374.
[7] 3 Met. 155, Cas. on Contr. 377.

intention of inducing him to do so, and with the full knowledge that a failure to perform the promise might place the promisee in a worse position than if the promise had never been made. Those who have held such promises to be binding have not based their opinion upon the notion of moral consideration, but have claimed that there was a sufficient common-law consideration. This view, like that of supporting a promise by means of an antecedent moral obligation, originated in Lord Mansfield's time, and was conspicuously put forward in Pillans *v.* Van Mierop.[1] It was also the ground of the decision in Alliance Bank *v.* Broom;[2] and it was stated by Blackburn, J., to be the ground of the decision in Cook *v.* Wright.[3] The view in question, however, really rests upon the notion of moral obligation, its peculiarity being that the moral obligation, instead of preceding the promise, is created by the promise. This was the only ground for supporting the promise either in Pillans *v.* Van Mierop or in Alliance Bank *v.* Broom. The way in which a common-law consideration was attempted to be found in these cases was by saying that the promisee's changing his position in reliance upon the promise constituted the consideration; but there are several conclusive objections to that view. 1st. There was no evidence that the promisee had in fact changed his position, nor was any such evidence held to be necessary: what the court went upon was the probability that the promisee would change his position. 2dly. If the promise was binding at all, it was bind

[1] 3 Burr. 1663, Cas. on Contr. 177, 180, 184–186.
[2] 2 Dr. & Sm. 289, Cas. on Contr. 279.
[3] 1 Best & S. 559, Cas. on Contr. 308, 313–314.

ing from the moment when it was made, and it was so held; yet that could not be if the consideration was something to be afterwards done by the promisee. 3dly. If it had appeared that the promisee had changed his position, his doing so would not have constituted a consideration for the promise, for the reason that the promise was not in fact made on any such consideration. If it had been, what is called the promise would have been only an offer upon condition of the promisee's doing the act in question; but in fact the promise was absolute in its terms, and its only condition was the condition (implied by law) of its acceptance. Finally, if the decision in Alliance Bank *v.* Broom is correct, it follows that the difficulties raised in Semple *v.* Pink,[1] and in Oldershaw *v.* King,[2] were imaginary. As to the moral obligation created by the promise, that is even more delusive as a ground of decision than an antecedent moral obligation; for every promise which excites in the promisee an expectation of performance creates such an obligation, and every binding promise is supposed to excite such an expectation, the only difference between one promise and another in this respect being one of degree.[3] The two cases in question, therefore, can only be supported upon a principle which would render a consideration unnecessary in any case,[4] and thus destroy all distinction in that respect between our law and the civil law. It is by no means clear that

[1] 1 Exch. 74, Cas. on Contr. 272.

[2] 2 H. & N. 399, 517, Cas. on Contr. 274.

[3] Austin, vol. 3, p. 128, 1st ed.

[4] *Per* Lord Denman, Eastwood *v.* Kenyon, 11 Ad. & El. 438, Cas on Contr. 343, 351.

Lord Mansfield would have shrunk from this latter consequence.[1]

8. Consideration Void in Part.

80. When an offer is made for a specified consideration, no promise arises until the consideration is fully performed; and if the consideration consists of several things, of course they must all be performed.[2] So if any part of a specified consideration be illegal, the illegality will affect the whole, and there will be no binding promise.[3] But it is not necessary that every part of what is specified as the consideration should be a consideration; if a good consideration can be found among the things specified, it is the same as if that alone had been specified as the consideration.[4] In King *v.* Sears[5] the plaintiff's permitting the widow to quit the premises at the next quarter-day, and forbearing to distrain her goods for the rent to become due at the next quarter-day, constituted no consideration for the defendant's promise, as the widow had a right to quit the premises when she chose, and the plaintiff's right to distrain was limited to the rent already due; but the forbearing to distrain for the rent already due constituted a sufficient consideration.

[1] See Lee *v.* Muggeridge, 5 Taunt. 36, Cas. on Contr. 333, 334; Eastwood *v.* Kenyon, 11 Ad. & El. 438, Cas. on Contr. 351, 353, note.

[2] Colston *v.* Carre, Cro. Eliz. 847, 848, Cas. on Contr. 401, 402, note.

[3] Best *v.* Jolly, 1 Sid. 38, Cas. on Contr. 402.

[4] Cripps *v.* Golding, 1 Rol. Abr. 30, Cas. on Contr. 401; Bradburne *v.* Bradburne, Cro. Eliz. 149, Cas. on Contr. 401; Colston *v* Carre, 1 Rol. Abr. 30, Cas. on Contr. 401; Crisp *v.* Gamel, Cro. Jac. 128, Cas. on Contr. 402.

[5] 2 C. M. & R. 48, Cas. on Contr. 403.

Parke, B., seems to have been clearly wrong in saying that the giving up of the bill of exchange was a consideration. The declaration stated it only as a condition, to be performed concurrently with the making of the last payment. If it had been a part of the consideration, there would have been no promise, as the declaration admitted that the bill had not been given up. It has been said that, where there are two considerations for a promise, and one is good and the other is void, damages shall be given only in respect to the good consideration.[1] But there seems to be no sufficient reason for this, as damages are given, not in respect to the consideration, but in respect to the promise.[2]

9. Mutual Promises.

81. In treating of consideration hitherto, it has been assumed that there was a promise on one side only. In that case, the contract is unilateral, consisting of a promise on one side, and something given or done (not promised to be given or done) on the other side. If there is a promise on each side, and yet but one contract, the contract is bilateral; and if the making of a promise is the only thing given or done on either side, the contract is purely bilateral, and of course neither promise has any other consideration than the counter-promise. Before the introduction of the action of assumpsit, a mere promise was not a consideration, as it could not create a debt;

[1] Crisp and Golding, 1 Leon. 296, Cas. on Contr. 401, n. (1); Best v. Jolly, 1 Sid. 38, Cas. on Contr. 402. And see *per* Parke, J., in Smith v. Algar, 1 B. & Ad. 603, Cas. on Contr. 260, 261.

[2] Leake, Contr. (2d ed.) 1052.

and hence purely bilateral contracts, not under seal, had then no existence in our law. But when it had become established that anything of value given or done by the promisee might be made the consideration for a promise, the courts were not long in perceiving that the making of a binding promise was giving or doing something of value, and hence that such promises were entitled to be admitted into the category of sufficient "considerations."[1] Hence the introduction of bilateral contracts not under seal was one of the great changes wrought in our law of contracts by means of the action of assumpsit.

82. A promise, regarded as the consideration for another promise, is governed by the same rules as any other consideration, except when a difference is necessarily caused by the difference between giving or doing a thing and promising to give or do it. For example, when mutual promises are the consideration for each other, it is a rule that both promises must, in legal contemplation, be made at the same moment of time; otherwise both will be without consideration. This, however, is only a special application of the general rule that the promise and the consideration must be simultaneous. So the rule that both the mutual promises must be binding, or neither will be, is only an application of the rule that a consideration must have some value in the eye of the law; for if one of the promises is for any reason invalid, of course the other has no consideration, and so they both fall. It was once doubted whether a woman is bound by a

[1] Strangborough and Warner, 4 Leon, 3, Cas. on Contr. 394 (1588): Gower *v.* Capper, Cro. Eliz. 543, Cas. on Contr. 395 (1597); Nichols *v.* Raynbred, Hobart, 88, Cas. on Contr. 395 (1615).

promise to marry, and the argument which the court deemed most conclusive in the affirmative was that, unless the woman is bound, the man cannot be bound.[1] But the court refused (and perhaps rightly) to carry this rule to the extent of holding that a bilateral contract between an infant and an adult is not binding on the latter because not binding on the former.[2] The promise of an infant, though not binding, is not a nullity; it can be made binding by a ratification after the infant comes of age; and if an action be brought upon it after the infant comes of age, the defendant may waive the defence of infancy by not setting it up. As an infant's promise, therefore, is a thing of which the law takes notice for certain purposes, it must, it seems, be deemed of some value in the eye of the law.

83. The rule that the consideration of a promise must move from the promisee makes it necessary, in case of mutual promises, that it should also move to the promisor; for if A should make a promise to B in consideration of B's making a promise to C, B's promise to C would be invalid for want of a consideration moving from C, and hence A's promise would have no consideration. This is only saying in another form that two promises cannot be the consideration of each other unless they are mutual.

84. It will sometimes happen that a promise to do a thing will be a sufficient consideration when actually doing it would not be. Thus, mutual promises will be binding, though the promise on one side be merely

[1] Harrison *v.* Cage, 5 Mod. 411, Cas. on Contr. 396.
[2] Holt *v.* Ward, 2 Str. 937, Cas. on Contr. 397.

to do a thing which the promisee is already bound to a third person to do, and the actual doing of which would not, therefore, be a sufficient consideration. The reason of this distinction is, that a person does not, in legal contemplation, incur any detriment by doing a thing which he was previously bound to do, but he does incur a detriment by giving another person the right to compel him to do it, or the right to recover damages against him for not doing it. One obligation is a less burden than two (*i. e.* one to each of two persons), though each be to do the same thing. If this distinction had been borne in mind in Shadwell *v.* Shadwell,[1] and in Scotson *v.* Pegg[2] (in both of which the contract declared on was unilateral), the decision might have been different. Baily *v.* Croft[3] seems to turn upon this distinction; for the plaintiff's promise to accept a new bill, being made to the defendant as well as to Bennet, served as a consideration for a promise by each of the latter to the plaintiff. Perhaps also the actual acceptance of the new bill by the plaintiff might have been made a consideration for two unilateral promises to plaintiff, one by defendant and one by Bennet; but plaintiff having bound himself to Bennet to accept a new bill, his actual acceptance of it could not have been a consideration for a promise by defendant. In Bret *v.* J. S. and Wife[4] it does not distinctly appear whether there was a promise by the plaintiff to the defendant, but it seems that there must have been, to support the decision.

[1] 30 L. J. C. P. 145, Cas. on Contr. 233.
[2] 6 H. & N. 295, Cas. on Contr. 240.
[3] 4 Taunt. 611, Cas. on Contr. 199.
[4] Cro. Eliz. 756, Cas. on Contr. 192.

85. When the thing to be done by one of the parties to a contract is negative, *i. e.* consists in forbearing to do a certain thing (*e. g.* to sue), and the forbearance is to be perpetual, and not for a limited time, the contract can only be bilateral; for if the offer on the other side should be in consideration of actual forbearance, the consideration could never be fully performed, and so the promise could never arise.

86. In many cases also in which it is possible to make performance on one side the consideration for a promise on the other side, it is not advisable to do so, for the reason that the promisor is not bound until the performance is completed, his offer (for such it is) being revocable in the mean time either by his own act or by the act of God. In particular, when the contract is for services which are not to be paid for until they are fully performed, the contract should always be bilateral; and hence it will always be presumed, in the absence of strong evidence to the contrary, that the parties intended to make it bilateral (**4**).

87. The kind of agreement known as an accord, *i. e.* an agreement for the compromise or settlement of a debt or other cause of action, is bilateral. Of course a unilateral promise may be made by the debtor in consideration of the actual extinguishment of the debt (which can only be by release), or by the creditor to extinguish the debt in consideration of something actually given or done by the debtor; but neither of these is what is meant by an accord, which is executory on both sides. It was formerly held that an accord could not be enforced by action, either because mutual promises were not binding, or because

the law would not enforce an agreement which merely substituted one cause of action for another, or for both of these reasons. The first reason of course has long ceased to exist, and the second would now, it seems, be disregarded. A cause of action may indeed be settled and extinguished without any previous binding agreement; and if with that view the parties merely agree upon terms of settlement without intending to make a contract, of course they will not be bound. It was contended by the defendant that such was the intention of the parties in Crowther *v.* Farrer,[1] but, as the question arose upon a motion in arrest of judgment, the allegation of mutual promises in the declaration was a conclusive answer to the argument.

88. In Anon.[2] the consideration of the defendant's promise was an actual extinguishment of the debt in question; hence it was not a case of an accord. In Longridge *v.* Dorville [3] there was not an accord in any sense; there was merely a unilateral promise in consideration of the discharge of the vessel from custody. In Smart *v.* Chell [4] there would have been an accord if the plaintiff had promised to receive the 7*l.* in full satisfaction of his claim; but as there was neither an extinguishment of the plaintiff's claim nor a counter-promise by the plaintiff, the defendant's promise was without consideration. In Edwards *v.* Baugh [5] the agreement sued on was in form an accord, but it was rightly held to be invalid, as it did not appear that

[1] 15 Q. B. 677, Cas. on Contr. 301, 303.
[2] 1 Sid. 31, pl. 9, Cas. on Contr. 284.
[3] 5 B. & Ald. 117, Cas. on Contr. 285.
[4] 7 Dowl. Pr. Cas. 781, Cas. on Contr. 288.
[5] 11 M. & W. 641, Cas. on Contr. 290.

the plaintiff had any cause of action, an accord being in that respect like a promise made in consideration of forbearance. If the plaintiff had alleged that the amount claimed by him was actually due from the defendant, there would still have been a difficulty, for then the defendant's promise, being simply to pay the plaintiff a part of what was due to him, would have been no consideration for the plaintiff's promise, and so both promises would have fallen to the ground. Both of these difficulties might, however, have been avoided, at least so far as the declaration was concerned, by alleging that the amount claimed was due, and that the defendant promised to pay the plaintiff 100*l.* (not in satisfaction of the debt or any part of it, but) in consideration of plaintiff's promising never to sue for the debt. The case would then have been like Reynolds *v.* Pinhowe.[1] If the mutual promises had been simply that the defendant should pay, and the plaintiff should receive, 100*l.* in full satisfaction of a larger sum due, neither promise would have been any consideration for the other, one being merely to do a part of what the promisor was already bound to do, and the other being inoperative, as a smaller sum cannot satisfy a larger sum. In Llewellyn *v.* Llewellyn[2] it is not clear whether the plaintiff intended to declare on a unilateral contract or on a bilateral contract; but in either view the declaration seems to be bad, for it neither states that the plaintiff did anything, nor that he promised to do anything, as a consideration for the defendant's promise. It is not stated that the plaintiff released his alleged cause of

[1] Cro. Eliz. 429, Cas. on Contr. 191.

[2] 8 Dowl. & L. Pr. Cas. 318, Cas. on Contr. 294.

action, nor that he made any promise except to give up his claim upon the defendant, and that would seem to mean nothing. But even if the plaintiff had declared properly upon mutual promises, the plaintiff's promise being to "give up, relinquish, and forbear to prosecute" his claim against the defendant, it would be difficult to reconcile the decision with that in Edwards *v.* Baugh. The declaration states that there were open and unsettled accounts between the parties (which must be taken to mean that there were items in the accounts showing an indebtedness to the defendant, as well as items showing an indebtedness to the plaintiff), but it is nowhere alleged that there was a balance in favor of the plaintiff; and if there was not, the plaintiff had no ground of action. In Smyth *v.* Holmes [1] the agreement declared on was in form an accord, but it was not shown to be valid as such, because it was not alleged that the claim which was the subject of it was well founded. Yet the defendant's promise was binding, being supported by another sufficient consideration, namely, the plaintiff's promise to relinquish the rights secured to him by the deed of submission. In Henderson *v.* Stobart [2] the defendant, being liable to the plaintiff as one of several joint acceptors of a bill of exchange for 1250*l.*, promised to give the plaintiff his individual promissory note for 500*l.*, in satisfaction and discharge of his liability on the bill, and the plaintiff promised to accept the note in such satisfaction and discharge. These mutual promises constituted a valid accord. The defendant assumed a new liability, and so his promise

[1] 10 Jur. 862, Cas on Contr. 297.
[2] 5 Exch. 99, Cas. on Contr. 299.

was a sufficient consideration for the plaintiff's promise The plaintiff's promise also was a sufficient consideration for the defendant's promise, as the note would extinguish the defendant's liability on the bill, if received by the plaintiff as an extinguishment according to his promise. Even if the agreement had been invalid as a mere accord, it would, it seems, have been rendered valid by the incidental and collateral promises made by the plaintiff and defendant respectively to each other. In Crowther *v.* Farrer [1] there was clearly a good consideration for the defendant's promise, it being the plaintiff's promise to forbear perpetually the prosecution of two pending actions; and it was not necessary to allege that the actions were well founded. Nash *v.* Armstrong [2] is also a plain case, the consideration for the defendant's promise being the plaintiff's promise to forego his right to have the amount of rent fixed in the mode provided in the lease. If no promise had been made by the plaintiff (*i. e.* if the contract had been unilateral), the defendant's promise would have been without consideration. The case of Lynn *v.* Bruce [3] furnishes an instance of an invalid accord; for the defendant's promise to pay only a part of what he already owed was no consideration for the plaintiff's promise; and the plaintiff's promise to receive a part of what was due to him in satisfaction of the whole (which by law he could not do) was no consideration for the defendant's promise. But if the defendant had promised to pay the plaintiff any sum, however small, in consider-

[1] 15 Q. B. 677, Cas. on Contr. 301.
[2] 10 C. B. N. S. 259, Cas. on Contr. 304.
[3] 2 H. Bl. 317, Cas. on Contr. 399.

ation of a promise by the plaintiff to release the debt, there would have been a binding accord.

89. It is no objection to a promise as a consideration for another promise, that it is conditional upon some future and uncertain event; but a promise which is in terms conditional upon the present existence of some fact is not, in truth, a conditional promise. If the fact exists, the promise is absolute; if it does not exist, no promise is made.[1] When, therefore, one of two mutual promises fails, for the reason just stated, it seems impossible to find any consideration for the other promise. Thus, if a wager be made by mutual promises upon a race which has already taken place, but the result of which is unknown to the parties, it is the losing party alone who promises, and he really receives no consideration for his promise. So in other contracts (especially in charter-parties), one of the mutual promises not unfrequently falls to the ground because of the non-existence, at the time of making the contract, of some fact upon which the promise purports to be conditional (**28**). This distinction, however, has not been taken by the courts, and all such promises as the foregoing have been assumed to be properly conditional, and hence to be a sufficient consideration for a counter-promise. In March *v.* Pigott[2] the point was actually involved in the decision, though it was not noticed by the court. Perhaps, therefore, this is a case in which the maxim *communis error facit jus* may properly be applied.

[1] Pothier, Traité des Obligations, Part. 2, c. 3, art. 1, § 2.

[2] 5 Burr. 2802.

10. Executed Consideration.

90. When the action of assumpsit was becoming the ordinary remedy for the recovery of debts by simple contract, a difficulty was experienced from the fact that a promise was indispensable to that action, while debts were often created without any actual promise. To obviate this difficulty, and to make assumpsit an available remedy in the latter class of cases, the courts invented the fiction that, wherever there was a simple-contract debt, the law would imply a promise to pay it. A consequence of this was to give generally two modes of declaring in assumpsit for the recovery of a debt, namely, either upon the actual promise (for in most cases of course there was an actual promise) or upon the promise implied by law. From these two modes of declaring, the two classes of counts known respectively as special counts and common counts came into use; the latter being used when a factitious implied promise was declared upon, and the former in all other cases. Of course the common counts could be used only where there was a debt (as it was in such cases only that the law implied a promise), and hence they were also called *indebitatus* counts. As the implied promise was a mere creature of the law, of course it was neither necessary nor possible that it should have a consideration in the proper sense of that term; yet it came to be the practice, in declaring upon an implied promise, to follow the analogy of a declaration upon an actual promise, by alleging that the promise was made in consideration of the indebtedness; and hence origi-

nated the notion of a past or executed consideration. As an implied promise does not constitute any part of the plaintiff's cause of action, and as an executed consideration will not support any other than an implied promise, of course it follows that a declaration on an executed consideration will never be good unless it states a good cause of action (*i. e.* a debt) independently of the promise. If this simple rule had always been understood and applied, the subject of executed consideration would have caused no trouble; but unfortunately it was not understood until within recent times. On the contrary, the opinion long prevailed that an executed consideration which had been performed at the defendant's request would support a subsequent actual promise; and hence it would follow that a declaration would never be bad because upon an executed consideration, provided a request was alleged.

91. This view is clearly untenable for several reasons: First, it makes an exception to the rule requiring a consideration to support a promise, which is repugnant to the rule itself; for, the consideration having been parted with irrevocably before the making of the promise, the plaintiff suffers the same detriment, and the defendant receives the same benefit, whether the promise be made or not, and hence the promise is without consideration. Again, as it is optional with the defendant to promise or not, as he has nothing to gain by promising, and nothing to lose by refusing to promise, it follows that the promise is purely voluntary. Secondly, it is admitted that such a promise is not binding unless the consideration be alleged to have been performed at the defendant's

request; and yet the allegation of a request has no effect except in those cases in which, as will be seen hereafter, it constitutes one of the elements of a debt. Thus, if a declaration allege that, the plaintiff having sold goods to A upon credit at the defendant's request, the latter, in consideration thereof, promised to guarantee the payment, the allegation of the request will not aid the plaintiff; for it can only mean that the defendant requested the sale as a favor either to A or to himself. Such a request may, indeed, be made under such circumstances as to import a promise by the defendant to indemnify the plaintiff for making the sale; but in that case the plaintiff must declare upon a promise made at the time of the sale, and use the request as evidence of the promise; and a subsequent promise, if one was made, may furnish further evidence to the same effect. Thirdly, if a consideration performed at the defendant's request will support a subsequent actual promise at all, it will support *any* promise that the defendant chooses to make, and at any time, however distant. Yet this latter proposition will be admitted by every one to be untenable. Indeed, it was never claimed that an executed consideration would support a subsequent promise generally, but only a promise commensurate with the consideration, *i. e.* one which would simply compensate or indemnify the plaintiff for performing the consideration. The rule, therefore, that an executed consideration will support an express promise is proved to be unsound by the arbitrary limitations which it is found necessary to impose upon it.

92. The courts seem formerly to have proceeded upon the theory, either that the consideration con-

tinued until the making of the promise,[1] or that the promise related back to the time of performing the consideration.[2] As to the former, it could only mean that the benefit of the consideration must be presumed to continue; which may be true, but is irrelevant. As to the latter, such a relation must be a pure fiction, and a fiction can never be the foundation of an obligation. *In fictione juris semper æquitas existit.* The courts may also have been influenced by two practical reasons, neither of which has any existence now. First, it was formerly held that no promise could be implied in fact from a request to execute a consideration.[3] Secondly, the execution of a consideration upon request seldom created a debt formerly, as a debt could not exist unless the amount of it was fixed.[4] Between these two objections, therefore, a subsequent promise furnished almost the only means of recovering a compensation or indemnity for a consideration executed upon request, and without any express promise.

93. The old view seems to have still prevailed when the case of Hayes *v.* Warren [5] was decided (1732), but it cannot be traced any later. In Rann *v.* Hughes [6] (1778), it was held by the highest authority

[1] *Per* Coke, *arguendo*, in Pearle and Edwards, 1 Leon. 102, Cas. on Contr. 408; *per* Walmsley, J., in Barker *v.* Halifax, Cro. Eliz. 741, Cas. on Contr. 410; Riggs *v.* Bullingham, Cro. Eliz. 715, Cas. on Contr. 411; Townsend *v.* Hunt, Cro. Car. 408, Cas. on Contr. 418; Barton *v.* Shurley, 1 Rol. Abr. 12, pl. 16, Cas. on Contr. 419.

[2] Bosden *v.* Thinne, Yelv. 40, Cas. on Contr. 412; Ampleigh *v.* Brathwait, Hobart, 105, Cas. on Contr. 413, 414.

[3] Bosden *v.* Thinne, Yelv. 40, Cas. on Contr. 412.

[4] Young *v.* Ashburnham, 3 Leon. 161.

[5] 2 Str. 933, Cas. on Contr. 420.

[6] 7 T. R. 350, n. (*a*), Cas. on Contr. 187.

that a debt would support no promise except the one which the law would imply, and therefore that the defendant's promise to pay personally a debt which she owed as administratrix was not binding without a new consideration. So also it was held in Hopkins *v.* Logan[1] (1839), and for the same reason, that a promise to pay at a future day a debt already due was not binding, no consideration being stated except the debt. In Roscorla *v.* Thomas[2] (1842) the decision went the full length of establishing that no executed consideration would support any actual promise; for there was no debt in that case, and hence the law implied no promise, notwithstanding the remark of Lord Denman that the only promise that would result from the consideration stated would be to deliver the horse upon request. Kaye *v.* Dutton[3] (1844) seems also to have involved the same proposition, for it was agreed that there was no debt and no implied promise; and though the court professed to decide against the plaintiff upon the ground that there was no consideration, executed or executory, yet it appears that the plaintiff had executed and delivered a deed of conveyance at the defendant's request, and that surely would have been a sufficient consideration for any simultaneous promise. None of the foregoing cases have ever been questioned, and they are undoubtedly now regarded in England as having fully established the doctrine here contended for.[4] Nevertheless, it was held in Ireland, in 1858,[5]

[1] 5 M. & W. 241, Cas. on Contr. 421.
[2] 3 Q. B. 234, Cas. on Contr. 423.
[3] 7 M. & G. 807, Cas. on Contr. 425.
[4] See Leake, Contracts (2d ed.), 19, 613.
[5] Bradford *v.* Roulston, 8 Ir. C. L. 468, Cas. on Contr. 432.

that an executed consideration would support an actual promise, provided it was a consideration from which no promise would be implied by law. It may be observed, however, that the court treated the question purely as one of authority, that they gave too little weight to the decision in Roscorla *v.* Thomas, and that they attached far too much importance to cases which had received no judicial recognition for a century and a quarter.

94. What has already been said supersedes the necessity of making any extended observations upon the cases decided while the old view prevailed. In Anon.,[1] Sidenham and Worlington,[2] Pearle and Edwards,[3] Marsh and Rainsford,[4] Bosden *v.* Thinne,[5] Townsend *v.* Hunt,[6] Sandhill *v.* Jenny,[7] and Gale *v.* Golsbury,[8] the declaration showed no cause of action, as the executed consideration was not of a nature to create a debt.[9] In all of them, however, except Pearle and Edwards, and Marsh and Rainsford (in which no consideration of any kind was stated), a jury might have found (consistently with the facts stated in the declaration) a promise by implication of fact at the time of performing the consideration.[10]

[1] Cited in Hunt *v.* Bate, Dyer, 272, Cas. on Contr. 406.
[2] 2 Leon. 224, Cas. on Contr. 407.
[3] 1 Leon. 102, Cas. on Contr. 408.
[4] 2 Leon. 111, Cas. on Contr. 409.
[5] Yelv. 40, Cas. on Contr. 412.
[6] Cro. Car. 408, Cas. on Contr. 418.
[7] 3 Dyer, 272, Cas. on Contr. 435, n. (1).
[8] 3 Dyer, 272 b, Cas. on Contr. 435, n. (3).
[9] See Baxter *v.* Read, 3 Dyer, 272, Cas. on Contr. 435, n. (2).
[10] The statement in the text seems to be too broad. A promise can be implied in fact from a request to execute a consideration only when the nature of the consideration is such as to enable the court to

In Jeremy *v.* Goochman,[1] Barker *v.* Halifax,[2] Riggs *v.* Bullingham,[3] Docket *v.* Voyel,[4] Field *v.* Dale,[5] Lampleigh *v.* Brathwait,[6] Janson *v.* Colomore,[7] Hodge *v.* Vavisor,[8] Howlet's Case,[9] and Barton *v.* Shurley,[10] the declaration showed the existence of a debt so far as it depended upon the nature of the consideration; but in none of them, except Barker *v.* Halifax (in which the declaration contained a good count for money paid to the defendant's use), was the plaintiff entitled to recover upon the facts stated in his declaration. Thus, in Jeremy *v.* Goochman there were at least three objections to the declaration: first, the words "*deliberasset et dedisset*" imported a gift, and not a sale, of the sheep; secondly, it did not appear that the 3*l.* was the price of the sheep; thirdly, the promise was to pay on a future and uncertain event. So, in Riggs *v.* Bullingham, it seems that the words "*dedisset et concessisset*" did not import a sale of the advowson,

fix the terms of the promise. Thus, in Sidenham and Worlington and Bosden *v.* Thinne, *supra*, if a jury had found that there was a promise by implication of fact, there could be no doubt as to the terms of the promise, for it would clearly be a promise to indemnify the plaintiff for performing the consideration. But in Anon., cited in Hunt *v.* Bate, *supra*, and in Sandhill *v.* Jenny, *supra*, it was impossible to say what promise should be implied, and therefore none could be implied.

[1] Cro. Eliz. 442, Cas. on Contr. 410.
[2] Cro. Eliz. 741, Cas. on Contr. 410.
[3] Cro. Eliz. 715, Cas. on Contr. 411.
[4] Cro. Eliz. 885, Cas. on Contr. 411.
[5] 1 Rol. Abr. 11, pl. 8, Cas. on Contr. 413.
[6] Hobart, 105, Cas. on Contr. 413.
[7] 1 Rol. 396, Cas. on Contr. 416.
[8] 1 Rol. 413, Cas. on Contr. 416.
[9] Latch, 150, Cas. on Contr. 417.
[10] 1 Rol. Abr. 12, pl. 16, Cas. on Contr. 419.

and even if they did, it did not appear that the 100*l.* was the price of it. In Docket *v.* Voyel the loan of 30*l.* would only support a promise to repay it when it became due. In Field *v.* Dale it did not appear that the beer was sold at 4*l.* per tun, nor that the price was to be paid in accordance with the terms of the promise stated. In Lampleigh *v.* Brathwait the consideration would only support a promise to pay a *quantum meruit* (**92**). In Janson *v.* Colomore, Hodge *v.* Vavisor, Howlet's Case, and Barton *v.* Shurley, the consideration would only support a promise to pay on request, *i. e.* immediately. In Hunt *v.* Bate [1] it seems that the plaintiff was not entitled to recover in any view: not on the express promise declared upon, for there was no consideration for it; not on a promise implied in fact at the time of performing the consideration, for there was none; not on a promise implied by law, for the service did not create a debt. If, indeed, the service had created a debt against any one, it would have been the defendant, for it was rendered to his apprentice and on his account, and. though he did not authorize it at the time, yet he ratified it by his subsequent promise. But a service which consists in becoming bail will not create a debt (unless it be as a compensation for the mere trouble), and an obligation to indemnify is not a debt.[2] In Oliverson *v.* Wood [3] it seems that the count for money

[1] Dyer, 272, Cas. on Contr. 406.

[2] In writing the above, the fact was overlooked that the payment of the 31*l.* by the plaintiff created a debt against the defendant for that amount. The facts stated in the declaration would, therefore, it seems, have entitled the plaintiff to recover for money paid to the defendant's use.

[3] 3 Lev. 366, Cas. on Contr. 419.

lent was a mere nullity, for it neither stated that the loan was made to the defendant nor that it was made at his request.

95. As a promise implied by law to pay a debt is a mere fiction and constitutes no part of the plaintiff's cause of action, the defendant cannot properly plead to the promise, but should plead to the facts alleged as constituting the debt; and although in form the defendant pleads *non assumpsit*,[1] yet, as the existence of the promise depends upon the truth of the facts from which it is alleged to arise, the plea of *non assumpsit* has the effect of putting those facts in issue. The question chiefly discussed in Lampleigh *v.* Brathwait[2] turned upon this principle.

96. When a plaintiff declares upon an implied promise arising from a debt alleged to have been created by services performed or money paid by him for the defendant, he must make it appear that the services were performed or the money paid by the defendant's authority, and also that it was not done by the plaintiff gratuitously. When a common count is employed, both of these objects are accomplished by alleging that the consideration was performed at the defendant's request; and hence it is a rule that, in the counts for services and for money paid, a request must always be alleged.[3] In the other common counts, however, namely, for goods sold and delivered or bargained and sold, for money lent, for money had and received, and on an account stated, it is unnecessary

[1] Harris *v.* Ewer, 1 Rol. Rep. 401, Cas. on Contr. 414, n. 2.

[2] Hobart, 105, Cas. on Contr. 413.

[3] Oliverson *v.* Wood, 3 Lev. 366, Cas. on Contr. 419; Hayes *v* Warren, 2 Str. 933, Cas. on Contr. 420.

to allege a request, as a sale, a loan, and the statement of an account are necessarily the acts of both parties, and the receipt of money, upon which a count for money had and received lies, is the act of the defendant alone.[1] It not unfrequently happens, however, that the request alleged in the count for money paid does not have to be proved; and it is commonly said that the request in such cases is implied.[2] But this is not strictly correct; a request does not have to be proved, because no request is necessary, the debt being created by operation of law and without the defendant's consent. The facts, however, out of which the law creates the debt, have to be proved, and in strictness the plaintiff ought to allege them instead of alleging a request; but as this could not easily be done in a common count, he is permitted to declare in the usual form for money paid for the defendant at his request, and then, instead of proving that the money was paid at the defendant's request, he may prove that it was paid under circumstances which will create a debt by operation of law.[3] This laxity doubtless originated in a desire to facilitate and extend the use of the common counts; and wherever those counts have gone out of use, a request should be alleged only when it has to be proved.

97. It is only when the declaration is upon an executed consideration that it is necessary to allege a request in terms.[4]

[1] Victors *v.* Davies, 12 M. & W. 758, Cas. on Contr. 430.

[2] 1 Smith's Lead. Cas. (1st ed.) 70.

[3] Leake, Contr. (2d ed.) 77.

[4] King *v.* Sears, 2 C. M. & R. 48, Cas. on Contr. 403, 405, *per* Parke, B.

98. As the fiction of a promise implied by law from an executed consideration was invented merely to render the action of assumpsit a more extensive and available remedy, it follows that such promises can have no existence in places where the action of assumpsit has been abolished, and hence in such places the phrase "executed or past consideration" has ceased to have any legal meaning.

DEBT.

99. The original and normal mode of creating a debt was by a loan of money. In that transaction, therefore, the true nature of a debt must be sought. The subject of a loan may be either a specific thing, as a horse, or a given quantity of a thing which consists in number, weight, or measure, as money, sugar, or wine. In the former case, it is of the essence of the transaction that the thing lent continue to belong to the lender; otherwise the transaction is not a loan. In the latter case, the thing lent may (and commonly does) cease to belong to the lender, and become the property of the borrower, such a loan commonly being an absolute transfer of title in the thing lent from the lender to the borrower. The reason why such a transfer of title takes place is obvious. The object of borrowing is to have the use of the thing borrowed; but the use of things which consist in number, weight, or measure commonly consumes them; and this use, of course, the borrower cannot have unless he owns the things used. When such things are lent, therefore, it is presumed to be the intention of both parties, in the absence of evidence to the contrary, that the borrower shall acquire the

title to them. But why then call the transaction a loan? The answer is, that, in every particular except the transfer of title, it is a loan; that the title is transferred for the purpose of making the loan effective as such, and because it is immaterial to the lender whether he receives back the identical thing lent, or something else just like it. Moreover, the difference between a loan of money, for example, and a loan of a specific article, is not commonly present to the minds of the parties; the lender of money thinks the money lent still belongs to him, and that the borrower has acquired only the right to use it temporarily; he is aware that the borrower is entitled to transfer to other persons the identical coins lent, and that he has the option of returning to him, the lender, either the identical coins borrowed, or others like them; but he is not aware that these rights in the borrower are inconsistent with his retaining the title to the money lent. In other words, he supposes (and, in every view except the strict legal view, he is right in supposing) that he may own a given sum of money without owning any specified coins; and that the only substantial difference between money in his own coffer and money due to him is, that in the former case he has the possession, while in the latter case he has not.

100. A debt, therefore, according to the popular conception of the term, is a sum of money belonging to one person (the creditor), but in the possession of another (the debtor). There is also much reason to believe that this popular conception of a debt was adopted by the early English law, at least for certain purposes. Thus, the action of debt (which was

established for the sole and exclusive purpose of recovering debts of every description) was in the nature of an action *in rem*, and did not differ in substance from the action of detinue; the chief difference between them being that the latter was for the recovery of specified things belonging to the plaintiff, the former, of things not specified. This would tend to the conclusion that the legal mode of creating a debt is not by contract, but by grant, *i. e.* by the transfer of a sum of money from the debtor to the creditor without delivering possession; and it is a confirmation of this view that a debt clearly may be so created. Thus, an annuity, which is simply a debt payable in equal annual instalments, has always been regularly created by grant; and there can be no doubt that an ordinary debt may be created by a mere deed of grant. But it would be too much to undertake to account in this way for all debts which may be created by the acts of parties; for, in the first place, a mere covenant (*i. e.* a promise under seal) to pay a certain sum of money will clearly create a debt; secondly, it is clear enough that a debt cannot be created by grant without a deed; thirdly, it would seem to be straining the facts to say that every loan of money is, in its legal operation, an exchange of the sum lent for a like sum to be paid in future by the borrower, and that every executed sale upon credit is a like exchange of the property sold for the purchase-money to be paid at a future day; fourthly, there has never been supposed to be any grant or conveyance on the part of a borrower in case of a loan, or on the part of a buyer in case of a sale, but, on the contrary, it has always been supposed that the debt in both

cases was created (in the only other possible mode, namely) by contract. Yet this latter view is not without its difficulties. That a debt cannot be created by a mere binding promise on the part of a debtor, without the receipt by him from the creditor of a supposed equivalent for the debt, is clear: First, until the introduction of the action of assumpsit (which was not earlier than the latter half of the fifteenth century) such promises were not enforceable by law at all. Secondly, an action of debt will never lie on a bilateral contract not under seal; but if the promise on one side be merely for the payment of money, an action of debt will generally lie to recover the money as soon as the promise on the other side is performed. For example, a contract of sale will never support an action of debt so long as it remains executory on both sides,[1] but as soon as the title to the property sold passes to the buyer, debt will lie for the price. It is clear, therefore, that it is the transfer of the property for a certain price, and not the previous executory contract, that creates the debt. The transfer may also take place without any previous executory contract, and yet the debt arises just the same. Thirdly, it is familiar law that an action of debt will not lie on a unilateral promise to pay money unless the promisor has received an equivalent. For example, when A sells goods to B upon credit, and in consideration of the sale C guarantees the payment of the price, an action of debt will not lie against C.

[1] It may be said that this is because the price is not payable until the title to the property passes; but the price may be made payable before the title passes, *i. e.* it may be made payable in advance, and yet an action of debt will not lie to recover it.

The result, therefore, is, that a debt cannot be created by contract unless either the contract is under seal or the debtor has received an equivalent, commonly termed a *quid pro quo*. But what kind of contract is that in which the obligation arises not from a promise, but from the receipt of an equivalent for the obligation by the obligor from the obligee? Upon examining the two classes into which contracts are commonly divided, viz. those under seal and those not under seal, it will be seen that the obligation arises in the former from the performance of certain acts prescribed by law, viz. reducing the promise to writing, sealing the writing, and delivering it; while in the latter it generally arises from a promise made and accepted, *i. e.* from an exercise of will on the part of the promisor and the promisee, the law imposing only the condition that there shall be some consideration for the promise. According to the nomenclature employed by writers on the civil law, the former are formal contracts, while the latter are consensual contracts. This distinction existed from the earliest times among the Romans, who allowed certain specified contracts (only four in all) to be made by mere consent, but for all others required some one of three prescribed forms. One of these forms consisted in the delivery of some movable thing by the promisee to the promisor. When this was done with the mutual understanding that either the specific thing delivered or (in case of things which consisted in number, weight, or measure) something else like it should be returned, an obligation to make such return arose immediately upon the delivery. As the contract arose from the delivery of a thing (*re*), it was called

a *real* contract. There were four of these contracts from the earliest times; namely, a loan of money or other thing consisting of number, weight, or measure (*mutuum*), a gratuitous loan of specific things (*commodatum*), a delivery of specific things for safe keeping (*depositum*), and a pawn or pledge (*pignus*). At a later period this species of contracts was so extended as to embrace any transaction which consisted in giving or doing on one side, with the mutual understanding that some specified thing should be given or done on the other side in exchange.

101. There can be little doubt that the Roman law in regard to real contracts was adopted by the English law at a very early period, at least so far as the latter law provided a remedy for enforcing such contracts; and whenever the giving or doing on one side created an obligation on the other side to pay a definite sum of money, the action of debt not only furnished an appropriate means for enforcing the obligation, but it was for that express purpose that the action was established. The testimony of the early writers is very explicit upon this subject. Thus, Glanville[1] enumerates five contracts, all of Roman origin, as creating debts. Three of these were the real contracts of *mutuum*, *commodatum*, and *depositum;* the other two were sale (*venditio*) and letting for hire (*locatio*), meaning a sale or letting which had been executed by a transfer of the thing sold or let. These latter were not regarded as real contracts among the Romans, for the reason that they were binding as consensual contracts, though wholly executory; but, as they were not binding by the English law while executory, they

[1] Lib. 10

were very properly classed by Glanville among real contracts when executed by a transfer of the property. Bracton,[1] who in this respect is followed by Fleta,[2] and in substance by Britton,[3] follows the Institutes of Justinian almost literally upon the subject of real contracts; and though the closeness of his copying may excite some suspicion as to the trustworthiness of his testimony, yet what he says upon real contracts is quoted as authority by Lord Holt, in Coggs *v.* Bernard.[4] It may be added that Britton and Fleta, as well as Glanville, treat of real contracts under the titles "debt" and "action of debt."

102. Upon the whole, it is submitted that the following propositions have been satisfactorily established: First, that debt by simple contract is, in our law, a phenomenon to be accounted for. Secondly, that, upon the supposition that it came from the real contracts of the Roman law, it is accounted for perfectly. Thirdly, that there is no other known mode of accounting for it. Fourthly, that, upon the same supposition, all the contracts known to the early English law, except contracts under seal, are accounted for. Fifthly, that the Roman law as to real contracts was in fact adopted by the early English law, though with such modifications as were necessary to make it harmonize with the latter system. Sixthly, that, whether regard be had to the origin or to the nature of debt on simple contract, it is clear that the transaction by which it is created is a formal, not a consensual contract.

103. It should, perhaps, be added, that in strictness

[1] Lib. 3, tr. 1, c. 2.
[2] Lib. 2, c. 56.
[3] Liv. 1, c. 29, § 3.
[4] 2 Ld. Raym. 909, 914.

there are no consensual contracts in our law, as a promise which has nothing else to make it binding must have a consideration. Still, those contracts which can be enforced only by an action of assumpsit, though they are not purely consensual, are substantially so; and they may, therefore, properly be termed consensual by way of distinguishing them from other contracts.

DEMAND.

104. When a debt is created without any specification of time for its payment, it is payable immediately, and, in the language of pleading, a debt payable immediately is said to be payable on request. When, therefore, it is alleged in a declaration upon a bond that the defendant acknowledged himself to be held and firmly bound to the plaintiff in such a sum, to be paid to the plaintiff by the defendant when the latter should be thereunto afterwards requested, it is not meant that the payment of the debt is subject to the condition of being first demanded, but merely that it is payable whenever the plaintiff chooses to require its payment. It is for this reason that a declaration in *indebitatus assumpsit* alleges a promise by the defendant to pay the debt upon request; for such a declaration must state facts showing a debt payable presently, and then the promise, being implied by law, must be precisely co-extensive with the debt. Hence the words "upon request" do not make the promise conditional. The same interpretation was also applied to a declaration on an express promise to pay a debt upon request; for it was truly said that the promise did not create the debt, but the debt

existed independently of the promise; and therefore, if the debt was unconditional, a promise to pay it in the precise terms which the law would imply could not be conditional.[1] But it was held that this analogy could not be extended to a promise which created a new cause of action, and that such a promise, though simply to pay money, must be interpreted according to the natural import of its terms. Hence, the distinction became established that a declaration on a promise to pay a debt upon request need not aver any request,[2] while a declaration on a promise to do some specific act upon request, or even a promise to pay on request a sum of money not constituting a debt, must aver an actual request before bringing the action.[3] This distinction, however, relates entirely to pleading, and the lesson to be learned from the cases which establish it is, that, in the latter class of cases, the promise should never be alleged to be upon request,

[1] See Rumball *v.* Ball, 10 Mod. 38, Cas. on Contr. 956.

[2] Estrigge and Owles' Case, 3 Leon. 200, Cas. on Contr. 950; Case of an Hostler, Yelv. 66, Cas. on Contr. 951; Wallis *v.* Scott, 1 Str. 88, Cas. on Contr. 956.

[3] Banks and Thwaits' Case, 3 Leon. 73, Cas. on Contr. 949; Selman *v.* King, Cro. Jac. 183, Cas. on Contr. 951; Harrison *v.* Mitford, 2 Bulst. 229, Cas. on Contr. 952; Hill *v.* Wade, Cro. Jac. 523, Cas. on Contr. 952; Lowe and Kirby, W. Jones, 56, Cas. on Contr. 953; Pecke and Mithwolde, W. Jones, 85, Cas. on Contr. 953; Alcock *v.* Blofield, Latch, 209, Cas. on Contr. 954; Birks *v.* Trippet, 1 Wms. Saund. 32, Cas. on Contr. 955. In the cases of Estrigge and Owles, Selman *v* King, and Wallis *v.* Scott, *supra*, the courts, while professing to proceed upon the foregoing distinction, seem to have misapplied it. In Estrigge and Owles' Case the defendant clearly was not a debtor, while in Selman *v.* King it seems clear that the defendant was a debtor. In Wallis *v.* Scott it did not appear that the goods had ever been accepted or received by the defendant, and if they had not, the title to them had not vested in him, and he was not a debtor for the price of them.

except when it is actually conditional upon making a demand; and a promise never is so conditional except when it is made so either expressly or by a clear implication.[1] In other words, the condition of making a demand is governed by the same principles as other express conditions, and any words or circumstances which will create such a condition in any other obligation will also create it in an obligation to pay a debt.

[1] See Carter *v.* Ring, 3 Campb. 459, Cas. on Contr. 957; Gibbs *v.* Southam, 5 B. & Ad. 911, Cas. on Contr. 958.

DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES.

105. When the performance of one of two mutual covenants or promises is conditional upon the performance of the other, the former is said to be dependent upon the latter. When the performance of each is conditional upon the performance of the other, the two covenants or promises are said to be mutually dependent. The term dependency, therefore, may be said to designate a class of conditions peculiar to bilateral contracts. Every condition in a covenant or promise must be founded upon the intention of the covenantor or promisor, and generally this intention must be an actual one, *i. e.* it must be proved to exist in each case. Conditions of the class just referred to, however, are frequently founded upon an intention which the law imputes to the covenantor or promisor without any evidence of its actual existence in the particular case; and in that respect these conditions differ from all others. Conditions which are founded upon an actual intention may be termed express conditions; those which are founded upon an imputed intention may be termed implied conditions. Dependency, therefore, is either express or implied, and

implied dependency includes all implied conditions. Those conditions which constitute express dependency do not differ materially from other express conditions, and therefore do not require separate treatment. Implied dependency, on the other hand, is governed by principles peculiar to itself, and it constitutes by far the most important and the most difficult branch of conditions. Implied dependency alone, therefore, will constitute the subject of the present title.

106. When it is said that a covenant or promise may be dependent by implication, the meaning is that the court may add a condition to a covenant or promise which is absolute in terms, and the language of which contains no evidence that it was intended to be conditional; and yet the court has no power either to make or to alter a covenant or promise. The explanation of this apparent contradiction is, that the court finds in the fact that the covenant or promise is a part of a bilateral contract a basis upon which to raise a legal (*i. e.* an artificial) presumption that the covenant or promise was intended to be conditional. A covenant or promise generally has for its object the exchange of the thing covenanted or promised to be given or done for something to be given or done by the covenantee or promisee, the latter being payment for the former. When the contract is unilateral, the thing covenanted or promised to be given or done is paid for when the contract is made, and hence payment is not made under or pursuant to the contract; but when the contract is bilateral, payment is not made until after the making of the contract, and hence it must be made under and pursuant to the contract. In the latter case, therefore, the question

is always liable to arise, whether performance of the covenant or promise can be enforced before it is paid for. If it can be enforced according to its terms, this question must be answered in the affirmative, for, *ex concessis*, the covenant or promise is absolute in terms. Yet the consequence of so holding would be that the covenantor or promisor would have to perform on his part without any certainty that he would ever receive the equivalent agreed upon. He would not merely have to take the risk of the pecuniary responsibility of the covenantee or promisee; for even if the latter were responsible, he might refuse to perform, and the only legal remedy of the former would be an action for damages. Can it be supposed that he intended to place himself at such a disadvantage? Not unless the contract furnishes positive evidence that he did so intend, and the mere fact that the covenant or promise is in terms unconditional, being mere negative evidence, is insufficient. On the contrary, the law will presume, in the absence of positive evidence to the contrary, that he intended not to perform unless he received the payment agreed upon; and for the purpose of carrying out this intention, the law will make the performance of the covenant or promise conditional upon performance by the covenantee or promisee. We thus arrive at the principle (and it is the only principle) upon which the performance of one of two mutual covenants or promises may be made dependent by implication upon the performance of the other, namely, that the latter is the equivalent or payment for the former. It is necessary to inquire, therefore, in what classes of

contracts this principle is found; especially, whether it is found in all bilateral contracts.

107. In every purely bilateral contract not under seal the mutual promises are necessarily, in legal contemplation, the full equivalent of each other; for otherwise the promise on one side would be in part a mere gift, and therefore would be invalid for want of consideration. In bilateral contracts under seal there is not the same legal necessity that the mutual covenants should be the full equivalent of each other, yet a case will rarely occur in which they must not be so regarded in fact. For all practical purposes, therefore, it may be said that mutual covenants and promises are always, in legal contemplation, the full equivalent of each other, and are given and received in payment for each other. And what is thus true of mutual covenants and promises is also necessarily true of the performance of them, provided the performance on each side is equally certain; but if the performance on one side is conditional, while on the other side it is unconditional, the inference is that the conditional performance makes up in quantity what it lacks in certainty; and therefore, though the covenants or promises are equal, the performances are unequal. In other words, whenever the performances of mutual covenants or promises are unequal in certainty, they will also be unequal in amount, and hence there will be no foundation for making one dependent upon the other by implication. This seems to have been the true ground for the decision in Martindale *v.* Fisher.[1] This principle is especially

[1] 1 Wils. 88, Cas. on Contr. 632.

applicable to all that class of contracts known to writers on the civil law as aleatory or hazardous contracts, *e. g.* contracts of insurance, of indemnity, of suretyship or guaranty, of warranty in sales of personal property, and covenants for title in sales of real estate. In most cases all of these contracts are unilateral, and then of course no question of dependency can arise; but even when they are bilateral, it seems that the covenants or promises are never dependent by implication. The consequence will generally be the same if the performance on each side is conditional, for the court can seldom say that each condition creates the same degree of uncertainty. Therefore mutual promises of guaranty are not dependent by implication, unless at least the debts guaranteed are of the same amount.[1]

108. With the exception stated in the preceding paragraph, it seems that the performances of mutual covenants or promises must always be deemed equal to each other, and therefore each must be deemed full payment for the other. This is not always obvious, however, at first sight. Thus, a contract may be made between two persons, not for the purpose of exchanging one thing for another, but for the promotion of an object in which they have a common interest, *e. g.* where two adjoining owners of land enter into a mutual agreement for making and maintaining a partition fence, each promising to make and maintain a fence on one half of the dividing line. In such a case it may be objected that each is as much interested in what he is to do himself as he is in what

[1] Christie *v.* Borelly, 29 L. J. C. P. 153, Cas. on Contr 688.

is to be done by the other; that each performs for his own benefit as well as by way of recompense for the other's performance; and therefore it cannot be said that performance on one side is simply payment for performance on the other side. But the answer to this is, that in dealing with the contract, each one's interest in his own performance is to be excluded from consideration, his interest in the performance of the other being the only thing material; and, looking at the contract in this light, it will be seen that each has the same interest in the other's performance that the other has in his performance. So far as the contract is concerned, therefore, the performance of each is simply payment for the other's performance. Another instance of such a contract is where landlord and tenant mutually covenant, the latter to keep the demised premises in repair during the term, and the former to find all necessary timber for making the repairs.[1] Another instance will be found in Ware *v.* Chappel;[2] for it must be assumed that the plaintiff and defendant had a common interest in having the five hundred soldiers raised and transported to Galicia, and that the contract was made for the accomplishment of that object.

109. If a covenant or promise be given partly in consideration of something given or done by the covenantee or promisee, and partly in consideration of something covenanted or promised to be given or done by the latter, the contract is bilateral in part and unilateral in part. In such cases what remains to be performed on one side is of course only part-

[1] See Thomas *v.* Cadwallader, Willes, 496, Cas. on Contr. 458, 461

[2] Style, 186, Cas. on Contr. 623.

payment for the entire performance on the other side, and hence the foundation fails on which the implication of dependency rests. It is not reasonable to suppose that a party who receives a part of the consideration of his promise when he makes it is to be discharged from his promise because he does not receive the remainder of the consideration (perhaps through the misfortune of the promisee), thus retaining what he has received without paying for it. Nor can the party who has performed in part refuse to complete his performance because the other has not fully performed, for that would be to make his performance conditional upon his receiving more than its equivalent. In other words, a refusal to perform by one party would involve his refusing to do what he has already been paid for doing, while a refusal by the other would be a refusal to perform a promise unless he was paid for something else. Therefore each must perform his own promise, and indemnify himself for any breach of the counter-promise by an action for damages. In short, the two promises will be independent of each other. An ordinary lease is a good example of this kind of contract; for the principal thing to be done by the lessor is to grant a term for years to the lessee, and, as this is done when the lease is made, the mutual covenants which a lease commonly contains are not dependent on each other by implication. A deed of apprenticeship is another instance of the same kind of contract; for a premium is always payable to the master in advance. He cannot, therefore, refuse to perform his covenants on the ground that those on the part of the apprentice have been broken. It seems also that, apart from

the payment of a premium in advance, a deed of apprenticeship is not a mere executory contract, but that it primarily creates a *status* in the apprentice, and a legal relation between the master and the apprentice which neither of them has theoretically the power to terminate before its regular expiration. The cases of Winstone *v.* Linn,[1] and Phillips *v.* Clift,[2] were decided in accordance with these views. Nor was their authority intended to be impeached by the case of Raymond *v.* Minton,[3] though it is difficult to reconcile the latter with established principles. The theory of the defendant's plea, and of the decision sustaining it, seems to have been that the apprentice prevented the defendant's performance of his covenant, and that that constituted a good affirmative defence. But it is to be borne in mind that the defendant's covenant was not with the apprentice, and that the action was not brought by the apprentice; and it is not obvious how the acts of a third person could be any answer to an admitted breach by the defendant of a covenant made by him with the plaintiff. And admitting such a defence to be possible, the plea clearly did not state sufficient facts to establish it, for it did not show that the defendant even attempted to perform the duty of requiring obedience from the apprentice. The only way of supporting the decision seems to be by treating the plea as an argumentative traverse of the breach alleged in the declaration. In that view, it would be open to the defendant to show that he had made every effort reasonably within his

[1] 1 B. & C. 460, Cas. on Contr. 649.
[2] 28 L. J. Exch. 153, Cas. on Contr. 685
[3] L. R. 1 Exch. 244, Cas. on Contr. 587

power to teach the apprentice, for that would show a performance of his covenant. He did not covenant absolutely to teach the apprentice the trade in question, but only to do so to the best of his ability.

110. Other instances of contracts partly bilateral will be found in Hunlocke *v.* Blacklowe,[1] Judson *v.* Bowden,[2] Campbell *v.* Jones,[3] and Carpenter *v.* Cresswell.[4] In Campbell *v.* Jones the part-performance seems to have consisted in the payment of the first 250*l.* by the defendant to the plaintiff, and not in an assignment of an interest in the patent; for the effect of the deed seems to have been to give the defendant no more than a license to use the patent. In Judson *v.* Bowden the first 400*l.* was to be paid concurrently with the execution of the deed, and such payment (assuming it to have been made) rendered the contract unilateral in part. In another respect also the contract was partly executed the moment that it was made, for the plaintiff and defendant thereupon became partners by relation from the first of January preceding the execution of the deed. In Havelock *v.* Geddes,[5] though a part of the freight was paid concurrently with the execution of the charter-party, yet it was simply a payment in advance for the first two months that the ship was to be employed, and therefore it did not affect the remainder of the contract.

111. The same consequence will follow from a part-performance on both sides at the time of making a

[1] 2 Wms. Saund. 156, Cas. on Contr. 627.
[2] 1 Exch. 162, Cas. on Contr. 673.
[3] 6 T. R. 570, Cas. on Contr. 839.
[4] 4 Bing. 409, Cas. on Contr. 870.
[5] 10 East, 555, Cas. on Contr. 857.

contract (namely, that there will be no dependency by implication), unless it appears affirmatively that the part-performance of one was regarded simply as payment for the part-performance of the other; and that will seldom happen. Thus, in Boone *v.* Eyre,[1] the plaintiff had performed in part by actually conveying such title as he had to the property, and the defendant had performed in part by paying 500*l.*; and as there was no ground for saying that the 500*l.* and the conveyance were intended to balance each other, it followed that the covenant to pay the remainder of the purchase-money was not dependent by implication upon the covenants for title; and of course the converse was equally true.

112. It should be observed, however, that the deed of conveyance in Boone *v.* Eyre contained an express covenant for the payment of the purchase-money, and it must not be inferred that the same reasoning will be applicable to the ordinary case of an executed sale of real or personal property on credit, with covenants for title, a warranty of quality, or any other covenant or promise on the part of the seller; for, though the mutual obligations in such a case are clearly not dependent by implication, the reason seems to be, not that they constitute a contract only partly bilateral, but that they constitute two separate contracts, each of which is wholly unilateral. A bilateral contract must consist either of mutual covenants or of mutual promises; it cannot consist of a covenant on one side and a promise on the other. If a covenant and a promise be exchanged for each other, the covenant will be actual performance in respect to the promise,

[1] 1 H. Bl. 273, note, Cas. on Contr. 838.

and both will be unilateral. A deed of conveyance of real estate, therefore, in its ordinary form, contains no bilateral contract, as it contains no covenant on the part of the buyer; and, if it contains covenants for title on the part of the seller, they are necessarily unilateral. If the purchase-money is not paid at the time of the conveyance, it becomes a debt, but the debt is created by the conveyance of the property, and not by any covenant in the deed. Again, a bilateral contract must consist of a covenant or a promise on each side, and not of a debt on one side without a covenant or promise. A covenant may indeed create a debt by its own force (*e. g.* the defendant's covenant in Boone *v.* Eyre), and in such a case the existence of a debt is no argument against a bilateral contract; but a debt by simple contract can be created only by the actual receipt of a *quid pro quo*, and therefore such a debt necessarily imports that the creditor's side of the contract has been performed. Hence a debt by simple contract can never be a part of a bilateral contract, but always constitutes by itself a unilateral contract or obligation. This principle applies to sales of both real and personal property; for in both cases the transfer of the property alone is the *quid pro quo* which makes the purchase-money a debt. Unless a credit is expressly agreed upon, the purchase-money becomes due the moment the property is transferred, and that, too, whether there are collateral covenants or promises on the part of the seller or not.[1] It is true that a sale may be preceded by an agreement to sell, which is a bilateral contract, but in that case the sale

[1] *Per* Williams, J., Behn *v.* Burness, 3 Best & S. 751, Cas. on Contr. 556, 564; Street *v.* Blay, 2 B. & Ad. 456.

is a performance of the agreement on both sides. That it is so when the price is paid is obvious; but in truth it is not material whether the price is actually paid or not, any more than it is material whether possession of the property is delivered or not; it is sufficient that the property has vested in the buyer, and the price of it in the seller. If an action is afterwards brought for the price, the cause of action is not the executory agreement, but the sale. An action of debt is brought to recover the price, just as an action *in rem* may be brought to recover the property. This is the true explanation of the decision in Thorpe *v.* Thorpe.[1] The executory agreement for the sale of the equity of redemption had been performed, and the action was to recover the price. As to the instrument pleaded by the defendant, so far from its extinguishing the plaintiff's cause of action, it created it. A sale, as distinguished from an agreement to sell, is not a contract at all (unless the term "contract" be used in a wider sense than the terms "covenant" and "promise"); it is an exchange of specific property for money. In Bach *v.* Owen [2] the plaintiff's mistake consisted in his supposing that the transaction upon which he sued was an executory agreement instead of an actual sale or exchange. In truth, the action should have been trover instead of assumpsit.

113. The foregoing considerations show that the obligation sued on in Cadwell *v.* Blake [3] was entirely unilateral, and hence that it was not dependent by implication upon any promise made by the plaintiffs.

[1] 12 Mod. 455, Cas. on Contr. 446.
[2] 5 T. R. 409, Cas. on Contr. 633.
[3] 6 Gray, 402, Cas. on Contr. 609.

Not only was the transaction there an executed sale, but it was stated expressly that the $4,000 was the price of the property sold, and the performance of the plaintiffs' promises was to be paid for by a share of the defendants' profits; and though the $4,000 was not payable until a future day, yet it was a debt and carried interest from the moment of the sale. So far, therefore, as regarded any implied dependency, the question before the court was the same as if the transaction had been simply a sale of the machinery and fixtures, without any promise on the part of the plaintiffs. Indeed, the plaintiffs' promise that the defendants should have the right to manufacture paper by the plaintiffs' process, and that the plaintiffs would teach them the mode of manufacturing paper by that process, together with the defendants' promise to pay the plaintiffs a certain share of the profits of the business, formed a bilateral contract separate and distinct from the sale of the machinery and fixtures.

114. In White *v.* Beeton[1] the plaintiff's claim consisted of several elements, each of which must be considered separately. First, there was an executed sale of the plaintiff's shares in the Hull Loan and Discount Society for the price of 480*l.* To that extent, therefore, the defendant became indebted to the plaintiff, and his obligation was unilateral. Secondly, there was an executory sale of the shares standing in the name of Charles Todd (but which the plaintiff claimed to own) for the price of 40*l.*; but as this contract had not been performed on the part of the plaintiff, it seems clear that the 40*l.* had not become due, and that the plaintiff was not entitled to recover it.

[1] 7 H. & N. 42, Cas. on Contr. 884.

Thirdly, the defendant promised to pay to the plaintiff a debt due to the latter from the society. The consideration for this seems to have been everything done and promised to be done by the plaintiff; and if so, the defendant's promise, being partly unilateral, was independent.

115. The two cases last referred to will serve to remind the reader that a single instrument or a single transaction may comprise several distinct contracts, and that it is not sufficient to raise a presumption of implied dependency between two covenants or promises that they are contained in the same instrument, or that each is a part of the same transaction; it must further appear that each is a part of the same contract. For example, if an agreement be made between A and B that a thing belonging to A shall be exchanged for a thing belonging to B, neither A nor B will be bound to perform unless the other also performs, for the two promises make only one bilateral contract; and the effect will be the same if the agreement be that the thing belonging to A shall be sold to B at such a price, and that the thing belonging to B shall be taken in part-payment at such a price. But if the agreement be that the thing belonging to each shall be sold to the other at such a price payable in money, there will be two separate contracts, each of them bilateral, and they will be independent of each other unless they be made expressly dependent. The terms of the agreement show that each pays his money for the sake of getting the thing purchased, and that each parts with his property for the sake of getting the price; and there is no room for the supposition that each sold one article for the sake of purchasing the other, or pur-

chased one for the sake of selling the other. It should be added, however, that such an agreement as the one last supposed is improbable, there being a strong presumption that what the parties intend in such a case is an exchange. These distinctions are well brought out by the case of Atkinson *v.* Smith.[1] A contract in writing sometimes contains a clause providing that any dispute arising under the contract shall be referred to arbitrators; and a question has been made whether in such a case the obligation of each party to perform the principal contract will be dependent by implication upon the other's performing the agreement to refer.[2] But it seems that an agreement to refer to arbitrators, and the agreement which is to furnish the subject of the reference, are necessarily separate contracts, the former not coming into operation until the latter is broken. If the agreement to refer were contained in a separate instrument, or if it were not made until after the dispute arose, the effect of it would be the same. Besides, it is impossible that a thing to be done by A in the event of B's *not* performing his promise should be a part of B's compensation for performing his promise. When two parties enter into two contracts at the same time, and by the same instrument, it may be justly inferred that neither contract would have been made unless both had been made, but that does not make them one contract. It merely amounts to saying that the *making* of each contract was conditional upon the making of the other; and it does not at all follow from that, that

[1] 14 M. & W. 695, Cas. on Contr. 742.

[2] Roper *v.* Lendon, 1 El. & El. 825, Cas. on Contr. 546.

the *performance* of either is conditional upon the performance of the other.

116. When a single contract contains several stipulations on each side, they are all to be considered as one for the purpose of deciding the general question of dependency; for a decision of that question in the affirmative affects all the mutual stipulations equally, and the same is true presumptively of a decision in the negative. If, however, it clearly appears that any two mutual stipulations were intended to be payment for each other, that will raise a presumption of dependency between them, though there be none as to the contract generally; and, therefore, there may be dependency between two mutual covenants or promises in a contract which is only partly bilateral. Thus, mutual covenants in a lease that the lessee shall keep the premises in good repair, and that the lessor shall find all necessary timber for making repairs,[1] or that the lessor shall keep the premises in good repair until a certain date, and the lessee during the remainder of the term,[2] are, it seems, dependent, *i. e.* the lessee's covenant is in each case dependent on the lessor's. So in Judson *v.* Bowden[3] the contract was only partly bilateral, and yet that was not claimed to be a reason for holding that the particular covenant sued on was not dependent.

117. As one instrument may contain two or more separate contracts, so each of two mutual covenants

[1] See Thomas *v.* Cadwallader, Willes, 496, Cas. on Contr. 458, 461; Holder *v.* Taylor, 1 Rol. Abr. 518, Cas. on Contr. 620.

[2] See Bragg *v.* Nightingale, 1 Rol. Abr. 416, pl. 15, Cas. on Contr 623.

[3] 1 Exch. 162, Cas. on Contr. 673.

or promises may be contained in a separate instrument, each instrument being complete in itself and neither making any reference to the other; and the question will then arise whether each covenant or promise forms a separate unilateral contract. In the case of mutual covenants there is no doubt that this question must be answered in the affirmative.[1] And the same may be said of two promises, each or either of which is contained in an instrument in the nature of a specialty, *e. g.* a promissory note. That two promissory notes given in exchange for each other make two separate contracts, there is no doubt; and if this is so, it follows that one promissory note given in exchange for an ordinary promise is a separate contract; and if the note is a separate contract, the promise for which it is given is so also.[2] It follows, therefore, that the decision in Hunt *v.* Livermore,[3] where a promissory note, absolute on its face, was held to be dependent by implication upon the payee's performing the condition of a bond given in exchange for the note, must be deemed erroneous. Whether the court intended to hold that the bond and the note actually formed but one contract, is not certain; but that is the only theory upon which the decision can be sustained. It is true that the bond and the note were parts of one transaction, and therefore the court was entitled to look at both instruments for the purpose of construing or interpreting anything that was doubtful in either; but there was nothing doubtful or ambiguous in the

[1] See Lock *v.* Wright, 1 Str. 569, Cas. on Contr. 456.

[2] Moggridge *v.* Jones, 14 East, 486, Cas. on Contr. 638; Spiller *v.* Westlake, 2 B. & Ad. 155, Cas. on Contr. 654.

[3] 5 Pick. 395, Cas. on Contr. 757.

note, and what the court did was to change the terms of the note because of what appeared in the bond.

118. Two ordinary promises, in order to be mutual, must be given in consideration of each other, and it seems that they will then under all circumstances constitute but one contract. The reason is that they must always in legal contemplation be made orally. When they are reduced to writing, the writing is technically only evidence of the promises, not the promises themselves; and hence the fact of their being put in two separate writings does not make them technically two contracts. It does, however, show that the parties intended to make each promise a separate contract; and therefore it cannot be supposed that they intended to make either of them dependent on the other. Moreover, the writing, though only evidence of the promise, is conclusive evidence. Each promise, therefore, is what the writing in which it is contained states it to be, and it can no more be changed by the writing which contains the counter-promise than it can be changed by extrinsic oral evidence. Yet if the writing which contains one of the promises could be used to show that the other promise is dependent, the latter promise would thus be changed from an absolute to a conditional one. These principles are applicable to the numerous cases (particularly in England) of executory sales of personal property, made by bought and sold notes. The bought note, therefore, should state every condition to which the buyer's promise is intended to be subject, and the sold note should do the same as to the seller's promise.[1]

[1] That this rule is generally observed in practice, see Callonel v

119. A bilateral contract may have for its object the making of another contract. In such cases, if the object is carried out, there will of course be two successive contracts between the same parties, one preliminary and the other final; the latter being the end, the former a means to that end. Thus, a mutual agreement for an insurance is a bilateral contract, which commonly contemplates the issuing of a policy.[1] When the policy is issued, the bilateral contract is performed and at an end, and a new unilateral contract is made. If the premium is not actually paid, there are two unilateral contracts or obligations, the premium constituting a debt. So an agreement for a lease has for its object an actual lease, and when the latter is made the bilateral contract is at an end, and a new contract, partly bilateral, comes into existence. A charter-party also (which may be termed a lease of a vessel) may involve the same distinction, though it is not so strongly marked. So the performance of an executory agreement for a sale may, as has been seen (**112**), result in the creation of one or more unilateral contracts or obligations; *e. g.* if the purchase-money is not actually paid when the sale is made, or if the seller warrants the title or quality of the property sold. In all such cases the preliminary contract must be carefully distinguished from the final one, when any question of implied dependency arises, for the performance of the latter will never be dependent by

Briggs, 1 Salk. 112, Cas. on Contr. 722; Morgan *v.* Gath, 3 H. & C. 748.

[1] See McCulloch *v.* Eagle Ins. Co., 1 Pick. 278, Cas. on Contr. 72; Tayloe *v.* Merchants' Fire Ins. Co., 9 How. 390, Cas. on Contr. 106.

implication upon the performance of the former. It is true that the making of the final contract by either party is dependent upon the performance of the preliminary contract by the other party; but, the final contract once made, the preliminary contract is out of the case. Thus, in the case of an agreement for insurance on the usual terms, the payment of the premium will be a condition of issuing the policy, but if the insurer chooses to issue the policy without payment of the premium, the policy will not be conditional upon its payment. So if an agreement for a sale of real estate provide that the deed shall contain full covenants for title, the buyer will not be bound to complete the purchase unless this part of the agreement be performed; but if he accepts a deed without covenants, he will be obliged to pay the purchase-money. The distinction in question is not always, however, so obvious as in the two cases just put; for the preliminary and final contracts are frequently made at the same time, and treated as one contract, the parties supposing that they constitute but one contract in fact; and then it becomes necessary, not only to separate the two contracts from each other, but to ascertain by construction to which contract a given stipulation belongs, or whether it belongs to both. Thus, if there be a sale of unspecified goods with a warranty of quality, it will be a question of construction whether the warranty is to continue indefinitely, or only until the goods are identified and accepted. In the former case, however, it must not be supposed that the warranty is the same contract before and after the title to the goods passes. Before the title passes it is one of the stipulations in a

bilateral contract, and the performance of it is a condition of the buyer's obligation to purchase. If, therefore, the goods tendered do not conform to the warranty, the buyer may reject them; but if he accepts them, and the title passes, although the warranty continues, it becomes a new unilateral contract, and the breach of it neither enables the buyer to return the goods nor to defend himself against the payment of the purchase-money; his only remedy is an action for damages.[1] In Tidey *v.* Mollett[2] the writing was in the first instance an agreement for a lease, but on the 24th of June, if the house had been taken, it would have become a lease; and hence the stipulations on the part of the plaintiff belonged to the preliminary contract or to the final one, according as they were or were not to be performed before the 24th of June. The former, therefore, made the defendant's obligation to take the house conditional; but if he had taken it, they would not have made his obligation to pay the rent conditional. The latter, on the other hand, did not make either of the defendant's obligations conditional: not the obligation to take the house, because they were not a part of the preliminary contract; not the obligation to pay the rent, because a lease is only partly bilateral. In Thompson *v.* Gillespy[3] the defendant's promise to take the vessel was conditional upon her being tight, staunch, and strong, but not his promise to pay freight. If the plaintiff had promised that the vessel should

[1] *Per* Williams, J., Behn *v.* Burness, 3 Best & S. 751, Cas. on Contr. 556, 564; Street *v.* Blay, 2 B. & Ad. 456.

[2] 33 L. J. C. P. 235, Cas. on Contr. 567.

[3] 5 El. & Bl. 209, Cas. on Contr. 537.

be tight, stanch, and strong at the time of sailing, for example, the promise would have been a part of the final contract, but, as it was, it was only a part of the preliminary contract. In any view of the case, it is quite impossible to support the decision. The court admitted that, if the cargo had been delivered in safety, the full freight might have been recovered, but the admission was fatal to the decision, for the following reasons: First. There was but one promise to pay the one fourth of the freight sued for. Secondly. By the terms of that promise the freight was payable when the vessel sailed, if ever. Thirdly. If that promise was conditional upon the vessel's being tight, stanch, and strong when she began to load, the breach of the condition would have been equally fatal, though the cargo had been delivered in safety. Fourthly. The loss of the cargo could not affect the question before the court, as it did not happen till after the freight was payable. Fifthly. If the promise sued on was conditional, as before stated, the promise to pay the remainder of the freight was equally so. The fact that the defendant intended to insure the one fourth of the freight (assuming that fact to have been established) only shows that he ought to have made the payment of it conditional, not that he did do so. Sixthly. If the one fourth of the freight had been paid before the cargo was lost, it clearly could not have been recovered back. In Bankart *v.* Bowers[1] the preliminary contract was for the purchase and sale of real estate, and all the clauses in the written agreement, except clauses 5 and 7, related to that exclusively. Clauses 5 and 7, however, did not relate to

[1] L. R. 1 C. P. 484, Cas on Contr. 753.

the preliminary contract at all, as they were not to come into operation until the sale was executed. The moment the sale was fully executed on both sides, the whole of the written agreement, except clauses 5 and 7, would become *functus officio*, and clauses 5 and 7 would become the only subsisting promises between the parties, and they would be independent of each other, and neither of them would be subject to any condition. So long as the sale remained executory, the promises contained in clauses 5 and 7 were indeed subject to the express condition that the sale should be executed (**39**), and it was because that condition had not been complied with that the plaintiff failed to recover. It is a mistake to suppose that the plaintiff failed because he had broken the preliminary contract; it was immaterial to the question before the court, whether it was the fault of the plaintiff or of the defendant that the sale had not been carried into effect; if it was the fault of the defendant, the plaintiff was entitled to maintain an action against him, but not on the 7th clause of the agreement. In Bettisworth *v.* Campion,[1] the agreement was for the purchase and sale of all the iron made in such a furnace at 40*s.* per ton, to be paid for on delivery. The promise to sell all the iron made in the furnace, and the corresponding promise to buy it all, belonged exclusively to the executory contract, and were mutually dependent; but the obligation to pay for iron actually delivered and received under the contract did not belong to the executory contract at all, and therefore was not dependent upon the plaintiff's promise to sell all the iron made in the furnace. As to the

[1] Yelv. 134, Cas. on Contr. 619.

iron which had been delivered and received under the contract, the executory contract had been fully performed on both sides (**112**), and had resulted in a debt due from the defendant to the plaintiff for the price. It is true that the contract in this case did not contemplate any ulterior relation of debtor and creditor between the parties, as the iron was to be paid for on delivery; but the seller having delivered the iron without payment, the effect was the same as if the contract had been to deliver it upon credit.

120. Such are the conditions which must exist to render implied dependency possible. They may be enumerated as follows: 1st. The subject of implied dependency must be a covenant or a promise, as distinguished from a debt. 2dly. The subject of dependency and the thing upon which it depends must be of the same nature, *i. e.* they must both be covenants or both be promises. 3dly. The covenants or the promises must be mutual. 4thly. They must each be a part of the same contract; and it does not follow that they are so, because they are made at the same time, or are contained in the same instrument. 5thly. If in writing, they must each be contained in the same instrument, or in different instruments which refer to each other. 6thly. The contract which contains the covenants or the promises must be wholly bilateral, or else it must clearly appear that the covenants or promises in question were given and received in payment for each other. 7thly. The performance of each of the covenants or promises must, it seems, be equally certain in legal contemplation.

121. Whenever two obligations satisfy each of the foregoing conditions, the fact is established that the

performance of each is payment for the performance of the other; and hence a presumption arises that the party who first breaks his own obligation cannot enforce performance of the other, for, if he could, he would be enforcing the performance of an obligation without paying for it in the manner agreed upon. This presumption does not of itself establish the dependency of either of the covenants or promises taken separately; it merely establishes a certain relation between them, and even that has to be expressed in negative terms. To be able to go further, and say of either covenant or promise whether its performance is dependent, *i. e.* conditional, upon the performance of the other, another element must be taken into consideration, namely, the relative time of performance of each covenant or promise; for in order that dependency should exist between two covenants or promises, it must appear either that one is to be performed at an earlier date than the other, or that the two are to be performed at the same date.

122. When it appears that one of two covenants or promises is to be performed at an earlier date than the other, the relative time of performance and the presumption stated in the preceding paragraph establish the only dependency that is possible between them, namely, that of the latter upon the former; and hence no other element enters into the question. In such cases, therefore, the rule is simple and uniform: namely, that the covenant or promise that is to be performed first is independent and absolute, while the one that is to be performed last is dependent, the performance of the former being a condition precedent to the performance of the latter. The application of

this rule will vary according to circumstances, but the rule itself is uniform. Whether each covenant or promise is for the performance of a single act or of a series of acts, and whether the contract consists of several covenants or promises on each side or of one only, the principle is the same; namely, that each act to be performed by either party is dependent upon all acts to be previously performed by the other party, while it is independent of, and a condition precedent to, all acts to be subsequently performed by the other party. Nor is it material whether the precise time for the performance of each act is fixed (*e. g.* in Grant *v.* Johnson[1]), or only the order in which the several acts shall be performed; nor whether the order of performance is fixed by the terms of the contract, or by the nature of the acts to be performed and their relations to each other. It seems, therefore, that the delivery of the outward cargo in Storer *v.* Gordon[2] was a condition precedent by implication to the furnishing of a homeward cargo, as the former necessarily preceded the latter in time (**166**). So in Fothergill *v.* Walton,[3] the shipment of the cargo of brandy at Havre necessarily preceded in time the furnishing of a cargo of fruit in the West Indies, and hence the former was a condition precedent by implication to the latter (**166**). Nor does it seem to be material whether the order of performance is fixed at the time of making the contract, or afterwards, pursuant to the contract; and therefore the decision in Dicker *v.* Jackson[4] must be deemed erroneous.

[1] 1 Seld. 247, Cas. on Contr. 603.
[2] 3 M. & S. 308, Cas. on Contr. 639.
[3] 8 Taunt. 576, Cas. on Contr. 645.
[4] 6 C. B. 103, Cas. on Contr. 676.

123. In deciding, however, whether a given contract requires a series of acts or only a single act to be performed by either party, it is necessary to distinguish between those acts which are done in performance of the contract, and a failure to do which will be a breach of the contract, and those acts which it is necessary for either party to do to enable him to perform the contract, but the doing of which concerns himself alone. In an executory contract of sale, for example, it is in strictness always necessary for one or both of the parties to do one or more preliminary acts in order to render the performance of the contract possible; for not only must the parties meet at the time and place appointed for the performance of the contract, but the money must be there ready to be paid, and the goods or the deed of conveyance must also be there ready to be delivered. If there is a failure in either of these particulars, the party in fault will be unable to perform the contract, and yet these preliminary acts generally constitute no part of such performance, which consists simply in the act of paying the money on one side, and delivering the goods or the deed of conveyance on the other. Therefore, in Morton *v.* Lamb,[1] there was no foundation for the argument that the first act to be done in performance of the contract was to carry the wheat to Shardlow, and hence that a failure by the defendant to do that constituted a breach of the contract, and made it unnecessary for the plaintiff to do anything on his part. It is true that the defendant could not perform the contract unless he had the wheat at Shardlow at the time appointed, but the only right secured to the

[1] 7 T. R. 125, Cas. on Contr. 727.

plaintiff by the contract was to have the wheat delivered to him at Shardlow at the time appointed, and hence there could be no breach of the contract by the defendant until the time for delivery arrived.

124. When a purchaser of real estate requires time for the payment of the purchase-money, it is frequently agreed that he shall have immediate possession, but that the seller shall retain the title for his security until the purchase-money is paid, the purchaser paying interest in the mean time in lieu of rent.[1] In such cases, of course, the giving of possession according to the agreement is a condition precedent to the payment of interest. The peculiarity of Wilks *v.* Smith[2] was that the contract was silent in regard to possession; and though the agreement to pay interest raised a violent conjecture that the purchaser was to have possession, yet that was not a basis upon which the court could act, and so it was necessarily held that the agreement to pay interest was absolute. The contract required the seller to do nothing until the purchase-money was paid.

125. When the performance of a contract consists in doing (*faciendo*) on one side, and in giving (*dando*) on the other side, the presumption will be that the former is to be performed first. It is scarcely possible that the two sides should be performed together, as one naturally requires time for its performance, while the other can be performed in a moment. It cannot be presumed that the latter is to be performed first,

[1] See Mattock *v.* Kinglake, 10 Ad. & El. 50, Cas. on Contr. 662 (where the purchaser was already in possession); Dicker *v.* Jackson, 6 C. B. 103, Cas. on Contr. 676.

[2] 10 M. & W. 355, Cas. on Contr. 666.

as the law will never presume that a thing is to be paid for before it is done.[1] Hence, either the former must be a condition precedent, or the two must be wholly independent of each other; but to hold the latter would be to disregard the presumption stated in § **121**, as well as the presumption that a thing is to be done before it is paid for. In all contracts for service, therefore, the presumption is that the performance of the service is a condition precedent to the payment for it. In Spanish Ambassador *v.* Gifford[2] the question was whether this presumption was rebutted by the terms of the agreement. The court seems to have supposed that the agreement stated in the declaration imported that the defendant was to be paid in advance for making the voyage; and the word "repay" certainly countenances that view, especially as a declaration must be construed most strongly against the plaintiff.

126. In the second case put in Anon.[3] the contract consisted in doing on one side and in giving on the other, and that would probably be a sufficient reason for holding the marriage to be a condition precedent to the making of the estate-tail; but there is another reason also, namely, that an estate in special tail is seldom made except to husband and wife; and though it is legally possible to make such an estate to a man and woman who are not married, yet there is a strong presumption against an intention to do so.

127. When one of the parties to a contract covenants or promises to give security for the performance

[1] Peeters *v.* Opie, 2 Wms. Saund. 350, Cas. on Contr. 792.
[2] 1 Rol. 336, Cas. on Contr. 620.
[3] Y. B. 15 Hen. VII. fol. 10 b, pl. 7, Cas. on Contr. 442.

of the contract on his part, a strong presumption arises that he is not to acquire any rights under the contract until the security is given; for the covenant or promise to give security is of no value as a covenant or promise, and therefore, if the other party may be compelled to perform the contract on his part before the security is given, his object in requiring security will be defeated. The court, therefore, will hold, if the language of the contract admits of such an interpretation, that the giving of security was intended to be a condition precedent to performance by the other party.[1]

128. To the rule stated in § **122** there is one apparent exception, namely, where a part-performance of a contract on one side creates a debt on the other side; for the debt, for the reasons heretofore given (**112**), is not a part of the bilateral contract, and hence the payment of it is not a condition precedent to any subsequent performance by the creditor. Thus, where a contract for the sale of goods provides that the goods shall be delivered in instalments, and each instalment paid for separately, either at the time of delivery or at some other specified time, the paying for instalments already delivered will not be a condition precedent to the delivery of subsequent instalments. This must be deemed the true ground of the decision in Freeth *v.* Burr.[2] It was also the reason for the opinion expressed by Patteson, J., in Withers *v.* Reynolds[3] (and which has been so often referred

[1] Roberts *v.* Brett, 11 H. L. Cas. 337, Cas. on Contr. 575; Kingston *v.* Preston, cited in Jones *v.* Barkley, Dougl. 684, Cas. on Contr. 901 905.

[2] L. R. 9 C. P. 208, Cas. on Contr. 712.

[3] 2 B. & Ad. 882, Cas. on Contr. 740, 742.

to with approbation), namely, that the mere refusal by the plaintiff to pay for a load of straw already delivered was not of itself an excuse to the defendant for delivering no more straw. So if a contract for service provide that the service shall be paid for at the end of stated periods, *e. g.* that each month's service shall be paid for at the end of the month, a failure to pay at the end of any month will not justify the other party in refusing to serve during the following month. So in Franklin *v.* Miller [1] the plaintiff's obligation to pay the defendant 1*l.* per week was unilateral, the 1*l.* per week being a debt created by the plaintiff's receipt of 40*l.* quarterly. But this principle will not commonly apply to a building contract which provides for payments by instalments as the work progresses; for the respective instalments are not payments for the work already done, but they are part-payments in advance for the entire work. They are not debts, therefore, and they are only payable by virtue of express covenants or promises. The same question was involved in Havelock *v.* Geddes; [2] for the plaintiff's right to recover instalments of freight which, by the terms of the charter-party, had not become payable when the vessel was lost, depended upon whether freight was earned monthly. If it was, the decision in favor of the plaintiff was correct. The true construction seems to have been, however, that no freight was earned until the final discharge of the vessel; and if so, the special covenants to make payments in advance on account of freight were dependent upon the plaintiff's performing the charter-party on

[1] 4 Ad. & El. 599, Cas. on Contr. 872.

[2] 10 East, 555, Cas. on Contr. 857.

his part, just as the plaintiff's obligation to perform the charter-party was dependent upon the defendant's making the payments as agreed. It seems also that, when a contract under seal contains an express covenant to pay a sum of money, the performance of the covenant may be a condition, notwithstanding the money would have constituted a debt without any covenant to pay it (**112**).

129. According to an opinion which has generally prevailed, another exception must be made to the rule stated in § **122**, namely, when a thing which requires an indefinite length of time for its performance is to be paid for at a day certain, which may arrive before the performance on the other side is or can be completed; *e. g.* where the plaintiff covenanted to teach the defendant the mode of using a certain patent, and the defendant covenanted to pay the plaintiff 250*l.* in one year;[1] or where the plaintiff covenanted to introduce the defendant as his successor in business on and after the 1st of January, 1846, and to use his best endeavors to establish the defendant in said business, and the defendant covenanted to pay the plaintiff 50*l.* on the 25th of March, 1846;[2] or where the plaintiff, having sold his business to the defendant, covenanted not to interfere with the latter by engaging in the same kind of business, and the defendant covenanted to pay the plaintiff an annuity.[3] In each of the foregoing cases the defendant's covenant was held to be independent and absolute, but in each of them except

[1] Campbell *v.* Jones, 6 T. R. 570, Cas. on Contr. 839.

[2] Judson *v.* Bowden, 1 Exch. 162, Cas. on Contr. 673.

[3] Hunlocke *v.* Blacklowe, 2 Wms. Saund. 156, Cas. on Contr. 627; Carpenter *v.* Creswell, 4 Bing. 409, Cas. on Contr. 870.

Judson *v.* Bowden the decision can be sustained upon the ground that the contract was only partly bilateral; and in Judson *v.* Bowden the decision must, it seems, be deemed erroneous. If the defendant's covenant had been expressly conditional upon the plaintiff's not breaking his covenant before the 25th of March, there is no doubt that the condition would have been good and valid. Why, then, should not such a condition be implied? There seems to be every reason for it that there can be for implying a condition in any case. The defendant was confessedly compelled to pay the 50*l.* without receiving for it the equivalent which had been agreed upon; and the plaintiff was permitted to maintain an action on a contract which he had confessedly been the first to break. It is true that performance by the plaintiff after March 25 would not be a condition precedent to the defendant's performance. Why? Because it would come after it. It ought to follow, then, that performance by the plaintiff before the 25th of March would be a condition precedent. In deciding the foregoing cases the courts were undoubtedly influenced by an apprehension that, if the defendant's covenant was held to be dependent, the slightest breach on the part of the plaintiff would be fatal to his right to recover the money; but that apprehension is shown elsewhere not to have been well founded (**161**).

130. In Rolt *v.* Cozens[1] the same question would have arisen as in the cases last referred to, if the court had held that the contract was bilateral, and that the plaintiff had promised to forbear perpetually or for an indefinite length of time. It is impossible to

[1] 25 L. J. C. P. 254, Cas. on Contr. 543.

deal with the case intelligently without first ascertaining what was the cause of action on which the plaintiff was to forbear to take proceedings against Wale and Dawe. The supposition that it was the guaranty given by Wale and Dawe to the plaintiffs would be fatal to the decision of the court, for no right of action could accrue on that guaranty before Dec. 13, 1854, as the debt guaranteed did not become due until that date, and forbearing to bring an action before the right of action accrued would be no consideration for the defendant's promise. Nor is such a supposition rational in point of construction, for a promise cannot be supposed to be made for a consideration which contemplates a breach of the promise, and yet it was only in the event of the breach of the defendant's promise that a cause of action would ever accrue on the guaranty given by Wale and Dawe. Moreover, the proceedings which it was the object of the contract to prevent were actually taken by the plaintiff before the 13th of December, and yet those proceedings could not have been on the guaranty, as the debt was confessedly not then due. It may fairly be inferred, therefore, that the forbearance contemplated by the contract was to take the proceedings which the plaintiff had threatened to take against Wale and Dawe for fraudulent representations.[1] Assuming this to be so, there was no ground for limiting the forbearance to the 13th of December, and hence the contract must have been bilateral, the word "forbearing" meaning "agreeing to forbear" without limitation as to time. This construction recommends itself for another reason, namely, that it makes the defendant's

[1] S. C. 18 C. B. 673.

guaranty binding from the time when it was given, while the construction adopted by the court made it revocable until the 13th of December, when the debt guaranteed would become due. Upon the whole, it seems that forbearance by the plaintiff until the 13th of December was a condition precedent to the defendant's liability, though for a different reason from the one given by the court.

131. The decision in Terry *v.* Duntze,[1] or rather the reason given for it (**164**), is much less reconcilable with principle than any of those hitherto commented upon; for the defendant there did not promise to pay the plaintiff for any portion of his work before he had done it; he merely promised to pay him in instalments as the work progressed. If nothing had been said about the time of payment, no payment would have been due until the whole of the work was done; and because the defendant had relieved the plaintiff of this hardship by promising to pay for the work as fast as it was done, the court came to the extraordinary conclusion that he might be compelled to pay the whole of the money before any of the work was done. Indeed, it would follow (as no date was fixed for any of the payments) that the defendant might be compelled to pay the whole of the money immediately upon making the contract. The mere statement of such reasoning is its best refutation. The case has not been followed in England, though it has never been formally overruled. In this country it has been distinctly repudiated,[2] and it clearly cannot be considered as law.

[1] 2 H. Bl. 389, Cas. on Contr. 634.

[2] Cunningham *v.* Morrell, 10 Johns. 203, Cas. on Contr. 600.

132. When two covenants or promises are to be performed at the same time, no principle hitherto stated will establish any dependency between them; for there is no ground for saying that either is to be performed before the other, and therefore neither can be a condition precedent in respect to the other. Nor can either party be prevented from suing on the contract upon the ground that he was the first to break it, for, in legal contemplation, it will be broken by both at the same instant. Moreover, if one party is disabled from suing because he has himself broken the contract, the other will be so too, and hence neither can compel the other to perform without performing himself first, and thus giving his adversary an advantage to which he is not entitled. Unless some other mode of dependence can be found, therefore, the necessary result will be that both the covenants or promises will be independent and absolute. Yet such a result will be unsatisfactory, as it enables each party to compel performance by the other, while refusing himself to give the equivalent agreed upon, thus ignoring the fact that the performance of each party is payment for the performance of the other. The law has found the means, however, of avoiding these opposing difficulties, of reconciling the just claims of both parties, and of doing perfect justice to each, by raising a presumption, from the fact that the covenants or promises are to be performed on the same day, that they are to be performed at the same moment, and concurrently. While, therefore, neither is a condition precedent, the performance of each is conditional upon the other's being performed at the same time. Hence the covenants or promises are mutually dependent, and they also con-

stitute mutual and concurrent conditions. As this kind of dependency is founded upon equality, which is justice, and as it does not require either party to trust the other, it is regarded by the law with much favor. Whenever, therefore, mutual dependency between two covenants or promises is possible and appropriate, the law will make every intendment in its favor that is consistent with the terms of the contract.

133. Several conditions must concur, however, to make mutual dependency possible and appropriate. 1st Each of the covenants or promises must be capable of performance in a moment of time; for otherwise it will not be possible for them to be performed concurrently. 2dly. The object of the covenants or promises must, it seems, be the exchange of some property or right for some other property or right; otherwise mutual dependency will be inappropriate. For this reason, as well as the former, two covenants or promises can seldom, if ever, be mutually dependent, unless they both consist in giving (*dando*) as distinguished from doing (*faciendo*). In particular, mutual covenants or promises which are entered into for the promotion of some object common to both parties can never, it seems, be mutually dependent (**108**). 3dly. The exchange contemplated by the covenants or promises must be between the parties thereto; otherwise it cannot, in legal contemplation, be made in an instant of time. Mutual promises, therefore, between A and B, that A shall give something to B, and B shall give something to C, will not be mutually dependent.[1] 4thly. The covenants or promises must be

[1] Jones *v.* Barkley, Dougl. 684, Cas. on Contr. 901; Northrup *v* Northrup, 6 Cow. 296, Cas. on Contr. 721.

capable of being performed at the same place; otherwise they cannot be performed at the same time. For this reason, among others already given (**126**), it seems there could be no mutual dependency in the second case put in Anon.;[1] for the estate-tail could be created only by livery of seisin on the land, and it could scarcely be contemplated that the marriage should be solemnized at the same time and place. 5thly. Of course it must appear, expressly or by implication, that the covenants or promises are to be performed in fact at the same time; but if all the foregoing conditions are satisfied, and if it does not expressly appear that the covenants or promises are to be performed at different times, the law will intend, in favor of mutual dependency, that they are to be performed at the same time. Hence, it will be sufficient if no time be specified for performance on either side.[2] So if the time be specified for the performance of one of the covenants or promises while the contract is silent as to the other, the law will intend that the latter is to be performed at the time fixed for the former.[3] So if one of the covenants or promises is to be performed on or before a certain day, and "on its performance" the other is to be performed, the meaning will be that the latter is to be performed on the day named, or at the same time as the former, if the former shall be performed before the day named.[4]

134. Even when a contract for the sale of goods specifies a day for the delivery of the goods, and a

[1] Y. B. 15 Hen. VII. fol. 10 b, pl. 7, Cas. on Contr. 442.

[2] Rawson *v.* Johnson, 1 East, 203, Cas. on Contr. 805.

[3] Morton *v.* Lamb, 7 T. R. 125, Cas. on Contr. 727.

[4] Dunham *v.* Pettee, 4 Seld. 508, Cas. on Contr. 762. But as to the last two propositions, see §§ **145-147**.

later day for the payment of the price, if the day of payment arrives before the goods are actually delivered, it seems that the delivery and payment will become concurrent acts, provided the delay in making the delivery has not been caused by the seller.[1]

135. Of the two kinds of dependency which are the subjects of preceding paragraphs, and which may be distinguished as general dependency and mutual dependency, it has been seen that the former may, and commonly does, extend to every part of the contract in which it is found, without regard to the number of covenants or promises which the contract contains, or the number of acts which each covenant or promise requires to be performed (**116**, **122**). Mutual dependency, on the other hand, as the term "mutual" necessarily implies, is a relation existing between two acts, and hence it cannot extend to the whole of any contract which requires several independent acts to be performed by either party. It may, however, exist between two acts constituting a part of a contract, as well as between two acts constituting the whole of a contract. In a contract, therefore, which requires the performance of only one act by each party, there may be either general dependency or mutual dependency, but of course either is exclusive of the other. If the two acts are to be performed at different times, there can be only the former; if at the same time, there can be only the latter. On the other hand, in contracts which require the performance of several independent acts by either or each party, there may be either a general dependency alone, extending to the whole contract, or a mutual dependency

[1] See Staunton *v.* Wood, 16 Q. B. 638, Cas on Contr. 517.

alone between two of the acts to be performed, or there may be both; for in such cases each rests upon independent grounds, and, though mutual dependency will not often be found in fact except where there is general dependency also, yet in strictness the existence of either is no argument for or against the existence of the other. In order that general dependency may exist, the contract as a whole must satisfy the conditions stated in § **120**; and in order that mutual dependency may exist, the two acts, in regard to which the question arises, must satisfy the conditions stated in § **133**, as well as those stated in § **120**. A distinction which should be particularly borne in mind is that general dependency requires that the two sides of the contract, taken as a whole, should be in payment for each other, instead of which mutual dependency requires that the two acts in question should be in payment for each other. A familiar instance of a contract in which there is both a general and a mutual dependency is a contract for the sale of real estate, where no credit is to be given, and where either or each party stipulates to do certain acts preliminary to the passing of the title and the payment of the money. A special instance of the same thing seems to be found in the case of Giles *v.* Giles.[1] The court there adopted the view, that delivering up possession of the premises in question, paying the rent, and executing the release in question, were to be treated as one act; and that between that act on the part of the plaintiff and the payment of the 200*l.* by the defendant there was a mutual dependency. If this view were tenable in other respects, there might be no serious objection

[1] 9 Q. B. 164, Cas. on Contr. 744.

to treating the three things to be done by the plaintiff as one act, for they were capable of being performed together, and the terms of the contract were at least consistent with the supposition that they were expected to be so performed; but clearly the 200*l.* was not payment for the three acts to be done by the plaintiff. It is plain that the plaintiff was to deliver up possession of the premises and pay the rent at the end of the year in consideration of his being permitted to occupy the premises during the year; and hence it follows that he was to execute the release in consideration of being paid the 200*l.* The latter proposition is also proved by the fact that interest was to be paid on the 200*l.* from the date of the agreement. The mutual dependency, therefore, was limited to the execution of the release on one side, and the payment of the 200*l.* on the other; and the plaintiff's obligation to do the other two acts was absolute. The effect of the decision was that, if the defendant failed to pay the 200*l.*, the plaintiff might refuse either to deliver up possession of the premises or to pay the rent, — a position which was clearly untenable.

136. In Roberts *v.* Brett[1] there was a general dependency between the two sides of the contract, and there were also two mutual acts which were to be performed at the same time; and yet the latter were not mutually dependent, because they were not in payment for each other. It was only an accident that each party was required to give a bond; for the object of each in requiring a bond was not to indemnify himself for giving one, but to obtain security for the performance of the principal contract. In other words,

[1] 11 H. L. Cas. 337, Cas. on Contr. 575.

each party required a bond, not because he had to give one himself, but because he was not satisfied with the pecuniary responsibility of the other party. The only consequence, therefore, of each party's stipulating to give a bond at the same time was to make the two acts independent of each other. There are two or three other cases in which, it seems, the same view ought to have been taken as in Roberts *v.* Brett. Thus, in Glazebrook *v.* Woodrow,[1] the conveyance of the school-house was only part-payment for the 120*l.*, and not, it seems, the principal part. The main subject of the transaction was the school, and the house was only an incident. The plaintiff, therefore, having covenanted to transfer the school, and even the possession of the house, to the defendant more than a year before the money was to be paid, there seems to have been no ground for holding that the payment of the money and the assignment of the house were mutually dependent acts, though the same date was fixed for doing each; and if they were not mutually dependent, they were mutually independent. It may be urged as an objection to this view, that the plaintiff clearly intended to retain the title to the house as his security until he received the money; but it may be answered that, according to the other view, the slightest default on the part of the plaintiff would have prevented his recovering anything for what he had already done under the contract. Similar observations may be made upon Kane *v.* Hood[2] and Beecher *v.* Conradt;[3] for in each of those cases the plaintiff was cor

[1] 8 T. R. 366, Cas. on Contr. 732.
[2] 13 Pick. 281, Cas. on Contr. 760.
[3] 3 Kern. 108, Cas. on Contr. 767.

fessedly entitled to receive more than half of the purchase-money long before the time arrived for him to convey the land; and though the actual decision in each case was in favor of the defendant, yet the effect of it was that the plaintiff might have refused to convey the land until he received the whole of the purchase-money, merely because the date fixed for conveying the land was also the date fixed for paying the last instalment of the purchase-money. In each case, therefore, the court implied mutual dependency in favor of inequality. It is true that the plaintiff in each case had made the conveyance of the land expressly conditional upon the payment of the whole of the purchase-money; but the decision can derive no support from that fact.

137. Though only two acts can be mutually dependent, yet there may be as many mutual dependencies in a contract as there are acts to be performed by each party; and thus every act to be performed under a contract may be affected both by a mutual and a general dependency. An instance of this will be found in a contract for the sale of goods to be delivered in instalments, and paid for as they are delivered; for the delivering of each instalment and the paying for it will be mutually dependent acts, and there will also be a general dependency affecting the whole contract; and the effect will generally be the same when nothing is said as to the time of payment, for the implication will generally be that each instalment is to be paid for when it is delivered; *e. g.* in Hoare *v.* Rennie [1] and in Withers *v.* Reynolds.[2]

[1] 5 H. & N. 19, Cas. on Contr. 549.
[2] 2 B. & Ad. 882, Cas. on Contr. 740.

138. Whenever two mutual acts which are to be performed at the same time do not satisfy all the conditions necessary to make them mutually dependent, they are necessarily mutually independent. So, whenever two mutual acts are incapable of being performed at the same moment, and yet no reason can be given for requiring one to be performed before the other, each must be performed at the proper time without regard to the performance of the other. This will happen chiefly when each act consists in doing (*faciendo*), *e. g.* when each of two parties covenants or promises to do something for the promotion of an object in which both have a common interest. For example, in Ware *v.* Chappel[1] it would be absurd to say that performance on either side was a condition precedent to performance on the other side, for the purposes of the contract required that the performance of the plaintiff's covenant to raise the soldiers and bring them to the port, and of the defendant's covenant to find shipping and victuals for them, should be completed as nearly as possible at the same time. Each, therefore, was bound to proceed without waiting for the other (**108**).

139. Such are the principles by which, it is conceived, the subject of the present title is governed; and if these principles had always been recognized and acted upon, it would not be necessary to add anything to what has already been said. In truth, however, the whole doctrine of the implied dependency of mutual covenants and promises is a modern one. Indeed, not a trace of it is to be found prior to the time of Lord Mansfield.

[1] Style, 186, Cas. on Contr. 623.

140. In early times the question could arise only with reference to mutual covenants, as mutual promises were not binding in law. As to mutual covenants, it was well settled from an early period that they were to be deemed separate contracts and wholly independent of each other, unless one of them was made expressly dependent on the other.[1] This gave great importance to the precise terms in which mutual covenants were expressed, and it not unfrequently happened that a single word turned the scale. Thus, if A covenanted with B to give or do something *for* something else which B covenanted to give or do in return, it was commonly held that the word "for" made A's covenant dependent upon B's.[2] And this is what was meant by the common saying "that the word 'pro' made a condition in things executory,"[3] *i. e.* in contracts. Sometimes, however, it was held that the word "pro" made a condition only when there was no mutual remedy, *i. e.* in unilateral contracts. This view was adopted in Pordage *v.* Cole,[4] and in Holder *v.* Taylor[5] (where the word was "provided," a much stronger word than "pro").[6] Again, if A covenanted with B to give or do something in consideration of something covenanted to be given or done by B in

[1] Anon., Y. B. 15 Hen. VII. fol. 10 b, pl. 7, Cas. on Contr. 442; *per* Holt, C. J. in Thorpe *v.* Thorpe, 12 Mod. 455, Cas. on Contr. 446.

[2] Anon., Y. B. 15 Hen. VII. fol. 10 b, pl. 7, Cas. on Contr. 442; *per* Holt, C. J., in Thorpe *v.* Thorpe, 12 Mod. 455, Cas. on Contr. 446; Shales *v.* Seignoret, 1 Ld. Raym. 440, Cas. on Contr. 899.

[3] Pordage *v.* Cole, 1 Wms. Saund. 319, Cas. on Contr. 625, 626; Peeters *v.* Opie, 2 Wms. Saund. 350, Cas. on Contr. 792, 794.

[4] 1 Wms. Saund. 319, Cas. on Contr. 625.

[5] 1 Rol. Abr. 518, Cas. on Contr. 620.

[6] And see Cole *v.* Shallett, 3 Lev. 41, Cas. on Contr. 631; Thompson *v* Noel, 1 Lev. 16, Cas. on Contr. 838.

return, the words "in consideration of" were held to make A's covenant dependent on B's.[1] But if B's covenant (and not the performance of it) was expressed to be the consideration of A's covenant, the latter was independent of the former.[2] And even if the terms of A's covenant left it in doubt whether it was in consideration of B's covenant or of his performance, it seems that it would be independent.[3] It will be seen, therefore, that the dependence of one mutual covenant upon another had to be proved in every case, without the aid of any presumption, and that it could be proved only by the words of the covenant. As late as 1744, Willes, C. J., while expressing his dislike of this view, admitted that it was established by so many authorities that it was too late to overturn it;[4] and accordingly it remained unquestioned until Lord Mansfield's time.

141. As to mutual promises, it was no sooner decided that such promises were a sufficient consideration for each other, than it was held to follow as a consequence that they were independent of each other.[5] This mistake seems to have arisen from not dis

[1] Brocas' Case, 3 Leon. 219, Cas. on Contr. 442; *per* Holt, C. J., in Thorpe *v.* Thorpe, 12 Mod. 455, Cas. on Contr. 446.

[2] Brocas' Case, 3 Leon. 219, Cas. on Contr. 442; *per* Holt, C. J., in Thorpe *v.* Thorpe, 12 Mod. 455, Cas. on Contr. 446.

[3] Caton *v.* Dixon, 1 Rol. Abr. 415, pl. 8, Cas. on Contr. 622 (compare Cas. on Contr. 453); Blackwell *v.* Nash, 1 Str. 535, Cas. on Contr. 631.

[4] Thomas *v.* Cadwallader, Willes, 496, Cas. on Contr. 458, 461.

[5] Gower *v.* Capper, Cro. Eliz. 543, Cas. on Contr. 395 (1597); Bettisworth *v.* Campion, Yelv. 134, Cas. on Contr. 619 (1608); Nichols *v* Raynbred, Hobart, 88, Cas. on Contr. 395 (1615); Thorpe's Case, March, 75, Cas. on Contr. 622 (1639); Beany *v.* Turner, 1 Lev. 293, Cas. on Contr. 629 (1670).

tinguishing with sufficient care between the making of a promise and the performance of it. Before the establishment of mutual promises, there had not been the same necessity for making the distinction, as the consideration for a unilateral promise is payment for its performance as well as for the promise itself. In case of mutual promises, however, the promise on one side is not payment for performance on the other side, but the promise on each side is payment for the promise on the other side, and the performance on each side is payment for the performance on the other side. To say, therefore, that the performances of mutual promises are independent of each other, because the promises themselves are payment for each other, is worse than a complete *non sequitur;* it is supporting a proposition by a reason which proves the contrary. However, the rule having been established that, in declaring on mutual promises, performance of the plaintiff's promise need never be averred, it necessarily followed that one mutual promise could never be dependent on another, either expressly or by implication, as mutual promises are always and necessarily the consideration of each other. Such a rule, if adhered to, was sure sooner or later to place the court in a dilemma; and this came near happening in Peeters *v.* Opie,[1] where the plaintiff declared upon mutual promises, and yet it was agreed that performance by the plaintiff was intended to be a condition precedent to performance by the defendant. The court finally avoided deciding the question, but the defendant's counsel showed that the fact of the defendant's promise being in consideration of the

[1] 2 Wms. Saund. 350, Cas. on Contr. 792 (1671).

plaintiff's promise had nothing to do with the question whether the defendant's promise was conditional, and the same view was clearly stated by Hale, C. J.[1] In Thorpe *v.* Thorpe[2] (1701) the court was called upon to meet the question directly, for the plaintiff declared upon mutual promises, and yet the defendant's promise was held to be dependent on the plaintiff's. Instead, however, of adopting the view of Lord Hale, and holding the two things to be perfectly consistent with each other, Holt, C. J., admitted the old rule to its fullest extent, but denied its applicability to the case before him, saying that it was entirely a question of intention whether the plaintiff's promise or his performance was the consideration of the defendant's promise. To this, however, there were two conclusive answers: first, the court only knew from the declaration what was the consideration of the defendant's promise, and the declaration expressly stated that it was the plaintiff's promise; secondly, if the plaintiff's performance had been the consideration, the contract would have been unilateral, and the defendant would not have been bound at all until the plaintiff's performance was completed. Upon the whole, Lord Holt's elaborate opinion left the subject of the dependency of mutual promises in a more embarrassed condition than ever. The question seems not to have attracted any further attention prior to Lord Mansfield's time, though the case of Martindale *v.* Fisher[3] shows that the old rule was regarded as still in full force as late as 1745.

[1] Compare Lea *v.* Exelby, Cro. Eliz. 888, Cas. on Contr. 789.

[2] 12 Mod. 455, Cas. on Contr. 446.

[3] 1 Wils. 88, Cas. on Contr. 632.

142. There seems to be no doubt that one reason why the doctrine of implied dependency was so slow in establishing itself was that the doctrine of concurrent conditions had not yet obtained recognition. During the times of which we have been speaking, only one kind of dependency between two mutual acts was supposed to be possible, namely, that which made one a condition precedent to the other. One act, therefore, could be made expressly dependent upon another only at the expense of the latter, even though the two acts were of such a nature that they ought to be performed together. Thus, if a buyer of goods promised to pay for them only upon delivery, the seller was obliged to trust the buyer for the price, and could not insist upon payment being made concurrently with the delivery; and if the seller promised to deliver the goods only upon payment of the price, the same consequence followed, *mutatis mutandis*.[1] Even if performance on each side was made expressly conditional upon performance on the other side, it seems that the consequence would have been that each party might refuse to perform unless the other performed first. It must be confessed that this would have been a novel application of the maxim, *potior est conditio defendentis*, but such was the effect of the ruling which Holt, C. J., is reported to have made in Callonel *v.* Briggs.[2] Lord Macclesfield appears to have been the first to recognize and act upon the principle of requiring two mutual acts to be performed concurrently; for he applied it, as early as 1713, to a covenant to pay the amount due on a judgment, the

[1] Lea *v.* Exelby, Cro. Eliz. 888, Cas. on Contr. 789.

[2] 1 Salk. 112, Cas. on Contr. 722.

creditor assigning the judgment.[1] It is true that the covenant there was unilateral, but that circumstance did not affect the reasons for holding the condition to be concurrent instead of precedent. This was followed by Merrit *v.* Rane[2] (1721), which was an action on an agreement by the defendant to transfer to the plaintiff 6,000*l.* of South-Sea stock upon payment of 9,000*l.*; and Pratt, C. J., there said: "The payment of the money is not a condition precedent, but a concurrent act; and if the defendant had been there [*i. e.* at the South-Sea House], the plaintiff must have laid down his money, though not so as to part with it till transfer; and so it was held in the case of Turner *v.* Goodwin." These two cases, therefore, may fairly be considered as having established the doctrine of express concurrent conditions.

143. The way having thus been prepared for establishing the doctrine of implied dependency upon a satisfactory basis, a good opportunity was afforded by the case of Kingston *v.* Preston[3] (1773). The defendant's covenant upon which the action was brought was absolute in terms, but the deed also contained a covenant on the part of the plaintiff, and justice clearly required that the latter should be performed first (**127**). Lord Mansfield, in delivering the judgment of the court, divided mutual covenants into three classes, viz.: first, those which are mutually independent; secondly, those which are subject to a general dependency; thirdly, those which are mutually dependent. He also said "that the dependence

[1] Turner *v.* Goodwin, Fortescue, 145, cited in Cas. on Contr. 904.
[2] 1 Strange, 458, cited in Cas. on Contr. 806–7.
[3] Cited in Jones *v.* Barkley, Dougl. 684, Cas. on Contr. 901, 905

or independence of covenants was to be collected from the evident sense and meaning of the parties, and that, however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." Accordingly, it was held that performance by the plaintiff was a condition precedent to performance by the defendant, *i. e.* that the defendant's covenant was dependent upon the plaintiff's by implication. Lord Mansfield did not intimate that he was deciding contrary to what had been held for law from time immemorial, but such was the fact. The decision has been uniformly acquiesced in, however, from that day to this, and hence in effect it overruled a long line of decisions, and established the doctrine of general dependency by implication as it exists at the present day. Nor is there any doubt that Lord Mansfield intended to lay down the same doctrine as to mutual dependency, *i. e.* that it may exist by implication, especially as such a dependency is very seldom created expressly. His language, however, was less explicit in regard to mutual dependency, and, as the case did not involve the doctrine, further decisions were required to establish it. The question was directly presented for the first time (so far as appears from reported cases) in Goodisson *v.* Nunn[1] (1792), where there were mutual covenants for the purchase and sale of real estate, each absolute in terms, but each to be performed on the same day; and the plaintiff having neither performed nor offered to perform on his part, it was held that he was not entitled to recover. The defendant, indeed, pleaded

[1] 4 T. R. 761, Cas. on Contr. 723.

upon the theory that performance by the plaintiff was a condition precedent, but the decision was based on the insufficiency of the declaration; and if the latter had alleged that the plaintiff offered to perform and the defendant refused, the decision would have been in the plaintiff's favor. The plaintiff's counsel cited Caton *v.* Dixon,[1] Pordage *v.* Cole,[2] and Blackwell *v.* Nash,[3] to prove that the two covenants were mutually independent; but Lord Kenyon said the determinations in those cases "outraged common sense," and the court unanimously declared them to be overruled. In Morton *v.* Lamb[4] (1797) the same question arose as to mutual promises, the action being on a contract for the purchase and sale of goods. There was also the special circumstance that, while a time and place were specified for delivering the goods, nothing was said as to the time or place of paying for them; but the court was clearly of opinion that, by a plain implication, payment was to be made at the time and place specified for delivery, and hence that payment and delivery were mutually dependent acts. No notice was taken (except incidentally by Lawrence, J.) of the old rule that mutual promises, being the consideration for each other, are necessarily independent; and therefore it may be considered from this time as abrogated. In Rawson *v.* Johnson[5] (1801) mutual promises for the purchase and sale of goods were held to be mutually dependent, though each promise was

[1] 1 Rol. Abr. 415, pl. 8, Cas. on Contr. 622.
[2] 1 Wms. Saund. 319, Cas. on Contr. 625.
[3] 1 Str. 535, Cas. on Contr. 631.
[4] 7 T. R. 125, Cas. on Contr. 727.
[5] 1 East, 203, Cas. on Contr. 805.

absolute in terms, and no time was appointed for the performance of either. With this case, therefore, the doctrine of mutual dependency was completely estab lished as it has ever since remained.

144. In consequence of the foregoing changes, all decisions upon the subject of the present title, made prior to the time of Lord Mansfield, require to be revised. In Anon.[1] performance by the plaintiff was a condition precedent in both the cases put, without regard to the distinction stated (**125**, **126**, **133**.) In Brocas' Case[2] the covenants were mutually dependent without reference to the distinction stated. In Thorpe *v.* Thorpe[3] the promises were mutually dependent, instead of the plaintiff's promise being a condition precedent. In Spanish Ambassador *v.* Gifford[4] it seems that performance by the plaintiff was a condition precedent, for the reason stated in § **125**. In Vivian *v.* Shipping[5] it seems that the payment of 10*l.* by the plaintiff, and the giving of a bond by the defendant, were mutually dependent acts. In Thorpe's Case[6] the promises as stated were mutually dependent. In Caton *v.* Dixon[7] it seems that the covenants were mutually dependent, while in Ware *v.* Chappel[8] they were mutually independent, for the reason stated in § **138**. In Gibbons *v.* Prewde[9] it seems that the

[1] Y. B. 15 Hen. VII. fol. 10 b, pl. 7, Cas. on Contr. 442.
[2] 3 Leon. 219, Cas. on Contr. 442.
[3] 12 Mod. 455, Cas. on Contr. 446.
[4] 1 Rol. 336, Cas. on Contr. 620.
[5] Cro. Car. 384, Cas. on Contr. 621.
[6] March, 75, Cas. on Contr. 622.
[7] 1 Rol. Abr. 415, pl. 8, Cas. on Contr. 622.
[8] Style, 186, Cas. on Contr. 623.
[9] Hard. 102, Cas. on Contr. 624.

promises were mutually dependent, though the conveyance by the plaintiff would operate before that by the defendant. So in Beany *v.* Turner [1] it seems that the promises were mutually dependent. In Cole *v.* Shallett [2] performance by the plaintiff was a condition precedent to performance by the defendant (**125**). In Blackwell *v.* Nash [3] the covenants were mutually dependent. In Martindale *v.* Fisher [4] it seems that the promises were independent, for the reasons stated in § **107**. In Callonel *v.* Briggs [5] the promises were not dependent by implication (**118**), but were expressly made mutually dependent. In Lea *v.* Exelby [6] the promises were mutually dependent. In Peeters *v.* Opie [7] performance by the plaintiff was a condition precedent, for the reason given in § **125**.

145. The case of Pordage *v.* Cole [8] occupies a peculiar and anomalous position. Were it not for certain comparatively recent authorities, there need be no hesitation in saying that, by the true construction of the contract in that case, the land was to be conveyed when the money was paid, and hence that the covenants were mutually dependent by implication. No other view is reconcilable with the decision in Morton *v.* Lamb,[9] where it was held that by implication the money was to be paid when the goods were delivered.

[1] 1 Lev. 293, Cas. on Contr. 629.
[2] 3 Lev. 41, Cas. on Contr. 631.
[3] 1 Str. 535, Cas. on Contr. 631.
[4] 1 Wils. 88, Cas. on Contr. 632.
[5] 1 Salk. 112, Cas. on Contr. 722.
[6] Cro. Eliz. 888, Cas. on Contr. 789.
[7] 2 Wms. Saund. 350, Cas. on Contr. 792.
[8] 1 Wms. Saund. 319, Cas. on Contr. 625.
[9] 7 T. R. 125, Cas. on Contr. 727.

Indeed, Pordage *v.* Cole is a stronger case in favor of mutual dependency than Morton *v.* Lamb, as an intention to pay for property in advance is more improbable than an intention to sell on credit. Such must also have been the view taken of Pordage *v.* Cole in Goodisson *v.* Nunn,[1] or Lord Kenyon would not have said that the decision "outraged common sense." On principle, also, this view seems to be equally clear, whether regard be had merely to the intention of the parties in the particular case, or to the general presumption in favor of mutual dependency. It is obvious that a time was limited within which the money should be paid, because the buyer was not ready to pay it immediately, and that nothing was said as to the time for conveying the land, because the seller was ready to convey whenever the money was paid. It is evident also that the plaintiff intended to retain the title to the property until he got his money; yet by the decision the defendant had an absolute right to a conveyance the moment the contract was made. Notwithstanding all this, however, it was held in Mattock *v.* Kinglake[2] (1839) that Pordage *v.* Cole was decided correctly, and mutual covenants were held independent under similar circumstances. Indeed, the decision in Mattock *v.* Kinglake did greater violence to the intention of the parties, as expressed in the contract, than in Pordage *v.* Cole; for in the former the buyer, being already in possession of the property, covenanted to pay the purchase-money on or before a day named, with interest "to the time of the completion of the purchase."

[1] 4 T. R. 761, Cas. on Contr. 723.

[2] 10 Ad. & El. 50, Cas. on Contr. 662.

This showed conclusively that the parties intended that the sale should be completed when the money was paid, for they meant that interest should be paid until the payment of the principal, and therefore they must have used the phrase "completion of the purchase" to designate the time when the money would be paid. In Wilks *v.* Smith,[1] though the precise point now under consideration did not arise, yet an opinion was expressed by Parke, B., and Rolfe, B., that the seller was not bound to convey until he received his money; and if so, it followed *a fortiori* that the buyer was not bound to pay until he got his deed, though it is by no means clear that the court would have so held. Sibthorp *v.* Brunel[2] contained an element not found in either of the cases hitherto referred to (though it is found in Dicker *v.* Jackson[3]), for the covenant to convey was in terms "on payment" of the purchase-money. It was impossible therefore to hold that the covenants were mutually independent, and yet it was held that the covenant to pay was independent and absolute; hence it must have been held that payment was a condition precedent. Yet it is contrary alike to principle and to precedent to hold that the words "on payment" create a condition precedent in a contract for the sale of property. Even if the contract were unilateral, these words would create only a concurrent condition; and surely they cannot have a greater effect in a bilateral contract. So far, therefore, from their furnishing any argument against holding the covenants to be mutually depend-

[1] 10 M. & W. 355, Cas. on Contr. 666.
[2] 3 Exch. 826, Cas. on Contr. 679.
[3] 6 C. B. 103, Cas. on Contr. 676.

ent in Sibthorp *v.* Brunel, they furnish a strong argument in support of that view.

146. Although Mattock *v.* Kinglake and Sibthorp *v.* Brunel professed to follow Pordage *v.* Cole, they can in truth derive no support from that case, but must stand or fall upon their own merits. The question in each of them was whether the covenants were mutually dependent; but no such question did or could arise in Pordage *v.* Cole. The question in the latter was whether the word "pro" made the conveyance of the land an express condition precedent. A decision of this question in the affirmative would have involved deciding that the two covenants were to be performed at different times, and hence could not be mutually dependent; but the decision of it in the negative left the question of the relative time for performing each covenant untouched. The only reason given for the decision in the report is that there were mutual remedies, *i. e.* that the contract was bilateral, and according to the authorities cited by the defendant's counsel (namely, Sir Richard Pool's Case, as stated by Lord Coke, and "affirmed for good law" by the court, in Ughtred's Case,[1] Gray's Case,[2] and Holder *v.* Taylor,[3] where the much stronger word "provided" was held not to make a condition because there were mutual remedies), that reason alone was decisive. It is true that Lord Holt (whose reasoning in Thorpe *v.* Thorpe[4] made it necessary for him to maintain that "pro" made a condition equally whether there were mutual

[1] 7 Rep. 10.
[2] 5 Rep. 78, 79, Cro. Eliz. 405.
[3] 1 Rol. Abr. 518, Cas. on Contr. 620
[4] 12 Mod. 455, Cas. on Contr. 446.

remedies or not) insisted [1] that the true ground of the decision was that "a day certain was appointed for the payment" of the money, no time being appointed for the conveyance of the land. This may have been an additional reason for holding that the word "pro" did not make the conveyance of the land a condition precedent, as showing that the money was to be paid by the day named, whether the land was conveyed or not, and that the defendant "relied on the plaintiff's mutual promise for his security;" [2] but it had no tendency to show that the land was not to be conveyed till *after* the money was paid, and even if it did show that, the effect would be (not that the covenants would be independent, but) that the payment of the money would be a condition precedent, and this has never been claimed. Whether, therefore, regard be had to the point decided, or to the reasons which have been given for the decision, the latter does not touch the question whether such covenants are mutually dependent at the present day. If an excuse be deemed necessary for insisting so strongly upon this proposition, it will be found in the fact that Mr. Serjeant Williams has (inadvertently, it seems) expressed a contrary view,[3] and has thus given to the case an importance which it would never otherwise have had. Indeed, it was rather the great authority of the learned Serjeant than the original decision in Pordage *v.* Cole that misled the court in Mattock *v.* Kinglake.

[1] 12 Mod. 455, Cas. on Contr. 446, 452.

[2] *Per* Hale, C. J., Peeters *v.* Opie, 2 Wms. Saund. 350, Cas. on Contr. 792, 794.

[3] Cas. on Contr. 627, note, last clause of rule 1.

147. Fortunately more correct views prevailed in the late case of Marsden *v.* Moore.[1] It is true that the court attempted to distinguish it from Pordage *v.* Cole, and none of the judges (except Bramwell, B.) professed to impeach the authority of the latter; but the distinction relied upon was an unimportant one (**122**), and the real ground of the decision was that, by the true construction of the contract, the two promises were to be performed at the same time, and therefore were mutually dependent. It fairly opens the way, therefore, for overruling Pordage *v.* Cole and the cases which have followed it.[2]

See tits. CONDITIONS; CONDITIONS PRECEDENT; CONCURRENT CONDITIONS; PERFORMANCE OF CONDITIONS.

[1] 4 H. & N. 500, Cas. on Contr. 750.

[2] Compare also Dunham *v.* Pettee, 4 Seld. 508, Cas. on Contr. 762.

MUTUAL CONSENT.

148. Mutual consent is of the essence of every contract (as it is of every transaction requiring the concurrence of two parties), and therefore it must always exist, in legal contemplation, at the moment when the contract is made. It never, however, is the subject of direct allegation or proof, partly because it is generally incapable of direct proof, and partly because every contract is made by acts performed. Proof of the necessary acts, therefore, is always indispensable, and proof of them carries with it presumptive proof of mutual consent. Thus, in formal contracts (**100, 103**), mutual consent is proved by proving delivery, while in consensual contracts (*ibid.*) the same object is accomplished by proving an offer and an acceptance of it. If proof of these acts fails in any point, it will be useless to prove that the parties fully intended to perform them, or even that they supposed they had performed them, for mutual consent alone is of no avail in making a contract. On the other hand, the performance of the acts will avail nothing, if mutual consent be shown to be lacking. Therefore, if two separate instruments be drawn up, signed, and sealed, each of them purporting to be a contract between A and B, and the parties, intending to deliver one of the instruments, deliver the other

instead by mistake, there is no contract made; not as to the instrument delivered, for want of consent; not as to the other instrument, for want of delivery. So, in Routledge *v.* Grant,[1] the plaintiff's acceptance of the defendant's offer failed through his inadvertently changing a date, and therefore there was no contract, though the plaintiff did an act which he declared and supposed to be an unqualified acceptance of the offer. Again, in Raffles *v.* Wichelhaus [2] there was a complete offer, and apparently a complete acceptance, yet there was a want of mutual consent through a mistake as to the subject of the proposed sale, and hence there was no contract.

149. Although the law requires that the consent of each party shall continue from the time when he performs the act necessary on his part for making the contract to the moment when the contract is made, yet it is never necessary to prove that it did so continue; for the law presumes that it continues so long as the act to which it was incident remains in force. An offer, therefore, which proves the consent of the offerer when it is made proves the continuance of such consent so long as the offer continues; and so it is with an acceptance. Not only is no proof required of the continuance of the consent, but no proof to the contrary will be admitted, for the presumption is conclusive. At the moment of making the contract, therefore, mutual consent in fact is not necessary, but only in legal intendment.

See tits. OFFER; ACCEPTANCE OF OFFER; REVOCATION OF OFFER.

[1] 4 Bing. 653, Cas. on Contr. 5.
[2] 2 H. & C. 906, Cas. on Contr. 39.

NOTICE.

150. When a covenant or promise is conditional upon the happening of an event which is not within the knowledge of the covenantor or promisor, and of which he has no means of informing himself, the covenant or promise will be subject to the further condition of notice being given of the happening of the event; for until that is done it is not possible, in legal contemplation, for the covenant or promise to be performed, and therefore the giving of notice is a condition implied in fact. This principle was recognized by Anderson, C. J., in Cole's Case [1] (1588), and by the court in Haverleigh *v.* Leighton [2] (1610), and it was the ground of decision in Gable *v.* Morse [3] (1610), in Holmes *v.* Twist,[4] and in Henning's Case.[5] The decision in Vyse *v.* Wakefield [6] may be rested on the same principle, assuming that the court interpreted the covenant sued on correctly. Makin *v.* Watkinson [7] was also decided upon the same principle, the defend-

[1] Cro. Eliz. 97, Cas. on Contr. 961.
[2] Jenk. Cent. 311, Cas. on Contr. 963.
[3] 1 Bulst. 44, Cas. on Contr. 963.
[4] Hobart, 51, Cas. on Contr. 964.
[5] Cro. Jac. 432, Cas. on Contr. 965.
[6] 6 M. & W. 442, Cas. on Contr. 969.
[7] L. R. 6 Exch. 25, Cas. on Contr. 978.

ant having no means of informing himself when the premises in question needed repairing. For the same reason it seems that the plaintiff was entitled to notice in Thomas *v.* Cadwallader.[1] If, however, the happening of the event is within the knowledge of some third person designated in the covenant or promise, the covenantor or promisor must take notice of it at his peril.[2] Such must be deemed the true principle of the decision in Bradley *v.* Toder.[3] In Clerke *v.* Child of Northwich[4] the covenant sued on was not conditional upon the land being measured, nor upon any other event. If the land did not amount to forty acres, the defendant covenanted absolutely; if it did, he did not covenant at all (**28**). If the covenant sued on in Vyse *v.* Wakefield[5] applied only to such insurance as should be effected at the office or offices at which the defendant should appear to be examined, as intimated by Parke, B.,[6] it seems that the decision cannot be supported.

[1] Willes, 496, Cas. on Contr. 458.

[2] Anon., Y. B. 18 Edw. IV. fol. 18 a, pl. 23, Cas. on Contr. 960 (1478), Anon., Y. B. 1 Hen. VII. fol. 5 a, pl. 8, Cas. on Contr. 960 (1485); Cole's Case, Cro. Eliz. 97, Cas. on Contr. 961; Fletcher *v.* Pynsett, Cro. Jac. 102, Cas. on Contr. 961; Haverleigh *v.* Leighton, Jenk. Cent. 311, Cas. on Contr. 963; Beresford *v.* Goodrouse, 1 Rol. Abr. 462, pl. 3, 4, Cas. on Contr. 965; Powle *v.* Haggar, Cro. Jac. 492, Cas. on Contr. 966; Jackson *v.* Thornell, 1 Rol. Abr. 464, pl. 20, Cas. on Contr. 966; Anon., Lil. Prac. Reg. 235, Cas. on Contr. 967; Cutler *v.* Southern, 1 Wms. Saund. 116, Cas. on Contr. 967; King *v.* Atkins, 1 Sid. 442, Cas. on Contr. 968.

[3] Cro. Jac. 228, Cas. on Contr. 962.

[4] Freem. 254, Cas. on Contr. 969.

[5] 6 M. & W. 442, Cas. on Contr. 969.

[6] Cas. on Contr. 977.

OFFER.

151. An offer, as an element of a contract, is a proposal to make a promise. It must be made by the person who is to make the promise, and it must be made to the person to whom the promise is to be made. It may be made either by words or by signs, either orally or in writing, and either personally or by a messenger; but in whatever way it is made, it is not in law an offer until it comes to the knowledge of the person to whom it is made.[1] If made orally, therefore, the words must be heard and understood by the offeree, or they will go for nothing. So if made by signs, the signs must be seen and understood. If made by letter, the written words are inoperative until the letter is received and read; but the moment the letter is received and read, the offer takes effect, the law supposing the offerer at that moment to speak the words of the letter to the offeree.[2] Whether this intendment will be made when the letter fails to reach the offeree as soon as it was expected to reach him

[1] Thomson *v.* James, 18 Dunlop, 1, Cas. on Contr. 125, 135.

[2] Adams *v.* Lindsell, 1 B. & Ald. 681, Cas. on Contr. 4; S. *v.* F., Cas. on Contr. 156, 159–161.

depends upon circumstances. The failure may be attributable to the offeree, or to the offerer, or to the mail service. In the first case, it seems no such intendment can be made; in the second case, it has been held that the intendment will be made,[1] but it would be too much to state this as an absolute rule. In the third case, the question ought to turn on the distinction (which will be stated presently in another connection) between a delay or detention of a mail and a miscarriage of a letter. The intendment in question is irrespective of any subsequent change of mind on the part of the offerer, unless such change of mind has been manifested by an act of revocation.

152. While an offer remains in force, it confers upon the offeree the power to convert it into a promise by accepting it.[2] The offerer, in making his offer, may state how long it shall remain in force; and it will then remain in force during the time so stated, unless sooner revoked.[3] In the absence of any specification by the offerer, an offer will remain in force a reasonable time, unless sooner revoked. As to what will be a reasonable time, no uniform or positive rule can be laid down. When an offer is made personally, it will *prima facie* continue until the interview or negotiation terminates, and no longer.[4] If it is made by messenger, whether orally or in writing, it may require an answer to be returned by the messenger or it may not; if it does, it will continue in force until

[1] Adams *v.* Lindsell, 1 B. & Ald. 681, Cas. on Contr. 4.
[2] Thomson *v.* James, 18 Dunlop, 1, Cas. on Contr. 125, 147.
[3] B. & M. Railroad Co. *v.* Bartlett, 3 Cush. 224, Cas. on Contr. 103.
[4] Mactier *v.* Frith, 6 Wend. 103, Cas. on Contr. 77, 84.

the messenger's return; if it does not, no general rule can be laid down as to how long it will continue in force. Where an offer is made through the mail, it will by implication authorize an answer to be returned in the same way, and hence the course of the mails will then be one of the elements to be considered in deciding how long such an offer will continue in force. In commercial transactions the general rule is that the offerer is entitled to an answer by return mail; but this rule will not apply in all cases, *e. g.* where there are several mails each day. Probably it would be held sufficient in all cases to mail an answer, either in time for the return mail, or on the same day that the offer is received;[1] but it would be too much to say that either of these things will be required in all cases, *e. g.* where an offer is received late in the day, and yet there is a return mail on the same day. In transactions which are not commercial, *e. g.* where an offer is made for the purchase or sale of real estate, much less promptitude in answering is required, and no definite rule can be laid down.[2] If an answer goes by the right mail, it will be in time, whether the mail arrives at the usual time or not; and the offer will remain open until the arrival of the mail, such being the presumed intention of the offerer.[3] But if an answer, having been mailed in time, fails to reach its destination in time by reason of miscarriage, though the miscarriage may not be at all the fault of the sender,

[1] Dunlop *v.* Higgins, 1 H. L. Cas. 381, Cas. on Contr. 21.

[2] See Thomson *v.* James, 18 Dunlop, 1, Cas. on Contr. 125.

[3] Dunlop *v.* Higgins, 1 H. L. Cas. 381, Cas. on Contr. 21, 27, 30–31. Br. & Am. Tel. Co. *v.* Colson, L. R. 6 Exch. 108, Cas. on Contr. 45, 52, *per* Bramwell, B.

it is, it seems, his misfortune; for the miscarriage of a letter differs from the delay or detention of a mail, and there can be no presumption that an offerer intends that the duration of his offer shall be affected by the former circumstance.

153. A subsequent letter from the offerer to the offeree, referring to the offer and treating it as still pending, will have the effect of renewing the offer, though it had already expired by lapse of time. An instance of this will be found in Averill *v.* Hedge.[1] It seems, also, that the duration of an offer may be extended during its pendency without an actual renewal. Thus, if the offeree write a letter, neither accepting nor rejecting the offer, but proposing to hold it under advisement, and to accept it upon the happening of a certain event, it seems that a mere assent to such proposal on the part of the offerer will amount to an extension of the offer; at least, there seems to be no other way of sustaining the decision in Mactier *v.* Frith,[2] for there the offer was held to be continuing when it was accepted, though the acceptance took place more than two months after the offer was received; and yet there had been no renewal of the offer, for Mactier received only one letter from Frith subsequent to the offer, and that contained no reference to the offer.

154. When no rule can be found for deciding a given question as to the duration of an offer, but it must be decided wholly upon its own circumstances, the question seems to be clearly one of fact for the jury, and not one of law for the court. If it be said

[1] 12 Conn. 424, Cas. on Contr. 90.
[2] 6 Wend. 103, Cas. on. Contr. 77.

that reasonable time is a question of law, the answer is that it is so only where the court can lay down a rule applicable to a class of cases including the case in question. Nor is it material for this purpose whether the offer be oral or written, for, if it be written, the question is not to be solved by interpreting or construing the writing; the court has fully performed that office when it declares the writing to mean that the offer shall continue a reasonable time. It seems, therefore, that the question was one of fact for the jury in the following cases: Ramsgate V. H. Co. *v.* Goldsmid;[1] Averill *v.* Hedge;[2] Loring *v.* City of Boston.[3]

155. In what has been said hitherto upon the continuance of an offer, it has been assumed that the offer contemplates a bilateral contract. When the contract is to be unilateral, the length of time that the offer will continue in force depends upon different considerations. The question is no longer one of accepting the offer orally or by letter, but of performing the consideration. The duration of such an offer, therefore, in the absence of any express limitation, will be measured by the length of time which may be reasonably required for the performance of the consideration. This may depend upon the length of time which the actual performance of the consideration will take, or upon the time when the performance ought to begin, or upon whether the performance, once begun, should be continued without interruption. It is obvious, therefore, that the question must gen-

[1] L. R. 1 Exch. 109, Cas. on Contr. 40.
[2] 12 Conn. 424, Cas. on Contr. 90.
[3] 7 Met. 409, Cas. on Contr. 99.

erally be one of fact; but perhaps one or two rules of law may be laid down. Thus, when performance of the consideration has been begun in good faith, it seems that the offer will continue, in the absence of actual revocation, until the performance is either completed or abandoned; and *a fortiori* this will be so when the progress of the performance is constantly within the knowledge of the offerer. If the consideration is of such a nature that the offer constitutes the sole inducement to perform it, and still more if the performance of the consideration inures to the benefit of the offerer as it progresses, of course the reasons for holding the offer to continue as stated above will be much strengthened. It seems also that the duration of an offer which contemplates a unilateral contract should be less strictly limited by implication than one which contemplates a bilateral contract, for the reason that, in the former case, the offerer can for the most part sufficiently protect himself by revoking the offer. Lastly, there is one class of offers, the duration of which should, it seems, be subject to no implied limitation, namely, where a reward is offered for the apprehension and conviction of the perpetrator of a crime. The object of such an offer is supposed to be to punish the criminal, speedily if possible, but at all events to punish him. Mere lapse of time, therefore, cannot be supposed to affect the offer.[1] The question decided in Loring *v.* Boston[2] was different. The reward there was not offered with reference to any particular crime, but with reference to a class of crimes. The crime in question was not committed until nearly

[1] See In the matter of Kelley, 39 Conn. 159, 162.

[2] 7 Met. 409, Cas. on Contr. 99.

four years after the reward was offered and the effect of the decision was that the crime did not come within the offer; not that the offer had expired, but that there never had been any offer as to the crime in question. If the crime had been committed during the time of the publication of the reward, the question presented would have been different, though even then it might have been said that prevention rather than punishment was the object of the reward, and therefore that it differed from a reward offered with reference to a particular crime already committed.

156. In Ramsgate V. H. Co. *v.* Goldsmid[1] it was held that an application for shares had expired before the shares were allotted, more than five months having elapsed between the application and the allotment. No reasons were given for the decision except the length of time, nor does the case disclose any other reasons; but it would seem to have been impossible to decide the case intelligently upon length of time alone. Regularly the allotment would not be made until all the shares had been subscribed for; and though it was provided in this case that the company might commence and carry on business before the whole number of shares in the company were subscribed for or issued, yet it was only to be "when, in the judgment of the board, a sufficient number of shares had been subscribed to justify them in so doing." As the case shows nothing as to the state of the subscriptions, it seems not to contain sufficient data for deciding whether there was or not unreasonable delay in making the allotment. It would seem not unreasonable to

[1] L. R. 1 Exch. 109, Cas. on Contr. 40.

hold that such an application will continue in force until either the allotment is made or the project is abandoned, unless it is actually revoked in the mean time.

See tits. Acceptance of Offer; Revocation of Offer; Mutual Consent.

PERFORMANCE OF CONDITIONS.

157. It is a fundamental principle of conditions that the court has no power to modify them or to dispense with their complete performance or fulfilment; for the exercise of such a power would involve the enforcement against a party of a covenant or promise which he had never made. In the case of an express condition this principle is so obvious that it is not likely to be lost sight of. Thus, in Shadforth *v.* Higgin[1] it was not claimed that the arrival of the ship at Jamaica on the 3d of July was a compliance with the condition that she arrive by the 25th of June; and hence the only question was whether the condition was annexed to the entire promise to load the vessel, or only to the promise to load her in time for the July convoy. So in Tidey *v.* Mollett,[2] where the defendant's promise to take the house on the 24th of June was on the express condition that certain things be done upon it by the 14th of June, and the defendant pleaded that they were not done by that date, the plea was clearly good, though it did not deny that they were all done before the 24th of

[1] 3 Campb. 385, Cas. on Contr. 482.
[2] 33 L. J. C. P. 235, Cas. on Contr. 567.

June. So, when an express condition requires an act to be done by a stranger, the covenantee or promisee must procure the stranger to do the act at his peril; for if he fails, it matters not that it was through no fault of his.[1]

158. In the case of implied conditions the application of the foregoing principle is less obvious, but it is equally certain; for it is immaterial for this purpose whether a covenant or promise expressly states that its performance is conditional upon the covenantee or promisee doing a certain thing, or whether the law implies the same thing. Therefore an act of God will be no excuse for the non-performance of an implied condition, though it will be an excuse for the non-performance of the same act regarded as a covenant or promise. Thus, in Poussard *v.* Spiers[2] the plaintiff was disabled from enforcing the contract by a breach of the implied condition of performing it on his own part; and yet he would have had a good defence to an action on the contract, his failure to perform having been caused by the act of God, *i. e.* by illness. So in Wells *v.* Calnan[3] the plaintiff was unable to enforce the defendant's promise because incapable of performing his own, the two promises being mutual and concurrent conditions; yet the fact of the buildings having been burnt would have been a good

[1] Worsley *v.* Wood, 6 T. R. 710, Cas. on Contr. 472; Thurnell *v.* Balbirnie, 2 M. & W. 786, Cas. on Contr. 489; Milner *v.* Field, 5 Exch. 829, Cas. on Contr. 516; Clarke *v.* Watson, 18 C. B. N. S. 278, Cas. on Contr. 572; Lamb's Case, 5 Rep. 23 b, Cas. on Contr. 787; More *v.* Morecomb, Cro. Eliz. 864, Cas. on Contr. 788; Hesketh *v.* Gray, Sayer, 185, Cas. on Contr. 798.

[2] 1 Q. B. D. 410, Cas. on Contr. 591.

[3] 107 Mass. 514, Cas. on Contr. 615.

defence to an action on the plaintiff's promise. So in Storer *v.* Gordon[1] the plaintiff was exempted from liability for not delivering the outward cargo by the exception in the charter-party, but it did not at all follow from that that he could enforce the defendant's promise to furnish a homeward cargo, he not having performed an implied condition precedent upon which that promise depended.[2] Nor is there primarily any difference between express and implied conditions in respect to the necessity of performing them in strict accordance with their terms. Therefore, in Tidey *v.* Mollett[3] the decision should have been the same, though the contract had contained no express condition. For the same reason the cutting of the timber-trees was fatal to the plaintiff's action in Duke of St. Albans *v.* Shore,[4] though the defendant would have been obliged to pay their full value if they had been left standing, and though there was no evidence that he purchased the estate with any special reference to the timber on it. So when a day is fixed for the performance of two covenants or promises which are mutually dependent, neither party can maintain an action against the other unless he offers to perform on his own part on the day fixed, an offer on the following day being of no avail.[5]

159. Undoubtedly courts of equity act upon a different principle from the foregoing; for they, rightly or wrongly, enforce the performance of a covenant or

[1] 3 M. & S. 308, Cas. on Contr. 639.
[2] See Poussard *v.* Spiers, 1 Q. B. D. 410, Cas. on Contr. 591, 594.
[3] 33 L. J. C. P. 235, Cas. on Contr. 567.
[4] 1 H. Bl. 270, Cas. on Contr. 464.
[5] Dunham *v.* Pettee, 4 Seld. 508, Cas. on Contr. 762.

promise, notwithstanding the breach of an implied condition by the plaintiff, unless the breach is one which goes to the essence of the defendant's covenant or promise; and therefore, it seems, the plaintiff might have had a specific performance in the Duke of St. Albans *v.* Shore,[1] unless the trees had a special and fancy value, as for purposes of shade or ornament. This, however, does not at all impeach the correctness of the principle stated in the preceding paragraph. Indeed, the rule in equity may be said to prove the rule at law; for it is constantly assumed and admitted in equity that there is no remedy at law in such cases, and it is upon that ground that equity asserts its jurisdiction. In other words, it is an exclusive, and not a concurrent jurisdiction that equity asserts. Moreover, the rule in equity differs from the rule at law *because* the procedure differs. Equity can give relief on such conditions as it sees fit to impose, and therefore it can and does make its decree for specific performance, in the cases now under consideration, conditional upon the plaintiff's fully compensating the defendant for the breach on the plaintiff's part. Equity also has complete control over the subject of costs; and therefore it does not follow that a plaintiff recovers costs against a defendant because he obtains a decree; on the contrary, he may be required to pay costs to the defendant, and such costs as will fully indemnify the latter for the expenses of the litigation. In a court of law, on the other hand, a breach of condition by the plaintiff must either be fatal to his action or be totally disregarded; for if the plaintiff recovers at all, his judgment will not be affected by

[1] 1 H. Bl. 270, Cas. on Contr. 464.

any breach that he may have committed, and he will necessarily recover costs. The defendant, therefore, besides being mulcted with costs, will confessedly be compelled to pay the plaintiff more than the latter is entitled in justice to receive, and take his chances of recovering back the excess by a cross-action; and yet the plaintiff was the first wrong-doer.

160. Breaches of implied conditions are divisible, however, into two classes, according as they take place before any part of the condition has been performed, or during the progress of its performance. It has been assumed hitherto that the breach belonged to the former class, which may be termed breaches *in limine*. Breaches of the latter class, which may be termed breaches after part-performance, give rise to different considerations; for if such a breach disables the party committing it from suing, the result may be that he will receive nothing for what he has already done, and that the other party will receive the benefit of the part-performance without paying for it. If the breach goes to the essence of the contract, the party committing it cannot complain of this result; but if it is slight and unimportant, and especially if it happens after the performance is nearly completed, he may justly say that the penalty is out of all proportion to the wrong. In this connection, also, there is an important distinction between express and implied conditions. An express condition is the creature of the parties to the contract. It cannot, therefore, in legal contemplation, work any injustice to either of them, nor can it operate in such a manner as to take either of them by surprise. The court, not being responsible for its existence, has nothing to do with its

consequences, and has neither power nor duty in connection with it beyond enforcing it according to its terms. An implied condition, on the other hand, is the creature of the court, and the court is therefore responsible for its consequences. If it is permitted to work any injustice, the only excuse for the court is that it is unavoidable; and if it is permitted to work more injustice than it prevents, not even that excuse is available, for, assuming it to be true, it shows that the condition has no right to exist. This responsibility rests upon the court, not only because an implied condition is its creature, but because, being its creature, the court has the power of moulding it as the purposes of justice may require. This power is not, indeed, unlimited, for the court must be consistent with itself; and therefore, having implied a condition, it must apply to it the principles which belong to conditions. Nor can the court imply a condition of a special and modified kind, for that would be taking an unwarrantable liberty with the terms of the contract. But for that very reason an implied condition can make no provision for special and unexpected contingencies, and therefore, if such a contingency arises, the court is bound to consider it as unprovided for (a supposition which is inadmissible in case of express conditions), and so to mould the condition that it will cause as little hardship as possible to either party.

161. Influenced by the foregoing considerations, courts of law have adopted the principles of courts of equity (so far as their procedure would admit of their doing so) in respect to breaches of implied conditions after part-performance; and therefore, if the

breach goes to the essence, they permit it to be set up as a defence, but if it does not go to the essence, they permit the plaintiff to recover, and leave the defendant to his cross-action. In the application of this rule, however, several distinctions must be borne in mind. An action may be brought upon a contract (*inter alia*) either to enforce payment for what the plaintiff has done under the contract, or to recover special damages against the defendant for refusing to permit the plaintiff to perform the contract so as to become entitled to payment; and in either case the plaintiff may have broken an implied condition, either because the performance or offer to perform upon which he grounds his action was not in conformity to the contract, or because he has failed in the performance of some part of the contract which is not the subject of the action, but the performance of which is a condition precedent to the plaintiff's right of action; and in the first case the breach may consist either in the plaintiff's not having performed, or offered to perform, all that the contract required him to perform, or in his not having done it in the time or manner that the contract required; and if he has performed, or offered to perform, less than the contract required, he may seek to recover as if he had performed, or offered to perform, all that the contract required, or only in proportion to his performance or offer to perform, and whether he properly seeks to do the one or the other will depend upon whether, by the terms of the contract, he is to be paid a fixed amount or at a certain rate. Each of these cases requires separate notice.

162. First. When the plaintiff's breach consists in

not doing, or offering to do, all that the contract requires, and the amount that he is to receive as payment is absolutely fixed, it seems that the breach will necessarily go to the essence as matter of law; for the defendant can say that he has not performed on his part because the plaintiff has not rendered the equivalent agreed upon, and that is a good defence. If payment is to be made in money, it is clear that there can be no debt until the whole of the *quid pro quo* is received, and if the payment consists in something else than money, the principle is the same. This principle seems to have been decisive against the plaintiff in Poussard *v.* Spiers,[1] for the plaintiff's wife clearly did not earn her salary during the four days that she was unable to sing, and therefore it was not material that the breach was after part-performance. On the other hand, in Fillieul *v.* Armstrong,[2] considering the nature of the engagement, the plaintiff's two days' absence was not a failure to perform an integral part of the service contracted for, and it would not have prevented his recovering his year's salary as a debt. So in Bettini *v.* Gye[3] the breach was after part-performance, as performance of the negative part of the plaintiff's contract began Jan. 1, 1875, but it did not come within the principle stated above, as it consisted in not attending rehearsals before the salary began.

163. Secondly. Even if the amount that the plaintiff is to receive in payment is not fixed, but only the rate of payment, it seems that a failure by the plaintiff

[1] 1 Q. B. D. 410, Cas. on Contr. 591.
[2] 7 Ad. & El. 557, Cas. on Contr. 657.
[3] 1 Q. B. D. 183, Cas. on Contr. 717.

to do or to offer to do all that the contract requires will be a breach going to the essence, if it is a breach of condition at all; for such a contract either means that the plaintiff is to be paid at the rate fixed for what he does, whether it be much or little (in which case there is no breach of condition), or it means that he is to be paid for doing all that the contract requires, if he is paid anything; in which case the contract will not differ in substance from that stated in the preceding paragraph. It seems, moreover, that the latter will be the true interpretation, unless the contract contains something special to indicate the contrary. Fixing a rate of payment is presumptively no more than agreeing upon a rule for ascertaining the amount to be paid; and the reason for it generally is, that, when the contract is made, there is no way, or no convenient way, of measuring accurately what the plaintiff is to perform. Thus, in Tully *v.* Howling[1] the contract was for twelve months' service of the "Conquest" in carrying coals from Sunderland to London at the rate of 7*s.* per ton, the twelve months beginning to run on the 9th of April; and as the vessel was not ready to begin the service until the 17th of June, the breach necessarily went to the essence, though it was also *in limine.* If the true construction of the contract had been that the service was to continue 12 months whether it began on the 9th of April or not, the breach would have been merely in the time of performance, and hence it would have come within the principle to be stated presently. Moreover, as the charterer was not bound to employ the vessel except for the entire period contracted for, so the owner was

[1] 2 Q. B. D. 182, Cas. on Contr. 595.

not bound to let the vessel serve except on the same terms. Therefore, in Bradford *v.* Williams,[1] the vessel having been chartered to carry coals at 2*s.* 6*d.* per ton from May, 1871, to the end of March, 1872, and the charterer having in effect refused to employ her during September, 1871, the breach necessarily went to the essence. The case of Ritchie *v.* Atkinson[2] was decided upon the ground that, by the true construction of the contract, the receiving of a full cargo was not a condition precedent to recovering freight for the cargo actually carried; and though it is difficult to support this construction, it seems that the decision cannot be sustained upon any other ground.

164. Thirdly. When the plaintiff performs or offers to perform all that the contract requires, but not at the time or in the manner required, there appears to be a legal presumption that the breach does not go to the essence,[3] and therefore the plaintiff need make no averment as to the time or manner of his performance, but the burden is on the defendant both to show that there has been a breach and that it goes to the essence. Accordingly it must be assumed that the breach did not go to the essence in the following cases: Constable *v.* Cloberie,[4] Cole *v.* Shallett,[5] Terry *v.* Duntze,[6] Bornmann *v.* Tooke,[7] Stavers *v.* Curling,[8]

[1] L. R. 7 Exch. 259, Cas. on Contr. 588.
[2] 10 East, 295, Cas. on Contr. 848.
[3] Cock *v.* Curtoys, 1 Wms. Saund. (6th ed.) 320 c, n. (b).
[4] Palm. 397, Cas. on Contr. 837.
[5] 3 Lev. 41, Cas. on Contr. 631.
[6] 2 H. Bl. 389, Cas. on Contr. 634.
[7] 1 Camp. 377, Cas. on Contr. 847.
[8] 3 Bing. N. C. 355, Cas. on Contr. 876.

Dicker *v.* Jackson,[1] Seeger *v.* Duthie.[2] In Bornmann *v.* Tooke [3] the words "the captain *must* sail with the first favorable wind," &c., seem to have created an express condition (**33**), and if so, the ruling of Lord Ellenborough cannot be sustained. In Davidson *v.* Gwynne [4] the failure to sail from London with the first convoy did not go to the essence; and the failure to deliver the homeward cargo in like good order and well conditioned as when the same was shipped was not a breach of any condition in the charter-party, either express or implied, but only of a stipulation in the bill of lading, — a separate contract. The right and true delivery of the homeward cargo was indeed both an express and an implied condition of the covenant to pay freight, but that condition had been complied with. In Freeman *v.* Taylor [5] the breach, though committed during the outward voyage, affected the homeward voyage also by postponing the time of its commencement. In Clipsham *v.* Vertue,[6] Tarrabochia *v.* Hickie,[7] and MacAndrew *v.* Chapple,[8] the breaches were *in limine*, and hence, it seems, those cases should have been decided in the defendant's favor, whether the breaches went to the essence or not.[9] In Clipsham *v.* Vertue it was not disputed that the words "then bound to Nantes" amounted to a

[1] 6 C. B. 103, Cas. on Contr. 676.
[2] 29 L. J. C. P. 253, 30 L. J. C. P. 65, Cas. on Contr. 691.
[3] 1 Campb. 377, Cas. on Contr. 847.
[4] 12 East, 381, Cas. on Contr. 865.
[5] 8 Bing. 124, Cas. on Contr. 483.
[6] 5 Q. B. 265, Cas. on Contr. 670.
[7] 1 H. & N. 183, Cas. on Contr. 681.
[8] L. R. 1 C. P. 643, Cas. on Contr. 706.
[9] See Lowber *v.* Bangs, 2 Wall. 728.

stipulation to sail to Nantes direct; which the vessel confessedly did not do. In Tarrabochia *v.* Hickie the plaintiff committed a breach *in limine* in not having his ship tight, stanch, and strong when she sailed from Fiume, and also (*semble*) in not setting sail from there with all convenient speed. In MacAndrew *v.* Chapple the plaintiff committed a breach *in limine* in sailing from Newcastle when the ship "was not complete and ready for the chartered voyage," and also in sailing for London instead of Alexandria. In Hoare *v.* Rennie[1] the breach was *in limine*, and therefore it is unnecessary to inquire whether or not it sufficiently appeared upon the pleadings that it went to the essence. The court has been criticised by high authority[2] for confining itself to the question whether the defendants were entitled to reject the iron actually tendered to them; but that question seems to have been decisive of the whole case. If the tender was not good, it was because the plaintiffs had already broken the contract by not shipping the required amount of iron in the month of June. In other words, if the defendants were not bound to receive the iron tendered (which was in entire conformity to the contract so far as it went), it was because they were not bound to receive the June instalment at all; and then it follows, from what is stated in the preceding paragraph, that they were not bound to receive the subsequent instalments, though they should be in conformity to the contract. To have compelled them to do so would have been to

[1] 5 H. & N. 19, Cas. on Contr. 549.

[2] See Jonassohn *v.* Young, 4 Best & S. 296, Cas. on Contr. 703; and Simpson *v.* Crippin, L. R. 8 Q. B. 14, Cas. on Contr. 710.

substitute for the contract for 667 tons of iron another contract for three quarters of that amount. Indeed, upon the same principle, the defendants might have been compelled to receive the last instalment, though the plaintiffs had refused to deliver either of the preceding instalments. It is a mistake to suppose that there was in any sense a separate contract for each instalment. There was but one contract for the purchase and sale of "about 667 tons" of iron; and the stipulations in regard to delivery related merely to its performance. There is no more reason for saying that each instalment constituted a separate contract than there is for saying, in the case of contracts which in their nature require the performance of several successive acts, that each act constitutes a separate contract. If Hoare *v.* Rennie was rightly decided, it must follow that the decision in Simpson *v.* Crippin [1] was erroneous; for the fact that the plaintiffs in the latter were the buyers instead of the sellers was not material, and though there was in the latter a part-performance, it will be seen presently that it was not of a nature to raise any equity in the plaintiffs' favor. Indeed, the learned judges who decided Simpson *v.* Crippin confessed their inability to distinguish it from Hoare *v.* Rennie.

165. The rule that a breach merely as to the time or manner of performance does not go to the essence, being founded upon the supposed intention of the parties to the contract, will give way to any clear expression of intention to the contrary. If, therefore, a building contract require the work to be completed

[1] L. R. 8 Q. B. 14, Cas. on Contr. 710.

by such a day, and declare that time shall be of the essence of the contract, the effect will be the same as if the obligation to pay for the work were expressly conditional upon its being completed by the day named.[1]

166. Fourthly. When the breach of condition relates to a part of the contract which is not the subject of the action, it may consist either in a failure to perform, or in the time and manner of performance. If the latter, there will be a presumption of law that it does not go to the essence; if the former, there will, it seems, be no such presumption; and therefore the plaintiff, as he cannot aver performance, must show that his failure to perform does not go to the essence. Accordingly, in Freeman *v.* Taylor[2] there was a presumption of law that the deviation committed by the plaintiff during the outward voyage did not go to the essence, but that presumption was overcome by the verdict of the jury. On the other hand, in Storer *v.* Gordon[3] the plaintiff ought to have shown in his declaration that his failure to deliver the outward cargo did not go to the essence, and not having done so, it seems that the decision should have been against him. The defendant may have relied upon the outward cargo to furnish the means to procure the homeward cargo, and if so, there could be no doubt that the breach went to the essence. The decision in Fothergill *v.* Walton[4] was clearly erroneous, for not only was the breach *in limine*, but the charter-party

[1] Munro *v.* Butt, 8 El. & Bl. 738.
[2] 8 Bing. 124, Cas. on Contr. 483.
[3] 3 M. & S. 308, Cas. on Contr. 639.
[4] 8 Taunt. 576, Cas. on Contr. 645.

left no room to doubt that the breach went to the essence.

167. It has been assumed hitherto that part-performance of a contract by one party inures to the benefit of the other party, and that this benefit will be obtained for nothing if a subsequent breach by the former enables the latter to put an end to the contract. Neither of these propositions, however, is necessarily true. First, performance by one party may not inure to the benefit of the other until it is completed and accepted by the latter, *e. g.* in a contract for the purchase and sale of a thing to be made to order, where the title remains in the seller until the thing is completed and accepted by the buyer. Secondly, there may be a part-performance which is of no benefit to either party. Thus, if a vessel be chartered to go in ballast from A to B, and there receive a cargo, the part-performance which consists in going to B will be of no benefit to the charterer if he does not load the vessel, and it may be a positive injury to the owner, as the vessel may be worth less at B than at A. Thirdly, a part-performance may have been fully paid for, or (what is the same thing in effect) payment for it may be due by the terms of the contract, whether there is any further performance or not. In the first of these cases there seems to be no ground for saying generally that part-performance will raise any equity in favor of the party performing; and therefore the thing contracted for may be rejected if, when completed, it does not conform to the contract. In the second case, Freeman *v.* Taylor [1] is an authority for saying that part-performance may raise

[1] 8 Bing. 124, Cas. on Contr. 483.

an equity. Indeed, Freeman *v.* Taylor is a stronger case than the one put, *supra*, for, though the outward voyage there inured to the benefit of the charterer, yet it had been fully paid for. In the third case, a part-performance seems clearly to raise no equity. Moreover, when the only performance by one party that inures to the benefit of the other consists in the payment of money, it seems that a part-performance by the former will not raise any equity in his favor, for it will either be a payment for what he has already received, or it will be a payment in advance, and in the latter case, if the expected consideration is not received, the money may be recovered back. Therefore the part-performance in Bradford *v.* Williams [1] and in Simpson *v.* Crippin [2] did not aid the plaintiffs. The foregoing rules are to be taken, however, only as illustrations of the more general rule that a part-performance, in order to raise an equity in the plaintiff's favor, must substantially change his position to his own detriment and to the defendant's benefit, or, if not to the defendant's benefit, at least to his own detriment. It seems, therefore, that the slightest breach of condition will authorize the throwing up of a contract whenever it can be done without putting the plaintiff in any worse position substantially than he would be in if the contract had not been made; *e. g.* if there has been only a slight and unsubstantial (still more if only an illusory) part-performance.

168. The doctrine that a breach after part-performance is not a defence unless it goes to the essence does not give a party a right to commit a breach because it

[1] L. R. 7 Exch. 259, Cas. on Contr. 588.
[2] L. R. 8 Q. B. 14, Cas. on Contr. 710.

does not go to the essence; it merely excuses the breach to the extent just stated after it has been committed. Therefore an offer or tender of performance which in itself is a breach of the contract (though not a breach going to the essence) will never be of any avail, whether there has been a part-performance or not. Hence, in Bradford *v.* Williams,[1] the plaintiff's refusal to load the vessel in September in the manner required by the charter-party had the same effect that a refusal to load her at all would have had, and that too whether the plaintiff had already partly performed the contract or not.

169. As to what will constitute performance of a condition, a distinction must be observed between the performance of physical acts and the legal effect of such acts when performed. This distinction is specially applicable to transfers of property and rights. Generally such transfers can be made only by the performance of certain prescribed physical acts, and yet other facts must concur to render the physical acts operative. Thus, the thing which an act purports to transfer must be in existence, and the person performing the act must have the power to make the transfer; otherwise the act will necessarily be inoperative. A condition, therefore, which requires a certain transfer to be made may mean either of three things; namely, that the act of transfer shall be performed if the necessary facts exist to make it effective, or that it shall be performed at all events, the effect of it being at the risk of the transferee, or that it shall be effectively performed, *i. e.* that the ownership of a certain thing or a certain right or interest shall be transferred. In

[1] L. R. 7 Exch. 259, Cas. on Contr. 588.

Doughty *v.* Neal[1] the defendant attributed to the condition the first of these meanings, but the court properly decided that the second was its true meaning. In an ordinary contract for the purchase and sale of property, however, the term *transfer* (or any term of equivalent import) means an effective transfer, and, therefore, the performance of such a contract on the part of the seller requires the concurrence of three things; namely, the existence of the thing to be transferred, the power in the seller to transfer it, and the act of transfer. If, therefore, either the first or the second of these things be wanting, the buyer may refuse to accept the third. Thus, it is familiar law that the buyer may refuse to complete the purchase if the seller has not a good title; and the Duke of St. Albans *v.* Shore[2] and Wells *v.* Calnan[3] are instances in which the buyer successfully refused to accept the act of transfer because of the non-existence of the thing to be transferred. Whenever, therefore, an action is brought against a buyer for refusing to accept a conveyance and complete the purchase, it is not sufficient for the plaintiff to aver an offer to execute and deliver a deed in proper form, but he must make his averment sufficiently comprehensive to show that the deed, if delivered, would have been a complete performance of the contract on his part. In this respect it seems that the declaration was defective in each of the cases just cited. Thus, in Duke of St. Albans *v.* Shore, all the averments in the declaration might have been proved, notwithstanding the

[1] 1 Wms. Saund. 215, Cas. on Contr. 792.
[2] 1 H. Bl. 270, Cas. on Contr. 464.
[3] 107 Mass. 514, Cas. on Contr. 615.

cutting of the timber trees; and yet the cutting of the timber trees constituted a negative defence. So in Wells *v.* Calnan the declaration only averred the execution and tender of a good and proper deed for conveying and assuring to the defendant in fee simple "the premises described in said agreement," *i. e.* a certain farm described by metes and bounds. It does not appear that the description in the agreement made any mention of the buildings on the farm, and it seems to require some straining to say that the issue upon which the parties went to trial embraced anything more than the act of transfer.

170. In contracts for the purchase and sale of real estate there are important differences between the law of England and the law of this country, as to what constitutes performance by the parties respectively. Thus, in England the presumption is that the deed of conveyance is to be prepared by the buyer and tendered to the seller for execution;[1] while in this country the presumption is that it is to be prepared by the party who is to execute it. Hence, in an action by the seller, it is only necessary in England to aver a readiness and willingness to execute a deed of conveyance;[2] while in this country it is necessary to aver an execution of it, and an offer to deliver it.

[1] Poole *v.* Hill, 6 M. & W. 835, Cas. on Contr. 825; see Duke of St. Albans *v.* Shore, 1 H. Bl. 270, Cas. on Contr. 464; Standley *v.* Hemmington, 6 Taunt. 561, Cas. on Contr. 816.

[2] Poole *v.* Hill, *supra.* In Duke of St. Albans *v.* Shore, 1 H. Bl. 270, Cas. on Contr. 464, it is to be observed that the defendant was to make a conveyance to the plaintiff, as well as the plaintiff to the defendant; and yet the plaintiff averred no performance as to the former. It seems, therefore, that the declaration was bad for that reason.

In an action by the buyer, on the other hand, it is necessary in England to aver a tender of a deed of conveyance for execution; while in this country it is only necessary to aver a readiness and willingness, and an offer, to pay the purchase-money upon the delivery of a deed of conveyance. Again, the seller is required in England to "make out a good title" before the time appointed for the completion of the purchase, and this includes proving to the buyer, by the production of satisfactory evidence, that a deed of conveyance executed and delivered by the seller, in conformity to the contract, will convey all that it purports to convey and be a complete performance of the contract; and hence, in an action by the seller, it is necessary to aver and prove the making out of a good title in the sense just stated. What will be a sufficient averment for that purpose has been made a question. Lord Loughborough expressed the opinion in Duke of St. Albans *v.* Shore [1] that it was not sufficient to aver generally that the plaintiff made out or offered to make out a good title, but he must state how; and this opinion was followed up by an actual decision in Phillips *v.* Fielding.[2] But this latter case was virtually overruled (and properly so) by Martin *v.* Smith.[3] A distinction must be taken between cases where the plaintiff's title is the foundation of his action, and cases where the action is upon a contract, and the plaintiff is called upon to show title merely by way of showing performance of a condition. It is true that, in averring performance of a condition, facts

[1] 1 H. Bl. 270, Cas. on Contr. 464.
[2] 2 H. Bl. 123, Cas. on Contr. 799.
[3] 6 East, 555, Cas. on Contr. 812.

must be stated, and not conclusions, *e. g.* the plaintiff must state what he has done, and not that he has done all that was necessary; but, on the other hand, facts should be stated, and not evidence, and to require the seller to set out his abstract of title would cause intolerable prolixity. However, no such question is likely to arise directly in this country, as the seller here is not required to make out a title in the English sense; it is sufficient that he has a good title "of record," and the buyer must inform himself in regard to it. It is only necessary, therefore, for the seller to show his ability to perform the contract, and this, for the reason just stated, he may do in general terms.[1]

171. As the law will permit no man to take advantage of his own wrong (*nullus commodum capere potest de injuria sua propria*), it is always an excuse for not performing a condition of a covenant or promise that the covenantor or promisor prevented its performance.[2] It must appear, however, that the non-performance was not in any degree the fault of the covenantee or promisee, and therefore he must show that he did everything in his power to perform the condition, unless the act of prevention rendered the performance impossible in the nature of things.[3] If the performance of a condition requires the co-operation of both parties, and the covenantor or promisor prevents its performance by refusing to do his part, of course that will be an excuse for its non-

[1] See Ferry *v.* Williams, 8 Taunt. 62, Cas. on Contr. 818.

[2] *Per* Popham, C. J., in Raynay *v.* Alexander, Yelv. 66, Cas. on Contr. 443; Hotham *v.* East India Co., 1 T. R. 638, Cas. on Contr 779, 784; Peeters *v.* Opie, 2 Wms. Saund. 350, Cas. on Contr. 792.

[3] Blandford *v.* Andrews, Cro. Eliz 694, Cas. on Contr. 787.

performance.[1] So if the performance of a condition requires the co-operation of a third person, and the latter prevents its performance by the procurement of the covenantor or promisor, or in collusion with him, it seems that this will amount to a prevention by the latter;[2] and it seems that this principle might have been applied in Milner *v.* Field.[3] But in both of the foregoing cases the covenantee or promisee must show that he has performed the condition so far as it could be performed without the co-operation of the covenantor or promisor or of the third person; and also that he has done everything necessary to procure such co-operation, *e. g.* by giving notice and making request.[4] The law, however, will compel no one to do vain and nugatory acts (*lex neminem cogit ad vana seu inutilia peragenda*), and therefore if a covenantor or promisor, who is required to co-operate in the performance of a condition, has disabled himself from doing so, the covenantee or promisee need do nothing;[5] and the effect will be the same if the covenantor or promisor gives notice to the covenantee or promisee that he will not perform the condition on

[1] Shales *v.* Seignoret, 1 Ld. Raym. 440, Cas. on Contr. 899; Lancashire *v.* Killingworth, 1 Ld. Raym. 686, 12 Mod. 529, Cas. on Contr. 796; Large *v.* Cheshire, 1 Vent. 147, Cas. on Contr. 795.

[2] Batterbury *v.* Vyse, 2 H. & C. 42, Cas. on Contr. 835.

[3] 5 Exch. 829, Cas. on Contr. 516.

[4] Holdipp *v.* Otway, 2 Wms. Saund. 106, Cas. on Contr. 445; Anon., 2 Rol. 238, Cas. on Contr. 791; Shales *v.* Seignoret, 1 Ld. Raym. 440, Cas. on Contr. 899; Lancashire *v.* Killingworth, 1 Ld. Raym. 686, 12 Mod. 529, Cas. on Contr. 796; Large *v.* Cheshire, 1 Vent. 147, Cas. on Contr. 795; Austin *v.* Jervoyse, Hobart, 69, Cas on Contr. 790.

[5] Mayne's Case, 5 Rep. 20 b, Cas. on Contr. 898; Short *v.* Stone, 8 Q. B. 358, Cas. on Contr. 921; Caines *v.* Smith, 15 M. & W. 189, Cas. on Contr. 926.

his part; for the former cannot complain that the latter takes him at his word. It was upon this ground that Ripley *v.* M'Clure[1] was decided; for the defendant there gave notice to the plaintiff that he would not receive the cargo of tea (*i. e.* not under the contract under which it was decided that he was bound to receive it), and that was held to excuse the defendant for not offering to deliver it. It is true that the defendant might have effectually retracted the notice at any time before the time for delivering the cargo arrived, and he claimed that he had done so, but the decision was against him on that point. The case of Cort *v.* Ambergate, &c. Railway Co.[2] illustrates the same principle in a still more striking manner; for the defendants there having given notice that they would not accept the chairs contracted for, it was held that the plaintiffs might maintain an action for damages without having even manufactured the chairs. Jones *v.* Barkley[3] appears to have been decided upon the same principle, but the fact was there apparently lost sight of that it was not the defendant, but a third person (Lane), whose co-operation was necessary to the performance of the condition. The declaration averred that the defendant "absolutely discharged" the plaintiffs from performing the condition. This may mean that the defendant informed the plaintiff that performance of the condition would not be accepted, or that the defendant would not perform his promise,[4] or it may mean both

[1] 4 Exch. 345, Cas. on Contr. 927.
[2] 17 Q. B. 127, Cas. on Contr. 937.
[3] Doug. 684, Cas. on Contr. 901.
[4] Cas. on Contr. 909, *per* Lord Mansfield.

of these things. Whether the last would discharge the plaintiffs from performing the condition will be considered presently; but it seems that the first could have no such effect, as Lane was the only person who could accept performance of the condition, and it was not shown that the defendant had any authority to act or speak for him.

172. According to the third resolution in Mayne's Case,[1] in an action on a covenant or promise, it is a sufficient excuse for the plaintiff's not having performed a condition, that the defendant had disabled himself from performing the covenant or promise; and if this is so, a notice from the defendant that he will not perform the covenant or promise ought to produce the same effect. It seems, however, that this is incorrect as to conditions precedent, notwithstanding the *dictum* of Maule, J., in Sands *v.* Clarke.[2] A disability in the defendant to perform, or a notice by him that he will not perform, cannot be placed higher than an actual refusal by him to perform; and yet he has a perfect right to refuse to perform so long as the condition remains unperformed, the condition being precedent. If it be said that the plaintiff performs the condition with the full expectation of having the covenant or promise performed, and that it is unreasonable to require him to perform the former when it is certain that he cannot have performance of the latter, the answer is, that it is not unreasonable to require him to do so, if he wishes to sue on the covenant or promise, for it is the necessary consequence of the condition's being precedent. The only

[1] 5 Rep. 20 b, Cas. on Contr. 898.
[2] 8 C. B. 751, 762, Cas. on Contr. 899, n. (1).

security that one ever has, when he performs a condition precedent, that the covenant or promise will be performed, is an action for damages, and that the plaintiff has in the case supposed. The only way in which the law can relieve a plaintiff from this hardship is by making the condition concurrent, and that the law does whenever it can. As to what will constitute actual performance, there is of course no difference between concurrent conditions and conditions precedent; but as to what will be an excuse for non-performance, there is a great difference. It is of the essence of a concurrent condition that its performance is conditional upon the performance of the covenant or promise, and hence a refusal to perform the covenant or promise concurrently with the performance of the condition necessarily excuses the non-performance of the latter; and in legal contemplation it is the cause of the non-performance of the latter, *i. e.* it prevents its performance. It is upon this theory that it is always sufficient for a plaintiff to aver that he was able and willing, and offered, to perform a concurrent condition, if the defendant would perform the covenant or promise, and that the latter refused. And even this need not be averred if the defendant has disabled himself from performing the covenant or promise,[1] or if he has given notice that he will not perform it. This latter was the ground of the decision in Withers *v.* Reynolds;[2] for, by the true construction of the contract, each load of straw was to be paid for on delivery, and, the plaintiff

[1] Short *v.* Stone, 8 Q. B. 358, Cas. on Contr. 921; Caines *v.* Smith, 15 M. & W. 189, Cas. on Contr. 926.

[2] 2 B. & Ad. 882, Cas. on Contr. 740.

having given notice that he would not pay on delivery, the defendant was entitled to assume that he would keep his word, and hence he was not bound to perform the nugatory act of offering the straw.

173. Such being the theory upon which a refusal to perform a covenant or promise excuses the non-performance of a concurrent condition upon which the covenant or promise depends, it is clear that the doctrine has no application to conditions precedent; and as the condition in Jones *v.* Barkley[1] was a precedent one, for the reasons given in §§ **23**, **133**, the performance of it was not dispensed with by a notice from the defendant that he would not pay the money according to his promise. It seems, therefore, that the theory upon which the defendant's second and third pleas were framed was correct. It may be said that the third resolution in Mayne's Case[2] must have been intended to apply to conditions precedent, as concurrent conditions were then unknown; but the answer to that is, that the condition in that case was in truth concurrent, and, though the court did not in terms hold it to be such, yet they treated it as such in their third resolution, and the reasons given for the resolution are applicable only to concurrent conditions. Moreover, the only authority cited[3] is a plain case of a concurrent condition, and it is only by treating it as such that the decision can possibly be supported.

174. When the performance of a condition requires the co-operation of both parties, much will depend

[1] Doug. 684, Cas. on Contr. 901.
[2] 5 Rep. 20 b, Cas. on Contr. 898.
[3] 14 H. IV. 18 **b**, pl. 19.

upon the time and place of performance. Thus, if the performance is to be at the residence or place of business of the covenantee or promisee, all that is required of the latter is to be there ready to perform; and if the other party does not come, the performance is excused. If, on the other hand, the performance is to take place at the residence or place of business of the covenantor or promisor, or at some other place than the residence or place of business of either party,[1] the covenantee or promisee must not only be present at the appointed time and place, but he must have there the means of performance, *e. g.* if anything is to be delivered by way of performance, it must be there. Again, if a particular day be appointed for performance, each party will have the whole of that day to perform in, and therefore either party who wishes to preserve his own rights, and at the same time put the other in default, if necessary, should attend at the place appointed at the close of the day;[2] but what will be the close of a day for the purpose of performing a condition will depend upon circumstances, *e. g.* if the performance is to be at a place of business which has a regular and known time of closing, that will be deemed the close of the day within the meaning of the contract.[3] When the excuse for non-performance consists in the fact that the defendant was not present at the appointed time and place, the plaintiff need only aver that he was there, ready and willing to perform, but the defendant

[1] See Shales *v.* Seignoret, 1 Ld. Raym. 440, Cas. on Contr. 899.

[2] Lancashire *v.* Killingworth, 1 Ld. Raym. 686, 12 Mod. 529, Cas. on Contr. 796.

[3] *Per* Holt, C. J., in Lancashire *v.* Killingworth, 1 Ld. Raym 686 12 Mod. 529, Cas. on Contr. 796, 798.

was not there to receive performance;[1] but if the excuse consists in the fact that the defendant refused to perform on his part, the plaintiff must aver, not only that he was present at the appointed time and place, ready to perform, but also, in case of a condition precedent, that he offered or tendered performance, and the defendant refused to accept it;[2] in case of a concurrent condition, that he offered to perform if the defendant would also perform, but the defendant refused. In Rawson *v.* Johnson[3] and Waterhouse *v.* Skinner,[4] in each of which the payment of money by the plaintiff constituted a concurrent condition, it was held (on motion in arrest of judgment) that an averment of readiness and willingness to pay was sufficient, though it did not appear that the defendant was absent; but it is to be observed that the ground taken by the defendant's counsel for arresting the judgment was, that an absolute tender of the money should have been averred;[5] and as that was clearly untenable, it was scarcely the fault of the court that the distinction between averring an absolute tender of the money and averring a conditional offer of it was not taken. In averring an excuse for the nonperformance of a condition, it is always necessary to show, not only what efforts towards performance have been made by the plaintiff, but why those efforts have

[1] Lancashire *v.* Killingworth, 1 Ld. Raym. 686, 12 Mod. 529, Cas. on Contr. 796.

[2] Lea *v.* Exelby, Cro. Eliz. 888, Cas. on Contr. 789; Ball *v.* Peake, 1 Sid. 13, Cas. on Contr. 791; Lancashire *v.* Killingworth, 1 Ld Raym. 686, 12 Mod. 529, Cas. on Contr. 796.

[3] 1 East, 203, Cas. on Contr. 805.

[4] 2 B. & P. 447, Cas. on Contr. 810.

[5] Compare Phillips *v.* Fielding, 2 H. Bl. 123, Cas. on Contr. 799.

not been successful, *i. e.* what the defendant has done to prevent performance.[1] Therefore, in Peeters *v.* Opie,[2] the averment would clearly have been insufficient on demurrer, and it is at least very doubtful if it was sufficient after verdict. So in Poole *v.* Hill[3] it seems that the declaration was defective in not showing why the plaintiff had not executed a conveyance and offered to deliver it, namely, that the defendant had not prepared it and tendered it to him for execution.

175. Though an excuse for not performing a condition is for some purposes equivalent to performance, yet it is not the same thing, and therefore, in pleading, performance must never be averred by a party who relies upon an excuse for not performing, but he must state his excuse.[4] Even under recent statutes, authorizing performance of conditions to be averred in general terms, a plaintiff cannot, under an averment that he has done all things necessary towards performing a condition, prove that the defendant has prevented his performing it.[5] Therefore, in the common cases of concurrent conditions, where the plaintiff has been ready and willing to perform at the time and place appointed, but the defendant has not appeared, or where the plaintiff has offered to perform, but the defendant has refused, the plaintiff must aver his excuse for not performing with common-law strictness.

176. An opinion has prevailed extensively, not only

[1] *Per* Holt, C. J., in Lancashire *v.* Killingworth, 1 Ld. Raym. 686, 12 Mod. 529, Cas. on Contr. 796, 797.

[2] 2 Wms. Saund. 350, Cas. on Contr. 792.

[3] 6 M. & W. 835, Cas. on Contr. 825.

[4] Co. Litt. 304, Cas. on Contr. 900, n. (1).

[5] Bullen and Leake, Precedents of Pleading (3d ed.) 148.

that a plaintiff who has been prevented by the defendant from performing a condition has a right of action, but that he has the same right of action as if he had performed the condition. This opinion must be received, however, with much qualification. If, indeed, the performance of a condition does not constitute the *quid pro quo* for the covenant or promise which is dependent upon it, it is true that prevention of performance by the defendant will give the same right of action to the plaintiff that performance will give; for the defendant has committed precisely the same breach of his covenant or promise in each case. He has covenanted or promised to give or do something upon the happening of a certain event; and though the event has not happened, he is the cause of its not having happened. Therefore he must perform his covenant or promise, or pay damages equivalent to its performance. Holdipp *v.* Otway [1] seems to have been a case of this description, and also Jones *v.* Barkley;[2] and this seems to be an additional reason (**171, 173**) for questioning the correctness of the decision in the latter. But when the performance of the condition is the *quid pro quo* of the covenant or promise, the covenant or promise is, first, to accept the *quid pro quo*, and, secondly, to give or do something in payment for it. If, therefore, the defendant prevents the performance of such a condition, the very act of prevention is a breach of the first part of the covenant or promise, and the cause of action then arises. No other breach is or can be committed, for the performance of the remainder of the covenant or promise never becomes

[1] 2 Wms. Saund. 106, Cas. on Contr. 445.
[2] Doug. 684, Cas. on Contr. 901.

due. Hence the defendant is only liable in damages for preventing the performance of the condition; *i. e.* such damages as will compensate the plaintiff for the loss of the bargain. This is all that the plaintiff is in justice entitled to receive. To permit him to recover as if the condition had been performed would be to permit him to keep the *quid pro quo* and yet recover payment for it. In accordance with these principles, it was held in Laird *v.* Pim [1] that the plaintiff was entitled to recover only special damages. For the same reason, in Smith *v.* Wilson,[2] the plaintiff clearly was not entitled to recover freight. Though it was the defendant's fault that freight had not been earned, yet the fact remained that it had not been; and that was an answer to the action. For the same reason, also, the plaintiff was not entitled to recover in Mattock *v.* Kinglake,[3] unless the covenants were independent; for the action was debt to recover the purchase-money. So in Shales *v.* Seignoret [4] it was properly held that the plaintiff was not entitled to recover the purchase-money of the stock, as the stock had not been transferred, and that the plaintiff should "have assigned his breach in the non-acceptance of the stock by the defendant." For the same reason, namely, that no good breach was assigned, it seems that the declaration was bad in Poole *v.* Hill,[5] though the point was not noticed either by the counsel or by the court. So in Lancashire *v.* Killingworth [6] it seems that the plain-

[1] 7 M. & W. 474, Cas. on Contr. 914.
[2] 8 East, 437, Cas. on Contr. 909.
[3] 10 Ad. & El. 50, Cas. on Contr. 662.
[4] 1 Ld. Raym. 440, Cas. on Contr. 899.
[5] 6 M. & W. 835, Cas. on Contr. 825.
[6] 1 Ld. Raym. 686, 12 Mod. 529, Cas. on Contr. 796

tiff was not entitled to recover the 2,000*l.* purchase-money (even if the declaration had been good in other respects), notwithstanding the opinion of Holt, C. J., to the contrary. So in Peeters *v.* Opie [1] and in Large *v.* Cheshire [2] there seems to have been no good breach assigned. In Thorpe *v.* Thorpe [3] the release pleaded by the defendant could not be a defence, because the plaintiff's right of action did not accrue until the release was executed and delivered. The plaintiff might indeed have acquired a right of action without delivering the release, if the defendant had refused to accept it, or had refused to pay the 7*l.*, but it would not have been a right to recover the 7*l.* In fact, however, the plaintiff delivered the release without insisting upon payment, and the defendant accepted the release, but did not pay; hence the 7*l.* became a debt. In Beecher *v.* Conradt [4] the court seems to have been inconsistent with itself, for, on the one hand, it held that the covenant to pay the last instalment of the purchase-money was conditional upon the plaintiff's conveying the land, and, on the other hand, that the last instalment became due without any conveyance, or even offer to convey. If the court was right in its first position, then no right of action had ever accrued as to the last instalment, and there was nothing to prevent the plaintiff's recovering the first four instalments. If the court was wrong in its first position (**136**), the plaintiff was entitled to recover the whole of the purchase-money.

[1] 2 Wms. Saund. 350, Cas. on Contr. 792
[2] 1 Vent. 147, Cas. on Contr. 795.
[3] 12 Mod. 455, Cas. on Contr. 446.
[4] 3 Kern. 108, Cas. on Contr. 767.

177. In accordance with the maxim, *Allegans contraria non est audiendus*, a covenantor or promisor will not be permitted to take two inconsistent positions in regard to the performance of a condition. If, therefore, having a right to throw up the contract for a breach of condition, he elects to go on with it, he cannot afterwards set up the same breach in defence to an action on the contract. Therefore, in Havelock *v.* Geddes,[1] a breach of the plaintiff's covenant that "the ship, at his expense, should be forthwith made tight and strong," &c., was no defence to the action. For the same reason, in Hall *v.* Cazenove,[2] the breach of the plaintiff's covenant that the ship should sail on or before the 12th of February would not, it seems, have been a defence, even if that covenant had been valid.[3] So in Thompson *v.* Noel[4] the defendant could not set up a breach of the plaintiff's covenant to carry two hundred and eighty men after he had consented to his carrying one hundred and eighty men. So in Jonassohn *v.* Young,[5] the defendant having gone on with the contract after the breaches which he complained of were committed, it was too late for him to set them up as defences. So in Dicker *v.* Jackson[6] it seems that the defendant had precluded himself from setting up a breach of the promise to deliver an abstract, &c., by retaining possession of the property. On the same principle, it seems that the replication in

[1] 10 East, 555, Cas. on Contr. 857, 859, 862.
[2] 4 East, 477, Cas. on Contr. 842.
[3] And see Constable *v.* Cloberie, Palm. 397, Cas. on Contr. 837.
[4] 1 Lev. 16, Cas. on Contr. 838.
[5] 4 Best & S. 296, Cas. on Contr. 703.
[6] 6 C. B. 103, Cas. on Contr. 676.

Ellen *v.* Topp[1] ought to have been held good; and it seems not to have been open to the objection that it set up a parol variation of a contract under seal, or that it departed from the declaration by setting up a different contract. In truth, it set up matter of estoppel merely.[2] That the principle under consideration is not confined to contracts not under seal

[1] 6 Exch. 424, Cas. on Contr. 520.

[2] Such at least seems to be the necessary consequence of holding that the plaintiff's continuing to follow the three trades of auctioneer, appraiser, and corn-factor, was a condition of the defendant's covenant that the apprentice should serve, as stated in § **41**. Further consideration of the case, however, has led the writer to doubt the correctness of that view. There is a difficulty in holding that the plaintiff's continuing to follow the three trades was a condition, for it was not a future and uncertain event (**26**); it was a mere continuance of an existing state of things. It is also the nature of a condition (unless it be a condition subsequent) to suspend the obligation of a covenant or promise until the event happens which constitutes the condition (**29, 30**); but the plaintiff's continuing to carry on the three trades in Ellen *v.* Topp did not suspend the obligation of the defendant's covenant that the apprentice should serve; on the contrary, the obligation of that covenant arose the moment the covenant was made. It is true that the event of the plaintiff's *ceasing* to carry on the three trades might have been made a negative condition subsequent, but there seems to be no ground for saying that it was made such a condition (**42, 43**). It seems, therefore, that the defendant's covenant was not properly conditional; and yet it was not an unqualified covenant that the apprentice should serve; it was only a covenant that he should serve as an apprentice to those three trades. In this view, the defence was that the covenant had not been broken; and if the plaintiff had resumed the three trades during the period of the apprenticeship, the apprentice must have resumed his service; whereas, if the plaintiff's following the three trades was a condition, the moment that he ceased to follow them the apprentice was absolutely discharged.

If the view of the case here presented is the correct one, it seems to follow that the replication was bad, as setting up a parol variation of a contract under seal, and also as being a departure from the declaration.

seems to be evident from the fact that in three of the cases already stated (viz. Havelock *v.* Geddes, Hall *v.* Cazenove, and Thompson *v.* Noel) the contract was under seal. It was with reference to a contract under seal also that Lord Cranworth said in the House of Lords:[1] "The party who may avail himself of the non-performance of a condition precedent, but who allows the other side to go on and perform the subsequent stipulations, has waived his right to insist upon the unperformed condition precedent as an answer to the action." In Bornmann *v.* Tooke[2] the defendant's obligation to pay freight was not affected by his "having accepted the cargo," for the cargo belonged to him.[3]

See tits. CONDITIONS; CONDITIONS PRECEDENT; CONCURRENT CONDITIONS.

[1] Roberts *v.* Brett, 11 H. L. Cas. 337, Cas. on Contr. 575, 586.

[2] 1 Campb. 377, Cas. on Contr. 847.

[3] Compare Ritchie *v.* Atkinson, 10 East, 295, Cas. on Contr. 848 *per* Lord Ellenborough.

REVOCATION OF OFFER.

178. An offer which contains no stipulation as to how long it shall continue, as it confers no right on the offeree, is in its nature revocable at any moment. If the offerer stipulates that his offer shall remain open for a specified time, the first question is whether such stipulation constitutes a binding contract. In those countries where the civil law prevails, it will do so, provided it be accepted and relied upon by the offeree; and that will be presumed in the absence of evidence to the contrary.[1] By our law, however, it must also be supported by a sufficient consideration, or be contained in an instrument under seal, in order to be binding.[2] When it is not binding, of course it is in law only an expression of present intention, and its only effect upon the offer will be to fix the period that it shall continue, provided it be not revoked in the mean time.[3] When such a stipulation is binding, the further question arises, whether it makes the offer irrevocable. It has been a common opinion that it

[1] B. & M. Railroad *v.* Bartlett, 3 Cush. 224, Cas. on Contr. 103, 105.

[2] Cooke *v.* Oxley, 3 T. R. 653, Cas. on Contr. 2; Dickinson *v.* Dodds, 2 Ch. D. 463, Cas. on Contr. 61, 67, 68.

[3] B. & M. Railroad *v.* Bartlett, 3 Cush. 224, Cas. on Contr. 103.

does,[1] but that is clearly a mistake. The offer and the stipulation are two separate things, and the nature of the former is not, and cannot be, changed by the latter. It may be said that the offer, in the case supposed, does confer a right on the offeree, and therefore the reason given above for an offer's being revocable does not apply. It is, however, the stipulation, and not the offer, that confers the right. An offer is merely one of the elements of a contract; and it is indispensable to the making of a contract that the wills of the contracting parties do, in legal contemplation, concur at the moment of making it. An offer, therefore, which the party making it has no power to revoke, is a legal impossibility. Moreover, if the stipulation should make the offer irrevocable, it would be a contract incapable of being broken; which is also a legal impossibility. The only effect, therefore, of such a stipulation is to give the offeree a claim for damages if the stipulation be broken by revoking the offer. It is not a contract of which it is possible for equity to enforce specific performance.[2] These principles seem to have been lost sight of by Bacon, V. C., in Dickinson *v.* Dodds.[3]

179. Care must here be taken, however, to observe a distinction which is apt to be lost sight of. There is no doubt that A may make a binding promise to sell certain property to B on certain terms, while B is left perfectly free to buy the property or not; and such a promise will, in most respects, confer the same

[1] Thomson *v.* James, 18 Dunlop, 1, Cas. on Contr. 125, 137, 138.

[2] See B. & M. Railroad Co. *v.* Bartlett, 3 Cush. 224, Cas. on Contr 103.

[3] 2 Ch. D. 463, Cas. on Contr. 61, 64–66.

rights upon B as if he had made a counter-promise to buy. But such a case differs materially from the one put in the preceding paragraph. It is not an offer contemplating a bilateral contract, but it is a complete unilateral contract. All that remains to be done is for B to perform the condition of the promise by paying the price, and for A to perform the promise. The contract will remain unilateral until it is performed, or otherwise comes to an end. Of course A and B together can at any moment substitute for it a bilateral contract, but they cannot strictly convert it into a bilateral contract; still less can this be done by any act of B alone. Even if B should subsequently make a binding promise to buy the property, the result would not be a bilateral contract, but two unilateral contracts; the two promises would not be the consideration of each other, and each would have to be supported by some other sufficient consideration. Moreover, a promise by A to sell without a counter-promise by B to buy, will never put it in the power of B to become the owner of the property by any act of his own; for the minds of seller and buyer must concur in order to pass title. For example, if A should offer to sell a book to B for one dollar, an acceptance of the offer by B would instantly make him the owner of the book; but if A should make a binding promise to sell the book to B, without any counter-promise by B to buy it, and B should afterwards notify A that he would take the book, A might refuse to let him have it, and B could only recover damages. It is seldom, however, that parties have any intention of making a contract of this latter description, and hence such an intention will seldom be expressed. For the same

reason the law will never presume an intention to make such a contract, and hence such contracts may be said to have practically no existence.[1] If, therefore, A and B agree that B, for a sufficient consideration, shall have the refusal of A's horse for one month at $100, the law supposes them to mean that A offers his horse to B for $100, and stipulates that the offer shall continue for one month; and the case will accordingly be governed by the principles stated in the preceding paragraph.

180. As an offer can only be made by a communication from the offerer to the offeree, so it can only be revoked in the same manner.[2] *Unumquodque dissolvitur eodem ligamine quo ligatur*. An opinion has prevailed, to some extent, that an offer is only evidence of the offerer's state of mind, and hence that it will be destroyed by any satisfactory evidence that the offerer has changed his mind since he made the offer; and this has been supposed to be a necessary consequence of the rule that, in order to make a contract, the minds of the contracting parties must concur at the time of making it.[3] But an offer is much more than evidence of the offerer's state of mind; otherwise, communication to the offeree would not be of its essence. It is, indeed, evidence of the offerer's state of mind, but it is not evidence which can be rebutted, except by showing that the offer has expired, or has been revoked. If an offer could be destroyed by evidence that the offerer has changed

[1] See B. & M. Railroad Co. *v.* Bartlett, 3 Cush. 224, Cas. on Contr 103.

[2] Thomson *v.* James, 18 Dunlop, 1, Cas. on Contr. 125, 135–137.

[3] Thomson *v.* James, 18 Dunlop, 1, Cas. on Contr. 125, 136.

his mind, it could also be rehabilitated after it has expired by evidence that the offerer continued of the same mind. As to the rule that the wills of the contracting parties must concur, it only means that they must concur in legal contemplation, and this they do whenever an existing offer is accepted, no matter how much the offerer has changed his mind since he made the offer. In truth, mental acts or acts of the will are not the materials out of which promises are made; a physical act on the part of the promisor is indispensable; and when the required physical act has been done, only a physical act can undo it. An offer is a physical and a mental act combined, the mental act being in legal intendment embodied in, and represented by, and inseparable from, the physical act. The law, however, makes this intendment only for purposes of justice and convenience, and therefore it will never make it when the actual existence of the mental act would be impossible. Hence the death or insanity of an offerer during the pendency of his offer makes it impossible to complete the contract for want of a concurrence of wills.[1]

181. It follows from what has been said, that an offer to sell property will not be revoked by a sale of the property to some one else. As evidence of a change of mind on the part of the offerer, such an act cannot be put higher than a letter of revocation sent to the offeree by mail; and yet it is well settled that a letter of revocation will not be operative until it is received by the offeree.[2] Nor will the subsequent

[1] Thomson *v.* James, 18 Dunlop, 1, Cas. on Contr. 125, 129, 136; S. *v.* F. Cas., on Contr. 156, 160–161.

[2] Thomson *v.* James, 18 Dunlop, 1, Cas. on Contr. 125.

sale of the property to some one else constitute any legal obstacle to the continuance of the offer. The original offeree and the subsequent purchaser cannot, indeed, both acquire the property, but they can both acquire a right to it as against the seller, together with the alternative right to damages; and this is all that a contract secures to one in any case. As to the purchaser's expectation of acquiring the property, that is always liable to disappointment by a failure of title in the seller. When an offer to sell is of such a nature that the title would pass immediately upon the offer's being accepted, as in case of a specified chattel, of course this result will be prevented by an executed sale of the chattel to some one else before the acceptance of the offer; and the offer can then be converted by acceptance only into an executory contract of sale. But when the offer is to sell real property (as in Dickinson *v.* Dodds [1]) or unspecified personal property (as in Adams *v.* Lindsell [2]), a subsequent sale of the property, whether executed or executory, will have no effect upon the contract which will be formed by an acceptance of the offer. Thus stands the question upon principle. As to authority, in Adams *v.* Lindsell, it was assumed that a sale of the wool by the defendants before the acceptance of their offer by the plaintiffs would have amounted to a revocation; but the point was not at all discussed, nor did the court profess to decide it, their decision being in favor of the plaintiffs. In Dickinson *v.* Dodds [3] the appellate court undoubtedly expressed the opinion, that the subsequent

[1] 2 Ch. D. 463, Cas. on Contr. 61.
[2] 1 B. & Ald. 681, Cas. on Contr. 4.
[3] 2 Ch. D. 463, Cas. on Contr. 61.

contract with Allan, either alone or together with the plaintiff's knowledge of it, revoked the offer to the plaintiff; but the point was not involved, for, the contract with Allan having been made before the contract with the plaintiff was made, Allan was entitled to a priority over the plaintiff, and hence the plaintiff's bill, which was for a specific performance, was rightly dismissed. To an action at law by the plaintiff for damages, however, Dodds would have had no defence.

182. It is admitted at the present day that the reasons given for the decision in Cooke *v.* Oxley[1] are bad, and that, upon the facts stated in the declaration, if proved at the trial, the plaintiff would have been entitled to recover. But elaborate attempts have recently been made[2] to support the decision upon the ground that the declaration was bad. It is said that the declaration does not allege that the offer was a continuing one when it was accepted, and therefore does not show that concurrence of wills which is necessary to the making of a contract; and though proof of the continuance of the offer might have been dispensed with at the trial, because there was a presumption that it continued, yet that this was only a presumption of fact, and so could not be called in to aid the declaration. This, however, assumes that an offer is mere evidence of the offerer's intention, whereas it is an act which constitutes one of the elements of a contract. In this case the offer continued until four o'clock, P.M., of its own force, unless revoked in the mean time. Proof of the offer and of the acceptance of it as alleged would have proved the contract as matter

[1] 3 T. R. 653, Cas. on Contr. 2.

[2] See Leake, Contracts, 2d ed. 44; Benjamin, Sale, 2d ed. 52.

of law; and the burden would have been upon the defendant to prove that the offer had been revoked, if such was the fact; and if the evidence of a revocation had been unsatisfactory, or if the evidence for and against it had been evenly balanced, the jury would have been bound to find a verdict for the plaintiff. In a word, the presumption that the defendant was of the same mind when the offer was accepted as when it was made was a presumption of law and not of fact.

See OFFER; ACCEPTANCE OF OFFER; MUTUAL CONSENT.

UNILATERAL CONTRACTS AND BILATERAL CONTRACTS.

183. A contract is one of the means by which two persons make a mutual exchange of something which one of them has for something which the other has. When such an exchange is made on each side at the same moment, and without either party's incurring any previous obligation to make it, it is made without a contract. A familiar instance of an exchange so made is where a shopkeeper sells goods over his counter for cash; for in that case the goods are exchanged for the money without any previous contract either to buy or to sell.[1] In most cases, however, it is not convenient to make the exchange on each side at the same moment, and in many cases it is impossible to do so, *e. g.* where the thing to be exchanged on one side consists of something to be done which cannot be done in a moment of time; and whenever, for either of these reasons, the exchange is made on one side before it is made on the other side, a contract becomes necessary for the security of the party who performs his part of the exchange first; for it is only by means of a contract that he can compel performance by the other party. For the same

[1] Bussey *v.* Barnett, 9 M. & W. 312.

reason, also, the contract must be made not later than the moment when the exchange is made by the party who performs first; and if the making of the exchange on the side of the party who performs first requires time, it is necessary for his protection that the contract be made before performance by either party. Frequently also the parties do not desire that the exchange be made immediately on either side, but wish to bind themselves mutually to make it at some future time; and in all such cases, of course, a contract is made before performance on either side. Whenever, therefore, the making of an exchange is preceded in whole or in part by a contract to make it, the contract must be made either before the exchange is made on either side, or at the moment that it is made on one side and before it is made on the other side. In the former case each of the parties binds himself to the other by a covenant or promise to make the exchange on his side; and hence the contract is called bilateral, or two-sided. In the latter case, only one of the parties covenants or promises to make the exchange, the other party actually making it instead of covenanting or promising to make it; and hence the contract is called unilateral, or one-sided. A bilateral contract, therefore, is one which is to be performed on each side at some future time, while a unilateral contract is one in which one of the parties performs at the moment when the other covenants or promises to perform. In other words, a bilateral contract is executory on both sides, while a unilateral contract is executed on one side. A bilateral contract also becomes unilateral whenever one side of it is fully performed, the other side remaining to be performed.

184. It must not be supposed, however, that two parties who bind themselves mutually to give or do something at some future time necessarily make a bilateral contract; for they may so bind themselves by two unilateral contracts. If, for example, one of the parties covenants and the other promises, the covenant and the promise will each constitute a unilateral contract; for a contract cannot be in part a simple contract, and in part a specialty, and yet such would be the nature of a bilateral contract consisting of a covenant on one side and a promise on the other side. Again, if two parties mutually covenant to give or do something, the two covenants may constitute one bilateral contract or two unilateral contracts at the option of the parties. If both covenants are contained in the same instrument, a presumption will arise that they were intended to constitute one contract; but if they are contained in separate instruments, each being complete in itself, and neither making any reference to the other, they necessarily constitute two contracts.

185. It is of the essence of a bilateral contract that the covenants or promises which it contains constitute the consideration for each other. Therefore, an instrument which contains several covenants or promises by each of two parties may constitute one contract or several contracts, and if several, they may all be unilateral or all bilateral, or partly one and partly the other.[1] If, for example, all the covenants or promises on one side collectively be the consideration for all those on the other side collectively, all the covenants

[1] §§ **113, 114, 115**; Giles *v.* Giles, 9 Q. B. 164, Cas. on Contr. 744, cited §§ **23, 135.**

or promises on both sides will constitute one bilateral contract. On the other hand, if the covenants or promises on each side respectively be the consideration for the covenants or promises on the other side respectively, there will be as many bilateral contracts as there are covenants or promises on each side. Again, each covenant or promise (if there be any such) which has for its consideration something else than the covenants or promises on the other side, will constitute a separate unilateral contract. For this reason, two simple-contract debts cannot constitute a bilateral contract, as they cannot be the consideration for each other, but each must have a *quid pro quo* consisting of something given or done by the other. So a simple-contract debt on one side and a covenant or promise on the other side cannot constitute a bilateral contract, as the covenant or promise cannot be the consideration for the debt.

186. A contract cannot have more than two sides. When, therefore, more than two parties, or two sets of parties, contract with each other, there must be more than one contract. In such cases, each separate party contracts either with all the others jointly, or with each of the others separately, according to circumstances. When *each* contracts with *all*, there are as many covenants or promises as there are contracting parties, and each covenant or promise makes a separate unilateral contract. If A makes a promise to B and C jointly, in consideration of B and C's making a joint promise to A, there are only two promises in all, each being the consideration of the other, and they make one bilateral contract; but if A makes a promise to B and C in consideration of B's making a promise to

A and C, and of C's making a promise to A and B; there are three promises in all, and no two of them are mutual; and hence no two of them can make a bilateral contract. It seems, moreover, that neither promise will be binding, unless supported by some consideration besides the other promises. A promise by A to B will not support a promise by B to C, because B's promise would be without any consideration moving from C (**83**). Nor will a promise by A to B and C, and a promise by B to A and C, support each other; for, if they would, C would acquire a joint interest in both promises, without any consideration moving from him. It may be said that C's interest in the promises of A and B is supported by his promise to them jointly; but that would be equivalent to saying that, while neither the promise of B nor the promise of C will alone support the promise of A, the promise of B and the promise of C will together support the promise of A; in other words, that nothing added to nothing equals something. It seems, therefore, that an agreement between three or more persons, by which each agrees with all the others, must, if wholly executory, be under seal in order to be binding.[1] An agreement between three or more persons to form a copartnership is a good example of such an agreement.[2]

[1] In George *v.* Harris, 4 N. H. 533, it appeared that twenty-nine persons had severally subscribed certain sums for an object which they all desired to accomplish; and one of them having refused to pay his subscription, the others were permitted to maintain an action against him to recover it, the court holding (erroneously, *semble*) that the promise of each might be considered as made in consideration of the promises of the others.

[2] Eccleston *v.* Clipsham, 1 Wms. Saund. 153; Spencer *v.* Durant,

187. When *each* of three or more persons contracts with *each* of the others, each will make as many covenants or promises as there are contracting parties, less one; and the whole number of covenants or promises will equal the whole number of contracting parties multiplied by the same number less one. Moreover, there will be in effect a separate agreement between each party and each of the others, and each agreement will form a separate bilateral contract. There will, therefore, be half as many contracts as there are covenants or promises. An example of such an agreement will be found in an agreement between three or more joint tenants that, upon the death of either, his share of the joint property shall be conveyed by each of the others to his heirs.[1]

The consequences of a contract's being unilateral or bilateral are many and important, but they have been fully stated under other titles, and therefore it is unnecessary to repeat them in this place.

Comb. 115; Saunders *v.* Johnson, Skin. 401, Comb. 230; Capen *v.* Barrows, 1 Gray, 376 (overruling Dunham *v.* Gillis, 8 Mass. 462).

[1] Wotton *v.* Cooke, Dyer, 337.

INDEX.

THE REFERENCES ARE TO SECTIONS.

ACCEPTANCE OF OFFER. (*See* OFFER; REVOCATION OF OFFER.)
- is essential to constitute promise 1
- without performance of consideration, nugatory . 2, 4
- every promise an offer before 1
- implies knowledge of offer 3
- cannot exist where parties' minds do not meet . . 148
- must be within time offer specifies 152
- cannot be after revocation of offer, or death or insanity of offerer 7, 18, 178

In unilateral contracts,
- no notice of, to offerer, necessary 2
  - unless stipulated for by offerer 6
  - instances of implied stipulation for 6
  - effect of stipulation for 6
    - in allotments of shares 6
    - in contracts of sale 6
- does not imply performance of consideration . . 2
- performance of consideration implies 2, 3
- without full performance, no promise 2, 4
  - criticism of contrary view 4
- when performance of consideration complete, a question of law in sales of personalty 5
- does not relate back to time of offer 7
  - relation discussed in this connection 7–11
- where offer does not specify time,
  - must be within reasonable time 155

ACCEPTANCE OF OFFER — *continued.*
what is reasonable time 155
in offers of reward 155
in allotments of shares 156
In bilateral contracts,
how it differs from acceptance in unilateral contracts 11, 12
implies performance of consideration 12
giving counter-promise is performance 12
how one offer and one acceptance can constitute two promises 13
must be communicated to offerer 14
so held, as to contracts *inter præsentes* 14
conflict of authorities as to contracts *inter absentes* 14
examination of authorities 14
discussion of the question on principle 14, 15
parties cannot stipulate to the contrary . . . 15
must be in terms of offer 17, 18
where particular mode of, is required by offer . . 17
where offer does not specify time,
must be within reasonable time 152
what constitutes reasonable time 152
delays in receipt of, if by mail 152
miscarriage of, when by mail 152
revocation of,
mere change of offeree's mind is not . . . 149
may be at any time before receipt of acceptance 16
by letter revoking or modifying acceptance . . 16
where revocation and acceptance are received together 16
ACCORDS,
definition of 87
always bilateral contracts 87
unilateral promises to extinguish debts are not . . 87
formerly held not binding 87
when invalid,
if to pay less sum in satisfaction of greater . . 88
if no cause of action exist originally 88
when plaintiff must allege good cause of action 58, 88
examination of authorities on 88

ALLOTMENT OF SHARES,
application for, is an offer 6
remains open a reasonable time 152, 156
accepted by allotment 6
notice of, impliedly necessary 6
complete by mailing letter 6
though letter be never received 6
title to shares passes when letter is mailed . . . 6
relates back to time of allotment 6

APPRENTICESHIP, DEEDS OF,
create a *status* in apprentice 109
mutual covenants in, not impliedly dependent . . 109
performance prevented by apprentice's act . . . 109
quære, whether master is excused 109
where master gives up trade he covenanted to teach 41

ARBITRATION,
agreement in contract to refer disputes to . . . 115
no implied dependency created by 115
same rule, if agreement to refer is separate . . 115

ASSUMPSIT (ACTION OF),
origin of 46–49, 65
certain promises not enforceable by 48
lies on bill or note 50
bilateral contracts not under seal introduced by means of 81

AUCTION SALES,
bids at, held offers by buyer 19
true view of bids, on principle 19
bidder or seller may retract before hammer falls . 19
though sale be "without reserve" 19
discussion of Payne *v.* Cave 19

BAILMENTS (GRATUITOUS),
may be consideration for promise to redeliver . . 68
difficulty of courts formerly in so holding . . . 64
presumption is *contra* 68
depends on intention of the parties 68

BANKRUPTS,
statutory discharge of,
does not extinguish debt 72
may be waived by bankrupt 72
new promise is a waiver of 72
declaration must be on old debt 72
new promise must be replied to plea of . . . 72

BILATERAL CONTRACT. (*See* UNILATERAL CONTRACT.)
what it is 106, 183
must consist of mutual covenants or mutual promises 112
a covenant and a promise cannot constitute . . 112, 184
a simple-contract debt cannot be a part of . 112, 128, 185
two simple-contract debts cannot constitute . . . 185
the covenants or promises which constitute, must be the consideration for each other 185
mutual covenants cannot constitute, unless contained in same instrument 117, 184
otherwise of mutual promises 118
executed sales do not commonly create 112
a bond, policy of insurance, or promissory note cannot constitute a part of. . . 33, 49–51, 107, 117, 119
cannot be between more than two parties or two sets of parties 186, 187
when fully performed on one side, becomes unilateral 183
continuance of offer in 152–154
acceptance of offer in. (*See* ACCEPTANCE OF OFFER.)
consideration of. (*See* CONSIDERATION, IX.)
conditions implied by law in. (*See* DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES.)
conditions precedent implied in fact in . . 32, 41, 150
express conditions precedent in 32–40
concurrent conditions implied in fact in 20, 25
express concurrent conditions in 20, 23, 24
conditions subsequent in 42–44
contracts partly bilateral 109–111

BONDS,
action of debt lies on 100
assumpsit will not lie on promise to pay 48
require no consideration 49
conditions in,
are subsequent in form, precedent in effect . . 44
defendant has the burden of proving performance of 44
not dependent by implication upon notes given in exchange for 117
heir, not bound by ancestor's, unless named therein 56
when void for coverture, promise to pay is not binding 71, 76
BOUGHT AND SOLD NOTES,
form bilateral contract 33
language creating condition precedent in 33
bought note, the language of the buyer . . . 33
sold note, the language of the seller 33
implied conditions do not exist in 118
neither can be varied by the other 118
nor by parol evidence 118
BUILDING CONTRACTS,
conditions in 36
where payment is to be in instalments 34
CHARTER-PARTIES,
may contain two contracts, one preliminary and one final 119
difference in construction between policies of insurance and 33
conditions precedent implied in fact in 41
,, ,, ,, in law in . . 119, 122, 128
,, ,, to cause of action on . . . 43
made dependent on certain event having happened 28, 39
breaches going to essence in 163, 166–168
exceptions in, effect of 158
waiver of breach of condition in 177
COMMON COUNTS. (*See* DEBT; EXECUTED CONSIDERATION.)
origin of 90

COMMON COUNTS — *continued.*
when executed consideration will support . . . 90
only when debt is created 90
if no debt, allegation of request useless . . . 90, 91
criticism of old view 90–95
history of old view 92, 93
when they must allege request 96
allegation in, of promise to pay on request, need not be proved 104
mode of pleading to,
what a general traverse of, puts in issue . . . 95
will not lie against bail or guarantor 94
effect of abolition of 98
CONCURRENT CONDITIONS. (*See* CONDITIONS; CONDITIONS PRECEDENT; CONDITIONS SUBSEQUENT; PERFORMANCE OF CONDITIONS; DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES.)
definition of 20
either express, implied in fact, or implied in law . 20, 32
in unilateral contracts,
may exist in unilateral promises 20
consideration cannot be 22
most common in unilateral covenants 22
consideration may be 22
in bilateral contracts,
counter-promise commonly the subject of . . . 20
test for deciding whether express conditions in, are 23
express, where law would not imply 24
implied in law, found only in 20, 105
implied in fact, uncommon in 25
except where both parties must perform, or neither can 25
CONDITIONS. (*See* CONCURRENT CONDITIONS; CONDITIONS PRECEDENT; CONDITIONS SUBSEQUENT; DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES; PERFORMANCE OF CONDITIONS; CONSIDERATION, V.)
definition of 26

CONDITIONS — *Continued.*
must be a future and uncertain event . . . 26, 28, 32, 89
uncertainty must exist in fact 26
not merely in belief of parties 26
uncertainty must be whether event will ever happen 26
not merely as to time of its happening 26
may be an event over which neither party has control 26
or over which promisee has control 26
or something to be done by promisor 26
cannot depend on promisor's will 26
if to happen before promise, offer, not promise, is conditional 27
contracts depending on certain event having happened 28, 89
cannot be an event happening after promise is performed 29
principle of classification of 29, 30
are precedent, concurrent, and subsequent . . . 30
plaintiff must allege precedent, to have happened . 30
need not allege subsequent, not to have happened 30
may be express, implied in law, or implied in fact . 32
when a clause in a contract is a promise, and when a condition 33
divisibility of 40
mode of distinguishing consideration from . . . 66–69

CONDITIONS PRECEDENT. (*See* CONDITIONS; CONDITIONS SUBSEQUENT; DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES; DEEDS OF REALTY; PERFORMANCE OF CONDITIONS.)
any uncertain event may be 26, 28, 32, 89
generally an act to be done by promisee 32
performance of, by promisee, optional in unilateral contracts 32
generally otherwise in bilateral contracts . . . 32
either express, implied in fact, or implied in law . 20, 32
mode of distinguishing stipulation from 33
where payment for work is to be in instalments . 34, 128

CONDITIONS PRECEDENT — *Continued.*
effect of, in agreements to pay existing debts . 36
making payment of debt depend on promisor's will 36
where employer or third party is to approve of work 36
what words will create 37, 38
promise unconditional in terms, construed conditional, when 39
divisibility of 40
must be wholly performed 40
implied in fact 41
when making a demand is 104
when giving notice is 150
in offers. (*See* OFFER.)
performance of. (*See* PERFORMANCE OF CONDITIONS.)
implied in law. (*See* DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES.)

CONDITIONS SUBSEQUENT. (*See* CONDITIONS; CONCURRENT CONDITIONS; CONDITIONS PRECEDENT; PERFORMANCE OF CONDITIONS.)
common in transfers of property 42
may exist in unilateral or bilateral contracts . . . 42–44
may be implied in law 42
may be express 42
exceptions in charter-parties 42
may be a negative or positive event 43
right to sue after breach, made to cease on . . . 43
differences between conditions precedent and . . 30
do not suspend obligation to perform 29–31
but extinguish existing obligation 29–31, 42
burden of proving performance of, is on defendant 30, 44
in bonds 44

CONSIDERATION. (*See* ACCEPTANCE OF OFFER; REVOCATION OF OFFER.)
definition of 45
two kinds of, distinguished 46
history of the two kinds of 46, 47
some promises on, not enforceable by assumpsit . 48

CONSIDERATION — *Continued.*
reason for this anomaly 48
all common-law contracts not under seal require . 47, 49
contracts valid by custom of merchants, without . 49–53
I. Adequacy of 54–60
must be commensurate with debt, to create a debt . 46, 54
need not be adequate, to support assumpsit . . . 54
examples of valid consideration:
surrender of paper containing void contract . . 54
execution of release of void claim 54
showing a deed 54
proving promisee to have right to sue 54
stating an account 54
giving bond of indemnity 54
making an affidavit 54
surrender of a letter by promisee 54
allowing boilers to be weighed 54
entering into a contract 54
discharge from legal, but groundless, imprisonment 54
examples of invalid consideration:
verbal transfer which is inoperative 54
discharging promisee from illegal imprisonment . 54
doing what promisee is already bound to do . . 54
performance of official duty 54
payment of smaller sum to satisfy larger . . . 54, 88
instance where consideration must be adequate . . 55
reason for this anomaly 55
forbearance to sue may be 56
claim must be valid 56
when plaintiff must allege validity of claim . . 56, 58
by assignee of chose in action 56
on note of feme covert 56
by heir, on ancestor's bond 56
where claim is doubtful 56
explanation of Longridge *v.* Dorville 56
where claim is groundless, but *bona fide* . . . 57
Callisher *v.* Bischoffsheim criticised 57
Cook *v.* Wright explained 57

CONSIDERATION — *Continued.*
declaration must specify time to continue . . . 59
if perpetual, contract must be bilateral 59
when time of, is unspecified 59
is construed to be for a reasonable time . . . 59
reasonable time is a question for the jury . . 59
II. Consideration and motive,
no distinction between, in debt 60
otherwise, in assumpsit 60
nominal consideration, valid 60
motive, apart from consideration, no element of contract 61
III. From whom consideration must move 62, 63
on principle, from promisee only 62, 63
person for whose benefit contract is made cannot sue thereon 62
IV. To whom the consideration must move 64, 67
in debt, to the debtor 64
in assumpsit, to any one, or no one 64
consideration need not be benefit to promisor . . 64
must be detriment to promisee 64
V. Mutual consent 66–69
must extend to consideration 66
distinction between consideration and condition . 66
criteria of, for individual cases 66, 68
what acts of promisee are presumptively neither a consideration nor a condition 68
gratuitous bailments in this connection 68
VI. Relation in time of consideration to promise,
consideration and promise must be simultaneous . 69
both in debt and assumpsit 69
promises, before performance of consideration, only offers 1, 70
promises, after performance of consideration, invalid 70
tender of performance of consideration, insufficient 70
VII. Moral consideration,
history of 71
will not support a promise 71

CONSIDERATION — *Continued.*
cases improperly cited as examples of 72–75
promises with expectation that promisee will act thereon, invalid 79
criticism of contrary view 79
VIII. Void in part,
promises bind, though consideration is 80
otherwise, if illegal in part 80
assessing damages, when consideration is 80
IX. Mutual promises,
anciently not binding 81, 140
requisites for validity of, as consideration . . . 82
must be made simultaneously 82
one of, may be conditional 89
one of, cannot depend on existence of present or past fact 28, 89
neither must be void 82
one may be voidable 82
promises, not mutual, no consideration for each other 83, 186
promise to do act may be, when doing act would not be 84
promise to do what one is bound to third party to do 84
promises to forbear perpetually 85
accords 87, 88
X. Executed consideration. (*See* COMMON COUNTS.)
history of 90–94
will not support actual promise 91
criticism of old view 90–95
when common count will lie on 90, 91, 96
DEATH,
of offerer, destroys offer 7, 180
effect of, on contract for personal service by deceased 42
DEBT. (*See* CONSIDERATION, X.; COMMON COUNTS; RELEASES; ACCORDS; STATUTE OF LIMITATIONS; INFANTS.)
nature of 99, 100

DEBT — *Continued.*
analysis of conception of 99, 100
may be created by grant 100
more often created by contract 100
origin of debt by simple contract 46, 100–102
real contracts in Roman law 100
cannot be created by a promise 100
action of, is *in rem* 100
will not lie, till performance of condition precedent 176
consideration to support action of,
how it differs from consideration in assumpsit 46, 81, 100
must inure to debtor's benefit 46, 64
reasons for this rule 65
must be actually executed 46
mutual promises are not 46, 81, 100
no difference between motive and 60
will not support subsequent actual promise . . . 90–99
effect of such promise 74
notes in payment of, valid 50
notes create 50
on issue of policy of insurance, premium becomes 51
effect of conditional promise to pay 36
agreements to compromise. (*See* ACCORDS; RELEASES.)
cannot be part of bilateral contract 112, 128, 183
always a unilateral contract 112, 128, 183
when payable on demand 104
meaning of "demand" 104
of testator, no consideration for executor's promise 75
barred by Statute of Limitations. (*See* LIMITATIONS, STATUTE OF.)

DEEDS OF REALTY. (*See* DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES; PERFORMANCE OF CONDITIONS.)
do not usually contain bilateral contract 112
on delivery of, debt lies for purchase-money . . 100, 112
covenants for title in 107, 112
conditions subsequent, common in 42

DEMAND. (*See* DEBT.)
allegation of, in pleading 104
unnecessary in debt or general assumpsit . . . 104
where declaration is not for a debt 104
if promise is to do something on demand, plaintiff must allege 104

DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES. (*See* CONDITIONS; CONCURRENT CONDITIONS; CONDITIONS PRECEDENT; PERFORMANCE OF CONDITIONS.)
dependency defined 105
peculiar to bilateral contracts 105
may be express or implied 20, 105
implied dependency,
history of doctrine of 139–148
1st stage. Ancient law,
no questions as to, possible, in mutual promises 81, 140
ancient rule as to mutual covenants 140
no dependency, unless express 140
2d stage. Modern law prior to Lord Mansfield,
mutual promises held binding 141
no dependency, unless express 141
reasoning of the courts 141
Lord Holt's judgment in Thorpe *v.* Thorpe . 141
authorities criticised 144
3d stage. Law since Lord Mansfield,
implied dependency recognized 142
reasons for slow recognition of 142
Lord Mansfield's view,
Kingston *v.* Preston 143
implied dependency established 143
division of conditions 143
Lord Kenyon's view in Goodisson *v.* Nunn . . 143
mutual dependency established 143
Pordage *v.* Cole reviewed 145–148
reasons for doctrine of 106
mutual promises, payment for each other . 106–109

DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES — *Continued.*
does not exist,
where performance on either side is conditional 107
where contract is partly unilateral 109
in leases 109, 116
in apprenticeship deeds 109
exceptions 116
where both parties partly perform on making contract 111
exceptions 111
between two separate unilateral contracts . 112, 117
in executed sales 112
between separate contracts in one instrument . 115
between mutual agreements in separate instruments 117
if mutual covenants 117
if promissory notes 117
if mutual promises 118
between preliminary contract and final contract 119
necessary conditions of 120
fundamental principle of 121
is either general or mutual 122, 132
general dependency,
principle of 122
applied to different cases 122–127
apparent exception to 128
supposed exception to 129–131
renders only one side of contract dependent . 122
creates conditions precedent 122
mutual dependency 132
principle of 132
necessary conditions of 133
creates concurrent conditions 132
is favored by the law 132–134
can exist only between two acts 137
may be several in one contract 137
where time for performance on one side only is fixed 133, 137, 145–148

DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES — *Continued.*
where time on neither side is fixed 133
general dependency distinguished from . . 135
may coexist with, when 135
impossible, where performances are to be at different times 135

EXECUTORS AND ADMINISTRATORS,
cannot be sued at law for a legacy 75
promises by, to pay testator's debts,
require consideration 75, 93
indebtedness of, as such, no consideration . . . 75
forbearance to sue, a good consideration, though when there are no assets 56

FORBEARANCE. (*See* CONSIDERATION.)

GIFT,
acceptance of, by donee, necessary, but presumed . 1
same rule, as to covenants made as gifts . . . 1
promise cannot constitute 1, 55
on principle, notes made as, binding 49, 50

GUARANTY (CONTRACTS OF),
generally unilateral 107
if bilateral, no implied dependency in 107
neither action of debt nor common count will lie on 94, 100
not binding, if in consideration of prior advances . 91
guarantor entitled to notice of advances 6

IMPOSSIBILITY OF PERFORMANCE. (*See* PERFORMANCE OF CONDITIONS.)

INFANT,
promises by, voidable 82
good consideration for counter-promise 82
may be ratified at majority 72, 82
new promise is a ratification 72
mode of pleading new promise 72
declaration must be on original contract . . 72
new promise must be replied to plea of infancy 72

INSANITY,
of offerer, destroys offer 7, 180

INSURANCE (CONTRACTS OF),
generally unilateral 51, 107
if bilateral, no implied dependency in 107

INSURANCE (POLICIES OF),
are in the nature of specialties 49, 51
on principle, require no consideration 49, 51
promise to pay premium, not consideration for . . 51
failure of consideration a defence to suit on . . . 52
when issued, premium becomes a debt 51
agreements to issue 51
require consideration 51, 52
performed by issue of policy 51, 119
equity compels specific performance of 51
payment of premium, condition of issue . . . 119
effect of waiver of payment of premium . . 119
warranties in marine 33

LEASES,
conditions subsequent common in 42
are contracts partly bilateral 109
mutual covenants in, not dependent by implication 109
exceptions to this rule 116
conditional covenant in, to pay rent reserved . . 36
does not affect right to distrain 36
examples of express conditions in 37, 38

LEGAL MAXIMS (APPLICATIONS OF),
allegans contraria non est audiendus 177
cessante ratione, cessat ipsa lex 46
communis error facit jus 89
in fictione juris semper æquitas existit 7, 92
lex neminem cogit ad vana seu inutilia peragenda . 171
nullus commodum capere potest de injuria sua propria 171
potior est conditio defendentis 142
qui hæret in litera hæret in cortice 37
quilibet potest renunciare juri pro se introducto . 72

LEGAL MAXIMS (APPLICATIONS OF) — *Continued.*
unumquodque dissolvitur eodem ligamine quo ligatur 180
ut res magis valeat, quam pereat 33, 36
LIMITATION (STATUTES OF),
new promise repelling plea of 73
only good, when declaration is on simple-contract debt 73
origin of doctrine of 73
Lord Mansfield's view of 71
declaration must be on old debt 72, 73
cannot be replied to plea of 73
is given in evidence under traverse of plea of . 73
MARRIAGE (PROMISE OF),
formerly doubted whether woman was bound by . 82
both parties bound by 82
concurrent conditions implied in fact, in 25
where one party has disabled himself from performing 171, 172
MARRIED WOMEN,
not liable on counts for goods sold 78
forbearance to sue on note of, no consideration for a promise 58
MUTUAL CONSENT. (*See* OFFER; ACCEPTANCE OF OFFER; REVOCATION OF OFFER; CONSIDERATION, V.)
essential to every contract 148
consent of offerer presumed to continue as long as offer is open 148, 180
consent of offeree, how long presumed to continue . 149
generally incapable of direct proof 149
mode of proving 148
must extend to consideration 66-69
NEGOTIABLE PAPER,
is governed by law merchant 49
failure of consideration, a defence to suit on . . 52
on principle, requires no consideration 49, 50
general view, *contra* 49
origin of general view 50

NEGOTIABLE PAPER — *Continued.*
reasons for holding it erroneous 50
declaration is on implied promise 50
notes in payment of debts are valid 50
payee can sue acceptor 50
notes create debts 50
when given for debts, are payment 50
exchange of one note for another 117
neither can be varied by the other 117
each note is a separate unilateral contract . . 117, 183
hence no implied dependency between them . 117
same rule, if note be exchanged for specialty 117, 183
or for another promise 117, 183
NOTICE. (*See* GUARANTY; ALLOTMENT OF SHARES.)
of performance of conditions, when necessary . . 150
of performance of consideration in unilateral contracts 6
offer may contain condition of 6
condition of, does not suspend promise 6
offerer cannot revoke after performance and before receipt of 6
promisor's liability depends on, when 6
mailing letter containing, is 6
in allotments of shares 6
in guaranties 6
OFFER. (*See* ACCEPTANCE OF OFFER; REVOCATION OF OFFER.)
mode of making 151
requires communication to offeree 2, 151
acceptance of, when it contains a counter-offer . . 14, 16
delays and miscarriages of, when by mail . . . 151
offerer's consent to, presumed to continue how long 149
where time to remain open is not specified . 152, 154, 155
remains open a reasonable time 152
reasonable time in bilateral contracts . . . 152, 155
where offer is by mail 152
in sales of realty 152
in commercial transactions 152
where offer is by messenger 152

OFFER — *Continued.*
where offer is made in person 152
reasonable time in unilateral contracts 155
in offers of reward 155
in allotments of shares 156
renewal of, after expiration of 153
extension of, without communication to offeree . . 153
promise before acceptance is 1
at auction sales. (*See* AUCTION SALES.)
if rejected, is at an end 18
acceptance after rejection is 18
when conditional 27
PERFORMANCE OF CONDITIONS. (*See* CONSIDERATION; CONDITIONS; CONDITIONS PRECEDENT; CONDITIONS SUBSEQUENT; DEPENDENT AND INDEPENDENT COVENANTS AND PROMISES; DEEDS OF REALTY; SALES OF PERSONALTY.)
where condition is express 157
cannot be dispensed with 157, 160
where condition is implied in law,
breach of, *in limine*,
party committing, cannot sue 159, 160
act of God causing, no excuse for 158
breach after part-performance 159, 160
when going to essence 162–167
effect of, on contract 160
what breaches are presumed to go to essence 162–167
requisites of the part-performance 167
when not going to essence 162–167
effect of, on contract 160
no right to commit such breach 168
effect of waiver of 177
what constitutes 169
no difference in that respect between concurrent conditions and conditions precedent 172
averments of, in pleading 169
in sales of realty 170
excuses for non-performance 171
where promisor prevents performance 171

PERFORMANCE OF CONDITIONS — *Continued.*
how far equivalent to performance 176
where promisor has disabled himself, how far an excuse 171–174
where promisor gives notice that he will not perform 172
does not apply to conditions precedent . . 173
where co-operation of both parties is required . 174
where promise is divisible 40

POLLICITATION,
definition of 1

POST-OFFICE. (*See* OFFER; ACCEPTANCE OF OFFER; REVOCATION OF OFFER.)
not the agent of parties contracting by letter. . . 15
effect of miscarriage of offer or acceptance sent by . 15, 151, 152
" delays " " " " 15, 151, 152
notice consists in deposit of letter in 6
offer through, authorizes acceptance to be sent by . 15

PROMISSORY NOTES. (*See* NEGOTIABLE PAPER.)

RATIFICATION. (*See* RELATION.)
of agent's acts, relates back 8

RELATION. (*See* ACCEPTANCE OF OFFER.)
legitimate office of doctrine of 7, 8
in enrolments of bargains and sales 8
in ratifications of agents' acts 8
in memoranda under 29 Car. II. c. 3 8
in acceptances of offer,
acceptance does not relate back to time of offer . 7
contrary view criticised 7–11
Lord Eldon's *dictum* in Kennedy *v.* Lee . . . 9, 10
in contracts for allotment of shares 6
title to shares passes on notice of allotment . . 6
relates back to time of allotment 6
in promises on executed consideration 92
doctrine of relation does not apply 69, 92
history of erroneous contrary view 92, 93

RELEASES. (*See* ACCORDS.)
of debts, good consideration for promise 87

REVOCATION OF OFFER. (*See* OFFER; ACCEPTANCE OF OFFER.)
may be at any time before acceptance 4, 7, 178
in unilateral contracts 7
in bilateral contracts 178
when offer does not state time to remain open . . 152
remains open a reasonable time 152
when offer states time to remain open 178
may still be revoked at any time 178
but is legally presumed to remain open till time expires 182
offerer has burden of proving revocation . . . 182
contrary view criticised 182
Cooke *v.* Oxley examined 182
where there is agreement not to revoke 178
agreement requires consideration 178
equity will not specifically enforce 178
does not make offer irrevocable 178
criticism of contrary view 178
but if revoked, offeree may sue 178
mere change in offerer's mind is not 149, 180
change must be communicated to offeree 180
criticism of contrary view 180
offers to sell not revoked by sale to another person 181
death or insanity of offerer destroys offer 7, 180

REWARDS (OFFERS OF). (*See* OFFER.)
performance of services specified, *prima facie* an acceptance of 3
offeree must know of, when he performs 3
time to remain open, if unspecified,
reasonable time, if for prevention of crimes . . 155
indefinitely, if for punishment of a crime . . . 155
may be accepted by officer whose duty it is to arrest 54

SALES OF PERSONALTY (EXECUTORY). (*See* ACCEPTANCE OF OFFER; REVOCATION OF OFFER.)
implied dependency in,
delivery and payment mutually dependent 134, 143, 164
where delivery is to be by instalments 128
payment for one instalment, not condition of further deliveries 128
delivery and payment for each instalment, mutually dependent 137
effect of failure to deliver any instalment . . 164
Hoare *v.* Rennie approved 164
where contract is by bought and sold notes . . 118
offers to sell. (*See* OFFER; REVOCATION OF OFFER.)
binding promise to sell, without counter-promise to buy 179

SATISFACTION. (*See* RELEASE; ACCORDS.)

UNILATERAL CONTRACT. (*See* BILATERAL CONTRACT.)
what it is 106, 183
every binding promise, not in consideration of another promise, is 185
every covenant, not given in exchange for another covenant, is 185
e. g. covenants for title 112
so is every simple-contract debt 112
e. g. a debt created by a part-performance of a bilateral contract 128
so are warranties in executed sales of personalty 112, 119
so are bonds, policies of insurance, and promissory notes 33, 49–51, 107, 117, 119
so is each of two mutual covenants, if contained in two separate instruments not referring to each other 117
so are covenants or promises by each of three or more parties or sets of parties to or with the others 186

UNILATERAL CONTRACT — *Continued.*
a bilateral contract becomes, when fully performed on one side 183
continuance of offer in 155, 156
acceptance of offer in. (*See* ACCEPTANCE OF OFFER.)
consideration of. (*See* CONSIDERATION, I.–VIII.; and compare § 81.)
no conditions implied by law in 105, 106
conditions precedent implied in fact in . . 32, 41, 150
express conditions precedent in 32–40
concurrent conditions implied in fact in 20, 25
express concurrent conditions in 20, 22
the consideration of, when and how it may be a condition 22, 27
conditions subsequent in 42–44
contracts partly unilateral 109–111
WAIVER. (*See* PERFORMANCE OF CONDITIONS.)