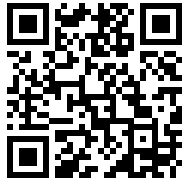
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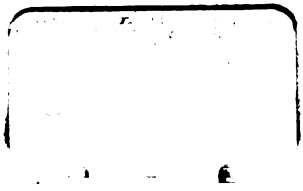
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TO

JAMES BARR AMES,

Bussey Professor of Law in Harvard University,

TO WHOM ALL INTERESTED IN THE DEVELOPMENT OF THE LAW, AND THE AUTHOR OF THIS WORK IN PARTICULAR, ARE INDEBTED FOR HIS SCIENTIFIC INVESTIGATION AND EXPOSITION THEREOF,

THIS BOOK IS DEDICATED.

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NOTE.

THE reason for the publication of this work is the fact that no attempt has hitherto been made to treat exhaustively the topics here considered. The ground covered is indicated sufficiently in the first chapter, dealing with the nature and scope of Quasi-Contracts.

In substituting the term "Quasi-Contract" for the term "Contract implied in Law," the writer has only followed the lead of Sir Frederick Pollock and Sir William Anson. While under such leadership the propriety of the substitution does not admit of question, the necessity therefor will soon become apparent to the reader.

NEW YORK,
September, 1893.

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A

TREATISE ON THE LAW

OF

QUASI-CONTRACTS.

BY

WILLIAM A. KEENER.

KENT PROFESSOR OF LAW AND DEAN OF THE FACULTY OF LAW
IN COLUMBIA COLLEGE.

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THE

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THE

LAW OF QUASI-CONTRACTS.

CHAPTER I.

NATURE AND SCOPE OF THE OBLIGATION.

It is usual to divide Contracts into three classes, —

Classification of Contracts.

1. Simple Contracts.
2. Contracts under Seal.
3. Contracts of Record.

Where this classification is made, Simple Contracts are subdivided into —

1. Express Contracts.
2. Contracts implied in Fact.
3. Contracts implied in Law.

In this classification of Contracts, obligations of a quasi-contractual nature are treated either as Simple Contracts or as Contracts of Record.

This treatment of Quasi-Contracts is, in the opinion of the writer, not only unscientific, and therefore theoretically wrong, but is also destructive of clear thinking, and therefore vicious in practice.

It needs no argument to establish the proposition that it is not scientific to treat as one and the same thing, an obligation that exists in every case because of the assent of the defendant, and an obligation that not only does not depend in any case upon his assent, but in many cases exists not-

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withstanding his dissent. And yet with this wide difference between simple contracts and quasi-contracts, the latter are generally treated to-day as a species of simple contract.

Equally objectionable in principle, though perhaps not so misleading in practice, is the classification of such quasi-contracts as cannot by any possibility be treated as simple contracts, as contracts of record.

A genuine contract rests upon intention.

A true contract, whether it be a simple contract, a specialty, a contract in the nature of a specialty, or a contract of record, exists as an obligation, because the contracting party has *willed*, in circumstances to which the law attaches the sanction of an obligation, that he shall be bound. Had he not so willed, he would not be under a contractual obligation. This statement is as true of a contract implied in fact as of an express contract. Indeed, the division of Simple Contracts into "express contracts" and "contracts implied in fact" does not involve a consideration of the principles of contracts at all.[1]

In the case of a contract implied in fact, as much as in the case of an express contract, the plaintiff must prove that the defendant either made or accepted an offer which resulted in a promise on the defendant's part, and that the promise was not only in fact made, but that a sufficient consideration was given therefor. If the defendant gave in words a promise containing all the terms of the contract which the plaintiff claims that he made, for a consideration expressly requested in words by him, in exchange therefor, then the contract is an express contract. Thus, if A should say to B: "I will promise to sell you my horse X for the sum of $500 in cash if you will promise to purchase on these terms," and B should so promise, an express contract would be created thereby. Suppose, however, that A should write to a livery-keeper,

[1] Marzetti *v.* Williams, 1 B. & Ad. 415; Montgomery *v.* Water Works, 77 Ala. 248; Dusenbury *v.* Speir, 77 N. Y. 144; Hertzog *v.* Hertzog, 29 Pa. St. 465.

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simply requesting him to send a coupé to his house at a certain hour, and the coupé was sent and used by A, there would certainly be no express contract, since A has never in words said that he intended to assume any obligation in favor of B. And yet A's conduct speaks quite as loudly as words, and leaves no doubt of his intention to enter into a contract with B for the use of the coupé. No one would question that A has communicated such an intention to B, and that he can be fairly said to have promised to pay him for the use of his property, and that to allow A to escape liability would defeat the intention of the parties quite as much as to allow him to refuse to be bound by his contract to sell the horse in the case first supposed.

"Express contracts" and "Contracts implied in fact," are terms of evidence.

The difference between the cases is a difference simply in the kind of the evidence used to establish the contract. In the one case the language of contract is in terms used, and because of the expressions used, the contract is called an express contract; whereas in the other case the contract is established by the conduct of the parties, viewed in the light of surrounding circumstances, and is called a contract implied in fact.

The terms, "express contracts" and "contracts implied in fact," are used then to indicate, not a distinction in the principles of contract, but a difference in the character of the evidence by which a simple contract is proved. The source of the obligation in each case is the intention of the parties.

Contracts implied in law exist independently of intention

The term "contract implied in law" is used, however, to denote, not the nature of the evidence by which the claim of the plaintiff is to be established, but the source of the obligation itself. It is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent.

The identity in principle of express contracts and contracts

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Distinction in principle between genuine contracts and quasi-contracts.

implied in fact, and the distinction between a genuine contract, whether express or implied in fact, and a quasi-contract, commonly called a contract implied in law, is thus stated by Maine in his "Ancient Law"[1]:

"The part of Roman law which has had most extensive influence on foreign subjects of inquiry has been the law of Obligation, or, what comes nearly to the same thing, of Contract and Delict. The Romans themselves were not unaware of the offices which the copious and malleable terminology belonging to this part of their system might be made to discharge, and this is proved by their employment of the peculiar adjunct *quasi* in such expressions as Quasi-Contract and Quasi-Delict. 'Quasi,' so used, is exclusively a term of classification. It has been usual with English critics to identify the quasi-contracts with implied contracts; but this is an error, for implied contracts are true contracts, which quasi-contracts are not. In implied contracts, acts and circumstances are the symbols of the same ingredients which are symbolized, in express contracts, by words; and whether a man employs one set of symbols or the other must be a matter of indifference so far as concerns the theory of agreement. But a quasi-contract is not a contract at all. The commonest sample of the class is the relation subsisting between two persons, one of whom has paid money to the other through mistake. The law, consulting the interests of morality, imposes an obligation on the receiver to refund; but the very nature of the transaction indicates that it is not a contract, inasmuch as the convention, the most essential ingredient of contract, is wanting. This word 'quasi,' prefixed to a term of Roman law, implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It does not denote that the two conceptions are the same, or that they belong to the same genus. On the contrary, it negatives the notion of an identity between them; but it points out that they are sufficiently similar for one to be classed as the sequel to the other, and that the phraseology taken from one department of law may be transferred to the other, and employed without violent straining, in the statement of rules which would otherwise be imperfectly expressed."

[1] 3d Am. Ed. 352.

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Notwithstanding the existence and recognition of this well-defined line of demarcation between genuine contracts, whether express or implied, and quasi-contracts, there exists the greatest confusion in the application thereof in practice. Thus Blackstone confuses contracts implied in fact and quasi-contracts, when he says :[1] —

Confused use in practice of the term "implied contract."

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

While this definition of an implied contract is, at best, true only of quasi-contracts, all the cases put are illustrations of contracts implied in fact. Mr. Justice Lowrie, referring to the language just quoted from Blackstone, properly says :[2]

"There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances as really existing; and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this.

"But it appears in another place, 3 Comm. 159–166, that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under this definition of an implied

[1] 2 Bl. Comm. 443.

[2] Hertzog *v.* Hertzog, 29 Pa. St. 465, 467.

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contract, another large class of relations which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in *assumpsit*.

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

Yet the learned Justice, after so intelligently criticising Blackstone, falls into the same confusion of statement when he says, in the same opinion: [1] —

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

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

Plainly, in the case put by Mr. Justice Lowrie, the inference of a contract is one of fact; and in another part of the

[1] Hertzog *v.* Hertzog, 29 Pa. St. 465, 468.

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same opinion the learned Justice clearly regards the inference as one of fact and not one of law, when he says :[1] —

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

In the opinion of Lord Justice Lindley, it was the failure of Lord Justice Brett to recognize the distinction in question, which led him to doubt[2] that a lunatic was liable for necessaries furnished to him by one knowing of his lunacy. On this point Lord Justice Brett expressed himself as follows:

"A question has been flushed, if I may use the word, in this case which it is not necessary to decide, namely, whether if a person supplies necessaries to a lunatic, knowing of the lunacy at the time, a contract on the part of the lunatic to pay for them can be implied. I give no opinion upon that point. It has not been fully argued to-day, and it appears to me to involve a very difficult point of law, which I do not think has ever been settled by authority. For my part I should doubt whether in favor of a person who knows of the lunacy you can imply a contract to pay for a supply of necessaries to a lunatic."

In Rhodes *v.* Rhodes,[3] Lord Justice Lindley, referring to the doubt raised by Lord Justice Brett, said : —

"The question whether an implied obligation arises in favor of a person who supplies a lunatic with necessaries is a question of law, and *In re* Weaver, a doubt was expressed whether there is any obligation on the part of the lunatic to repay. I confess I cannot participate in that doubt. I think that that doubt has arisen from the unfortunate terminology of our law, owing to which

[1] Hertzog *v.* Hertzog, 29 Pa. St. 465, 469.

[2] *In re* Weaver, 21 Ch. D. 615, 620.

[3] 44 Ch. D. 94, 107.

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the expression 'implied contract' has been used to denote, not only a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it had a contractual origin. Obligations of this class are called by civilians *obligationes quasi ex contractu.*"

It was this confusion of ideas that caused the counsel in Sceva *v.* True [1] to contend that as an insane person was not able to contract, the defendant was not liable for necessaries furnished to her by one knowing her to be insane. The counsel's argument in that case was as follows: —

"The foundation principle of the entire law of contracts is, that the parties must have the capacity to contract, and must actually exercise their faculties by contracting. Here there was no capacity, for there was but one mind; no contract was made, and no attempt was made to make one. The two vital facts, without which no contract, tacit or express, can exist, — capacity and its exercise, — are wanting. Was there an implied contract? What does that term mean? In thousands of cases, in the books, we know just what it means. The parties have capacity to contract; facts, circumstances, few or many, clear or complicated, exist, which lead the minds of the jurors to the conclusion that the minds of the parties met. Minds may meet by words, acts, or both. The words even may negative such meeting; but 'acts which speak louder than words' may conclude him who denies a tacit contract. Aside from cases where the capacity to contract is wanting, no instance now occurs to us in which the implied contract cannot be supported upon these principles, and the familiar doctrines of waiver and estoppel. . . . It is another fundamental principle that no one, by voluntarily performing services for another, can make that other his debtor. If these principles apply to cases where the contracting mind is wanting, they settle this case. We know it is sometimes said, in such a case, 'the law will imply a contract.' What does that mean? As it seems to us, only this: that where A, who has capacity to contract, furnishes B, who is totally destitute of such capacity, what is proper for B to have, the judges will turn the bench into a broker's board, will substitute themselves for B, make a contract where none existed, cause it to relate back to the

[1] 53 N. H. 627.

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voluntary acts of A, and then sit in judgment upon and enforce their own contract. It is a perversion of language to call such a performance a contract of any kind. It is judicial usurpation. The Constitution gave the court no such power. The court has no power to make contracts for people: it can only infer one where a jury might."

To this argument the court made the following conclusive answer: —

"We regard it as well settled by the cases referred to in the briefs of counsel, many of which have been commented on at length by Mr. Shirley for the defendant, that an insane person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of accident or disease, may be held liable, in assumpsit, for necessaries furnished to him in good faith while in that unfortunate and helpless condition. And the reasons upon which this rests are too broad, as well as too sensible and humane, to be overborne by any deductions which a refined logic may make from the circumstances that in such cases there can be no contract or promise in fact, no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant, as the defendant's counsel seems to suppose, an actual contract, — that is, an actual meeting of the minds of the parties, an actual mutual understanding, to be inferred from language, acts, and circumstances, by the jury, — but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. The defendant's counsel says it is usurpation for the court to hold, as matter of law, that there is a contract and a promise, when all the evidence in the case shows that there was not a contract, nor the semblance of one. It is doubtless a legal fiction, invented and used for the sake of the remedy. If it was originally usurpation, certainly it has now become very inveterate, and firmly fixed in the body of the law."[1]

Not only has this identification in classification, of quasi-contracts with genuine contracts, led to a confusion of ideas,

[1] Further illustrations of this confusion of ideas, which might be multiplied almost indefinitely, will be found in the discussion of the scope of quasi-contract.

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Meaning of the term "implied contract" when used in statutes.

but it has also rendered the interpretation of written laws or statutes exceedingly difficult where the word "contract" is used; thus, for example, in Dusenbury *v.* Speir,[1] the legality of an arrest turned upon the meaning to be given to the phrase "contract express or implied," as used in a statute regulating arrests in civil actions. The plaintiff had been arrested in an action, corresponding to the common law action, for money had and received, brought to recover money which the plaintiff (the defendant in that action) had fraudulently obtained. The plaintiff was arrested on a warrant issued on the theory that the action was that of contract, express or implied, within the meaning of the statute. It was held that his liability was in quasi-contract, and not in contract, and that as the phrase "contract express or implied" was used in the statute with reference solely to genuine contracts, the arrest was illegal, and the judgment of the lower court was reversed. And yet the court, whose judgment was reversed by the Court of Appeals, recognized as fully as did the Court of Appeals that the obligation to return the money was a quasi-contractual, and not a contractual, obligation.[2]

[1] 77 N. Y. 144.

[2] Probably no clearer statement of the distinction between a genuine contract and a quasi-contract can be found than is contained in the following statement, taken from the opinion of Mr. Justice Danforth in this case: —

"We cannot agree with the learned judge in this construction of the statute. On the contrary, we think that the express contract referred to in the statute is one which has been entered into by the parties, and upon which, if broken, an action will lie for damages, or is implied, when the intention of the parties, if not expressed in words, may be gathered from their acts and from surrounding circumstances; and in either case must be the result of the free and *bona fide* exercise of the will, producing the *aggregatio mentium*, the joining together of two minds, essential to a contract at common law. There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, simi-

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In O'Brien *v.* Young,[1] the question involved was the construction of the statute reducing the rate of interest from seven per cent to six per cent. The statute contained a clause excepting from its operations "any contract or obligation" made before the passage of the Act. It was contended that a judgment obtained before the passage of the Act was exempted from its operations, and that the judgment creditor was, therefore, entitled to seven per cent interest. But the court reversed the judgment of the lower court, holding that the clause in question referred, not to quasi-contracts, but to genuine contracts only, and that, therefore, the judgment creditor was entitled to only six per cent after the passage of the Act.

But in The Gutta Percha Shoe Co. *v.* Mayor, etc.,[2] it was held that although a judgment was not a genuine contract, yet an attachment could issue in an action brought on a foreign judgment under a section of the code of civil procedure, allowing an attachment against property, in an action brought for "breach of contract, express or implied, other than a contract to marry." Yet the same court held, in Remington Paper Co. *v.* O'Dougherty,[3] that an attachment could

lar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrongdoer to restore it to the rightful owner, although it is obvious that is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all. And a somewhat similar distinction is recognized in the civil law, where it is said: 'In contracts it is the consent of the contracting parties which produces the obligation; in quasi-contracts there is not any consent. The law alone, or natural equity, produces the obligation by rendering obligatory the fact from which it results. Therefore these facts are called quasi-contracts, because, without being contracts, they produce obligations in the same manner as actual contracts.'"

[1] 95 N. Y. 428.

[2] 108 N. Y. 276.

[3] 96 N. Y. 666, affirming 32 Hun, 255.

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not issue under the same section of the code, in an action brought to enforce a statutory liability created by the Legislature of New York to pay the cost of an action.

The law of remedies the reason for the classification of quasi-contracts with contracts.

The question naturally arises, why a classification productive of so much confusion was ever adopted. The answer to this question is to be sought, not in the substantive law, but in the law of remedies.

The only forms of action known to the common law were actions of tort and contract. If the wrong complained of would not sustain an action, either in contract or tort, then the plaintiff was without redress, unless the facts would support a bill in equity.[1]

Although from time to time the judicial view of substantive rights broadened under the leavening effect of equity and other considerations, the broadening process did not lead to the creation of remedies sounding in neither contract nor tort. The judges attempted, however, by means of fictions, to adapt the old remedies to the new rights, with the result usually following the attempt to put new wine into old bottles. Thus, largely through the action of assumpsit, that portion of the law of quasi-contract usually considered under the head of simple contracts, was introduced into our law.

In the action of assumpsit, as the word assumpsit implies, whether it be special or indebitatus assumpsit, a promise must always be alleged,[2] and at one time it was an allegation which had to be proved.[3] It was only natural, therefore, that the courts in using a purely contractual remedy to give relief in a class of cases possessing none of the elements of contract, should have resorted to fictions to justify such a course. This was done in the extension of assumpsit to quasi-contract; and the insuperable difficulty of proving a promise where none existed was met by the statement that

[1] 1 Spence, Eq. Jur. 243; Woods *v.* Ayres, 39 Mich. 345; Sceva *v.* True, 53 N. H. 627.

[2] Chitty on Pleading, 301.

[3] Ames, The History of Assumpsit, 2 Harv. Law Rev. 64.

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"the law implied a promise." The statement that the *law imposes the obligation* would not have met the difficulties of the situation, since the action of assumpsit presupposed the existence of a promise. The fiction of a promise was adopted then in this class of cases solely that the remedy of assumpsit might be used to cover a class of cases where, in fact, there was no promise.

Distinction between quasi-contract and tort.

It might be asked: Why did the court extend to this class of obligations the remedies peculiar to contracts rather than the remedies peculiar to tort? The right conferred in quasi-contract, and the right, the violation of which constitutes a tort, undoubtedly possess this common characteristic, — that the obligation is imposed by operation of law, regardless of the consent of the defendant. But treating a tort as the violation of a right *in rem*, the obligations differ in an important particular; for while to avoid committing a tort, one need only forbear,[1] to discharge the obligation imposed by quasi-contract one must act.[2] It is true that the obligation imposed by a contract may be simply to forbear; but the obligation most generally assumed under a contract requires one to act, and therefore contract rather than tort would naturally suggest an analogy. Another consideration would also suggest the analogy of contract rather than of tort; not only in most cases where a quasi-contractual obligation is imposed has the defendant not acted in violation of a right *in rem*, in consequence of which the law could impose an obligation; but in many cases he has either not acted at all, — as, for example, where an absent husband, who is ignorant of the death of his wife, is obliged to reimburse one who has defrayed the expenses attendant upon her burial, — or, if he has acted, has acted with the consent, and perhaps the co-operation, of the plaintiff; as, for example,

[1] Austin, Jurisprudence, Lect. XIV.

[2] Illustrations of this proposition will be given in discussing the scope of the obligation.

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where a defendant is obliged to refund money which he has received from the plaintiff, both parties acting under a misapprehension.

It remains to consider the scope of quasi-contract.

Sources of the quasi-contractual obligation.

Quasi-contracts may be said in general to be founded,[1] —

1. Upon a record.

2. Upon a statutory, or official, or customary duty.

3. Upon the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another.

A judgment is not a contract, but a quasi-contract.

The obligation created by a judgment which, as Sir William Anson has said,[2] is unfortunately styled in our law a contract of record, resting, not upon the agreement of the parties, but regardless thereof, is a quasi-contractual, and not a contractual, obligation.[3] In Louisiana *v.* New Orleans,[4] Mr. Justice Field, delivering the opinion of the court, in support of the decision that a judgment was not a contract within the meaning of that word as used in the clause of the Constitution forbidding the enactment by a State of a law impairing the obligation of a contract, said: —

"A judgment for damages, estimated in money, is sometimes called by text-writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and by a fiction of law a promise to pay is implied where such legal obligation exists. It is on the principle that an action *ex contractu* lies upon a judgment. But this fiction cannot convert a transaction wanting the consent of parties into one which necessarily implies it."

An obligation created by statute is quasi-contractual.

A statutory obligation which does not rest upon the consent of the parties, is clearly quasi-contractual in its nature.[5] In

[1] Ames, The History of Assumpsit, 2 Harv. Law Rev. 64.

[2] Anson, Contracts, 6 ed. 7.

[3] Biddleson *v.* Whytel, 3 Burr. 1545; State of Louisiana *v.* New Orleans, 109 U. S. 285; O'Brien *v.* Young, 95 N. Y. 428.

[4] 109 U. S. 285.

[5] Steamship Co. *v.* Joliffe, 2 Wall. 450; Louisiana *v.* New Orleans, 109 U. S. 285; Inhabitants of Milford *v.* Commonwealth, 144 Mass. 64; Woods *v.* Ayres, 39 Mich. 345; McCoun *v.* New York Central & Hartford R. R. Co., 50 N. Y. 176.

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Steamboat Co. *v.* Joliffe,[1] Mr. Justice Field, in discussing the nature of the claim for half-pilotage fees under a statute allowing such fees, where a pilot's services are offered and declined, thus distinguishes between a contract liability and a liability imposed by statute: —

"The transaction in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi-contract*. The absence of assent on the part of the master or owner of the vessel does not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting. . . .

"The claim of the plaintiff below for half-pilotage fees resting upon a transaction regarded by the law as a *quasi*-contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had."

In Inhabitants of Milford *v.* Commonwealth,[2] the court, discussing the nature of the plaintiff's claim for the support of a pauper under a statute imposing upon the Commonwealth an obligation to reimburse the plaintiff for the expenses so incurred, recognizes the distinction between a contract liability and a liability imposed by statute, in the following language: —

"The law regards the money as expended at the implied request of the defendant, and a promise to pay the money is said to be implied from the liability created by the statute. A contract may be expressly made, or a contract may be inferred or implied when it is found that there is an agreement of the parties and an intention to create a contract, although that intention has not been expressed in terms of contract; in either case, there is an actual contract. But a contract is sometimes said to be implied when there is no intention to create a contract, and no agreement of parties; but the law has imposed an obligation which is enforced as if it were an obligation arising *ex contractu*. In such a case there is not a contract, and the obligation arises *ex lege*."

[1] 2 Wall. 450. [2] 144 Mass. 64.

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Nature of the obligation of a carrier or innkeeper.

Of a quasi-contractual nature, it is submitted, is the duty of a carrier, founded upon the custom of the realm to receive and to carry safely. That the liability in such cases arises, not from contract, but from a duty, is clear.[1] While it is true that the liability is ordinarily described as one in tort, it is submitted that it has been so described because of the usual classification of legal rights into contracts and torts, and that since the obligation imposed upon the carrier is *to act*, the obligation is really quasi-contractual in its nature, and not in the nature of a tort. If this be the proper classification of the duties imposed by law upon a carrier, it must necessarily be true of the common law liability of an innkeeper to receive guests, or to keep their goods safely.[2] The obligation in these cases seems analogous in principle to the obligation imposed by the Austrian law upon one in possession under a *fidei commiss* in favor of his successor, as to the care of the property. That liability is thus described by Lord Justice Cotton in Batthyany *v.* Walford:[3] —

"It appears, as far as I understand the evidence, that the law of Austria (I will omit Hungary, because the Hungarian law on this head is practically the same as that of Austria) is this: The tenant in possession under a *fidei commiss*, both of real and personal estate, is considered in possession in a different way from that in which a tenant for life or a tenant in tail in England stands. There are no trustees, and if he loses any portion of the personal estate, which apparently stands as regards the provision of the *fidei commiss* nearly in the same position as real estate, he must make that loss good. As regards the real estate, he is answerable, at the time when he surrenders, by death or otherwise, the possession of the property in the *fidei commiss*, for the deterioration of the estate which has taken place since the time when he took possession. He is considered as having possession of the estate, not only for his

[1] Anonymous, 12 Mod. 3; Marshall *v.* York, N. & B. Railway Co., 11 C. B. 655; Austin *v.* Great Western Railway Co., L. R. 2 Q. B. 442, 445.

[2] Morgan *v.* Ravey, 6 H. & N. 265, 275.

[3] 36 Ch. Div. 269, 278.

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own benefit, but subject also to an obligation to hand it over to his successor in as good a condition as when he took possession, subject only to this, that he can excuse himself if he shows that the deterioration took place without any fault ('culpa,' as it is called) on his part. But, as I understand the evidence, the claim according to the law of Austria is not in the nature of damages for default, but a claim under an obligation to keep the property in as good condition as the late possessor found it, with liberty to excuse himself from making good the deficiency if he can show that it was not caused by any default of his own. That, in my opinion, is not a claim simply depending on tort, and does not come within the rule of *actio personalis moritur cum persona*. It may be that it is a wrong which has produced the deterioration; but the claim, in my opinion, is one depending on the implied contract or obligation which, by the law of Austria, every possessor under a *fidei commiss* takes upon himself when he enters into possession.

"It was contended that there could be no such liability of a personal representative for anything connected with default, unless there was an express contract. No authority was referred to in support of that proposition, and in my opinion it is contrary to English law. . . . It is not only where there is an express contract that a suit grounded on some default of the person whose representative is sued can be maintained; but if the position of the parties was such that the law of England would imply a contract from that position, then on assumpsit the executor might still be held liable. There are many cases where an action can be brought upon an obligation implied by law in consequence of the position which the parties have undertaken one to another."

Sheriff's obligation is quasi-contractual.

Of this nature also, it is submitted, is the obligation of a sheriff to levy execution and pay the proceeds thereof to a judgment creditor.[1]

Unjust enrichment the most important source of the quasi-contractual obligation.

By far the most important and most numerous illustrations of the scope of quasi-contract are found in those cases where the plaintiff's right to recover rests upon the doctrine that a man shall not be allowed to enrich himself unjustly at the expense of another.

As the question to be determined is not the defendant's

[1] Speake *v.* Richards, Hobart, 206; 3 Bl. Comm. 163.

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intention, but what in equity and good conscience the defendant ought to do, the liability, while enforced in the action of assumpsit, is plainly of a quasi-contractual, and not contractual nature.

Liability of a lunatic for necessaries is quasi-contractual.

It is on the theory of quasi-contract, founded on the doctrine of unjust enrichment, that an insane man, known to be insane by the party furnishing necessaries, is held liable therefor. That such is the nature of the liability is evident, not only from the fact that he has no contracting mind, but also from the fact that he is equally liable for necessaries furnished at a time when there was no attempt on his part to contract.[1]

The nature of the obligation incurred by a lunatic for necessaries was thus stated by Lord Justice Cotton, in Rhodes *v.* Rhodes:[2] —

"Now the term 'implied contract' is a most unfortunate expression, because there cannot be a contract by a lunatic. But whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property. It is asked, Can there be an implied contract by a person who cannot himself contract in express terms? The answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessaries."

The liability of an infant for necessaries is quasi-contractual.

Of a quasi-contractual nature also, is the obligation of an infant to pay for necessaries. It is usually stated that an infant is bound by his contract for necessaries. But if, as is held in many jurisdictions, the infant is bound to pay for necessaries, not the contract price, but the reasonable value thereof, it would seem clear that he is not liable on his contract. By the terms of his contract he is required to pay a stated sum, and not the reasonable value for necessaries fur-

[1] *In re* Rhodes, 44 Ch. D. 94 308; Sceva *v.* True, 53 N. H. (*semble*); Sawyer *v.* Lufkin, 56 Me. 627.

[2] 44 Ch. D. 94, 105.

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nished. If he is bound by his contract to pay for necessaries, then of course he should be liable in damages for having, in violation of his contract, refused to pay therefor; and if liable in damages, the amount of the plaintiff's recovery would be determined, not by the reasonable value of the necessaries, but by the price agreed upon, — since had the infant performed his contract, the plaintiff would have received that amount of money. When, therefore, the infant is required to pay, not the stated price, but simply the reasonable value of the necessaries, the obligation differs from that which he assumed; and though the result reached, as to the amount of the recovery, by a plaintiff in any given case, may be the same as would have been reached had the recovery been had on the theory of the plaintiff's being entitled to the price agreed upon, yet such a result is purely accidental. The doctrine, therefore,[1] that while the payee of a note given by an infant for necessaries can recover on the note, he can recover, not the amount thereof, but simply the reasonable value of the necessaries, must be regarded as an anomaly in procedure. In no other way can the result actually reached in some jurisdictions[2] — that while the payee of the note can recover in the action on a note the value of necessaries furnished, an indorsee thereof has no right of action — be explained.

That the liability is really in quasi-contract seems to be recognized in the jurisdiction which has furnished the leading authority[3] for the proposition that the payee, while not allowed to recover the amount of the note, can, in an action brought on the note, recover the value of the necessaries. In Trainer *v.* Trumbull,[4] where the court held an infant liable for necessaries furnished in the absence of contract, Allen, J., delivering the opinion of the court, said: —

"The practical question in this case is, whether the food, clothing, etc., furnished to the defendant were necessaries for which he

[1] 1 Daniel Neg. Inst., 4th ed., § 226.

[2] Ibid.

[3] Earle *v.* Reed, 10 Met. 387.

[4] 141 Mass. 527, 530.

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should be held responsible. . . . The question whether or not the infant made an express promise to pay, is not important. He is held on a promise implied by law, and not, strictly speaking, on his actual promise. The law implies the promise to pay, from the necessity of his situation; just as in the case of a lunatic. (1 Chit. Con. 11th Am. ed. 197; Hyman *v.* Cain, 3 Jones (N. C.), 11; Richardson *v.* Strong, 13 Ired. 106; Gay *v.* Ballou, 4 Wend. 403; Epperson *v.* Nugent, 57 Miss. 45, 47.) In other words, he is liable to pay only what the necessaries were reasonably worth, and not what he may improvidently have agreed to pay for them. If he has made an express promise to pay, or has given a note in payment for necessaries, the real value will be inquired into, and he will be held only for that amount."

The liability of a husband for necessaries is quasi-contractual.

Such also, it is submitted, is the nature of the liability of a husband for necessaries furnished a wife whom he has wrongfully refused to support, where the circumstances do not justify the party supplying the necessaries in supposing that the husband in fact authorized the wife to pledge his credit. In such cases it is settled that one furnishing necessaries can recover against the husband therefor, notwithstanding his knowledge at the time he furnished them that the husband did not intend to pay therefor. It is usually stated that the wife, in such circumstances, is authorized to pledge the credit of the husband. Since, however, the husband may be liable for necessaries furnished even though the wife made no attempt to pledge his credit, — as, for example, for necessaries furnished a deserted wife while she is unconscious; and since, furthermore, the husband is held liable for necessaries furnished a wife while he is incapable of contracting, — as where necessaries are furnished a wife while the husband is insane,[1] — the better form of statement would seem to be that an obligation is imposed by law upon the husband to pay for necessaries furnished in such circumstances. That such is the nature of the liability was recognized in Cunningham *v.* Reardon,[2] where Hoar, J., delivering the opin-

[1] Read *v.* Legard, 6 Ex. 636. [2] 98 Mass. 538. (96 A.D. 670)

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ion holding the husband liable for necessaries furnished a wife, said: —

"The husband, who by his cruelty, compels his wife to leave him, is considered by the law as giving her thereby a credit to procure necessaries on his account; and is responsible to any person who may furnish her with them. This responsibility extends not only to supplies furnished her while living, but to decent burial when dead. Its origin is not merely and strictly from the law making her his agent to procure the articles of which she stands in need. If it were so, the consequence would follow for which the defendant contends, that the agency would end with the life of the agent. But it is rather an authority to do for him what law and duty require him to do, and which he neglects or refuses to do for himself; and it is applicable as well to supplies furnished to the wife when she is sick, insensible, or insane, and to the care of her lifeless remains, as to contracts expressly made by her." [1]

Liability of a father for necessaries quasi-contractual.

On this ground must also be put the obligation of a father, where such obligation is imposed by law, to pay for necessaries furnished a child whom he has refused to support.[2]

Quasi-contract the basis of the obligation to refund money paid under mistake.

That the right to recover money paid under mistake rests upon a quasi-contractual obligation is a self-evident proposition, when it is remembered that in the typical cases where money is recovered as paid under mistake, the mind of the plaintiff as well as the mind of the defendant was directed, not to the creation of, but the discharge of an obligation.[3]

[1] The theory of holding a husband liable in quasi-contract to prevent an unjust enrichment, where the facts will not warrant the inference of a contract, is of very early origin in our law. An illustration of this is found in case V. of Jenkins' Century Cases, p. 4, reported as follows: —

"The Wife of A. receives £10 to the Use of A. and this comes to the Use of her Husband in a convenient or necessary Way; altho' the Husband did not command it, nor consent afterwards, he is liable to this Debt, and the Count shall be of a Receipt by the Hands of the Husband. Such manner of Count will serve in Debt in this Case. The Reason is, the Wife's Contract is void; and it ought not to be alleged in the Count, but the Count ought to be as above. *Nemo debet locupletari ex alterius incommodo.*"

[2] Gilley *v.* Gilley, 79 Me. 292; Cromwell *v.* Benjamin, 41 Barb. 558.

[3] See *infra*, Ch. II. p. 26, *passim.*

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Waiver of Tort.

That quasi-contract is the basis of liability where a plaintiff is allowed to sue a tort-feasor in assumpsit is equally clear, since it is the want of assent on the part of the plaintiff that renders the defendant's act tortious. It is idle to speak of the possibility of contract where there is not even the suggestion of a meeting of minds. For example: A takes B's horse, believing him to be his own, and sells it. B can recover from A, in a count for money had and received, the proceeds of the sale. To speak of a contract in such a case is simply to attempt to deceive one's self by a form of words.[1]

Recovery by a plaintiff in default under a contract.

Quasi-contractual, of necessity, is the nature of the obligation of the defendant, where a liability exists to compensate the plaintiff for benefits received under a contract which the plaintiff cannot enforce because he has failed to comply with the conditions thereof.[2]

Obligation of a defendant not liable for his breach of contract.

When it is for any reason conceded — *e. g.* illegality, the statute of frauds, impossibility of performance — that a defendant is not liable to a plaintiff for a failure to perform a contract made with the plaintiff, and yet it is held that he is liable in assumpsit, or other contractual remedy, for benefits conferred by the plaintiff under the contract, such liability is necessarily quasi-contractual, and rests on the doctrine of unjust enrichment.[3]

Obligation of a defendant who has requested but has not contracted to pay for benefits.

Of this character also is the liability of a defendant for benefits received, which, though requested by him, were not conferred under a contract, because of some misunderstanding of the parties, or other reason, preventing the creation of a contract.[4]

Obligation of a defendant for benefits conferred without request.

Where the benefit for which the plaintiff seeks a recovery was conferred without the assent of the defendant, there can, of course, be no contract, and unless the facts would establish a liability in tort, the plaintiff must proceed on the theory of quasi-contract.[5]

[1] See *infra*, Ch. III. p. 159, *passim*.
[2] See *infra*, Ch. IV. p. 214, *passim*.
[3] See *infra*, Ch. V. p. 267, *passim*.
[4] See *infra*, Ch. VI. p. 315, *passim*.
[5] See *infra*, Ch. VII. p. 341, *passim*. and Ch. VIII. p. 363, *passim*.

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Where one is compelled to indemnify, or contribute to the expenses of one with whom he has not consciously entered into any relationship, or with whom he has not consciously or voluntarily had any dealing, the elements of a contract are necessarily wanting, and the basis of the liability is that in equity and good conscience he should either assume or share a burden which was borne by the plaintiff.[1] Indemnity and contribution.

Where money is paid to another, who demands it as his right, or as a condition of allowing the plaintiff to exercise a right, it may well be, and is in many instances, held that the money so paid can be recovered;[2] but to speak of an implied contract in such a case is idle, if anything more is meant than that the obligation is imposed by law, and is therefore a quasi-contract. The statement shows the absence of assent on the part of the defendant, and therefore the absence of a contract. Recovery of money paid under compulsion.

[1] See *infra*, Ch. IX p. 388, *passim*.

[2] See *infra*, Ch. X. p. 411, *passim*, and Ch. XI. p. 426, *passim*.

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CHAPTER II.

RECOVERY OF MONEY PAID UNDER MISTAKE.

Recovery is had upon equitable principles, and not upon principles of contract.

THE recovery at law of money paid under mistake affords not only one of the most striking illustrations of the equitable nature of the quasi-contractual obligation, where the liability rests upon the doctrine of unjust enrichment, but also shows, in common with the other topics belonging to the law of Quasi-Contracts, how utterly foreign to the subject are the principles of the law of Contract.

That one is dealing with an equitable doctrine in discussing the subject-matter of this chapter, is evident from the statement universally accepted that the plaintiff cannot recover, unless it appears that it is against conscience for the defendant to retain that which the plaintiff has paid him.[1] Although this statement in itself shows that the right to recover money paid under mistake, must be established on principles other than those of contract, the proposition becomes, if possible, more apparent, when one considers that while the essence of a contract is that the parties thereto intended to create an obligation, usually the money which the plaintiff seeks to recover as paid by him, and received by the defendant, under mistake, was paid not in the creation of, but as the parties supposed, in discharge of, an obligation.

No objection to a recovery that payment was voluntary.

Money paid with knowledge that the payee is not entitled thereto cannot be recovered, the law not permitting one who knows, or believes, that a claim is not well founded, to make the voluntary payment thereof a reason for appearing

[1] See *infra*, p. 43.

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in court as a plaintiff. Since the payment was unnecessary, the plaintiff must be regarded either as having intended to make a gift of that sum of money to the defendant, — in which event there is no reason why he should be allowed to recover, — or else as attempting to shift his position from that of a defendant to that of a plaintiff, — a course which would be in most cases unfair to the claimant, and which is not allowed in any case where the law deems the payment a voluntary one.

While it is true that a payment made under mistake must be regarded as a voluntary payment, yet since the payment was made in extinguishment of a supposed obligation, a gift thereof was clearly not intended, nor was the party paying endeavoring to change his position from that of a defendant to that of a plaintiff. It would therefore be clearly unjust and inequitable to deny a recovery in such cases, simply because the payment need not in fact have been made.

Since, however, the plaintiff seeking to recover money paid under a mistake proves the mistake for the purpose of taking the case out of the rule denying a recovery of voluntary payments made with knowledge, proof merely of an inability to produce evidence necessary to defeat the demand of the defendant will not sustain a recovery, if in fact it appears that he was satisfied when he made the payment that he did not owe the claim.

Money must be paid under a belief that it is due.

In Windbiel *v.* Carroll[1] it was held that the plaintiff, who had purchased property, assuming the payment of a mortgage thereon, and who had paid a sum of money claimed by the defendant to be due on the mortgage debt, stating at the time of payment that the claim had been paid, could not recover the money so paid. Learned, P. J., said: —

"Ignorance of fact is one thing; ignorance of the means of proving a fact is another. When money voluntarily paid is recov-

[1] 16 Hun, 101.

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ered back, it is because there was some mistake as to the fact. But here the plaintiff was not mistaken as to the fact. Only at the time he did not know how to prove it. The subsequent discovery of evidence to prove a fact known to the party when he makes the payment cannot authorize a recovery back of the money. Such a principle would be most dangerous."

In National Life Insurance Co. *v.* Jones,[1] the plaintiff sought to recover money which it had paid on a policy of life insurance, believing at the time of payment that the policy was procured by false and fraudulent representations. It was held that the money so paid could not be recovered. On this point Talcott, J., said: —

"In the case before us the finding, which seems to be abundantly sustained by the evidence, is not that the party paying acted under the 'supposition' or 'impression' that the policy had been fairly obtained, but the precise contrary, and that the plaintiff, at the time of the payment, actually not only believed, but had considerable evidence to establish the existence of the precise state of facts which it now sets up to rescind the payment. . . .

"The plaintiff, believing that a good defence existed to the demand, might be unwilling to encounter the risk of undertaking to prove it, might doubt whether it could be proved with sufficient clearness to secure a verdict, and for that reason have concluded that it was better to pay than to encounter a litigation which might prove unsuccessful.

"In such case a payment is not made under a mistake of fact, but upon the ground that, notwithstanding the fact, it is for the interest of the party paying to make the payment."

On the same principle it was held in Frambers *v.* Risk[2] that the plaintiff, who had paid a sum of money estimated to be due according to certain weights, which he stated at the time of payment were not correct, could not recover the money so paid.

While one making a payment, believing the same not to be due, will not be allowed to recover the money so paid, a

[1] 59 N. Y. 649. Affirming 1 T. & C. 466, on the opinion of Talcott, J. delivered at general term.

[2] 2 Ill. Ap. 499.

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mere suspicion that the money is not due will not prevent a recovery. Thus in Chatfield *v.* Paxton,[1] it was held that a plaintiff who paid a bill of exchange, ignorant of the fact that the defendant had by his laches lost his right to demand payment thereof, could recover the money paid thereon, notwithstanding the fact that he had a slight suspicion that the defendant had been guilty of laches.

A mere suspicion that money is not due will not prevent a recovery.

It is only on the ground of the money having been paid under a bare suspicion of the fact of a prior payment that the decision in Guild *v.* Baldridge[2] can be supported. The case hardly seems, however, to warrant the inference that the plaintiff, when he paid the money, was not satisfied that he did not owe the claim. The defendant demanded of the plaintiff money which he claimed the plaintiff owed one Manning, against whom the defendant had recovered a judgment, by virtue of which he was entitled to demand payment of the plaintiff to the extent that the plaintiff was indebted to Manning. The plaintiff stated to the defendant that "he believed he had paid the debt, but that he had nothing to show payment, and as Manning was dead, he would have no bad feelings about it, and rather than have them he would pay it again." The trial judge charged the jury in substance that if the plaintiff, believing that he had paid the debt to Manning, chose to pay it again rather than be supposed to withhold the payment of the money from the defendant, as a creditor of Manning, without any understanding with the defendant that the money should be refunded if the claim had in fact been paid, then the plaintiff would not be entitled to recover; that it was important that the jury should ascertain whether there was any understanding between the plaintiff and the defendant on the subject. If there was not, the defendant would be entitled to a verdict. The jury having found a verdict for the defendant, the judgment entered thereon was reversed.

[1] 2 East, 471, note (*a*). [2] 2 Swan. 295.

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It seems difficult in view of the facts of this case to say that the plaintiff had simply a vague belief that it might not be due, and in fact paid the money believing it to be due.

Money paid by way of compromise can be recovered only where the compromise is based on mistake.

Since money cannot be recovered as paid under mistake unless the payment was induced by mistake, money paid by way of compromise or settlement cannot generally be recovered, for in such cases the plaintiff makes the payment without regard to the real facts of the case to rid himself of all further dispute and possible litigation.[1]

If, however, the settlement or compromise is made under mistake as to the existence of a certain fact, when but for the mistake the compromise in question would not have been made, then, as the plaintiff cannot be said to have made the payment without regard to the truth of the matter, about which he claims he was mistaken, the money so paid can be recovered. Thus in Stuart *v.* Sears,[2] it was held that a payment made in consequence of the plaintiff's mistaken belief in the existence of vouchers showing two payments made by the defendant, when in fact only one payment had been made, could be recovered. This is the principle involved in Wheadon *v.* Olds.[3] In that case the defendant had agreed to sell to the plaintiff from 1,600 to 2,000 bushels of oats, the oats to be delivered on board a vessel. When a quantity of oats, supposed by the plaintiff and the defendant to be 500 bushels, had been delivered, the plaintiff and the defendant agreed to guess as to the quantity delivered thereafter. In performance of this agreement the plaintiff paid the defendant for 412 bushels of oats more than had been delivered. This overpayment was due to the fact that only 250 bushels had been delivered at the time when the parties supposed 500 had been delivered. It was held that the

[1] Townsend *v.* Crowdy, 8 C. B. N. S. 477 (*semble*); Troy *v.* Bland, 58 Ala. 197; McArthur *v.* Luce, 43 Mich. 435; National Life Ins. Co. *v.* Jones, 59 N. Y. 649; Bergenthal *v.* Fiebrantz, 48 Wis. 435.

[2] 119 Mass. 143.

[3] 20 Wend. 174.

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plaintiff could recover back the overpayment made by him in consequence of this mistake. On this principle it was held in Rheel *v.* Hicks[1] that money paid by the plaintiff to the defendant by way of compromise for the support of an unborn bastard child could be recovered, it appearing that the supposed mother was not in fact pregnant. Said the court: —

"The fact as to who was the father of the child may have been waived by the compromise, but not the vital fact which gave it all its force, and without the existence of which the superintendent had no power to act, viz., the pregnancy of Louisa Hehr. There was no disagreement or compromise between the plaintiff and the defendant as to the fact of pregnancy. They both believed and acted upon the assumption that she was pregnant, and it turns out that they were both mistaken."

Knowledge of facts prior to time of payment immaterial.

If the plaintiff is able to establish that the fact was not present to his mind when he made the payment, that he at one time knew of the fact about which he claims to have been mistaken at the time when he made the payment, is immaterial. Thus it was held in Kelly *v.* Solari,[2] that the plaintiff, who in forgetfulness of the fact that a policy of life insurance had lapsed in consequence of non-payment of the premium, paid the policy, could recover the money so paid. Lord Abinger, who had misdirected the jury, on making the rule absolute for a new trial, said: —

"There may also be cases in which, although he might by investigation learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding; in that case there can be no doubt that he is equally bound. Then there is a third case, and the most difficult one, — where the party had once a full knowledge of the facts, but has since forgotten them. I certainly laid down the rule too widely to the jury, when I told them that if the directors once knew the facts they must be taken still to know them, and could not recover by saying that they had since

[1] 25 N. Y. 289. [2] 9 M. & W. 54.

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forgotten them. I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment."

Mistake must be as to a material fact.

A plaintiff paying a claim, supposing himself to be under an obligation to pay the same, because of mistake as to a fact, which, if true, would not have imposed an obligation upon him, cannot recover the money so paid in jurisdictions where a recovery is not allowed of money paid under mistake of law; since had the plaintiff known the law, the fact about which he was mistaken would not have induced him to make the payment. Thus in Needles *v.* Burk,[1] the plaintiff paid to the defendant a sum of money, supposing that his, the plaintiff's, child had burned the defendant's barn, and that in consequence thereof the defendant had a claim upon him for indemnity. It was held that, assuming that the child did not burn the barn, there could be no recovery, since the fact, if true, would not have induced the plaintiff to have paid the money but for his ignorance of law.

When a defendant has a right to demand a payment of money as a condition of allowing the plaintiff to assert a right, there can be no recovery of money paid by the plaintiff not in the performance of a supposed obligation, but in the assertion of a right under a mistake as to a fact, which if it had been as the plaintiff supposed, would not have changed the plaintiff's rights, but have simply rendered the assertion thereof less desirable. Thus in Langevin *v.* City of St. Paul,[2] two lots owned by the plaintiff's intestate and an adjoining lot had been assessed for the improvement of a street, on which the adjoining lot fronted. This assessment had been made under the belief that the two lots of the plaintiff's intestate fronted also on this street. The three lots were sold under a judgment obtained for the non-payment of the assessment. The plaintiff's intes-

[1] 81 Mo. 569.

[2] 49 Minn. 189.

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tate afterwards paid to the defendant the sum necessary to redeem the three lots, he and the defendant both supposing that he owned the three lots, and that the three fronted on the street which had been improved. It was held that as the judgment was valid, and as the plaintiff could not have redeemed his two lots without also redeeming the adjoining lot, there could be no recovery of the money so paid. Dickinson, J. delivering the opinion of the court said:

"If upon the facts stated, the action is maintainable against the city, it is as in *assumpsit* for money had and received; and so the plaintiff treats the case, resting the right of recovery upon the alleged mutual mistake of fact. But it is not maintainable on that ground. To justify a recovery in such an action, the money must have been received under such circumstances that, in equity and good conscience, the defendant ought not to retain it. The mistake, where that is the foundation of the action, must relate to a fact which is material, essential to the transaction between the parties. A payment made under the influence of a mistake, concerning a fact which, even if it were as it is supposed to be, would create no legal obligation, but merely operate as an inducement upon the mind of the party paying the money, the other party being without fault, would not justify a recovery as for money had and received. (Aiken *v.* Short, 1 Hurl. & N. 210; Leake, Cont. 103. See also, Chambers *v.* Miller, 13 C. B. N. S. 125.) The city was entitled to receive the money for redemption of the property, if any one having the legal right to redeem should elect to do so. It was not only legally authorized, but required, to receive the money, and neither its authority nor obligation was in any manner affected by the fact concerning which a mistake is alleged. It made no difference to it whether the plaintiff owned lot 5 or not, nor whether or not lots 3 and 4, which the plaintiff did own, fronted on the street improved. Such facts were wholly immaterial, so far as its right and duty to receive the money was concerned. The plaintiff's property, lots 3 and 4, had been sold pursuant to the judgment, in connection with lot 5. The plaintiff was entitled to redeem the whole property by paying to the city the money necessary therefor. It was necessary for him to do this if he would save his own property. If he chose to do it, the city was equally bound to receive the money, whatever the fact might

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be concerning which a mistake is alleged. Nor was the supposed obligation of the plaintiff in any way affected by the alleged mistake. He was at liberty to pay or not, as he should deem to be most for his interest. Plainly, the fact in question was in no way material, except as it might influence the plaintiff in determining for himself whether or not he would make redemption. It was not in any proper sense a mutual mistake of an essential fact. As he voluntarily paid the money, and thereby effectually redeemed his land, and as the city ought to have received it, irrespective of what may be the truth as to the fact in question, it is under no legal or moral duty to repay it merely because his election to pay was influenced by an erroneous conception as to a fact which concerned him only, and not the other party."

Money must have been paid without the receipt of an equivalent.

To recover money paid under mistake, it is not sufficient that the plaintiff establish that the money was in fact paid under mistake; he must in addition thereto prove that there has been a failure of consideration, in that the money was paid without his receiving an equivalent therefor. Thus in Merchants' National Bank *v.* National Bank of the Commonwealth,[1] the plaintiff under a mistake as to the amount of its depositor's account, paid the amount of an overdrawn check to the defendant, the endorsee thereof. The drawer of the check had an account with the bank, but the amount thereof was not equal to the face of the check. Under the custom of banking, the plaintiff had a right to refuse to pay any sum whatever. In an action brought by the plaintiff to recover the money so paid, as money paid under mistake, it was held, that while the plaintiff had a right of action against the defendant, it could only recover from the defendant the difference between the face of the check and the amount of the depositor's account. The court said:

"The fact that, if Burgess & Sons had overdrawn, and this had been known to the plaintiff, it would have wholly refused the check, should not deprive the defendant of that which it was the duty of the plaintiff to pay him, upon a check properly drawn,

[1] 139 Mass. 513.

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when it has itself honored the check as it was actually drawn. The plaintiff bank was entitled, if it saw fit, to pay the check to the amount actually due from it to Burgess & Sons, if the defendant was willing to accept that sum. To this Burgess & Sons could have made no objection. . . .

"The money which was the subject of the mistake was $7,500. In the forenoon of September 4, and necessarily before the check of the defendant could be treated as paid, three checks, together amounting to $1,425, were drawn from the deposit of Burgess & Sons, which was nominally $17,145.46. These two sums being deducted from this deposit, there remained $8,220.46, for which Burgess & Sons had a right to draw. The amount which the plaintiff is entitled to recover is the difference between this sum and $15,000 (the amount of the check), with interest from the date of the writ."

This doctrine is well illustrated in Illinois Trust & Savings Bank *v.* Felsenthal.[1] In that case the plaintiff sought to recover money paid in the following circumstances:

One Hertel borrowed money of the plaintiff, giving his note for the amount of the loan secured by a mortgage of certain real estate. Hertel had represented that there was a house on the land, and in reply to a question of the plaintiff's attorney stated that one Zimmerman and one Breyer had claims against him for services rendered and materials furnished in the building of said house. In making the loan to Hertel the plaintiff's attorney at Hertel's request deducted from the amount of the loan the amounts of the claims owing to Zimmerman and Breyer, and gave to Hertel two checks for the amount thereof, payable to the order of Zimmerman and Breyer respectively. In fact there was not, nor had there been a house on the land, and therefore neither Zimmerman nor Breyer had any such claim as was represented by Hertel. Hertel endorsed the checks in the name of the respective payees, and the defendant in ignorance of the forgery dis-

[1] 26 Ill. Ap. 624.

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counted the checks in the course of business. The plaintiff, with knowledge of the fraud practised upon him by Hertel, brought an action against Hertel upon the note, and obtained judgment thereon. It was held that although he had paid the checks to the defendant in ignorance of the fact that the endorsements were forged, he could not recover from the defendant the amounts so paid. Bailey, J., delivering the opinion of the court, said:—

"It is plain from the foregoing facts, that, as between Hertel on the one hand, and Zimmerman and Breyer on the other, Hertel was the equitable owner of the moneys represented by said checks, and therefore the equitable owner of the checks themselves. They were given for money which he had borrowed from the plaintiff and for which he had given the plaintiff his note and deed of trust. He was owing Zimmerman and Breyer nothing, and they, therefore, had and could have no claim on said money or any portion of it. If Hertel had retained the checks in his possession, they would have been powerless to compel him to deliver the same over to them. Nor can they have any claim upon the plaintiff based upon the checks, or upon the payment of them by the plaintiff without their endorsement.

"Hertel, by selling and delivering the checks to the defendants, transferred to them his equitable title. We may entirely disregard the endorsement of the names of the payees, and treat such endorsements as mere forgeries. The rights of the defendants in that case are the same as though Hertel had sold them the checks without endorsement, which would have amounted to an equitable assignment. The defendants' equitable title to the checks gave them an equitable right to the moneys payable thereon, a right which they could doubtless have enforced by a proper proceeding. The plaintiff then having the defendants' money, which the latter were equitably entitled to receive, we see no ground upon which said money can be recovered back. The action for money had and received is an equitable action, and lies where a defendant has received money which *ex æquo et bono* he ought not to retain. In this case, however, the money in controversy belongs *ex æquo et bono* to the defendants, and it is therefore plain that the plaintiff's action therefor should not be maintained."

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This principle was recognized in United States *v.* Badeau,[1] where it was held that waiving the question of the right of the government to recover money paid by its officers to the defendant, under mistake of law, there could be no recovery, for the reason that the defendant, if not a *de jure* was a *de facto* officer, and actually rendered services during the period for which he received pay.

This doctrine receives its most striking illustration in the cases where it is held, that one who has paid a royalty for permission to use what in fact was a void patent right, cannot recover the money so paid, although both the plaintiff and the defendant believed at the time when the money was paid, that the defendant had the exclusive right to use the invention described in his letters patent. This decision was first reached in the case of Taylor *v.* Hare.[2] In that case the plaintiff sought to recover royalties paid to the defendant under an agreement by which the defendant agreed to permit the plaintiff to use a certain apparatus of which the defendant was supposed to be the inventor, and for the invention of which the defendant held letters patent. It was afterwards discovered that the invention was not patentable by the defendant, having been used by the public before the defendant applied for his letters patent. Notwithstanding the fact that the plaintiff laboring under this mistake paid for the use of an apparatus which he had a perfect right to use without payment of a royalty, the court held that he could not recover the money so paid because there was not a failure of consideration. Chambers, J., said: —

"The plaintiff has had the enjoyment of what he stipulated for, and in this action the court ought not to interfere unless there be something, *ex æquo et bono,* which shows that the defendant ought to refund."

Heath, J., said: —

"There never has been a case, and there never will be, in which a plaintiff having received benefit from a thing which has after-

[1] 130 U. S. 439. [2] 1 B. & P. N. R. 260.

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wards been recovered from him, has been allowed to maintain an action for the consideration originally paid. We cannot take an account here of the profits, and it might as well be said that if a man leases land and the lessee pay rent, and afterwards be evicted, he shall recover back the rent, though he has taken the fruits of the land."

Although the decision has been almost universally followed, the author is not able to agree with the result reached. That the plaintiff enjoyed all that he would have enjoyed had the defendant been in fact the owner of the patent goes without saying, and that the plaintiff would not have derived this enjoyment but for the agreement made with the defendant, is probably true, since the plaintiff regarded the defendant as the owner of valid letters patent. What the plaintiff contracted for in Taylor *v.* Hare, however, was the right to manufacture under the letters patent, and the contract was made on the basis of the defendants having transferred such a right to the plaintiff. The plaintiff did not get from the defendant the right in question because the defendant had not the right to withhold, and therefore did not receive from the defendant an equivalent for the money paid by him. As well might it be said, that a man who, under mistake of fact, contracts with a defendant in possession thereof for permission to use his own land, cannot recover from the defendant the money paid by him as rent, for the reason that he has enjoyed the land just as he would have enjoyed it, had the defendant in fact been the owner, and has enjoyed it as he would not have enjoyed it but for the contract, for the reason that believing the defendant to be the owner he would not have attempted to use the same without the defendant's permission. The case put by Heath, J., of a party in possession of land not being allowed to recover rent paid to his lessee before eviction, is hardly analogous. In such a case, although the lessor may not have been the owner of the land, yet he had a right to hold possession as against every one

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except the true owner. When, therefore, he transferred this possession to the plaintiff he did in fact confer upon the plaintiff something of value and something which could only have been conferred upon him by the defendant or the true owner. Furthermore, not only has something been conferred upon the plaintiff, but the defendant has in reality deprived himself, in that he no longer has a right to the possession thereof during the period of the lease to the plaintiff. In the case of letters patent, which are a grant of an incorporeal right, of which one cannot predicate possession, the defendant either has or has not that right, and if he has not the right, he has nothing to transfer. There may be in the case of land possession of land, as distinct from ownership, conferring certain rights as against every one except the true owner. But in the case of an idea which one owns by virtue of letters patent, unless one claims under the true owner there is no such thing as having a right thereto as against every one except the true owner, with the ownership thereof outstanding in another. In Taylor *v.* Hare, since the defendant claimed nothing by way of assignment, and was not in fact the owner of the idea, he had no better right to the use of the patent than the plaintiff. He therefore had nothing to give the plaintiff, and the plaintiff in fact received nothing from him.

The doctrine that failure of consideration is the basis of the recovery of money paid under mistake, the plaintiff proving the mistake simply as a means to an end, was lost sight of in the case of Claflin *v.* Godfrey.[1] In that case the plaintiff, ignorant of the fact that payment operated in law as a discharge of a mortgage, and that the mortgage thereby became *functus officio*, advanced to the defendant a sum of money for an assignment of a one-third interest in a mortgage held by the defendant. On discovering that the mortgage was in fact defunct because it had been paid, he sued

[1] 21 Pick. 1.

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in *assumpsit* to recover the money so paid. In answer to the objection that the plaintiff could not recover because the mistake was one of law, the court said: —

"It was undoubtedly the clear understanding of all the parties that the plaintiff should receive and become the legal owner of one-third of the Farnum mortgage. This is the consideration for which he paid his money, but contrary to the honest belief of all this proved to be a legal nullity. The plaintiff acquired nothing. He paid his money, and for it received nothing in return. Upon the plainest principles of right, therefore, the consideration should be restored to him. Nor would this operate unjustly upon the defendant. He supposed that he had something of value, and undertook to transfer it to the plaintiff. But it turned out that it had no legal existence, and that he had transferred nothing. Having by misapprehension got something without parting with anything, why should he not restore? He not only conveyed nothing but he lost nothing. If he restores what he received he will be in as good a situation as if he never had received it. . . .

"It cannot properly be objected to this view of the case that the parties contracted with a full knowledge of all the facts, and that the mistake arose altogether from a misapprehension of the law. We shall not here enter into a discussion of the vexed question, whether money paid by mistake of law can be recovered back, because we do not think that the doctrine, if sound, applies. (See Haven *v.* Foster, 1 Pick. 112). Here was a total misapprehension of everything material to the subject of negotiation. The plaintiff strives to reclaim the consideration of a contract which never had any legal force or effect. The general principle is well settled that when the consideration totally fails, where nothing passes by the attempted transfer or conveyance, the amount paid may be recovered back. And the application of the principle does not at all depend upon the question whether the failure arose from ignorance of law or of fact."

A better statement of the doctrine of failure of consideration is probably nowhere to be found than in the paragraphs just quoted; but a greater misconception of the province of mistake where the plaintiff seeks to recover money paid under mistake never existed.

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In Claflin *v.* Godfrey the failure of consideration was established only by the plaintiff's proving that the money paid by him was paid on the mistaken supposition that he was receiving a valid mortgage, and the writer knows of no case where a plaintiff has been allowed to recover because of mistake, except where failure of consideration has been established to the satisfaction of the court allowing the recovery.

Mistake as value immaterial.

If, however, the plaintiff has received the equivalent, which he demanded in return for the money paid by him, the fact that he is mistaken as to the value of the equivalent is immaterial. In such a case there is no failure of consideration, and to recover the money which he has paid, he must establish a warranty on the part of the person to whom the money was paid. Any other result would seem manifestly unjust to the defendant, since he gave to the plaintiff all that the plaintiff demanded, and has only received in exchange therefor what he stipulated for at the time when the exchange was made. Thus in Harris *v.* Loyd,[1] the plaintiff, an assignee under a trust deed for the benefit of creditors, who had paid a claim, to release goods from an execution which had been levied by the defendant to satisfy a judgment, sought to recover the money so paid, alleging that the goods were subsequently taken from him by an assignee in bankruptcy, appointed because of an act of bankruptcy of the plaintiff's assignor, committed before the plaintiff's appointment as trustee, but not discovered until after the plaintiff had made the payment. The plaintiff contended that he was entitled to recover the money so paid, for the reason that he would not have paid the money had he known of the act of bankruptcy. The court held that the plaintiff was not entitled to recover; that the plaintiff had engaged in a speculation which proved to be a bad venture, but that the worthlessness

[1] 5 M. & W. 432. See also Chamber *v.* Hopkins, 4 M. & W. 399.

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of the bargain could not affect the validity of the transaction between the plaintiff and the defendant. Lord Abinger, C. B., said: —

"The plaintiffs appeared to have been mere volunteers. Suppose the friends of the debtor had paid the money, and the possession of the goods had been thereupon delivered back to him; could they have recovered it back upon it afterwards turning out that he had previously committed an act of bankruptcy? The plaintiffs claim under a deed of assignment, and pay the money, supposing that under it they have a right to the goods; in that they are mistaken. But the goods were liable to seizure; the property in them was not divested by the writ, and the trustees might take them, but only subject to the writ of the execution creditor. . . . The short answer, however, to the action is, that the money was not paid under mistake of fact, but upon a speculation, the failure of which cannot entitle the plaintiffs to recover it back."

In Lemans *v.* Wiley,[1] the plaintiff, the widow of the maker of two notes, secured by mortgage of land which had descended to the widow and her children, paid one of the notes to avoid a foreclosure suit, believing that she would be entitled to contribution from the heirs. The remaining note not being paid, the mortgage was foreclosed and the land sold. She then brought an action to recover back the money so paid, claiming that she supposed at the time she made the payment that she would be reimbursed out of the land. It was held that she was not entitled to recover, the court saying: —

"There was no contract or promise on the part of appellant to receive the money or note as the money and note of appellee, or to in any way return the one or its amount, or repay the other. The consideration was ample. Appellee was not personally liable upon the notes held by appellant, but she was the owner of the undivided one-third of the land held for the purchase-money and covered by the mortgage, and was interested in the extinguishment of those liens, and, besides, appellant surrendered a note that might have

[1] 92 Ind. 436.

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been enforced against the land, or against the personal estate of appellee's husband, if there was any.

"This note is not shown to have been a worthless thing, and we know of no rule of law or equity which will sanction her holding it, and recovering of appellant what she paid for it. It is not a sufficient answer to say that she was not legally liable upon the notes held by appellant, nor for the purchase-money for the land. She had the undoubted right to make the payments, and had the balance of the debt been paid and the land saved, she doubtless would have been entitled to contribution from the heirs, as was told her by appellant and her son. The money was voluntarily paid, and money so paid cannot be recovered back. (Lafayette, &c. R. R. Co. *v.* Pattison, 41 Ind. 312; Worley *v.* Moore, 77 Ind. 567; Thompson *v.* Doty, 72 Ind. 336.) Had the balance of the purchase-money been paid and the land saved, the payments by appellee might have been a wise thing. As it turned out, her payments proved to be a misfortune to her; but the courts cannot repair the many misfortunes which follow accidents, ill-luck, ill-health, and bad judgment. We are of the opinion that the evidence does not make, nor tend to make, a case against appellant for money had and received, and that for this reason the judgment must be reversed."

Retention of money must be against conscience.

To entitle the plaintiff, who has paid money under mistake, to recover the money so paid, he must not only prove that he has paid the money without receiving the equivalent contemplated by him, but he must in addition thereto prove that it is against conscience for the defendant to retain the money so paid. Thus, for example, money paid in ignorance of the fact that the statute of limitations has run, cannot be recovered.[1] For although the creditor could not have collected the claim by suit, had the debtor interposed the defence of the statute of limitations, yet since he received from his debtor only what in point of conscience was due, he is doing nothing inequitable in refusing to return it.

In Farmer *v.* Arundel,[2] the plaintiff sought to recover

[1] Moses *v.* Macferlan, 2 Burr. 1005 (*semble*); Hubbard *v.* Hickman, 4 Bush, 204 (*semble*).

[2] 2 Wm. Bl. 824.

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money which he had paid the defendant for the support of a pauper, supposing that the defendant, who had supported the pauper, had a right to call upon him for reimbursement. It was held that regardless of the defendant's right to demand payment, there could be no recovery, since it was not against conscience for the defendant to retain the money so paid. De Grey, C. J., said: —

"When money is paid by one man to another on a mistake either of fact or of law, or by deceit, this action will certainly lie. But the proposition is not universal that whenever a man pays money which he is not bound to pay he may by this action recover it back. Money due in point of honor or conscience, though a man is not compellable to pay it, yet if paid, shall not be recovered back as a *bona fide* debt, which is barred by the statute of limitations . . . .

"Admitting, therefore, that the money could not have been demanded by the defendant (which it is not now necessary to decide), yet I am of the opinion that it is an honest debt, and that the plaintiff having once paid it shall not by this action, which is considered an equitable action, recover it back again." [1]

In Munt *v.* Stokes [2] the plaintiff sought to recover money paid by him in the following circumstances. The laws of

[1] Lord Mansfield's description in Moses *v.* Macferlan of the count for money had and received, is often quoted in favor of the proposition stated in the text.

"This kind of equitable action," said Lord Mansfield, "to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which *ex æquo et bono* the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law, as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or for money fairly lost at play; because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. . . .

"In one word, the gist of this kind of action is, that the defendant upon a circumstance of the kind is obliged by the ties of natural justice and equity to refund the money."

[2] 4 T. R. 561.

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Denmark required the master of a vessel flying the Danish flag to be a natural born subject, or a denizen who had taken the oath of allegiance. The plaintiff's testator, an Englishman, who had not taken the oath of allegiance, gave, as master of a vessel flying the Danish flag, a respondentia bond, in exchange for a loan of money. The plaintiff, ignorant of the fact that under the laws of Denmark the bond could not be enforced, paid the amount of the bond. It was held that as there was nothing inequitable in the defendants' receiving and retaining the money which they had advanced, there could be no recovery of the money so paid.

In Platt *v.* Bromage,[1] the plaintiff, who claimed that he had consented to the defendant's selling certain after acquired property, and receiving the proceeds thereof, because he supposed that the defendant had a right to do so, under the mortgage given by the plaintiff to the defendant in terms covering "after acquired property," sought to recover the money so received. It was held that he was not entitled to recover. One of the grounds upon which the decision was based, was that it was not against conscience for the defendant to keep the money so paid.

A striking illustration of this doctrine is afforded by the decision in The Mayor *v.* Erben.[2] In that case the plaintiff, who had taken proceedings for the opening of a street, sought to recover from the defendant money paid to him as the owner of certain lots, in excess of the amount awarded by the Commissioners of Estimate and Assessment. The defendant, when the report of the commissioners was filed, called at the office to examine the report. The clerk did not show him the report, but named, as the sum awarded, the amount which the defendant afterwards demanded of the plaintiff, and which the plaintiff paid. When the

[1] 24 L. J. Ex. 63.

[2] 10 Bosw. 189; s. c. on Appeal, 3 Abb. App. Dec. 255.

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plaintiff sued to recover the overpayment, the time within which the defendant could file exceptions to the report of the commissioners had expired. It was held that the defendant could defeat the action of the plaintiff by proving that the amount which he had received from the plaintiff, while in excess of the award made by the commissioners, was not in excess of the value of his property, and therefore should have been awarded to him by the commissioners.

On this ground was put the decision in Kingston Bank *v.* Eltinge,[1] where the plaintiff sought to recover money which had been paid with his consent by the sheriff to the defendant. The money so paid was the proceeds of personal property sold by the sheriff on an execution issued on the plaintiff's judgment. The plaintiff and the defendant both had judgments against the debtor, whose property was thus sold, the defendant's judgment because of priority of record being a prior lien on the real estate. The plaintiff consented to the payment of the money in question to the defendant, supposing the sale to have been made under an execution levied under the defendant's judgment, whereas the sale was made under the plaintiff's execution, the defendant's execution having expired by lapse of time. On receiving payment, the defendant satisfied his judgment of record, thereby releasing the real estate from the lien thereof. The plaintiff realized from the sale of the real estate so released at least as much money as had been paid under mistake to defendant. Assuming the money to have been paid under mistake, the court held, that as "defendant received no more than his due, and thereupon relinquished a lien from which plaintiff derived full as much benefit as if it had itself received the money, plaintiff on this ground alone was not entitled to recover."

In Levy *v.* Terwilliger,[2] the plaintiff sought to recover money paid in the following circumstances: The plaintiff

[1] 66 N. Y. 625. [2] 10 Daly, 194.

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priced a safe of the defendant, and asked that information be given him through his agent, at a certain address, as to the shipping rates. The plaintiff then purchased of another dealer, of the same name as the defendant, a safe, and directed his agent, whose name he had given to the defendant, to pay for the same on the presentation of the bill of lading. Defendant having ascertained the shipping rates, called on the agent and gave him the rates. The agent, supposing him to be the party of whom his principal had bought a safe, informed him that he would give him a check upon his shipping the safe, and delivering to him the bill of lading. The defendant shipped the safe and delivered the bill of lading, and was paid by the agent out of a fund belonging to the plaintiff. It was held that, as the shipment of the safe was due to the negligence of the plaintiff, unless the safe shipped by the defendant was returned to him, there could be no recovery of the money so paid, notwithstanding the plaintiff had not received the safe from the vessel by which it was shipped.

In Goddard *v.* Town of Seymour,[1] plaintiff sought to recover money paid by him, in extinguishment of a claim for taxes, to an officer having a warrant for the collection thereof. This warrant was irregular and void, because the selectmen had not signed the rate bills, and the plaintiff, because of his ignorance of the fact that the bills had not been so signed, supposed the warrant to be legal, and paid the taxes. It was held that, as it was the duty of the plaintiff to pay the taxes without the issuing of process, the town might equitably retain what it had received, and that the plaintiff could not recover.

This principle seems to have been overlooked in Sheridan *v.* Carpenter.[2] In that case the plaintiff, the payee of a note executed by one Hull, and signed "John T. Hull, Treasurer of St. Paul's Parish," paid the amount thereof as

[1] 30 Conn. 394. [2] 61 Me. 83.

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endorser to the defendant, not noticing that in the signature of the maker, the word "for" had been substituted for the word "of," thereby changing the signature so as to read "John T. Hull, Treasurer for St. Paul's Parish." At the time the note was executed, and at the time it was endorsed to the defendant, all the parties supposed that the instrument was a note binding St. Paul's Parish, and not John T. Hull personally. After the note had been endorsed to the defendant, the parish being insolvent, Hull, fearing that he would be held personally liable on the instrument, asked the defendant to let him see the note, and on examining it, said to him that he understood that the note executed in that form was not a parish note, and that with his permission he would alter it so as to make it a parish note, and the defendant consenting, he made the change aforesaid. It was held that the plaintiff was entitled to recover from the defendant the amount paid by him in extinguishment of his supposed obligation; that the alteration being a material one absolved him from liability, and the payment having been made in ignorance of a fact which released him from liability, was paid without consideration, and could be recovered. It is submitted that this decision cannot be supported. By the alteration, which was in fact made, the note corresponded exactly to the note which the plaintiff intended to receive, and thought he was receiving at the time the note was delivered to him as payee. It was never the intention of Hull to execute a note binding himself personally. As between the plaintiff and Hull it would seem that Hull could have filed a bill in equity to have had the instrument reformed so as to conform to the intention of the parties, and bind the parish instead of Hull personally. The plaintiff when he transferred the instrument by endorsement to the defendant intended to transfer to the defendant an obligation against the parish, and not against Hull, and that obligation the defendant meant to receive.

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Had the plaintiff desired so to do, on discovering that he had not the parish obligation, but the obligation of Hull, he also could have had the instrument reformed; and it would seem that the defendant, as his assignee, would have had the right to ask for such reformation as against the plaintiff and Hull. If as against the plaintiff he had a right in equity to ask for the reformation of the instrument, on what ground can the plaintiff complain that without his, the plaintiff's consent, the instrument was changed so as to conform to what the defendant was equitably entitled to claim against the plaintiff? Furthermore, even if it be assumed that equity would not have reformed the instrument in question, why should a plaintiff, who has sold an instrument on the theory that it was a parish note, the defendant purchasing it on that theory, be entitled to recover money from the defendant that he would have had to pay, had the instrument been originally what the party supposed it to be, and what it was in fact made, though without the plaintiff's consent?

In Franklin Bank *v.* Raymond,[1] the defendant sought to establish by way of set-off a claim against the plaintiff for money had and received, arising from a payment made in the following circumstances: The defendant had given his promissory note to one Bailey; this note was sold and delivered before maturity by Bailey to the Hoboken Bank; by a mutual mistake the note was delivered unendorsed. At the maturity of the note, the plaintiff, as the agent of the Hoboken Bank, presented the note for payment to the defendant, who paid the same, not noticing that the note was not endorsed, and believing that title thereto had been transferred by endorsement. At the time when the payment was made the defendant had a set-off against Bailey. The fact that the note was not endorsed was discovered shortly after the payment, and notice thereof given the plaintiff,

[1] 3 Wend. 69.

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who nevertheless paid the money to his principal. It was held that the money so paid could not be recovered. The court said: —

"The debt paid by the defendants was one that subsisted against them at the time of payment. The fact of which they were ignorant did not show that there was no debt existing at the time; it only showed that they were in a situation which enabled them to set off against the demand they had paid, a demand due to them from Bailey. I do not find any case where money paid on a subsisting demand has been recovered back on the ground that the person making the payment has subsequently discovered facts that show he had a set-off against the demand. . . . According to the principles laid down by Lord Mansfield, in Price *v.* Neal, 3 Burr. 1354, money paid by mistake or ignorance of facts can never be recovered unless it be against conscience for the defendant to retain it. The operation of this principle destroys the defence in this case; for it will scarcely be contended that it is against conscience for the Hoboken Bank to retain the money. The defendants gave the note to Bailey, not doubting that he would negotiate it; and on the reasonable supposition that he had done so, they paid it. The Hoboken Bank paid the amount of the note when it was transferred to them by Bailey, intending it should be, and believing it had been duly negotiated to them. By mistake it was not, and by ignorance of this mistake the note was paid. It was by a mere accident that the defendants were in a situation to avail themselves of their set-off at the time the note became due; and it was because ignorant of this accident that they failed to avail themselves of this advantage. To retain the money paid under these circumstances cannot be against conscience."

While the result reached in Franklin Bank *v.* Raymond can be justified on the ground that it was not against conscience for the plaintiff to keep that which the defendant would have had to pay, but for the accidental circumstance that the note was unendorsed, it is submitted that the court went too far in intimating that there could be no recovery of money paid in ignorance of a fact, showing, not the non-existence of the debt, but simply a right of set-off. Had the Hoboken Bank been insolvent, and had the money been paid,

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not to a purchaser of the note, but to assignees in insolvency, it is submitted that a different result should have been reached. As between the debtor and the original creditor the difference in amount between the two debts represents what in conscience should be paid by the one to the other. And the fact that in our system of law one claim does not extinguish the other, and must be pleaded, not as payment, but by way of set-off or counter-claim, does not prove that a creditor receiving in such circumstances, not the amount of his debt less the set-off, but the entire amount of his claim, has not in conscience received more than he should keep. Accordingly it was held in Bize *v.* Dickason, assignee, etc.,[1] that money so paid could be recovered.

In Buel *v.* Boughton,[2] the plaintiff gave a promissory note to one Fuller, which, in consequence of a mutual mistake, did not call for the payment of interest, and when the obligation matured, he paid to the defendant, an endorsee, the principal sum with interest, supposing the note to call for interest. It was held that he could not recover the money so paid, Bronson, Chief Justice, saying: "This is a remarkable case. The plaintiff has omitted by mistake to make the note payable with interest, as he should have done; and then, by another mistake, he corrected the first error by paying interest, when the note itself imposed no such obligation. And thus by two blunders the parties have come out right at last. . . ."

It would seem that this principle might have been successfully urged in DeHahn *v.* Hartley,[3] where the plaintiff, who issued a policy of Marine Insurance, was allowed to recover money paid on the policy, in ignorance of the fact that the defendant had sailed with forty-six hands instead of fifty, as stipulated in the policy. The shortage was made good soon after sailing, and the loss of the vessel was in no way attri-

[1] 1 T. R. 285.
[2] 2 Den. 91.
[3] 1 T. R. 343.

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butable to the fact that the vessel sailed short-handed. The plaintiff had received the premiums from the defendant for the voyage, and the defendant received, as he supposed, from the plaintiff a policy indemnifying him against loss, and in consequence thereof took no steps to procure other insurance. In these circumstances, the loss having occurred in consequence of events not at all related to the warranty in the policy of insurance, it would seem that the defendant, had he been sued on the policy, would, in availing himself of the fact that the vessel sailed short-handed, have been pleading a technical legal defence, without the semblance of equity. If this be true, the defendant could in conscience retain the money which had been paid to him under mistake.

It would seem that had it been urged in Kelly *v.* Solari,[1] that it was not against conscience for the defendant to keep the money which the plaintiff had paid in forgetfulness of the fact that the policy had lapsed a month before the death of the insured, the defendant should have been allowed to retain the money so paid, since the premiums paid by him were in excess of what would have been paid for a term insurance during the time that the insured lived after procuring the policy of the company. At all events the defendant should have been allowed to retain at least the equitable value of the policy.

In Jackson *v.* McKnight,[2] the plaintiff, who was indebted to the defendant on an overdue bond secured by mortgage, paid to the defendant $230 in payment of interest, which at the time of payment both the plaintiff and the defendant supposed to be due, but which the plaintiff had previously paid. After such payment the defendant assigned the bond and mortgage to a third party, and after the assignment the plaintiff, discovering that the money which he had paid as interest was not in fact due, sued to recover back from

[1] 9 M. & W. 54. [2] 17 Hun, 2.

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the defendant the money so paid. It was held that he could not recover.

Learned, P. J., delivering the opinion of the court, said:

"The difficulty is that at the time when the plaintiff made this payment, he was owing the defendant a much larger amount, overdue and payable on the very obligation upon which this payment was made. Clearly, if the plaintiff had handed the defendant $230 to apply on the bond and mortgage, he could not have recovered that sum back; but in this present case, he claims to recover, because it was intended as a payment of interest, which had, in fact, been paid, and not as a payment of principal, which had not. The payment, however, was really made on the debt. The plaintiff always is, and always will be, entitled to a credit for so much paid thereon; and the defendant's assignee can enforce the bond and mortgage only for what is payable after crediting this and all other payments. In fact, over six months' interest had accrued at the time when this money was paid, payment of which, it would seem, might have been demanded, the principal being overdue. And further, after this money was paid, and before the suit was commenced, even before the defendant assigned the bond and mortgage, interest accrued on the bond and mortgage more than this amount. Whether any subsequent payments were made is not shown. The action to recover money paid by mistake is sustained, because otherwise the party would suffer unjust loss. It should not be extended to actions where the relief is not necessary. It is not necessary in the present case, because the plaintiff can protect himself whenever he is sued on the bond and mortgage. Perhaps in such a suit the holder of the mortgage may, voluntarily, give the plaintiff the credit to which he is entitled for this payment. Any question between the defendant and the assignee, as to the liability of the defendant, on the assignment, they must settle among themselves."

It is submitted that the plaintiff, if it be assumed that the defendant assigned the bond for its face value, and not for its face value less the payment made by the plaintiff, should have been allowed to recover. The reasons assigned by the court for refusing a recovery may be said to be: —

1. That he could not recover because it was the ordinary case of a man paying part of a debt.

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2. That even if the debt could not be said to be technically paid, he should not recover because he had lost nothing by the payment, being entitled to avail himself of that payment whenever he was sued by the third party.

It is submitted that the position of the court that the payment should be treated as a payment *pro tanto* of the debt, is not sound in principle. If it be true that the plaintiff did pay the debt in part, it should follow that when sued on the bond, he should avail himself of the payment made under mistake, by a plea of payment and not by way of counter-claim or set-off.

In McGinnis *v.* The Mayor,[1] sued to recover arrears of salary which had accrued subsequently to an overpayment of salary made by the defendant under mistake, the defendant endeavored to reduce the plaintiff's recovery by the amount of the overpayment. It was held that the facts did not support the plea, and should have been pleaded as a set-off.

While it is true that the two cases differ in that there was a debt due in the one case, to which the money might be applied, while in the other no debt was due at the time when the money was paid, it is submitted that the two cases are not to be distinguished in principle, as the money was paid and received in each case for a certain purpose.

It is true that had the bond not been assigned by the obligee, the defendant in Jackson *v.* McKnight, whenever sued by the plaintiff for the recovery of the money, could have defended the action by pleading a counter claim or set-off of the debt owing by the plaintiff to him; but this does not establish that the plaintiff had no claim, but simply that the defendant could settle the claim with the plaintiff by means of a cross action or its equivalent. If the money paid by the plaintiff was in fact a payment on account of the principal debt, though both parties supposed the money was in fact paid upon a different account, it would follow that

[1] 6 Daly, 416.

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the plaintiff, whenever sued upon the bond, would be able to defeat a recovery *pro tanto;* whereas, if he is regarded, not as having paid any part of the principal debt, but as having paid money under mistake, the mistake giving rise to a claim against the party to whom it was paid, then, should he fail to assert that claim within the statutory period of time, it would follow that when he was sued on the bond, he would get no credit for the payment so made.

At first sight the decision in Belden *v.* The State[1] would seem to support the proposition that an overpayment on one account, made under mistake, can be applied in extinguishment *pro tanto* of another account, although the right to recover the money as money paid under mistake has been barred by the statute of limitations. On examination, however, the decision will be found not to be an authority in favor thereof. In that case the plaintiff made a claim against the State before the Board of Audit, and the State claimed that there should be deducted from the amount of the plaintiff's claim the amount of an overpayment made by the State on another account. This deduction was made, notwithstanding more than six years had elapsed since the payment of the claim. But it must be remembered that the claim on the part of the plaintiff was made, not in a court of law or equity, but before a Board of Audit, whose powers were defined by the Act conferring jurisdiction, and under that statute the Board of Audit were authorized to allow such sums only as it considered were equitably due from the State.[2] It cannot be disputed that equitably one who has received such an overpayment ought not to compel the payment of any claim arising thereafter, without giving credit for the amount of such overpayment. But to say that after the statute of limitations has run against a claim, it can still be used in an action brought in a Court of Law or Equity to reduce the amount of a plaintiff's recovery, is to

[1] 103 N. Y. 1.

[2] Laws 1876, Ch. 444, § 2.

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say that mutual claims extinguish each other, a proposition which has received no countenance in our law. It was because of the absence of such a doctrine in our law that the plea of set-off was introduced by statute. When, therefore, a party sues in a Court of Law, the question is not what he as an honest man should do, but whether the claim which he presents, exists as a cause of action. If it does, then he is entitled to recover thereon, unless the defendant is in a position to plead a set-off. But to plead successfully a claim by way of set-off, one must plead a claim on which he could succeed in an action as a plaintiff, the statute not creating a right, but simply allowing one to assert an existing right in an action in which he is sued as a defendant, where, but for the statute, he could only assert the claim as a plaintiff.[1]

But in Belden *v.* The State, the broad question presented for the consideration of the Board of Audit was not, what would be the rights of the parties were the plaintiff suing a private individual in a Court of Law or Equity, but what were the rights of a claimant having no right of action except as provided by statute, and that statute allowing a recovery only of what was justly and equitably due. The Board of Audit could not do otherwise than allow a credit to the State for such overpayment. Nor could the court on appeal, authorized by statute to consider both the law and evidence, "and determine the same between the claimant and the State as shall be equitable and just,"[2] do otherwise than affirm such decision. The question involved in Belden *v.* The State was simply, what amount one would consider himself bound in justice and common fairness to pay to another in such circumstances.

In affirming the finding of the Board of Audit, the Court said: —

[1] Langdell, Summary of Eq. Pl. 2 ed. §§ 151, 152. Green *v.* Farmer, 4 Burr. 2214, 2220, 2221.

[2] Laws of 1881, Ch. 211.

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"The appellants contend that the statute of limitations barred the right to recover the overpayments. Whether time had elapsed sufficient in any view for that purpose, I do not think it needful to inquire. No judgment has gone in favor of the State against the appellants. The money in their hands was in excess of that due from the State when they presented their claims, and a tribunal having the powers of a court not only of law but equity, and expressly charged to allow only such sums as it considered should equitably be paid by the State to the claimants (Laws of 1876, Ch. 444, § 2), has adjudged, that while retaining it, they have no claim which can be allowed. That conclusion has been approved by a court authorized upon appeal to consider both the law and the evidence, 'and determine the same between the claimant and the State, as shall be equitable and just' (Laws of 1881, Ch. 211). A different decision would be a reproach to either jurisdiction. The claimants could ask for only so much as was due to them, and before a court having power to take an account and strike a just balance between the parties, it would be a surprising assertion for one to say, 'I obtained the money of my adversary under circumstances which imposed on me an obligation to repay; but in the meantime he became justly indebted to me, and as by lapse of time no action can be brought by him, I now demand that my title to the money so obtained shall not be questioned, but be deemed absolute, and he be required to pay the debt which has accrued.' It might be well answered: 'You shall be deemed to have done your duty, and at the moment of the accruing of the claim to have applied upon it the money which you had already received from your debtor.' So here the money received by the claimants in overpayment on one contract, must be deemed to have been money in their hands for the use of the State, the State entitled to its application, and the claimants be presumed to have applied it in payment of the other obligation the moment it accrued. The existence of means of payment in the hands of the creditor, and the lapse of time, are conclusive evidence of the pre-existing fact of an actual discharge of the accruing debt, or are of themselves facts which require a court of equity to adjudge such application to have been made. Equity requires that one demand should extinguish the other by deducting the less from the greater."

The facts of the case certainly rendered it quite unnecessary for the court to indulge in the fiction of presuming that

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the plaintiff had done his duty, and that at the moment of the accruing of the claim upon which he made his demand, he had applied thereto the money already received by him from his debtor. It is perfectly apparent from the facts of the case, that he did no such thing, and the rights of the parties are the same whether he did or did not do it. The statement made by the court that equity requires that one demand shall extinguish the other by deducting the less from the greater, while true of equity, as that word is used in common parlance, receives no recognition in a court of equity.[1]

If it be assumed that the plaintiff in Jackson *v.* McKnight, when sued on the bond, should avail himself of the fact of an overpayment of interest, not by plea of payment, but by plea of set-off or counter-claim, the decision cannot be supported, since a counter-claim or set-off presupposes a right of action.[2] But a right of action in Jackson *v.* McKnight would exist, not against the assignee of the bond, who would be the plaintiff in the action on the bond, but against his assignor, the obligee; not against the plaintiff of record, but the plaintiff's assignor, the obligee of the bond, as it was the obligee and not the assignee who received the money. The court, however, in denying the plaintiff's right in Jackson *v.* McKnight to recover money so paid, necessarily found that he had no claim. Unless, therefore, the facts can support the plea of payment, the plaintiff must lose the amount so paid.[3]

In Boas *v.* Updegrove,[4] the plaintiff sought a recovery of money which he had paid in satisfaction of a judgment obtained against a third party, supposing the judgment to be a lien on land of which he was the terre-tenant. It was

[1] 12 Story, Eq. Jur. 13 ed. 765.

[2] *Supra*, p. 56.

[3] In Devine *v.* Edwards, 101 Ill. 138, the defendant, who claimed to have made an overpayment under mistake, pleaded the overpayment by way of set-off.

[4] 5 Pa. St. 516.

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held that as the judgment creditor could in conscience refuse to refund the money so paid, there could be no recovery.

Right of recovery where defendant cannot be put in *statu quo*.

Is it against conscience for a defendant to retain money paid to him under mistake, when the circumstances are such that the parties can no longer be put in *statu quo*, and the repayment thereof will throw a loss upon him? This question may arise where, but for the negligence of the plaintiff, the mistake would not have been made; where the mistake was due to the negligence of the defendant; where neither the plaintiff nor the defendant can be said to have been negligent; where if the plaintiff was negligent the defendant was equally negligent; or where, though there was no negligence at the time of payment, the plaintiff has been guilty of laches in asserting his rights.

It was at one time assumed in the English cases that if the mistake was one for which the defendant was no more responsible than the plaintiff, there could be no recovery, if the parties could not be put in *statu quo*. In Brisbane *v.* Dacres,[1] one of the grounds upon which two of the three judges, who decided that the plaintiff could not recover, rested their decision, was the fact that the defendant's position had been irrevocably changed in consequence of the payment. In that case the plaintiff, a captain of a naval vessel, sought to recover money which he had paid to the defendant's testator, supposing that he was entitled thereto, by virtue of his position as admiral. Mansfield, C. J., in his opinion denying the plaintiff's right to recover, said: —

"I find nothing contrary to *æquum et bonum*, to bring it within the case of Moses *v.* MacFerlan, in his retaining it. So far as it being contrary to *æquum et bonum*, I think it would be most contrary to *æquum et bonum* if he were obliged to repay it back. For see how it is: If the sum be large it probably alters the habits of his life; he increases his expenses; he has spent it over and over

[1] 5 Taunt. 144.

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again; perhaps he could not repay it all, or not without great distress. Is he, then, five years and eleven months after to be called on to repay it?"

In Smith *v.* Mercer,[1] one of the grounds upon which a recovery was denied the plaintiff, who sought to recover money paid on a forgery, was, that in consequence of the payment, the defendant had either lost his remedy against the endorser, or perhaps could not realize the amount of his claim, if the remedy still existed.

In Grier *v.* Huston,[2] it was assumed that if the defendant could not be put in *statu quo*, the plaintiff could not recover money which he had paid to the defendant under mistake. It was objected to a recovery in that case, that the defendant could not be charged personally, by the plaintiff seeking to recover money paid under mistake, for money which he had received as administrator. The court, holding that he could be so charged, said: —

"But it is objected that it would be both hard and unjust that the defendant, who had received money through the plaintiff's mistake, and had administered it in payment of debts of the intestate without notice of the mistake, should be responsible personally: whereas, if he had been sued as administrator, he might have pleaded that he had fully administered. Undoubtedly it would be unjust that the defendant should be deprived of his defence by this form of action. But that is not the case. He may plead the special matter, and show that he had disposed of the money in payment of debts of the intestate before he had notice of the mistake; just as an agent may do, who, in a like case, may defend himself by proving that he had paid over the money to his principal before notice. There is, indeed, this difference between an administrator and an agent: The administrator, besides proving that he has applied the money to the payment of debts, must show that the estate of the intestate is insolvent, because if there are assets he may indemnify himself. But where the agent pays over to his principal, the person who has made the mistake may have his

[1] 6 Taunt. 76. [2] 8 S. & R. 402.

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action against the principal, which he could not have against a creditor who had received payment of his debt from the administrator. From necessity, therefore, the action must be brought against the administrator personally, and if he has assets by which he may be indemnified he cannot be injured."

In Boas *v.* Updegrove[1] one of the grounds upon which the plaintiff's right to recover money paid under mistake was denied, was that the defendant had suffered an irrevocable change of position.

It seems, however, that in England to-day an irrevocable change of position on the part of a defendant, which will result in a loss to him if he is compelled to refund money paid by mistake, constitutes no defence, even in cases where the responsibility for the mistake rests as much upon the plaintiff as on the defendant. In Newall *v.* Tomlinson,[2] the plaintiff and the defendant, each acting for an undisclosed principal, but dealing with each other as principals, entered into a contract whereby the plaintiff contracted to buy, and the defendant contracted to sell, certain cotton. Weight lists were furnished by the warehouseman to both the plaintiff and the defendant. By a mistake made by the defendant's clerk in adding the figures, the weight appeared to be greater than it really was, and the plaintiff, relying upon the figures made by the defendant's clerk, made an overpayment to the defendant. At the time of the sale to the plaintiff, the defendant's principal was indebted to the defendant for advances made on the cotton sold to the plaintiff, and the defendant on receiving the money from the plaintiff, applied it, as he was authorized by his principal to do, in extinguishment of this indebtedness. The plaintiff did not discover the mistake which led to the overpayment until after the defendant's principal had become insolvent. It was held that the plaintiff was entitled to recover from the defendant the overpayment so made. It was urged on

[1] 5 Pa. St. 516. [2] L. R. 6 C. P. 405.

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behalf of the defendant that, as the plaintiff must necessarily have known that the defendant was acting for a principal, though undisclosed, that the fact of payment over, or what was the same thing in point of law, the credit in account with his principal, was a complete defence to the action for money had and received.

Effect of payment over by one not disclosing his agency.

This question seems to have been argued by the counsel without regard to the insolvency of the defendant's principal, and on the simple principles of agency. The court properly refused to apply the doctrines of agency. While it is true that it is a complete defence to an action brought against an agent for money, which was voluntarily paid to him *as agent*, that he has paid the money over to his principal without notice of any claim thereto on the part of the plaintiff, from whom he received the money, the reason therefor is that in legal contemplation the payment was made by the plaintiff to the defendant's principal; and if in addition thereto the money has in fact reached the principal's hands, without notice on the part of the agent that he should not pay the same over, then, since the money has reached the very person to whom the plaintiff intended to pay it, in circumstances implying nothing inequitable on the part of the defendant in paying it over, the plaintiff should assert his claim against the defendant's principal, and not against the defendant. In Newall *v.* Tomlinson this doctrine could not be invoked, because the parties dealt with each other, not as agents, but as principals, and therefore the defendant could not claim that in paying the money over to a party, who in fact sustained the relation of principal to him, he had paid the money to the person to whom the plaintiff intended to pay it at the time when he made the payment to the defendant. While, therefore, the plaintiff could not prove that he was in fact an agent for the purpose of invoking the doctrine of payment over, yet if it be assumed that the mistake was one for which the defendant was not more liable than the plaintiff, it

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seems that he should have been allowed to prove any fact which, if proved, would establish or tend to establish that a loss would in fact be thrown upon him if he were compelled to restore to the plaintiff the money which had been paid under mistake. Why in such a case should a court pursue a course which will indemnify the plaintiff at the expense of the defendant? Had the plaintiff not made the mistake, the defendant would have collected from his debtor the amount of his advances. In consequence of the plaintiff's mistake, the defendant, because of appropriating, as he was authorized to do, the money which he in fact held, not for his own benefit, but for the benefit of his principal, in payment of the debt, is now in a position where he can no longer effectually assert his claim against his debtor, owing to the debtor's insolvency. Why in such a case should not the law leave the loss where it finds it? Why is not such a case, a case for the application of the rule, that as between equal equities the legal title will prevail?

Legal title to money paid under mistake is in payee.

That the legal title to money paid under a mistake, such as occurred in Newall *v.* Tomlinson, passes, does not seem to admit of question. The title to the money must be regarded as vesting in the defendant, just as title to real estate is regarded as vesting in the grantee where the grantor under a mistake as to his obligation to the defendant conveys to him by deed a piece of real estate. Unquestionably in such a case the title passes, and a reconveyance thereof is necessary to revest the title in the original grantor.

The title in the case of real estate passes because the grantor has observed the formalities necessary to the transfer of title, and delivered the deed with the intention that the title to the property should pass. Now the formality necessary to the passing of title to personal property is the intention to transfer the same, coupled with a delivery thereof in the case of a gift; and since in a case of money

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paid under mistake, where there is no mistake as to the identity of the party to whom the money is delivered, there is the intent to vest the title, and the intention is accompanied by delivery, it seems impossible to hold that the defendant does not at law become the owner of the money. That the intention would not have existed but for the mistake, is as immaterial in considering the question of the vesting of title, as is the fact in a case of fraud that had the plaintiff known that the defendant was defrauding him, he would not have delivered the property in question to him. In either case, whether the case be one of mistake or fraud, the title passes; but in each case the title is defeasible, that is to say, the legal title passes subject to an equity in the plaintiff to demand a revesting of the title in himself. And though in the case of personal property, courts of law, since no formal conveyance thereof is necessary, have substituted for the bill in equity the action of trover, it is nevertheless true that the title to the property was transferred to the defendant. It is because the defendant has the title that he can transfer an indefeasible title to an innocent purchaser for value. That the title to personal property — and in this particular there can be no distinction drawn between money and negotiable paper — passes by delivery with intent to confer title, is well illustrated by the case of Robertson *v.* Coleman.[1] In that case a person, representing himself to be Charles Barney, left for sale with the defendants a horse and carriage, which they sold for him, giving him in exchange therefor a check payable to the order of Charles Barney. This check was endorsed by the defrauding party in the name of Charles Barney to the plaintiff for value. Before selling the property, the defendants had made inquiries regarding Charles Barney, and had been informed that Charles Barney was a responsible and trustworthy man. The person for whom the defend-

[1] 141 Mass. 231.

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ants had sold the horse and carriage was not, however, Charles Barney, though the defendants, at the time they sold the property, and at the time they delivered the check to him, believed the individual in question to be Charles Barney. It afterwards appeared that the property which the defendants had sold had been stolen by the person who left it with them for sale. It was held that notwithstanding the mistake made by the defendants, the title to the check had vested in the person to whom they delivered it under the name of Charles Barney, and that therefore the plaintiff had an indefeasible title thereto. Field, J., delivering the opinion of the court, said: —

"The defendants for a valuable consideration gave the check to a person who said his name was Charles Barney, and whose name they believed to be Charles Barney, and they made it payable to the order of Charles Barney, intending thereby the person to whom they gave the check. . . .

"It appears that the defendants thought the person to whom they gave the check was Charles Barney of Swansey, a person in existence. . . . It is clear from these facts that, although the defendants may have been mistaken in the sort of man they dealt with, this person was the person intended by them as the payee of the check, designated by the name he was called in the transfer, and that the endorsement of it was the endorsement of the payee of the check by that name."

The legal principle in Robertson *v.* Coleman is a simple one: namely, that where personal property is delivered to one with an intention of vesting the title thereto in him, the title will vest, notwithstanding the existence of the intention was due to a mistake. If this proposition is true of ordinary chattels, it must equally be true where money is delivered in similar circumstances. And it is submitted that where the legal title passes to a defendant not more responsible for the mistake than the plaintiff, and acting in good faith in receiving the same, a recovery should not be allowed which would involve him in loss.

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In Durrant *v.* The Ecclesiastical Commissioners,[1] it was held that a plaintiff who had paid tithes in ignorance of the fact that they were assessed in part against land not occupied by him, the defendant supposing that the plaintiff was the occupier of the land, could recover the money so paid, notwithstanding the fact that the defendant, because of the time that had elapsed between the time of the payment and the time when the plaintiff sued to recover the same, had lost all remedy against the real occupier of the land. The court regarded the fact of defendant's having suffered an irrevocable change of position as immaterial, for the reason that there was no mutual relation between the parties creating a duty on the part of the plaintiff to the defendant, and on that ground distinguished the case from Cocks *v.* Masterman.[2]

It is submitted that the distinction made by the court is not sustained by the decision in Cocks *v.* Masterman. In that case the plaintiff had paid a bill of exchange purporting to be accepted by the drawees thereof, payable at the plaintiff's, with whom the drawees kept an account. The acceptance being forged, the plaintiff gave notice thereof on the following day to the defendant, to whom the money was paid as endorsee of the bill, and sought to recover the money, as money paid under mistake. It was held that the plaintiff could not recover. Bayley, J., delivering the opinion of the court, said: —

"In this case we give no opinion upon the point whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendant on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to other parties on the bill; but we are all of opinion that the holder of a bill is entitled to know on the day when it becomes due whether it is an honored or dishonored bill, and that if he receive the money and is suffered to retain it during

[1] 6 Q. B. D. 234. [2] 9 B. & C. 902.

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the whole of that day the party who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonored by the acceptor) to take any steps against the other parties to the bill until the day after it is dishonored, but he is entitled to do so if he thinks fit, and the parties who pay the bill ought not by their negligence to deprive the holder of any right or privilege. If we were to hold that the plaintiffs were entitled to recover, it would be in fact saying 'that the plaintiffs might deprive the holder of a bill of his right to take steps against the parties to the bill on the day when it becomes due.' "

It is submitted that the essence of this decision is, not that the plaintiff was under a duty to the defendant (for the plaintiff had not accepted the bill), but that the defendant had a right to take steps against the parties secondarily liable on the bill, on the day when it became due, and that one depriving him of that right by paying the bill could not recover the money so paid.

To say that a plaintiff can recover money paid by mistake notwithstanding the recovery will throw a loss upon the defendant provided the plaintiff is under no obligation to the defendant, is to lose sight of the grounds upon which a recovery is allowed, — namely, that the defendant has money which in conscience he cannot keep. It seems difficult to establish in a case where the defendant cannot be said to be more responsible for the mistake made by the plaintiff than is the plaintiff himself, that he should in conscience return to the plaintiff money paid under mistake, where the result of such repayment is to throw a loss upon the defendant which he would not have suffered, had not the payment been made. The principle that forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself against loss at the expense of an innocent and blameless defendant.[1]

In Kingston Bank *v.* Eltinge,[2] the plaintiff and the defend-

[1] Ellis *v.* Ohio L. & T. Co., 4 Oh. St. 628 (*semble*).

[2] 40 N. Y. 391.

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ant had obtained judgments against the same debtor. The defendant's judgment was a prior lien upon the real estate because of priority of record. Money realized from the sale of personal property of the judgment debtor on execution by the sheriff was, with the plaintiff's consent, paid to the defendant, and the defendant's judgment cancelled of record. The plaintiff at the time he consented to the payment to the defendant supposed that the property was sold under the defendant's execution and that the defendant was therefore entitled thereto. In fact the execution delivered by the defendant to the sheriff had expired by lapse of time, giving the plaintiff a prior claim on the personal property which was sold by the sheriff. The court held that the fact that the defendant would lose the amount of his judgment if compelled to pay to the plaintiff what he had received, would constitute no defence to an action by the plaintiff to recover the money so paid, although if the money had not been paid to the defendant, the amount of the defendant's judgment could have been realized out of the real estate.

"The next proposition of the respondents," said Hunt, C. J., "is that by the discharge of their judgments they have lost their lien upon the real estate of their judgment debtors, and if compelled to refund would lose their debt. To state it in another form, they insist that the claim against them cannot be maintained unless they can be restored to their original position, and secured from the intervention of other liens and purchases. This, they say, cannot now be done, citing Crozier *v.* Acker (7 Paige, 137). That was the case of a mistake of law. The Chancellor says: 'If this court can relieve against a mistake in law in any case, where the defendant has been guilty of no fraud, which is very doubtful, it must be in a case in which the defendant has lost nothing by the mistake, and where the parties can be restored to the same situation in which they were at the time the mistake happened.'

"The application of this principle to the present case would substantially destroy the rule that money paid in mistake of facts can be recovered by the payer from the receiver. If the facts could be so arranged that there would be no loss to either party, there

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would be nothing to contend about, and no such actions would be brought. It is only where the retention or restoration of the money involves a loss that the parties are anxious about it. It is an ordinary result of the transaction that the party receiving has incurred liabilities or paid money which he would not have done except for the receipt of the money. I find no case, however, in which this has been held to relieve him from the performance of his duty. In the present case the one party or the other, upon the facts found, will lose his debt. By cancelling their judgment the respondents will have lost an available security. By failing to receive the amounts due to them upon their subsisting executions the appellants will have lost their debt. One party or the other being compelled to lose, the question is, which shall it be? The answer given by the authorities is, that the party having the legal right must prevail."

Meaning of rule that legal title will prevail.

That a recovery by a plaintiff in the case of mistake necessarily throws a loss upon a defendant; that a loss to the plaintiff if he is not allowed to recover, necessarily means a loss to the defendant if the plaintiff is allowed to recover, will not of course be contended for. Where money is paid under mistake, a recovery by the plaintiff, in the absence of intervening circumstances, leading to an irrevocable change of position on the part of the defendant, means, not a loss to the defendant, but that the parties are, by the plaintiff's recovery, put in *statu quo*. The defendant in such a case only fails to make an acquisition. To assume, as did the court in Kingston Bank *v.* Eltinge, that the defence of an irrevocable change of position throwing a loss upon a defendant, would destroy the rule that money paid under mistake of fact can be recovered, is to lose sight of the many questions of law and fact raised in this class of cases. The statement by the court that "The answer given by the authorities is, that the party having the legal right must prevail," it is submitted, ought to have precluded a recovery by the plaintiff instead of conferring upon him a right of action. The rule that as between innocent parties the legal right will prevail, is a rule asserted in behalf of a

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defendant who seeks to protect himself against an equitable claim. In other words, the proposition that the party having the legal right must prevail, it is submitted, means in this connection, that a defendant can avail himself of that fact as a defence, and not that the defendant who now has a legal right can have it taken away from him, because at some prior time the legal right was in the plaintiff.

In The Corn Exchange Bank *v.* The Nassau Bank,[1] the doctrine of the Kingston Bank *v.* Eltinge, that an irrevocable change of position involving a loss to the defendant, where the parties are equally innocent, constitutes no defence to an action brought to recover money paid under mistake, was confirmed, and a recovery allowed in a case where the defendant offered to prove that the money which had been paid to him by the plaintiff, under a mutual mistake as to the genuineness of an endorsement, had been in fact collected by him for a depositor, and had been paid to the depositor, who, although insolvent when the recovery was sought, was solvent at the time when the money was paid, and for some time thereafter. It may therefore be regarded as the law in New York at the present time, notwithstanding numerous *dicta* to the contrary in the earlier decisions, that in such circumstances money paid under mistake of fact can be recovered back.

There remains for consideration the effect of the plaintiff's negligence on his right to recover, where a recovery will throw a loss on the defendant.

Negligence no bar to a recovery where defendant can be put in *statu quo*.

Before considering this question it is necessary to consider the effect of the plaintiff's negligence on his right to recover in a case where a recovery will not involve the defendant in a loss.

Although the rule is not universal,[2] it is generally held[3]

[1] 91 N. Y. 74.

[2] West *v.* Houston, 4 Harring. 170; Wilson *v.* Barker, 50 Me. 447; Peterborough *v.* Lancaster, 14 N. H. 382 (*semble*); Brummitt *v.* McGuire, 107 N. C. 351. See also First National Bank of Denver *v.* Devenish, 15 Col. 229.

[3] Kelly *v.* Solari, 9 M. & W. 54; Rutherford *v.* McIvor, 21 Ala. 750;

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that the fact of the plaintiff's mistake having been caused by his own negligence will not, in the absence of other facts, bar a recovery. In Appleton Bank *v.* McGilvray,[1] the reasoning by which this result has been reached was well put by Bigelow, J. : —

"This view of the legal relation of the parties is decisive of the remaining objection to the plaintiffs' right of recovery in this action. The money was clearly paid over to the defendants under a mistake of fact; and, upon familiar principles, an action can be maintained to recover it back. It is no answer to the plaintiffs' claim, that the mistake arose from the negligence of the plaintiffs. The ground on which the rule rests is, that money, paid through misapprehension of facts, in equity and good conscience belongs to the party who paid it; and cannot be justly retained by the party receiving it, consistently with a true application of the real facts to the legal rights of the parties. 2 Saund. Pl. & Ev. (2d ed.) 394. The cause of the mistake therefore is wholly immaterial. The money is none the less due to the plaintiffs, because their negligence caused the mistake under which the payment was made."

Effect of negligence where defendant cannot be put in *statu quo*.

If, however, where the mistake was due to the plaintiff's negligence the defendant would suffer a loss if a recovery were allowed, it seems clear that negligence should operate as a bar to a recovery. Since but for the plaintiff's negligence neither plaintiff nor defendant would have suffered a loss, the law should leave the parties where it finds them, and not allow the plaintiff to indemnify himself at the expense of the innocent defendant.[2]

For the same reason, if the mistake was due to negligence

Devine *v.* Edwards, 101 Ill. 138; Brown *v.* College Corner Road Co., 56 Ind. 110; Fraker *v.* Little, 24 Kan. 598 (*semble*); Baltimore R. R. Co. *v.* Faunce, 6 Gill, 68; Appleton Bank *v.* McGilvray, 4 Gray, 518; Koontz *v.* Central National Bank, 51 Mo. 275; Lawrence *v.* American National Bank, 54 N. Y. 432; Meredith *v.* Haines, 14 W. N. C. 364; Glenn *v.* Shannon, 12 S. C. 570; Hurd *v.* Hall, 12 Wis. 112 (*semble*).

[1] 4 Gray 518, 522.

[2] Walker *v.* Conant, 65 Mich. 194.

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on the part of the defendant, and the plaintiff cannot be fairly said to have contributed thereto, the defendant, notwithstanding a recovery by the plaintiff will involve the defendant in loss, should not be allowed to plead that fact in bar of a recovery, since but for the defendant's negligence neither party would have suffered a loss.[1]

In Koontz *v.* Central National Bank,[2] the plaintiff sought to recover money paid to the defendant in the following circumstances: The defendant, as agent for collection, by mistake and inadvertence presented to the plaintiff a draft, drawn, not upon the plaintiff, but upon one Simpson. The plaintiff, under the impression that she was indebted to the drawer of the draft, paid the draft, supposing that it was drawn upon her. Before the defendant received notice of the mistake, he had paid the money to his principal, and the drawee of the draft had become insolvent. It was held, nevertheless, that the plaintiff could recover.

It is submitted that this result should not have been reached. If the defendant in presenting to the plaintiff for payment a draft drawn upon another was guilty of negligence, the plaintiff was equally negligent in paying the draft without inspecting it. The drawee of the draft being insolvent, the loss must fall, if the plaintiff is allowed to recover, upon the defendant, or upon his principal, and it would seem that as between parties equally innocent, the fact being that, but for the negligence of the plaintiff, no loss would have been incurred, the law should leave the loss where it finds it.

Effect of laches in asserting claim.

If a plaintiff, whose mistake was due to negligence, cannot recover money paid under mistake, where the parties can no longer be put in *statu quo*, on the same principle it should be held that there can be no recovery where, though not negligent at the time when the money was paid, he has been

[1] Union Bank *v.* U. S. Bank, 3 Mass. 74.

[2] 51 Mo. 275.

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guilty of laches in asserting his claim, and a recovery by him will throw a loss upon the defendant.[1]

Burden of establishing an irrevocable change of position.

Assuming that a plaintiff will not be allowed to recover, if a recovery will result in a loss to the defendant, it remains to consider upon whom the burden rests of establishing the facts bearing on that question. In Brisbane *v.* Dacres,[2] although there was no evidence in the case bearing on the question, one of the grounds upon which the court denied the plaintiff a right to recover was that the party to whom the money had been paid might have changed his position. In Smith *v.* Mercer,[3] Dallas, J., discussing the question of injury arising from a recovery by the plaintiff, of money paid under mistake, said: —

"Is it, however, productive of no injury to any of the parties on the bill? Suppose Smith & Co. had not paid it, it would have been immediately returned to Spooner, and by him to Le Souef the endorser; and it might have been recovered or put in suit. But the effect of the delay has been to give him an extended credit; and how am I able to say that his situation in the intermediate time may not have undergone such a change as to render him incapable of paying what he could have paid upon proper notice and demand? Nor do I think it will be an answer to observe that nothing of this sort is stated in the case; for the plaintiffs had no right to cast upon the defendants the burthen of such proof, which in point of law, if the fact had existed and could have made any difference, it was for themselves to produce."

It is submitted that this position cannot be justified. At the time when the defendant received the money, had the mistake been immediately discovered and a demand made,[4] the defendant would have been compelled to return to the plaintiff the money so received. Independently of the rule that a state of facts once shown to exist is presumed to continue to exist until the contrary is shown, the plaintiff

[1] Skyring *v.* Greenwood, 4 B. & C. 281.

[2] 5 Taunt. 144.

[3] 6 Taunt. 76.

[4] As to the necessity of demand see *infra*, p. 140.

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should be held to have made out his case by proving the receipt of money under a mistake resulting in a failure of consideration, causing an unjust enrichment of defendant in the absence of exceptional circumstances. Furthermore in the case of money paid under mistake, as in other cases,[1] an exceptional state of facts should be alleged and proved as an affirmative defence. And such seems to be the rule of law in regard to the question of change of position, notwithstanding the cases referred to.[2]

Effect of mistake being as to a collateral fact.

It has been said that even though there has been a failure of consideration as to the plaintiff, there can be no recovery by him of money paid under mistake, if the mistake was as to a collateral fact.

Thus in Southwick *v.* The First National Bank of Memphis,[3] the plaintiff, who had authorized the drawing of a bill of exchange upon himself as drawee for the purpose of taking up with the proceeds thereof a note to which the plaintiff was a party, sought to recover the money paid to the defendant, an endorsee of the bill (the drawers being the payees thereof), claiming that when he paid the bill he supposed that the defendant had collected the bill for the purpose of taking up the note with the proceeds thereof, when in fact the defendant had credited the drawers with the amount of the bill on account of an overdrawn account, and was collecting the bill for its own use. It was held that the plaintiff could not recover. One of the grounds upon which the decision of the court was rested was that the mistake was as to a collateral fact, and that in order that a recovery might be had of money paid under mistake, the mistake must be not as to a collateral, but as to an intrinsic fact. On this point Erle, J., delivering the opinion of the court, said:—

[1] Langdell, Summary of Eq. Pl. § 109.

[2] Walker *v.* Conant, 65 Mich. 194; Mayer *v.* New York, 63 N. Y. 455.

[3] 84 N. Y. 420.

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"It is certainly true that if the drawers had known what they now know, or if they had known that the proceeds of the draft were to be applied otherwise than upon the whole draft, they would not have accepted or paid the bill. But were they so mistaken that they can claim the money voluntarily paid by them? It is not every mistake that will lay the groundwork for relief. It must be a mistake as to some existing fact, not as to something to happen or to be done in the future. It must be a mistake as to some fact not remotely but directly bearing upon the act against which relief is sought. (Dambman *v.* Schulting, 75 N. Y. 55.) If it were the rule to relieve against mistake as to remote or what are sometimes called extrinsic facts, great uncertainty and confusion would attend business transactions. Here the draft was genuine, and addressed to the drawees, who had authorized it to be drawn; and it was held by the defendant which could lawfully receive payment thereof. The fact that the drawers had not acted in good faith with the drawee, or had placed the draft and its proceeds beyond their control so that the whole draft might not be paid, were too remote. The mistake of the drawees was rather as to the application of the money paid by them,— a future fact. If the defendant had received this money and applied it upon the old draft, the precise expectation of the drawers would have been met, and there would have been no ground of complaint."

Now it is submitted that the mistake of the plaintiff in this case was not, as the court states, simply as to a future fact. It was a mistake as to an existing fact, and as to the rights acquired on paying the amount of the bill to the defendant. The mistake as to an existing fact was that he supposed that the bill was held by the defendant with instructions to pay to the drawer of the bill the money in question, or to use the same directly for the purpose of taking up the old draft. In other words, his mistake was that the drawer was collecting the amount of this draft for the purpose of doing a future act, and that the defendant was representing him in furtherance of that purpose. The plaintiff's mistake in regard to this existing fact resulted in his failure to acquire the right that he expected in ex-

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change for the money paid by him, namely, a right to have the note taken up with the proceeds of the draft. That great confusion and uncertainty would attend business transactions if the court inquired into the mistake as to collateral facts seems hardly to be a sufficient reason for refusing to allow a recovery of money paid under mistake, since a plaintiff, if the defendant is not the more blameworthy of the two, should never be allowed to recover where it can be shown that a recovery will involve the defendant in a loss. And to deny a recovery where the mistake is as to a collateral fact because of the necessity of discouraging and suppressing litigation, while allowing a recovery where the mistake is as to an intrinsic fact, notwithstanding the mistake was due to the negligence of the plaintiff, seems hardly consistent.

In Chambers *v.* Miller,[1] where it was held that money paid on a check in ignorance of the fact that the drawer's account was overdrawn, the cashier supposing the account to be good, could not be recovered, Williams, J., based his opinion upon the fact that the mistake was as to a collateral fact.[2]

[1] 13 C. B. N. S. 125.

[2] If the holder of the check knew that the drawer was paying the check under mistake, he would not be allowed to retain the money. Martin *v.* Morgan, 3 Moore, 635.

In view of the decision in Southwick *v.* First National Bank of Memphis (*supra*, p. 74) one would expect to find that in New York a bank cashing a check under mistake as to the drawer's account, could not recover the money so paid. But such is not the case. It was held in The Troy City Bank *v.* Grant, Hill & Den. 119, that the plaintiff, who had credited the holder with the amount due on a promissory note, payable at the plaintiff bank, under a mistake as to the account of the maker thereof, could, on discovering the mistake, correct it and serve the endorsers with notice of nonpayment. This decision has been reaffirmed in Whiting *v.* The City Bank, 77 N. Y. 363 ; 89 N. Y. 604. It is impossible in the opinion of the writer to distinguish the cases. In each case, the instrument was genuine, and addressed to the drawee. In each case the mistake was as to a fact not to be ascertained by an inspection of the instrument. In each case the instrument was in the hands of an innocent party, and received by him in the course of business.

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It would follow from this doctrine as to collateral mistake, that if money were paid under a mistake as to the account of the drawer of a check, the drawer having no account when the bank supposed his account to be good, a mere donee of a check could retain the money so paid. That is to say, if A should draw a check in favor of B and make him a present thereof, that though B had no rights against the drawer for the reason that there was no consideration as between himself and the drawer, and had no claim upon the bank because the bank was not a party to the check, yet, if the bank paid the check thinking the state of the drawer's account required them so to do, the bank could not recover the money so paid. It would follow that B would make a profit at the expense of the bank, unless the bank were able to collect the amount thereof from A, and yet such a result would seem to be plainly inequitable. Why should B be allowed to profit by the mistake of the bank and thereby throw a loss upon the bank? The writer does not believe that such a result, though logically necessary, would be reached.

No recovery against a holder for value

It would seem, however, that the cases in which it has been held that a plaintiff could not recover money paid under mistake as to a collateral fact were correctly decided, because in all of the cases the defendant received the money in the course of business and in payment of a claim. Having acquired the legal title to the money,[1] and having parted with value therefor in that he surrendered a right, he should be allowed to invoke the rule that one who parts with value in good faith for a legal title takes the same free from equities.

This principle was stated in Southwick *v.* The First National Bank of Memphis,[2] as an additional ground for holding that the plaintiff was not entitled to recover.

"If the drawers," said Erle, J., "had received this money from the drawees to pay the old draft, and had used it to pay their

[1] *Supra*, p. 63. [2] *Supra*, p. 74.

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antecedent debt to the defendant, it is conceded that the drawees could not have reclaimed it. How can it make any difference in principle that the money was paid to the defendant directly by the drawees upon the order of the drawers? Whether the money was paid in the one way or the other, the principles of public policy and convenience lead to the same conclusion."

The principle was also recognized in, and is well illustrated by, the decision in Merchants' Insurance Co. *v.* Abbott,[1] where the plaintiff sought to recover money paid to the defendants, Denny, Rice, & Co., in the following circumstances: The plaintiffs had issued a policy of fire insurance to one Abbott. Abbott, who was a debtor to the defendants, burned the premises insured by the policy. Denny, Rice, & Co. making a demand upon him for the payment of their debt, Abbott assigned to them the policy which had been issued to him by the plaintiff. The policy was presented for payment by Denny, Rice, & Co. to the plaintiff and paid by the plaintiff, both parties being ignorant of the fact that Abbott had burned the property covered by the policy. The plaintiff subsequently discovering this fact demanded a return of the money from Denny, Rice, & Co. It was held that the plaintiff was not entitled to recover. Said Gray, C. J.: —

"The only contract of the plaintiffs was with Abbott, and the only mistake was as between them and him. The money was voluntarily paid by the plaintiffs in discharge of Abbott's supposed claim upon them under their policy, and to these defendants as the persons designated by Abbott to receive, and was in legal effect a payment by the plaintiffs to Abbott. These defendants received the money, not in satisfaction of any promises which the plaintiffs had made to them (for the plaintiffs had made no such promise), but under the agreement of Abbott with these defendants that they might receive it from the plaintiffs, and apply it to the satisfaction of Abbott's debt to themselves. In other words, the money was paid by the plaintiffs to these defendants, not as a sum which the latter were entitled to recover from the plaintiffs, but as a sum

[1] 131 Mass. 397.

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which the plaintiffs admitted to be due to Abbott under their contract with him, and which at his request and in his behalf they paid to these defendants, who at the time of receiving it knew no facts tending to show that it had not in truth become due from the plaintiffs to Abbott. This payment of the plaintiffs to these defendants at Abbott's request was a satisfaction of Abbott's debt to these defendants, and might have been so pleaded by him if sued by them upon that debt. (Tuckerman *v.* Sleeper, 9 Cush. 177.) As between the plaintiff and these defendants there was no fraud, concealment, or mistake. These defendants had the right to receive from Abbott the sum which was paid to them; the assignment which they presented to the plaintiffs was genuine, and was all that it purported to be. They hold the money honestly, for value, with the right to retain it as their own under a title derived from Abbott, and independent of the fraud practised by him upon the plaintiffs.

"The case stands just as if the money had been paid by the plaintiffs to Abbott, and by him to these defendants, in which case there could be no doubt that while the plaintiffs could recover the amount from Abbott, neither Abbott nor the plaintiffs could recover the amount from these defendants. The fact that the money instead of being paid by the plaintiffs to Abbott, and by Abbott to these defendants, was paid directly by the plaintiffs to these defendants, does not make any difference in the rights of the parties. The two forms do not differ in substance. In either case Abbott alone is liable to the plaintiffs, and these defendants hold no money which *ex æquo et bono* they are bound to return either to Abbott or to the plaintiffs."

It is submitted that the defence of a holder for value announced by Gray, C. J., is the ground upon which the decision in Chambers *v.* Miller[1] is to be supported. Such also, it is submitted, is the ground upon which the decision in Aiken *v.* Short[2] is to be supported. In Aiken *v.* Short the plaintiff took as security for a debt due him from one Carter an assignment of an interest in property, which Carter was supposed to hold under a will, the assignment being subject to a charge in favor of the defendant's testator, which the plaintiff agreed with Carter to pay. The defend-

[1] *Supra*, p. 76. [2] 1 H. & N. 210.

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ant made a demand upon Carter for payment, and was referred by him to the plaintiff, who paid the debt. Subsequently it was discovered that Carter had no interest in the property assigned by him to the plaintiff, the testator having revoked the will under which Carter claimed. The plaintiff then sought to recover from the defendant the money paid, and it was held that there could be no recovery.

In this case it is clear that had the money been paid to Carter, and by him been paid to the defendant, the plaintiff could not have recovered from the defendant.[1] Why should the fact that the money was paid directly to the defendant instead of being paid in the first instance to Carter make a difference in the rights of the parties, since in either case the money was received by the defendant in extinguishment of a claim due from Carter?

Another illustration of this principle is afforded by the case of Walker *v.* Conant.[2] In that case the defendant loaned money to one Van Riper, receiving from him a note and mortgage purporting to be executed by his father, but in fact a forgery. Subsequently Van Riper borrowed from the plaintiff a sum of money, a portion of which the plaintiff was to pay the defendant in satisfaction of the loan which he had made Van Riper. The loan from the plaintiff to Van Riper was also obtained by means of a forged note and mortgage purporting to be executed by Van Riper's father. The plaintiff, on discovering the forgery, brought an action to recover the money paid to the defendant as money paid under mistake, and it was held that he was not entitled to recover. One of the grounds upon which the court rested its decision was that the defendant was a holder for value. The court regarded the case as the same in principle as if the money had been first paid to Van

[1] Southwick *v.* First Nat'l Bank, 84 N. Y. 420; Merchants Ins. Co. *v.* Abbott, 131 Mass. 397.

[2] 69 Mich. 321.

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Riper and had then been paid by Van Riper to defendant. The court said: "The authorities are uniform that where money is received in good faith and in the ordinary course of business and for a valuable consideration, it cannot be recovered back because the money was fraudulently obtained of some other person by the payer.

"To hold otherwise would be to put every one who receives money in the due course of business upon inquiry, at his peril, as to the manner in which money was procured by the payer."

The cases of Chambers *v.* Miller and Aiken *v.* Short, and The Merchants' Insurance Co. *v.* Abbott are one in principle. In each case the mistake was as to a collateral matter, namely, the obligation of the plaintiff to a third party. In each case the plaintiff supposed that because of his obligation to a third person he must comply with the demand made upon him by the defendant, and in none of the cases did such an obligation exist. In each of the cases the defendant made the demand in course of business, and received the money paid to him by the plaintiff in extinguishment of a claim against a third party. Accordingly Gray, C. J., cites in Merchants Insurance Co. *v.* Abbott, in support of the conclusion there reached, Chambers *v.* Miller, and Aiken *v.* Short.

The Merchants Insurance Co. *v.* Abbott was decided in 1881; Aiken *v.* Short was decided in 1856; and Chambers *v.* Miller in 1862. In view of the fact that the Massachusetts Supreme Judicial Court approved of these decisions in 1881, it is surprising to find that the opposite conclusion was reached by that court in Merchant's National Bank *v.* National Eagle Bank, decided in 1869.[1] The court apparently decided that case without having the English cases before them, saying, "It is well settled by recent decisions that money paid to the holder of a check or draft drawn without funds may be recovered back if paid by the drawee under mistake

[1] 101 Mass. 281.

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of fact." Although it had always been regarded as a well-settled rule of law in Massachusetts that negligence was not a bar to a recovery of money paid under mistake of fact, and that doctrine was fully recognized by the court at the same term of the court, in Merchant's National Bank *v.* The National Eagle Bank just referred to, it was nevertheless held, in Boylston National Bank *v.* Richardson,[1] that money so paid could not be recovered back because of the plaintiff's laches in making the payment. And in the Merchant's National Bank *v.* The National Bank of the Commonwealth, decided in 1885,[2] it was held that money paid under mistake as to the amount of the depositor's account might be recovered. The court cited with approval the Merchant's National Bank *v.* The National Eagle Bank, which case was not cited in the case of The Merchants Insurance Co. *v.* Abbott, but made no reference to Aiken *v.* Short and Chambers *v.* Miller, the cases which formed the basis of the decision in The Merchants Insurance Co. *v.* Abbott. In regard to the Merchants Insurance Co *v.* Abbott, the court said: —

"The defendant also relies much on the case of Merchants Insurance Co. *v.* Abbott as establishing a somewhat different principle from the case of the Merchant's Bank *v.* National Eagle Bank. The latter case is not there cited, but we do not find any intention to impugn its authority. It appears to us quite distinguishable from the case here presented. Denny, Rice, & Co. held a valid debt due from Abbott, whose premises had been insured by the plaintiff company and had been destroyed by fire. Abbott assigned to Denny, Rice, & Co. his claim against the plaintiff, who at Abbott's instance paid the amount of the loss to Denny, Rice, & Co. There was no question of the validity or genuineness of the assignment, and by the payment made by the plaintiff the debt which Abbott owed Denny, Rice, & Co. was discharged and satisfied; and this might have been so pleaded by Abbott had he been sued thereon. A year later the plaintiff discovered that the fire had been caused by Abbott, and that his proofs of loss were false and fraudulent. Afterwards an action was brought

[1] 101 Mass. 287. [2] 139 Mass. 513.

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against Abbott and Denny, Rice & Co. It was conceded that Denny, Rice, & Co. had no knowledge of any fraud. As to Abbott, it was not doubted that the plaintiff might recover. If the money had been paid to him it could have been recovered as money paid under mistake of fact; and the payment by the plaintiff, at his request in discharge of his debt to Denny, Rice, & Co., was equivalent to a receipt by him of so much money. But as to the other defendants, Denny, Rice, & Co., the case was deemed to stand as if the money had been paid by the plaintiff to Abbott and by Abbott to them in the ordinary course of business, in which case it could not be doubted that while the plaintiff could recover the money from Abbott, neither Abbott nor the plaintiff could recover the amount from Denny, Rice, & Co. There was not only no mistake between the plaintiff and Denny, Rice, & Co., but by reason of the mistake of the plaintiff — produced by the fraud of Abbott, to which Denny, Rice, & Co. had in no way contributed — they had been induced to surrender and discharge the debt which Abbott owed them. It was impossible to restore them to their original position.

"In the case at bar there is no change of circumstances after the time when the defendant had a right to treat the check as paid, and before it was returned, which would in any way subject the defendant to loss, or render it unjust for the plaintiff to recover. The fact that the defendant gave credit to his depositor in this interval did not make the defendant liable to such depositor when a mistake was discovered which showed it to have been erroneously done.

"The mistake made by the plaintiff was such as would bring the case within the rule which has heretofore been held applicable on this subject. There was no carelessness, as in the Boylston National Bank *v.* Richardson (101 Mass. 287), where they neglected to examine the account of the drawer of a check. Such a transaction shows no mistake of fact in any legal sense, but laches simply. The teller in that case was not misled in any way, and had no reason to suppose the account of the depositor was otherwise than as it actually appeared."

Although in Merchant's National Bank *v.* The National Bank of the Commonwealth the defendant collected the money as agent of the endorsee of the check, the case should be

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treated as if the endorsee were the defendant and not the agent, because if the plaintiff were entitled to recover from the principal, then of course he would be allowed to recover against the agent if he still held the money as agent; but if the plaintiff could not recover against the principal, then he could have no right to recover money paid to the principal's agent. The statement made by the court that they found no intention on the part of the court in Merchants Insurance Co. *v.* Abbott to impugn the principle of the decision in Merchant's Bank *v.* National Eagle Bank, seems hardly warranted by the facts, since the court in The Insurance Co. *v.* Abbott relied upon a case reaching a directly opposite conclusion to that announced by the court in The Merchant's National Bank *v.* National Eagle Bank. The fact that had the money been paid in the first instance by the Insurance Company to Abbott, and then by Abbott to Denny, Rice, & Co., there could have been no recovery by either the Insurance Company or Abbott against Denny, Rice, & Co., it is submitted, does not distinguish the cases. Surely had the payee of the check in Merchant's National Bank *v.* National Bank of the Commonwealth received payment in circumstances similar to those under which the payment was made on the payee's endorsement, and had then paid the money to the defendant, no one would claim that the plaintiff could recover the money from the defendant. Furthermore, the court, in saying there was no mistake between the plaintiff and Denny, Rice, & Co. in The Merchants Insurance Co. *v.* Abbott, but that Denny, Rice, & Co., by reason of a mistake of the plaintiff, produced by the fraud of Abbott, to which Denny, Rice, & Co. had in no way contributed, had been induced to surrender and discharge the debt which Abbott owed to them, makes a statement which can be equally stated of the endorsee in the case which they had under consideration. There was no mistake between the endorsee and the bank. The check was a genuine check, the presentment was authorized. The

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Mistake of Law Begins Here

endorsee knew nothing about the state of the account of the drawer. And the bank, with a knowledge of all the necessary facts as to the check, paid the check, because they thought that the drawer had funds to meet it, and that therefore they were under an obligation to meet the check.

Recovery of money paid under mistake of law.

There is one very general,[1] though not universal,[2] exception to the rule that money paid under mistake may be recovered where it is against conscience for the defendant to retain the money so paid.

Generally money paid under mistake of law cannot be recovered although it is against conscience for the defendant to retain it. This exception dates from the decision in Bilbie *v.* Lumley,[3] decided in 1802. Prior to that time it had been held and assumed in numerous cases,[4] that where

[1] Bilbie *v.* Lumley, 2 East. 469; Mayor *v.* Lancashire, 60 L. J. Q. B. 323 (*semble*); Waples *v.* United States, 110 U. S. 630; Cahaba, Town Council of, *v.* Burnett, 34 Ala. 400; Pritchard *v.* Woodruff, 36 Ark. 196 (*semble*); Bucknall *v.* Story, 46 Cal. 589; Richardson *v.* Denver, 17 Col. 398; The People *v.* Foster, 133 Ill. 496; Fowler *v.* Black, 136 Ill. 363; Snelson *v.* The State, 16 Ind. 29; Hollingsworth *v.* Stone, 90 Ind. 244 (*semble*); Kraft *v.* Keokuk, 14 Iowa, 86; Bailey *v.* Paullina, 69 Iowa, 463; Livermore, Inhabitants of, *v.* Peru, 55 Me. 469; Lester *v.* Baltimore, 29 Md. 415; Wayne County *v.* Randall, 43 Mich. 137; Erkens *v.* Nicolin, 39 Minn. 461; Carson *v.* Cochran, 53 N. W. Rep. 1130 (Minn. 1892); Mutual Savings Institution *v.* Enslin, 46 Mo. 200; Camden *v.* Green, 54 N. J. Law, 591; Clarke *v.* Dutcher, 9 Cow. 674 (*semble*); Vanderbeck *v.* Rochester, 122 N. Y. 285; Newell *v.* March, 8 Ire. L. 441; Railway *v.* Iron Co., 46 Oh. St. 44; Johnson *v.* McGinness, 1 Ore. 292; Real Estate Saving Institution *v.* Linder, 74 Pa. St. 371; Evans *v.* Hughes County, 52 N. W. Rep. 1062 (So. Dakota, 1892); Carwin *v.* Nashville, 2 Bax. 453; Beard *v.* Beard, 25 W. Va. 486.

[2] Northrop *v.* Graves, 19 Conn. 548; Mansfield *v.* Lynch, 59 Conn. 320; Culbreath *v.* Culbreath, 7 Ga. 64 (see, however, Tatum *v.* Trenton, 85 Ga. 468); Ray *v.* Bank of Kentucky, 3 B. Mon. 510; Louisville *v.* Henning, 1 Bush, 381 (but see Louisville & Nashville R. R. Co. *v.* Commonwealth, 89 Ky. 531); Lawrence *v.* Beaubien, 2 Bail. 623 (see, however, Cuningham *v.* Cuningham, 20 S. C. 317).

[3] 2 East. 469.

[4] Hewes *v.* Bartholomew, Cro. Eliz. 614; Bonnel *v.* Fouke, 2 Sid. 4; Turner *v.* Turner, 2 Rep. Ch. 3 ed. 81; Lansdowne *v.* Lansdowne, 2 J. & W. 205, S. C. Moseley, 364;

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a recovery was sought of money paid under mistake, the question of whether the mistake was one of fact or law was immaterial.

In Bilbie *v.* Lumley, Lord Ellenborough denied the plaintiff's right of recovery on the short ground that, "every one must be taken to be cognizant of the law, otherwise there is no saying to what extent the excuse of ignorance might not be carried." It is, however, a curious fact that nine years later Lord Ellenborough did not hesitate to hold [1] that a deed cancelled under mistake as to the legal effect of a will was not to be regarded as cancelled. "And when once," said he, "it is established, as it clearly is, that a mistake in point of fact may destroy it, it seems difficult upon principle to say that a mistake in point of law clearly evidenced by what occurs at the time of cancelling should not have the same effect."

While this proposition of the learned judge is undoubtedly sound, it should be borne in mind that it is only by disregarding the statement made by him in Bilbie *v.* Lumley, that "every one must be taken to be cognizant of the law," that he was able to discover that a mistake of law was made in Perrott *v.* Perrott. And if for the purpose of relieving from the effect of cancellation one is allowed to introduce evidence of a mistake of law, it is difficult to see why any greater danger is involved in allowing the same evidence for the purpose of showing that money was paid under a similar mistake. The decision in Bilbie *v.* Lumley was however followed by the *dicta* of the judges in Brisbane *v.* Dacres [2] to the same effect, and is regarded as establishing the rule in England, that money paid under mistake of law cannot be recovered in an action at law. The same result has been reached generally, though not universally, by the courts of this country. The case of Clarke *v.* Dutcher,[3]

Bingham *v.* Bingham, 1 Ves. Sr. 126; Farmer *v.* Arundel, 2 Wm. Bl. 824 (*semble*); Bize *v.* Dickason, 1 T. R. 285.

[1] Perrott *v.* Perrott, 14 East, 423.
[2] 5 Taunt. 144.
[3] 9 Cow. 674.

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which is regarded as one of the leading authorities on this point in the United States, did not really involve this question, what was said by the court in regard to a mistake of law being a *dictum* simply. The plaintiff there sought to recover money paid under mistake as to the relative value of the New York and English pound sterling. It was held that a part of the claim was barred by the statute of limitations, and that there could be no recovery as to the remainder of the claim not so barred, because it was received by the defendant on account, and that more than that sum was due from the plaintiff to the defendant at the time when the action was brought.

The reason usually assigned for not allowing a recovery of money paid under mistake of law is, that every one is presumed to know the law; and undoubtedly this fictitious way of stating a rule of law in the form of a presumption has had much to do with the establishment of the doctrine under consideration. There is a rule of law that in certain cases ignorance of law excuses no one; but there is no presumption that every one knows the law.[1]

When it is material, ignorance of law can be shown.

Wherever knowledge of the law is material, knowledge is an issuable allegation. Thus, for example, the crime of larceny consists not simply in taking property belonging to another, but in taking property with the intention of appropriating it, knowing it to be another's property. Knowledge of the law may therefore be material as bearing on the question of criminal intention, and it is always permissible for a defendant charged with larceny to show that the property which he in fact took, he regarded as his own and not as the property of the person from whom he took it; and this he can prove, even though in order to prove it, it becomes

[1] In striking contrast with the saying that every one is presumed to know the law, was the opinion of Abbott, C. J., as shown in his charge to the jury in Montrion *v.* Jefferies, 2 C. & P. 113, 116. "God forbid," said he, "that it should be imagined, that an attorney, or a counsel, or even a judge, is bound to know all the law."

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necessary for him to show that the mistake on his part as to the title was due to his ignorance of, or mistake of law.[1]

The same principle was involved in Regina *v.* Twose,[2] where the prisoner, indicted for setting fire to some furze growing on a common, was allowed to show that she did so thinking that she had a right to burn it. The decision in the case of The Queen *v.* Mayor of Tewksbury,[3] can only be supported on the theory that there is no such presumption. In that case the claimant for an office who in fact received a minority vote, sought to establish his election by showing that the ineligibility of his opponent was known to the voters casting their votes for him. To establish this proposition he proved as a fact that it was known by the voters that his opponent was mayor of the town of Tewksbury and the returning officer at the election in question, the law being that one who was mayor and returning officer was not eligible for office. It was argued for the claimant that as he had established knowledge on the part of the voters of his opponent being mayor and returning officer, he had established knowledge on their part of his ineligibility, since every one is presumed to know the law.

This contention was not supported. Blackburn, J., delivering the opinion of the court, said: —

"It is therefore necessary to decide whether the mere knowledge of the fact that Blizard was the mayor and returning officer must be taken to involve knowledge of his being disqualified for election. Every elector in the borough must have known that Blizard was the mayor; and every elector who saw him presiding at the election must have known that he was the returning officer; and every elector who was a lawyer and who had read the case of Regina *v.* Owens (2 E. & B. E. 86), would know that he was disqualified. From the knowledge of the fact that Blizard was mayor and returning officer, was every elector bound to know as a matter

[1] Commonwealth *v.* Stebbins, 8 Gray, 492; Rex *v.* Hall, 3 C. & P. 409.

[2] 14 Cox Cr. Ca. 327.

[3] L. R. 3 Q. B. 629.

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of law that he was disqualified? I agree that ignorance of law does not excuse, but I think in Martindale *v.* Falkner (2 C. B. 719), Maule, J., correctly explained the rule of law. He says: 'There is no presumption in this country that every person knows the law. It would be contrary to common sense. In Jones *v.* Randell (Cow. 38–40), Dunning, *arguendo*, says: "Laws of this character are clearly evident and certain; all the judges know the laws, and knowing them administer justice with uprightness and integrity." But Lord Mansfield in delivering judgment says: "(As to the certainty of the law mentioned by Mr. Dunning), it would be very hard upon the profession, if the law was so certain that everybody knew it; it is so uncertain that it costs much money to know what it is, even in the last resort." It was a necessary ground of the decision in that case that a party may be ignorant of the law. The rule is that ignorance of the law shall not excuse a man or relieve him from the consequence of a crime or from liability upon contract. There are many cases where the giving up of a doubtful point of law has been held to be a good consideration for a promise to pay money. Numerous other instances might be cited to show that there may be such a thing as a doubtful point of law. If there were not, there would be no need of courts of appeals, the existence of which shows that judges may be ignorant of law. That being so, it would be too much to hold that people are bound to know in what particular court such and such a practice does not prevail.'

"I take this to be the rule of law applicable to this case. I think the knowledge that Blizard is the mayor is clearly brought home to every voter.

"But it does not seem to me consistent with justice or common sense or common law to say that because these voters were aware of a certain circumstance they were necessarily aware of the disqualification arising from that circumstance, and that therefore their votes were to be considered as mere nullities."

Confessedly, a party seeking to recover money paid under mistake of law is in no sense a delinquent. He has not inflicted a loss upon any one, nor does he seek to inflict a loss. He is only endeavoring to save himself from a loss, the saving not to be at the expense of any one. If, then, the rule under consideration presupposes a charge of delin-

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quency, the rule can never be properly invoked, except in cases where the person against whom it is invoked is charged with a violation of a right, and a right of which the wrongful violation is not at all dependent upon one's knowledge of law, — a right about which one must inform himself at his peril. In a word, then, one cannot by alleging ignorance of law justify the commission of a crime (though if knowledge of law is material, he can show that because of ignorance of law no crime was committed), a breach of contract, or *quasi*-contract, or the commission of a tort.

The very phraseology of the rule that ignorance of law excuses no one implies a charge of delinquency, and therefore assumes the existence of a defendant seeking to justify an act, in the doing of which it is claimed he has violated some right. Such was the view taken of mistake of law by Lord Ch. King, in Lansdowne *v.* Lansdowne,[1] and Mr. Justice Maule, in Martindale *v.* Falkner,[2] by Mr. Justice Blackburn, in Queen *v.* Tewksbury,[3] and by Nisbet, J., in Culbreath *v.* Culbreath.[4]

While one charged with larceny is permitted to show that, because of his ignorance of law when he took the property, he supposed the property to be his own,[5] this fact when established does not justify the commission of a crime, but shows that none was committed. The same defendant, were he charged in a civil action with the conversion of the property, would not be permitted to show that he, through mistake of law, regarded himself as the owner of the property, for the reason that it would be immaterial, since one deals with property at his peril. The true owner's right to his property is a right *in rem*, and any one interfering with the property without the owner's consent, no matter what his state of mind may be, unless he is acting under warrant of law, is

[1] Moseley, 364.
[2] 2 C. B. 719.
[3] L. R. 3 Q. B. 635.
[4] 7 Ga. 64.
[5] See *supra*, p. 87.

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guilty of a tort. So if one person confer on another contract rights, or if the law confers upon a person *quasi*-contractual rights, these rights must be observed, and the defendant's state of mind, if he violates these rights, is immaterial. In other words, one should never be allowed to plead his ignorance of law where he has violated rights, whether they be public or private, since he has no right morally or legally to throw a loss, which he has caused, upon the party whom he has injured rather than suffer it himself.

But where one is seeking to recover money paid under mistake of law, he is not trying to excuse a delinquency on his part; he is not attempting to throw a loss upon any one. If the plaintiff's recovery would lead to a loss on the part of the defendant, then, the parties being equally innocent, that fact of itself is sufficient reason for denying the right of recovery on the plaintiff's part.

It is evident that public policy requires that ignorance of law shall not excuse the doing of acts which the welfare of society demands should be prohibited. Furthermore, it would be plainly unjust to allow a man who has injured another to throw the loss on that other rather than sustain it himself, because of the fact that if he had known the law, he would not have done the injury. But what is the public policy which demands that one who has done no injury, but simply seeks to avert a loss, shall, because of his ignorance of law, suffer a loss?

The only possible danger arising from allowing recovery of money paid under mistake is, that one who has paid money knowing that the defendant had no claim upon him might, if he were allowed to plead ignorance of law, repent of his generosity, and seek to recover it by falsely swearing to the existence of a mistake of law. But this argument proves too much, for it is as easy for a claimant to simulate ignorance of fact as of law. In either case the inquiry is as to the plaintiff's state of mind at the time that he made the pay-

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ment. It is, therefore, difficult to understand why the same rule should not be applied in each case, since, in any case, the plaintiff is required to show, not only that he paid the money under mistake, but that the defendant has no claim in law, equity, or conscience to the money so paid.

Mistake as to foreign law.

A limitation upon the doctrine that money paid under a mistake of law cannot be recovered is made in cases where the mistake made by the plaintiff was, as to the law of a jurisdiction, foreign to the plaintiff and to the jurisdiction in which the action is brought. Thus, in Haven *v.* Foster,[1] the plaintiff had paid money to the defendant under a mistake as to the law of New York. The court held that the rule that money paid under mistake of law could not be recovered had no application, Morton, J., saying: —

"That the *lex loci rei sitæ* must govern the descent of real estate is a principle of our law with which every one is presumed to be acquainted. But what the *lex loci* is, the court can only learn from proof adduced before them. The parties knew in fact that the intestate died seised of estate situated in the State of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But are they bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the court by proof, like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other facts? *Juris ignorantia est cum jus nostrum ignoramus*, and does not extend to foreign laws or the statutes of other States.

"We are of opinion that in relation to the question now before us, the statute of New York is to be considered as a fact, the ignorance of which may be ground of repetition."

Mistake as to domestic law by a foreigner.

Nor is the doctrine applied where, though the action is brought in the jurisdiction about whose law the mistake was made, the mistake was made out of the jurisdiction, and by one residing elsewhere. Thus, in the Bank of Chillicothe *v.*

[1] 9 Pick. 112.

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Dodge,[1] it was held that the plaintiff, who had discounted in Ohio commercial paper issued in New York, and void under the laws of New York because of illegality, could nevertheless recover the money paid thereon, notwithstanding the fact that he could not recover on the instrument itself. Said Johnson, J. : —

"The defendant was a resident of this State, and chargeable with a knowledge of all legislative enactments. The law imputes to him knowledge that this paper, negotiated by him, was utterly void and worthless, — no better than mere blank paper. The money was then advanced and paid to him without consideration. It was advanced in Ohio, and the plaintiffs are a corporate body of that State. They are not presumed to have notice of our statutes. The statutes of our State are only brought to the notice of courts and citizens of that State by proof. Had it been shown that the plaintiffs, or the officers of the bank, had actual knowledge of the statute in question, they might, notwithstanding their residence, be placed upon a footing of persons mutually dealing in illegal transactions. There is no such question here. It is not pretended that the officers of the bank had any knowledge of the fact of our statute.

"The cause was evidently tried upon the assumption that the money was advanced upon the draft in good faith by the plaintiffs, supposing it to be good. No question of that kind was raised at the trial.

"The plaintiffs then stand in precisely the same situation as though the money had been paid by them under a mistake as to material facts. Ignorance of the law of a foreign government is ignorance of fact, — and in this respect the statute laws of the other States of this union are foreign laws. (Haven *v.* Foster, 9 Pick. 112; Norton *v.* Marden, 3 Shepley, 45). And this proceeds upon the principle that foreign laws are matters to be proved, like other facts, before even courts can notice them.

"It is an elementary principle that money paid under a mistake of material facts, where the party paying derives no benefit from it, may be recovered back."

[1] 8 Barb. 233; see also Vinal *v.* Continental Construction Company, 53 Hun, 247

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A plaintiff who seeks to recover money as paid under mistake as to the law of the jurisdiction where the action is brought, may, although residing in another jurisdiction, have paid the money in the jurisdiction about the laws of which he was mistaken, or, though residing in the jurisdiction about whose laws he was mistaken, may have paid the money elsewhere.

It would seem that in neither of these cases could a plaintiff be allowed to recover, consistently with the doctrine that money paid under mistake of law cannot be recovered. Surely a court would not be justified in saying that a non-resident is entitled to relief, though making a mistake as to the law of the jurisdiction where the money was paid, while in that jurisdiction, when a resident making a similar mistake would have no right to recover. Furthermore if it is the policy of the State that its citizens must at their peril be acquainted with its laws, that policy would seem equally applicable to a case where the citizen, though out of the jurisdiction, acts under mistake as to its laws. From this point of view it would seem that had the plaintiff, in Haven *v.* Foster,[1] brought his action in New York, he would not have recovered, since the mistake made by him was made in New York and not in Massachusetts.

Recovery of money paid under mistake of law to an officer of a court.

Another limitation upon the doctrine denying the right of recovery where money is paid under mistake of law, is that money paid under a mistake of law to an officer of a court can be recovered.[2] Thus, in *Ex parte* James,[3] it was held that a trustee in bankruptcy who had received from a creditor money which the creditor had realized from a sale upon execution of property belonging to the bankrupt, to which the creditor was in fact entitled, but which was paid to the trustee upon the mistaken supposition that the trustee was

[1] *Supra*, p. 92.

[2] *Ex parte* James, 9 Ch. Ap 609; *Ex parte* Simmonds, L. R. 16 Q. B. 308. See also Moulton *v.* Bennett, 18 Wend. 586.

[3] 9 Ch. Ap. 609.

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entitled thereto as a matter of law, could be recovered back. Lord Justice James said: —

"With regard to the other point, that the money was voluntarily paid to the trustee under a mistake of law, and not of fact, I think that the principle that money paid under a mistake of law cannot be recovered, must not be pressed too far; and there are several cases in which the Court of Chancery has held itself not bound strictly by it. I am of opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The court then, finding he has in his hands money which in equity belongs to some one else, ought to set an example to the world, by paying it to the person really entitled to it. In my opinion, the Court of Bankruptcy ought to be as honest as other people."

So in *Ex parte* Simmonds [1] it was held that money paid to a trustee in liquidation could be recovered. Lord Escher said: —

"A rule has been adopted by courts of law for the purpose of putting an end to litigation, that if one litigant party has obtained money from the other erroneously, under a mistake of law, the party who has paid it cannot afterwards recover it, but the court has never intimated that it is a high-minded thing to keep money in this way. The court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil, in order, that is, to put an end to litigation; and James, L. J., laid it down in *Ex parte* James that although the court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, viz., — not to take advantage of the mistake of law. This rule is not confined to the Court of Bankruptcy. If money had by a mistake of law come into the hands of an officer of a court of common law, the court would order him to repay it as soon as the mistake was discovered."

No distinction between ignorance and mistake of law.

A distinction has been suggested between ignorance and mistake of law, the contention being that money paid under

[1] L. R. 16 Q. B. 308.

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mistake of law can be recovered, while money paid in ignorance of law cannot.[1]

This distinction would seem to have no foundation either from the point of view of equity or public policy. Equitably considered it is as unconscientious for a man to retain money paid to him in ignorance of law as it is to retain money paid under mistake of law. From the standpoint of public policy the distinction would seem to be unwarranted, since mistake always involves ignorance. No one who knows the law can make a mistake in regard to it.

When mistake to be regarded as mistake of law.

The general recognition of the rule that money paid under mistake of law cannot be recovered, renders it necessary to consider when a question is to be regarded as one of law, and not of fact. The existence of a right depends upon the application of a rule of law to the facts of a case. In any given case the controversy between the parties may involve questions of fact only; questions of law only; or questions of both fact and law. If the controversy is as to a question of fact, it may arise from a conflict of evidence, or it may arise from the fact that while the parties are agreed upon the evidence, they differ as to the inference which should be drawn therefrom.

When knowledge of law one necessary to solution of question, question one of law.

A fact is in its nature transient, existing at one time but not at another. But the theory of law is, that for any given state of facts there is a principle of law applicable, though owing to the novelty of the facts the principle of law may assume a new form. Therefore if in a given case a lawyer or judge can, solely because of his knowledge of law, give an opinion as to the result that should be reached, the case necessarily involves a question of law and not of fact.

Question of fact may become question of law.

Undoubtedly what was once a question of fact may in time, in consequence of repeated adjudications, become a rule of

[1] Culbreath *v.* Culbreath, 7 Ga. 64; Lawrence *v.* Beaubien, 2 Bail. 623; Hutton *v.* Edgerton, 6 S. C. 485 (see, however, Cuningham *v.* Cuningham, 20 S. C. 317). See also Champlin *v.* Laytin, 18 Wend. 407, 424; but see *contra* Jacobs *v.* Morange, 47 N. Y. 57.

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law. As, for example, the rule that twenty-four hours is a reasonable length of time in which to give notice of the dishonor of a bill of exchange or promissory note, or the rule that twenty years adverse possession establishes a prescriptive right, or the rule that a person is presumed dead who has been absent seven years without being heard of by those who naturally would have heard of him if he had been alive.[1]

Therefore what is to-day a question of fact may in the future become a rule of law; but until a court is prepared to say that on a given state of facts a certain result shall follow in all cases presenting those facts, the question must be one of fact and not of law. Even in the case where the rule is first laid down, the question should be treated as one of fact, if the conclusion reached by the court is reached by them not because of their learning as lawyers, but for the reason that the court is of the opinion that no jury of reasonable intelligence could differ from the result which the court thinks should be reached.

Questions of fact not necessarily for the jury.

It is frequently said that questions of law are for the court while questions of fact are to be decided by the jury. If this statement were correct, it would be of assistance only in those cases where, because of previous adjudications, one could say that the question at issue was for the court, and not for the jury. But the statement is in fact not correct, if it is to be regarded as indicating anything more than the peculiar province of the jury. The special province of the jury is to pass upon the issuable allegations of fact in an action where the court would not be justified in setting aside a verdict as unreasonable.

It cannot be said, however, that the court has no right to pass upon questions of fact. It is not only the recog-

[1] Thayer, Presumptions and the Rule of Evidence, 3 Harv. Law Rev. 148, 155. The author wishes to acknowledge his indebtedness to Professor Thayer for the invaluable suggestions on this subject found in his series of articles in the Harvard Law Review.

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nized right of the court to pass upon certain questions of fact, but it is the duty of the court so to do.[1] For example, if the question of the admissibility of evidence depends upon facts about which there is a dispute, it is the duty of the court to decide that question of fact and to admit or exclude the evidence offered, according to its finding of the fact upon which the admissibility of the evidence depends. Thus, if evidence is offered as the dying declaration of a person, and it is conceded that the case is a proper one for the admission of a dying declaration, if the person against whom it is offered denies that the party making the declaration believed himself to be *in extremis*, it becomes necessary for the court to settle as a fact whether the person making the declaration regarded himself as in imminent danger of death.

Again, it is the duty of a court to require a jury to act as reasonable men in their findings as to the facts, and this the court does by directing a non-suit, or a verdict in the first instance, or by setting aside a verdict, which it thinks the facts did not authorize the jury as reasonable men to render. If, for example, the question is whether A walked across the street, and the court is of opinion that no reasonable man could say that he did, the court should direct a non-suit or a verdict. But no one would seriously contend that because the court thinks that A did not walk across the street, and so declares, that the question of whether A walked across the street has become one of law. This instance will suffice to show that all questions considered by the court are not questions of law, and the fact that this has not been clearly kept in mind has led to much confusion of expression if not of thought. Thus, for example, it has been said that as a contract in writing is to be construed by the court and not by the jury, the questions involved are therefore questions of law; that in certain cases where questions are to be passed upon by the court, the

[1] Thayer, Law and Fact In Jury Trials, 4 Harv. Law Rev. 147, 159.

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question of negligence becomes one of law; that as the existence of reasonable or probable cause in an action for malicious prosecution is a question for the court, therefore it is a question of law.

Now it is true for historical reasons that a contract in writing is construed by the court and not by the jury; but it is submitted that whether any given question arising under a contract is one of law or fact depends not upon the fact that the court is dealing with the question, but upon the nature of the question involved. If the question involved is as to the intention of the party making the contract, and that intention depends not upon any peculiar meaning given to the word in law, as distinguished from its ordinary meaning, then the question is in its essence one of fact and not of law, because upon an assumed state of facts any man of the same degree of intelligence as the judge passing upon the question, though he possesses no knowledge of law, could as intelligently interpret or construe the instrument. It is true that if one not a lawyer were asked to construe the instrument he might reach a different result from that reached by the court, for the reason that he might consider certain matters as bearing upon its meaning, which under the rules of law could not be used in ascertaining that meaning. This fact simply establishes that judges in interpreting instruments are limited in the means which can be used for that purpose. It does not alter the fact, that what they are seeking to ascertain is a question of fact and not of law.

That a judge is learned in law enables him to avoid making an error of law in the means used by him to ascertain the meaning of the word, but it does not enable him to say what the word actually means. If the question is one of law, then the party interpreting or construing the instrument should be able to declare its meaning simply because of his attainments in law. When this is true the question is undoubtedly one of law; when it is not, the question is one

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of fact. If, for example, by a deed of conveyance an estate is in terms given to A for life, with remainder to his heirs, the intelligent layman, ignorant of the technical rules of law, would unhesitatingly say that A had an interest in the property which would terminate on A's death. The judge because of his knowledge of the rule in Shelly's case is able to say that A takes a fee simple. This conclusion he reaches, not because of his general intelligence, but solely because of his knowledge of a rule of law.

If the meaning to be given to the language of an instrument is conceded, and the question is simply as to the legal result flowing therefrom, then, of course, the question is one of law, because only a man versed in law can assert what result should be reached. But so long as a court is endeavoring to ascertain the intention of a party as expressed in a given instrument, where no well-defined legal meaning as distinguished from the ordinary meaning of the language is given to the language which has been used, the question is necessarily one of fact and not of law. When the language has a legal meaning, and the instrument or surrounding circumstances do not show an intention to give the language a meaning other than its legal meaning, the question, while one of construction, is no longer a question of fact, but a question of law.

The distinction between a question of law and a question of fact in dealing with a written instrument is very well illustrated by the cases of Hutchinson *v.* Bowker[1] and Brown *v.* Fales.[2] In Hutchinson *v.* Bowker it appeared that the defendant had written to the plaintiff offering to sell him "*good barley.*" The plaintiff wrote to the defendant accepting his offer of "*fine barley;*" the defendant refusing to deliver barley to the plaintiff, the plaintiff sued him, alleging a non-delivery, as the defendant's breach of contract. The question was left to the jury as to whether the words

[1] 5 M. & W. 535. [2] 139 Mass. 21.

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"good" and "fine" had different meanings in the trade. The jury returned a special verdict stating that the words did have a different meaning in the trade, "fine barley" being heavier than "good barley," but gave their verdict for the plaintiff, stating that "the parties did not understand each other." This verdict was set aside by the court. The question presented for the consideration of the court was a question of law. It was conceded that the defendant had only offered good and not fine barley, and that the plaintiff had only agreed to take fine barley. The question was whether there was a meeting of minds and therefore a contract between the parties. This question was peculiarly one of law, namely, how far as a matter of law has one who in fact varied the terms of an offer a right to say that because he meant simply to accept in the terms offered, his acceptance should be treated as if the terms of the offer had not been varied? In answering this question all that the court had to do was to apply a well-recognized rule in the law of contracts to the facts, namely, that a meeting of minds in the law of contract depends not upon the abstract intention of the parties but upon their expressed intention; and with this rule to control the question but one result could be reached.

In Brown *v.* Fales,[1] the defendant had delivered to the plaintiff's intestate twelve shares of stock; the intestate sold the stock, but during his lifetime paid to the defendant regularly the dividend declared on the stock, representing that he still held the stock. The defendant making a demand upon the plaintiff as administratrix for the stock, the plaintiff purchased with money belonging to the estate twelve shares of the stock and delivered the same to the defendant, representing that it was the original stock delivered by him to her intestate, and received from the defendant the following instrument: "Received from Mrs. J. S. Brown, administratrix of Walter R. Brown, twelve shares of Calumet & Hecla

[1] 139 Mass. 21.

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mining stock: I agree to hold her harmless in any manner from loss arising out of her above action."

This purchase having been disallowed the plaintiff in her accounts as administratrix, she sued the defendant for indemnity, relying on the above agreement to establish her right of action, and it was held that she could not recover. Allen, J., said: —

"It is therefore now to be assumed as a fact that the defendant executed the agreement in suit under the belief that she was simply receiving back her own identical shares which she owned in 1875. . . . It is moreover to be added that this belief of the defendant was induced by information given to her by the plaintiff. . . . The question then is, what in the light of this fact is the true meaning of the defendant's words, 'I agree to hold her harmless in any manner from loss arising out of her above action'? The view of the plaintiff is that the words mean an action which she had actually performed; namely, using the funds of her husband's estate for the purchase of new shares and delivering the same to the defendant. But we think the words mean the action which the defendant believed the plaintiff had performed, and which upon the jury's answer it must now be assumed that the plaintiff knew that the defendant believed had been performed. This was the understanding which the defendant must have had of the contract which she made; it was also the understanding which the plaintiff knew that the defendant had of it. This understanding is also consistent with the words used. The result is that the plaintiff was not entitled to recover as the loss sustained by the plaintiff was not embraced within the defendant's contract."

Now what the court declared in this case was that the defendant had not expressed an intention to indemnify the plaintiff in the event which had happened. This result they were able to reach, not because of the legal, as distinguished from the popular, meaning of the language used by the defendant, but because in the light of surrounding circumstances as found by the jury, they were able to say, not as men learned in the law, but as men of intelligence, what the

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defendant intended. Assuming the existence of the facts which the court assumed, before it attempted to ascertain the meaning of the defendant, any man of affairs of the same degree of intelligence was just as competent to pass upon that question as the judge who delivered the opinion, and in the construction of such an instrument the only advantage which a judge by virtue of his knowledge of law would have over a layman, would be that he would know what kind of evidence the law allowed him to call to his aid to assist him in giving a meaning to the instrument. But these rules of law would not warrant him in saying that the word "action" referred not to the purchase of stock with funds belonging to the estate, because after all that was simply a question appealing to his reason as an intelligent man. This idea was well expressed by Doe, C. J., in Edes *v.* Boardman,[1] who, in dealing with the question of whether a common law remedy had been repealed by a statute, said:

> "The question whether the common law is repealed is a question of statutory construction, which is a question of the intention of the legislature, which is a question of fact, and is determined by the natural weight of competent evidence, and not by an arbitrary formula. Legal rules of constructions, so called, suggest natural methods of finding and weighing evidence and ascertaining the fact of intention, but do not determine the weight which the evidence has in the mind, and do not establish a conclusion at variance with that reached by a due consideration of all the competent proof."

Whenever a court is prepared to say that the use of certain words in a given class of transactions shall always produce a certain result, then the court in fact no longer deals with the intention or meaning of the party to the instrument, but simply lays down a rule of law, and the only question involved is whether the facts exist which brings the case within the rule of law. For example, if in

[1] 58 N. H. 580, 592.

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a given jurisdiction it is declared that the use of certain language in a deed gives ownership of property to the middle of the road, and a deed is produced under which the grantee claims such ownership; if the grantor did not intend to convey title to the middle of the road, and supposed that the language used would not so convey, he has made a mistake of law, because had he known the rule in question, he would have known that the legal effect of the conveyance would be to so convey. If, however, a court is not prepared to lay down a rule to govern a class of cases, and will only say that in the case under consideration a certain result was intended by the parties, the question is clearly one of fact, and not of law.

If in any given case arising out of the construction of an instrument it is contended that the question is one of law, then the party making the contention ought to be able to suggest how learned one should be in law, and in what branch thereof, to answer the question involved. In Nunez *v.* Dautel,[1] where the only evidence in the case was an instrument of which the defendant admitted the execution, whereby the defendant agreed to pay the plaintiff a certain sum of money within a *reasonable time*, it was held that what was a reasonable time within which to make payment was a question for the court to decide. It does not appear in the case whether the court regarded the question as one of fact or as a question of law; but the case serves as an illustration of a class of cases where it is stated that if under the terms of a written instrument an act must be done within a reasonable time, what is a reasonable time is a question of law for the court. In Nunez *v.* Dautel the defendant was to have a reasonable time within which to sell his crop, or raise the money from some other source, before he should be called upon for payment. In jurisdictions where the court would say that the question in such a case is one of law for the

[1] 19 Wall. 560.

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court, an interesting question to ask would be how much law must a man know in order to determine within what time the crop should be sold, or the money obtained from other sources? That such a question is not a question of law but of fact was the view taken by Mr. Justice Story in Wallace *v.* Agry.[1] In that case, which was an action upon a bill of exchange, payable at sixty days sight, it was objected that the bill had not been presented for payment within a reasonable time. In charging the jury, Mr. Justice Story said: —

"There is a difference between a bill of exchange drawn payable at so many days after date, and one drawn payable at so many days after sight. In the former case the bill must be presented at the period of its maturity, in the latter it is sufficient if it be presented in a reasonable time. What that reasonable time is depends upon the circumstances of each particular case; and no defined rule has as yet been laid down, or indeed can be laid down, to govern all cases. The question is a question of fact for the jury, and not of law for the abstract decision of the court."

Such also was the view taken of this question by Marshall, C. J., in Chesapeake Ins. Co. *v.* Stark,[2] where in discussing the fact of abandonment he said: —

"The law is settled that an abandonment to be effectual must be made in a reasonable time; but what time is reasonable is a question compounded of fact and law, which has not yet been reduced to such certainty as to enable the court to pronounce upon it without the aid of a jury. Certainly the delay may be so great as to enable every man to declare without hesitation that it is unreasonable, or the abandonment may be so immediate that all will admit it to have been made in reasonable time; but there may be such a medium between these extremes as to render it doubtful whether the delay has been reasonable or otherwise. If it was a mere question of law which the court might decide, then the law should determine to a day or an hour on the time left for deliberation after receiving notice of the loss. But the law is not so

[1] 4 Mason, 336, 345. [2] 6 Cranch, 268.

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determined, and it therefore remains a question compounded of fact and law, which must be found by a jury under the direction of the court."

In contrast with this statement as to the nature of the question involved in determining what is a reasonable time, is the opinion of the court in Wright *v.* Bank of The Metropolis,[1] where the plaintiff sued the defendant for a conversion of stock which the defendant held as pledgee. The court held that the plaintiff was entitled to recover the highest market price which he would have had to pay to replace the stock within a reasonable time after the notice of the conversion. The owner of the stock, who was seventy-six years old, was notified of the conversion of the stock May 9th, 1878. The court held that the expiration of a reasonable time within which the stock should have been replaced was July 1st, 1878. Said the court: —

"What is a reasonable time *when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts, is a question of law.*

"We think that beyond all controversy in this case, and taking all the facts into consideration, this reasonable time had expired by July 1st, 1878, following the 9th day of May of the same year."

It is submitted that the question which this court should be able to answer, if the question is one of law, is, how skilful must one be as a lawyer to be able to say that July 1st, 1878, is the expiration of a reasonable time? How much law must a man know to say that no juror could reasonably infer from the evidence in the case that the plaintiff should have had until July 3d, 1878, within which to replace the stock?[2]

[1] 110 N. Y. 237.

[2] In many jurisdictions it has been held that the construction of a written instrument being for the court and not for the jury, it is for the court and not for the jury to say what amounts to a reasonable time. It would seem that the duty of the

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A consideration of two or three cases it is believed will show that it is erroneous to regard negligence as a question of law, even where the question is to be decided by the court. In Hunter *v.* The C. & S. V. R. R. Co.[1] it was held that it was negligence, *as a matter of law*, for an adult, in full possession of his faculties and with nothing to disturb his judgment, to attempt to board a train moving at the rate of from four to six miles an hour. The fact was that the plaintiff attempted to board the train in consequence of the conductor's telling him to jump on if he intended to go on that train. In delivering the opinion of the court, holding that the plaintiff should have been non-suited, Peckham, J., said: —

"The important question which arises is, does a man who is *sui juris* and in the full possession of his faculties, with nothing to disturb his judgment, act with ordinary care in endeavoring to board a train moving at the rate of from four to six miles an hour? It seems to me that there can be but one answer to such a question. That it is a dangerous, a most hazardous attempt, must be the judgment of all men. Persons are taught from their earliest youth the great danger attending upon an attempt to board or leave a train while it is in motion; and no person of mature years and judgment but has the knowledge that such an attempt is dangerous in the highest degree. . . .

"There may undoubtedly be cases in which an attempt to get on or off a moving train would not be regarded as negligence as a matter of law, and where the question of negligence upon all the facts of the case should be submitted to the jury. . . .

"We think that the facts of this case are so overwhelming in their nature that no reasonable judgment can be formed as to the

court under this rule has been discharged when they have said that the instrument requires the act to be done within a reasonable time, and that the question of whether the defendant has performed his contract should be left to the jury with instructions that the contract requires the defendant to do the act within a reasonable time, and that the contract has not been performed if more than a reasonable time has elapsed.

[1] 112 N. Y. 371.

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act of the deceased in attempting to jump upon this moving train other than it is dangerous and reckless, and that the injury resulting therefrom was contributed to by him."

On a second trial of this case the plaintiff gave evidence tending to show that the speed of the train was between one and two miles an hour. The jury returned a verdict for the plaintiff. A judgment entered upon this verdict was reversed by a divided court of four to three.

In the case as first reported, the conclusion that it was negligent to board a train running at a rate of speed of from four to six miles an hour, was acquiesced in by all the judges save one. In the second report of the case, the decision holding that it was negligent to board a train running at the rate of from one to two miles an hour was reached by vote of four to three. Now what was the rule of law in which all the judges with one exception acquiesced in the first case, but in which only a bare majority of the judges acquiesced in the second case? What view of the law applicable to the case was held by the dissenting judges in either case that differed from the rule of law announced by the majority of the court?

Mr. Justice Peckham in the case as first reported based his opinion upon the fact that the facts in the case were so overwhelming in their nature that no reasonable judgment could be formed as to the act of the plaintiff other than that it was dangerous and reckless, and he therefore thought the plaintiff should have been non-suited. In the second case Mr. Justice Gray, with whom three judges agreed, but from whom three judges differed, was of the opinion that to alight from or board a train in motion is a negligent and hazardous act, and can only be made to appear excusable when a person is under such coercion of circumstances as to raise the question whether he is in the free possession and use of his faculties and judgment. And he thought that the plaintiff was in full possession and use of his faculties and

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judgment. O'Brien, J., was of the opinion that the act done by the plaintiff was one about which reasonable and prudent men might differ, and that the verdict of the jury and the judgment entered thereon should not be disturbed.

There were two rules of law involved in the case, namely: first, that the plaintiff was not entitled to recover if he had been guilty of contributory negligence; secondly, if the facts were so clear that a jury could not as reasonable men have failed to find that the plaintiff had been negligent, the case should not have been submitted to the jury. But it was conceded by the plaintiff, and was not therefore in dispute, that the judgment should be for the defendant, if in fact the jury could not as reasonable men have found that there was no contributory negligence. The only issue between the plaintiff and the defendant was as to whether reasonable men could differ in opinion as to that fact.

All the judges in the one case, with one exception, thought that no reasonable man could say that the plaintiff was not guilty of negligence. Four judges in the second case were of the same opinion, while three thought that a reasonable man might hold that the plaintiff was not guilty of negligence. Now what principle of law was it which compelled a majority of the court to say that the plaintiff was negligent? And what principle of law was it which enabled the minority of the court to say that it could not be said that the jury was wrong in finding that the plaintiff was not negligent? How much law should a man know to be able to answer intelligently the question whether in given circumstances certain conduct is negligence? Clearly in such a case the judge who finds one way or the other bases his decision upon his knowledge of men and of affairs, and not at all upon his legal attainments; and the judge best fitted to pass upon such a question is not the one most learned in the law, but the one who most thoroughly understands the standards of conduct prevailing among men.

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That the existence of probable cause in malicious prosecution is in its essence a question not of law but of fact, is evident not only from the nature of the test to be used in determining this question, but also from the treatment of the question by the courts. In Hazard *v.* Flury,[1] an exception to the charge to the jury that the plaintiff had no probable cause was overruled, Parker, J., saying:—

"The only question requiring consideration is presented by an exception to the charge. . . . Where facts are undisputed and but one inference can be drawn from them, the question of probable cause is one of law for the court.

"The facts, so far as that proposition is concerned, are not in dispute. If then they do not permit an inference that defendant had probable cause to believe that the plaintiff had committed an offence against the law, the instruction was right. . . .

"Now, can it be said that these facts permit an inference that the defendant had probable cause to believe that the plaintiff was guilty of larceny? . . .

"The facts within his knowledge do not indicate that a crime had been committed. . . .

"The court therefore rightfully instructed the jury as *a matter of law*, that the defendant who caused the arrest of the plaintiff did so without probable cause to believe that an offence had been committed by the plaintiff."

If this is a question of law, as the court states, then the court should be able to state the law by which one is to judge whether a given state of facts justifies one man in believing that another has committed a crime. No such an attempt has ever been made. And yet if no test can be given, how can the question be regarded as one of law? If probable cause is a question of law, then the courts are in a position to state as rules of law what facts will justify one man in believing another to be guilty of a crime. A formulation of these rules will very materially lighten the labor of the advocate in criminal cases, much of whose argument is often

[1] 120 N. Y. 223.

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addressed to the question of whether fact X establishes fact Y.

No better statement showing the fallacy underlying the proposition that reasonable cause in malicious prosecution is a question of law has ever been made, than is found in the opinion of Lord Colonsay in Lister *v.* Perryman.[1] Said his Lordship :—

"I have frequently had to deal with cases of this kind on the other end of the island; but there this question of want of reasonable and probable cause is treated as an inference in fact to be deducted by the jury from the whole circumstances of the case, in like manner as the question of malice is left to the jury. If I had tried the case there, I should have left this matter to the jury; and if the jury had found a verdict for the defendant, I should have approved of that verdict for reasons I am about to explain. If, on the other hand, the jury had found for the plaintiff, still being a matter so much in the province of the jury, and as it could not be said that they had gone decidedly wrong and contrary to evidence, I should have held that it was not a case for the court to interfere. But in England it is settled law that this is a matter for the court to deal with. The court deals with it as an inference to be drawn by the court from the facts, but whether an inference of law or an inference of fact, does not, I think, appear from the reports. I do not clearly see whether it is called an inference of law merely because it is left to the court, or whether it is left to the court because it is really an inference of law. . . .

"Finding that I had to deal with this as a matter of inference in law, I was desirous to ascertain what are the rules or principles of law by which the court ought to be guided in drawing that inference. I did not find that there were any. Neither in the very able argument heard from the bar, nor in the judgment set out in these papers, nor in the cases that have been referred to, are any such rules or principles enunciated. I think it is laid down by the learned Lord Chief Baron, that it is a mere question of opinion depending entirely on the view that the judges may happen to take of the circumstances of each particular case. And upon a careful consideration of the decisions it seems to me impossible

[1] L. R. 4 H. L. 521, 538, 540.

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to deduce any facts and definite principle to guide and assist the judge in any case that may come before him. Chief Justice Tindal's rule seems almost the only one that can be resorted to, — that there must have existed a state of circumstances upon which a reasonable and discreet person would have acted. Now in the system to which I have already alluded, it is thought that twelve reasonable and discreet men (as jurors are supposed to be) can judge of that matter for themselves, and that lawyers are not the only class of persons competent to determine whether the information was such as a reasonable and discreet man should have acted upon. For what is it that a judge would have to determine? He would have to determine whether the circumstances warranted a reasonable and discreet man to deal with the matter; that is to say, not what impression the circumstances would have made upon his own mind, he being a lawyer, but what impression they ought to have made on the mind of another person, probably not a lawyer."

The question of the right to recover money paid under mistake usually arises,

1. Where the money was paid under a mistake as to the creation, existence, or extent of an obligation.

2. Where the money was paid in the purchase of property to which the defendant had no title.

3. Where the money was paid in the purchase of a non-existing thing.

take result- in failure to ire con- t rights.

The failure of consideration caused by the plaintiff's mistake may consist in a failure to obtain contract rights in exchange for the money paid by him. Thus, in Martin *v.* Sitwell,[1] the plaintiff, thinking that he had goods on board a certain vessel, obtained from the defendant a policy of insurance covering said goods, paying him a premium of £5 therefor. It appearing that the plaintiff in fact had no goods on board the vessel, and that the policy was therefore void, the plaintiff was allowed to recover the premium as paid on failure of consideration. So in Feise *v.* Parkinson,[2] where the defendant had avoided a contract of insurance

[1] 1 Show. 156. [2] 4 Taunt. 640.

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because of misrepresentation, the plaintiff was nevertheless allowed to recover the premium paid by him, the misrepresentation having been made in consequence of a mistake of fact.

On this principle it was held in McDonald *v.* Lynch[1] that the plaintiff could recover money paid in the belief that a contract had been created between the defendant and himself for the purchase and sale of land, when in fact there was no contract because of a mutual misunderstanding as to a material term.

The principle of the right of a plaintiff to recover money paid for a contract right which he failed to acquire, seems to have been overlooked entirely in Higgs *v.* Scott.[2] In that case the plaintiff took a lease of premises from the defendant. After the execution of the lease the defendant mortgaged the property. The mortgagee, the defendant being in default, notified the plaintiff not to pay any further rent to the defendant. He did, however, make a payment of rent to the defendant through one Hodgkinson, professing to represent the defendant. Subsequently being compelled to pay to the mortgagee the rent which he had previously paid to the defendant, he brought an action to recover the rent so paid. His declaration contained two counts, one a count upon an indemnity given by Hodgkinson in the defendant's name; the second the count for money had and received. The plaintiff having introduced no evidence showing Hodgkinson's authority to make such contract, the court refused to allow the introduction of evidence showing that Hodgkinson entered in terms into a contract of indemnity on behalf of the defendant. The court also refused to allow a recovery on the count for money had and received for the reason that the money was paid with a knowledge of all the facts. That the plaintiff could not recover on the contract of indemnity without proving that Hodgkinson had in fact authority to bind the

[1] 59 Mo. 350.

[2] 7 C. B. 63.

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defendant by a contract of indemnity or that the defendant was estopped from denying want of authority, does not admit of question. But it would seem that the evidence should have been received had it been offered not for the purpose of establishing the contract of indemnity, but for the purpose of showing that the plaintiff did not pay his money with knowledge of all the facts; and that the money was paid not simply to discharge an obligation due from himself as tenant to the defendant as landlord, but in exchange for what he supposed was a contract binding the defendant to return the money in the event of the facts establishing that the person claiming to be mortgagee was in fact entitled to the rent. Had the evidence been received, it would have appeared that the plaintiff did not get the equivalent for which he stipulated at the time he paid his money. The defendant had no right to the money as landlord, and while the plaintiff could not recover on the contract of indemnity, because of the absence of authority on the part of the agent to make such a contract, yet, the evidence would have established that he did not occupy the position of one paying as volunteer, knowing all the facts, but that he in fact paid it under mistake, leading to a failure of consideration, and that therefore the defendant should be compelled to refund to the plaintiff that which he had received. That such a result is the only equitable result to reach seems self-evident. The only suggestion that occurs to the writer which might apparently justify any other result is the rule in agency that one dealing with an agent must at his peril ascertain the extent of the agent's authority. But it is submitted that the meaning of this rule is simply that as between the plaintiff and the defendant, two innocent parties, there is no reason why the plaintiff, who takes it upon himself to contract with the defendant through the defendant's agent, should throw upon the defendant a loss consequent upon an unauthorized act of the agent. One being under no obligation to contract, if he seeks to acquire rights against another

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through an agent, must ascertain the extent of the agent's authority. If a plaintiff is allowed to enforce against a principal a claim to which the agent had no authority to bind the principal, then the court enables the plaintiff to throw a loss upon the defendant, in a case where one of two innocent parties must suffer. But to say that a third party shall not as between himself and the defendant throw a loss upon the defendant, where an agent has exceeded his authority, does not authorize the conclusion that because the plaintiff did not ascertain the extent of the agent's authority, the defendant shall be allowed to enrich himself at the plaintiff's expense.

It may be suggested that if one dealing with an agent who has exceeded his authority is to be given rights against the principal, it matters little whether you allow an action upon the contract made by the agent or allow an action in quasi-contract. But the case of Higgs *v.* Scott brings out in a forcible manner the importance of distinguishing between the two rights. If, in a case like Higgs *v.* Scott, it should be held that the plaintiff is entitled to recover on the contract itself, it would follow that the defendant should indemnify the plaintiff against any expense incurred by him in consequence of having paid the rent to the defendant, relying upon the contract of indemnity. On this theory the plaintiff would be entitled to recover any expense incurred in litigating the question in dispute. On the other hand if the plaintiff is allowed to recover on the theory that it would result in an unjust enrichment of the defendant to allow him to retain that for which no equivalent was given, the plaintiff would be entitled only to restitution, and, if in fact the plaintiff has incurred expense, or suffered damage, restitution does not mean indemnity. This difference in results is well illustrated by the decision in Deery *v.* Hamilton.[1] In that case an executor in excess of his authority had borrowed money from the defendant, giving him a note in terms binding the estate, and secur-

[1] 41 Ia. 16.

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ing the payment thereof by mortgage of real estate belonging to the estate. A bill was filed by the parties claiming the property under the will asking that this mortgage be cancelled as a cloud upon title. It was held that as the executor had no authority to borrow money for the estate, the estate was not bound by the note and mortgage; but, that since the estate had received the benefit of the money borrowed by the executor, it was only just that the estate should repay to the defendant the money borrowed. The note under which the defendant claimed called for 10% interest. The court decreed that the plaintiff as a condition of getting the relief should pay to the defendant the principal, but with interest at the rate of 6% only, that being the rate of interest prevailing where no rate was specified. Beck, J., delivering the opinion of the court, said: —

"This estate has received the benefit of the money which was advanced by defendant. It ought in good conscience to repay it with legal interest. This is not required because of the contract under which the money was borrowed, which is invalid, but on the ground that the estate has had the benefit of the money received from the defendant; therefore the interest to be paid defendant must be six per cent per annum, and not ten per cent as agreed by the executrix."

In Kilgour *v.* Finlyson,[1] the plaintiff having failed to recover against the defendant, an ostensible endorser of a bill of exchange, attempted to recover on the count for money had and received. The facts were, that the defendants, formerly engaged in a copartnership, had dissolved the copartnership and authorized one of the partners, Thomas Finlyson, to receive and discharge all the debts due to the copartnership. The plaintiff discounted a bill drawn in the name and payable to the late copartnership, on the endorsement thereof in the firm name by Finlyson, giving to Finlyson his note for the amount of the bill less the discount. This

[1] 1 H. Bl. 155.

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note Finlyson had discounted by Sterling, Douglas, & Co. He then paid back to Sterling, Douglas, & Co. the amount so received in part payment of a debt due to Sterling, Douglas, & Co. from the copartnership. It having been held that the plaintiff could not recover upon the endorsement, for the reason that Finlyson had no authority to bind the firm by such endorsement, the plaintiff sought to recover in the count for money paid to the use of the firm, treating the money, which was the proceeds of the discount of the note given by plaintiff, as money paid by plaintiff to the creditor of the firm. It was held by the court that the money could not be followed through all the applications made of it by Finlyson, and the plaintiff was therefore defeated. If the money did not in fact become the money of the firm, but was used by Finlyson in paying the debts of the firm, it would seem that it would not have been an undue extension of the count for money paid to the use of the defendant, to have allowed the plaintiff to have recovered in that form of action. Whether the plaintiff should have been allowed to recover on the count for money had and received, would seem to depend upon whether it can be said, not that the firm received the benefit of the plaintiff's money in consequence of the use made of it by Finlyson, but whether the money when received by Finlyson, should be treated as received by the firm. If the money was received by the firm, then the plaintiff should be allowed to recover, since, in such a case, the defendant has not only had the benefit of, but has actually had, the money which was given by the plaintiff, without the equivalent which he supposed he was receiving in exchange therefor. The plaintiff discounted the bill of exchange drawn by Finlyson on the theory that he was receiving in exchange for his note, not the obligation of Finlyson, but an obligation of the firm, in consequence of which he regarded himself as amply secured in the event of the bill not being paid by the drawee. The plaintiff, having given his note without receiving the expected

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equivalent, could, it seems, on tendering back the bill to Finlyson, have demanded a return of his note; and this right to demand the return of the note would, in equity, have constituted Finlyson a constructive trustee thereof for the plaintiff. Finlyson being a constructive trustee of the note for the plaintiff, the plaintiff would have had a right to demand of him the proceeds of the note arising from the discount thereof, and could have maintained against Finlyson an action for money had and received to enforce that obligation.

In McCulloch *v.* Royal Exchange Assurance Company,[1] the plaintiff, who had insured a vessel under the mistaken supposition that he was the owner thereof, when in fact the title thereto was in another, sought to recover the premiums paid for said insurance. The action was not brought by him until after the vessel had completed the voyage mentioned in the policy of insurance. It was held that after the completion of the voyage it was too late for him to say that he had no insurable interest. If this case is to be supported it must be supported on the short ground suggested by the court, that to allow a recovery of premiums paid for insurance after the safe arrival of a vessel "would place underwriters in a very awkward situation." Clearly, as between the plaintiff and the defendant, there was an absolute failure of consideration. Had the vessel been in fact lost, the defendant would have had a perfect defence to any action on the policy, namely, that the vessel was not the property of the plaintiff; and had the defendant paid the amount of the policy in ignorance of this fact, he could, on the discovery of the fact, have recovered the money as paid under mistake. And, to the writer, the policy of saying that although the defendant has not shown any change of position which will involve him in a loss should he be compelled to pay the plaintiff, he may nevertheless withhold from the plaintiff that for which he gave the plaintiff no equivalent, is at least questionable.

[1] 3 Camp. 406.

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Recovery of money paid under mistake as to the existence of an obligation.

The failure of consideration consequent upon mistake may arise from the payment of money in extinguishment of a supposed obligation which did not in fact exist, or from the payment of a sum in excess of the amount actually due.

In Milnes *v.* Duncan,[1] the defendant, an endorsee, who had failed to present a bill of exchange, of which the plaintiff was an endorser, for payment at maturity, demanded payment of the plaintiff for the amount thereof, on the ground that the bill was a foreign bill, and not being properly stamped, was void. The plaintiff, supposing the bill to be a foreign bill, paid the defendant the amount thereof. In fact the bill was a domestic bill, and was therefore perfectly valid. The mistake made by the plaintiff, in which the defendant shared, was due to the illegibility of the writing indicating the place at which the bill was drawn. It was held that the plaintiff was entitled to recover the money so paid.

In Mills *v.* The Alderbury Union,[2] the plaintiff, who had become a surety for one Brodie, paid to the defendant a sum of money to make good a deficit, supposing that Brodie had received in person certain funds, when in fact they had been received, not by Brodie, but by a firm of which Brodie was a member. The court held that in these circumstances he was under no obligation to make good the deficit, and allowed him to recover the money so paid.

On this principle the plaintiff, in Hazard *v.* The Franklin Fire Insurance Company,[3] who had paid assessments after he had assigned the property insured, in violation of a clause of the policy of insurance, was allowed to recover the assessments so paid.

In Mayer *v.* New York,[4] the plaintiff, who owned lot 28, and received a notice of assessment against lot 27, was allowed to recover the taxes paid by him upon lot 27,

[1] 6 B. & C. 671.
[2] 3 Ex. 590.
[3] 7 R. I. 429.
[4] 63 N. Y. 455.

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supposing the assessment to have been made upon lot 28. In Talbot *v.* The National Bank of the Commonwealth,[1] the plaintiff, an endorser of a note, was allowed to recover money paid by him under the mistaken belief that the note had been duly presented for payment.

In Bostock *v.* Jardine,[2] the defendant, who had been authorized by the plaintiff to purchase for him fifty bales of cotton, purchased three hundred bales in his own name, the fact being that he represented, not only the plaintiff, but other principals. He then informed the plaintiff that he had purchased the fifty bales, and the plaintiff thereupon paid him the purchase price for that number of bales of cotton. It was held that the money so paid could be recovered, since the money was paid by the plaintiff in the belief that the purchase made for him was a single purchase, and not a part of a purchase made for others, and as a consequence there did not exist a contract which the plaintiff had authorized to be made, and which he supposed had been made when he made the payment.

Mistake resulting in an overpayment.

Although the plaintiff was, in fact, under an obligation to the defendant, he may have made a payment in excess of the amount due.

A plaintiff may seek a recovery as for an overpayment made under mistake, where the mistake was as to the amount required to be paid by the contract under which the payment was made; or where, though the payment called for by the contract is the amount paid, the contract itself was based on mistake.

The mistake as to the payment required under a contract may arise from a mistake as to the terms of the contract itself or from facts extrinsic to the contract, but involved in its performance. In either case if the mistake is not one of law, and the consideration is divisible, the plaintiff can, where it is against conscience for the defendant to retain the money

[1] 129 Mass. 67. [2] 3 H. & C. 700.

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so paid, recover the overpayment. As, for example, where goods are sold by weight[1] or measurement,[2] and owing to a mistake in weight or measurement the plaintiff pays for a quantity in excess of that received by him, the money so paid can be recovered. So where an overpayment is made because of a mistake in an account rendered,[3] the overpayment can be recovered. So also an overpayment made under mistake as to the contract price can be recovered. Thus in Holtz *v.* Schmidt,[4] the plaintiff, who purchased goods from the defendant, under a contract by which the defendant agreed to sell him the goods at as low a price as he sold to any one else, and who paid the price asked by the defendant, supposing that no one purchased at a lower price, when in fact the defendant was selling to other parties at a price below that which the plaintiff paid, was allowed to recover the difference between what he paid and what was in fact paid by other parties.

In the cases of overpayment heretofore considered, the mistake has been as to the amount called for by the contract under which the payment was made. But the payment made may be due under the contract, the contract itself, however, being based on mistake, and the fact being that but for the mistake the plaintiff would not have agreed to pay the sum in question. Can there in such a case be a recovery as of money paid under mistake? The contract under which the payment was made may have been oral or may have been in writing, and if in writing, a simple contract or a contract under seal. The mistake may have been a mistake made by the plaintiff alone, without any fault on the part of the defendant, or a mistake to which the defendant in some way contributed; or

[1] Devaux *v.* Conolly, 8 C. B. 640; Billings *v.* McCoy, 5 Neb. 187; Calkins *v.* Griswold, 11 Hun, 208; Noyes *v.* Parker, 64 Vt. 379.

[2] Devine *v.* Edwards, 101 Ill. 138.

[3] Townsend *v.* Crowdy, 8 C. B. N. S. 477; Stuart *v.* Sears, 119 Mass. 143.

[4] 59 N. Y. 253; see also Worley *v.* Moore, 97 Ind. 15.

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the mistake may have been mutual, the plaintiff and the defendant both sharing therein.

When mutuality of mistake is necessary in case of over-payment.

Where a payment is made in excess of the amount due under the terms of a contract, the amount so paid can be recovered, even though the mistake was not mutual, for if the defendant knew that he was not entitled thereto, and that the plaintiff was paying under mistake, he is guilty of fraud in receiving the money; or if he received the money, knowing that he was not entitled thereto, but supposing that the plaintiff intended to make a gift thereof, then it is plainly inequitable and against conscience for him to retain the money after being informed that the money was paid under mistake.

If, however, the payment was due under the terms of the contract, but a recovery is sought as for an overpayment, because the contract was made under mistake, the plaintiff, if he does not establish a mutual mistake, must show that the mistake was made in circumstances entitling him to a reformation or rescission of the contract in equity, and that with the contract reformed or rescinded, the money claimed by him should in equity and conscience be refunded to him.[1] Any other conclusion would lead to this anomalous result: that a plaintiff who in making the payment only performed a contract, from the performance of which he would not have been relieved in equity, can recover money so paid, as received or retained inequitably, and against conscience.

Since equity will not rescind a contract because of a mistake made by the plaintiff, to which the defendant has in no way contributed, money paid under such a contract cannot be recovered as for an overpayment.

Relief in equity in case of overpayment.

If, however, the contract is one which a court of equity would reform or rescind because of mutual mistake, or would rescind because, while only the plaintiff acted under mistake, the defendant either acted fraudulently, or by his conduct contributed to the mistake, the plaintiff is clearly entitled to relief. Can

[1] Norton *v.* Bohart, 105 Mo. 615.



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he, however, be given relief at law? This question was considered in Sheffield *v.* Hamlin,[1] and a recovery was allowed at law in the following circumstances: The plaintiff and the defendant orally contracted for the sale, by the defendant to the plaintiff, of certain property, both parties supposing that a price named in an inventory, which had been made by a third party, represented the cash value of the property, when in fact it was in excess thereof. It was objected that the plaintiff's only remedy was to file a bill in equity, and that he could not maintain the action for money had and received, to recover money paid in excess of the cash value. It was held, however, that the count for money had and received would lie.

"We think," said Smith, J., "that view of the case is erroneous; the contract being in parol and not in writing, an action to reform it is neither necessary nor proper. In a case of mistake in a written contract the necessity for reforming the contract before seeking to enforce it according to the intent of the parties arises from the rule of evidence that the written paper is to be treated as a full and correct expression of the intent, and it cannot be varied by parol; but where the contract rests in parol the intent of the parties may be shown by oral proof, and when the intent is ascertained it is to control."

From the paragraph just quoted, it is evident that the court was of the opinion that, had the contract been in writing, the plaintiff's remedy would have been in equity and not at law. It is respectfully submitted that there is no necessity for a party resorting to a court of equity for relief even where the contract is in writing. The plaintiff is not attempting to vary the terms of a written instrument. Were this his position, his contention would be that he never made the contract as claimed by the defendant; whereas, he in fact admits that the contract was performed by him as made, but that because the contract was made under mistake, in circumstances which would have entitled him to a reformation or

[1] 26 Hun, 237.

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rescission thereof, it is inequitable for the defendant to retain the overpayment. The question being purely an equitable one, the count for money had and received being allowed only on equitable principles, why should a court of law not deal with the question, if in equity the relief, which the plaintiff seeks in the count for money had and received, would be the ultimate relief granted him without any further act on his part?[1]

In jurisdictions where equitable defences are allowed at law, a defendant would be allowed, where the mistake would in equity allow him to defeat a recovery by the plaintiff, to plead the mistake as a defence at law in an action brought for a breach of contract. Why then should not a court which, through the count for money had and received, has taken jurisdiction of equitable principles without the aid of legislation, deal with mistake in the same way when the question is raised in an action for money had and received, in a case where the relief which the plaintiff seeks is what a court of equity would give him on the facts as they are established at law?

Where recovery is sought of an overpayment, consideration must be apportionable.

Where a recovery is sought as for an overpayment of money under mistake, the failure of consideration is of course only partial, else a recovery of the entire amount paid would be sought. In the event of the failure of consideration being partial only, there can be no recovery of an overpayment, unless the consideration is divisible.[2] Thus, in Rand *v.* Webber[3] it was held that there could be no recovery in a court of law in a count for money had and received as for an overpayment where land was sold for a gross sum, the plaintiff supposing that a parcel of about ten acres was included in the conveyance, when in fact that parcel was omitted by the fraud or mistake of the defendant.

[1] See, however, Howes *v.* Barker, 3 Johns. 506; Paine *v.* Upton, 87 N. Y. 306.

[2] Mayor *v.* Lancashire, 60 L. J. Q. B. 323 (*semble*); Rand *v.* Webber, 64 Me. 191.

[3] 64 Me. 191.

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In Goodspeed *v.* Fuller,[1] where the defendant contracted to convey to the plaintiff two lots of land, each for a specified price, and only one lot was conveyed, it was held that the consideration being apportionable or divisible, there being in substance two bargains in one transaction, each lot being sold for a stated price, and the sale of the one not depending upon the sale of the other, that the plaintiff could recover in an action for money had and received, the amount which he had paid to the defendant in excess of that to which he was entitled for the lot conveyed.[2]

Recovery of money paid under mistake as to title.

When money has been paid in the purchase of property to which the defendant had no title, the plaintiff supposing him to be the owner thereof, the plaintiff may have purchased under the belief that the defendant warranted his title thereto, or may have known that the defendant intended to do no more than to transfer such interest in the property as he might have, the plaintiff and not the defendant assuming the risk as to the title.

Plaintiff must prove a warranty of title.

The decisions would seem to authorize the statement that a plaintiff cannot recover purchase-money because of a failure of title, unless the facts establish his right to sue for a breach of warranty.[3] It is true that in an exceptional case facts might exist which would establish the plaintiff's right to recover as for a failure of consideration where an action for a breach of warranty could not be maintained, yet in such cases the facts would probably always warrant the inference of a contract implied in fact to repay the purchase-money in the event of a failure of title. While the plaintiff could recover in the count for money had and received, he would really recover in that count for the reason that it was the understanding of the parties that the money should be repaid in

[1] 46 Me. 141. See also Murdock *v.* Gilchrist, 52 N. Y. 242.

[2] See further, as to the divisibility or apportionment of consideration, *infra*, p. 306.

[3] This statement is made subject to the limitation stated on p. 128.

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the event of a failure or want of title. In Morley *v.* Attenborough,[1] where it was held that there could be no recovery of money paid for property to which the defendant had no title, the distinction was taken by Parke, B., who said:

"It may be that though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But if there was no implied warranty of title, some circumstances must be shown to enable the plaintiff to recover for money had and received. This case was not made at the trial, and the only question is whether there is an implied warranty."

The suggestion of the learned baron indicates the practical difference between recognizing the right of a party to sue for a breach of warranty and to sue simply as for a failure of consideration. If the defendant has in fact given a warranty and there has been a breach thereof, he must pay the plaintiff not simply the amount of money which he received from the plaintiff at the time of the sale, but must indemnify the plaintiff against any damage which can be approximately traced to his breach of warranty. Thus on the theory of a warranty the plaintiff would be entitled to recover from the defendant, in addition to the purchase-money paid by him, all expenses incurred in an attempt to defend his title to the property against a successful claimant. But on the theory of failure of consideration the plaintiff would be entitled to recover not the expenses which he had incurred in consequence of his failure to obtain a title to the property which he purchased from the defendant, but simply the amount of money which he paid the defendant for such property.

In cases where the defendant cannot be regarded as warranting his title, or stipulating that the money shall be re-

[1] 3 Ex. 500.

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covered as paid on a failure of consideration in the event of a failure of title, the fact that the plaintiff regarded the defendant as selling not a chance, but title, with a warranty, is immaterial. In such a case the money paid by the plaintiff is paid either in performance of a contract or in compliance with certain negotiations resulting in the sale; and since a contract rests not on abstract intention, but on intention as expressed between the parties, the plaintiff to recover must show that according to the expressed intention of the parties the money paid by him was paid under mistake. If, according to the terms of the contract, the defendant would have had a right to demand payment of the plaintiff, then clearly the plaintiff should not have a right to recover the money so paid. And, if the contract as expressed between the parties does not authorize the construction that the plaintiff was in fact purchasing a title, or the property with a warranty, to allow the plaintiff to show that he in fact thought he was so doing, would be to hold that a contract depends for its existence not upon the expressed but upon the abstract intention of the parties. To allow the plaintiff to recover because of the mistake based upon his abstract intention, would be to allow him to contradict either the terms of an offer made by him and accepted by the defendant, or to show that what in form was an acceptance of an offer made to him by the defendant was not so in fact because of an unexpressed intention on his part.

While in the case of mistake the law will always, where it does not contradict the terms of a contract made between the parties, allow proof of abstract intention for the purpose of showing that a payment which was not in fact due was not intended as a gift; yet proof of abstract intention should never be allowed to vary the terms of a contract between the parties for the purpose of allowing a recovery of money paid under mistake, where such proof would not be allowed for the purpose of resisting payment on either legal or equitable grounds.

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In accordance with these principles it is held that the rights of a party who has purchased real estate, and who has accepted a deed of conveyance thereof, are determined by the deed, and if the deed contains no covenants giving him a right of action, the plaintiff in the event of failure of title is remediless unless the facts are such as to entitle him to have the deed rescinded or reformed in equity.[1]

The proposition just stated is, it seems, subject to the limitation, that if the title fails for want of authority in the defendant to act in the capacity in which he professed to act, the money paid can be recovered, notwithstanding the defendant executed a quit-claim deed only.[2]

On the same principle it would seem that, notwithstanding the absence of covenants in a deed, there can be a recovery of money paid for property to which the plaintiff does not obtain a title because the execution or process under which the property was sold was a nullity.[3]

Where, however, the plaintiff is entitled to call for a deed with warranty of title, he can in the event of a failure of title refuse to accept a deed, and recover the money paid under the contract.[4]

And it is not necessary for the plaintiff in such a case to establish that the defendant's title is actually defective; it is sufficient for him to show that there is a reasonable doubt sufficient to create a cloud upon title.[5]

So if the interest in the real estate can be conveyed by parol, and is so conveyed, the court will look to the intention

[1] Clare *v.* Lamb, L. R. 10 C. P. 334; Soper *v.* Stevens, 14 Me. 133; Phillips *v.* City of Hudson, 31 N. J. L. 143 (*semble*); Whittemore *v.* Farrington, 76 N. Y. 452. See, collecting cases, Rawle, Covenants for Title, 5 Ed. 321.

[2] Earle *v.* Bickford, 6 Allen, 549.

[3] Schwinger *v.* Hickok, 53 N. Y. 280; Hoxter *v.* Poppleton, 9 Ore. 481.

[4] Johnson *v.* Johnson, 3 B. & P. 162; Phillips *v.* City of Hudson, 31 N. J. L. 143; Chapman *v.* City of Brooklyn, 40 N. Y. 372.

[5] Moore *v.* Williams, 115 N. Y. 586.

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of the parties, and if the intention warrants it, will allow a recovery where the vendor had no title. Thus, in Cripps *v.* Reade,[1] the plaintiff who purchased from the defendant a leasehold interest, to which the defendant had no title, in consequence of a mistake in the letters of administration which had been granted to him, was allowed to recover the money so paid, the transfer having been made by parol.

The principle that there can be no recovery of money paid for property, to which the defendant had no title, unless the defendant can be regarded as contracting to transfer, not his interest, but the title to the property, is well illustrated by the case of Morley *v.* Attenborough.[2] In that case the plaintiff bought at an auction sale of unredeemed goods, pledged to a pawnbroker, property which he was afterwards compelled to restore to the true owner, the party pledging the goods to the pawnbroker having wrongfully converted them. It was held that there could be no recovery of the money so paid, since the vendor could not be regarded as selling anything more than the right which he himself had to the pledge. If the facts had warranted the inference that the vendor was selling, not simply his *right* to the goods, but a title thereto, then the plaintiff would have been entitled to recover.[3]

When plaintiff mistaken as to title must make restitution.

Since, however, the obligation of the defendant to refund the purchase-money rests upon the principle of unjust enrichment, the plaintiff will not be allowed to recover the purchase-money when the result of the recovery would be an unjust enrichment of the plaintiff at the defendant's expense. Accordingly, a plaintiff will not be allowed, where the true owner has not asserted his right to the property, to retain possession of the property, and at the same time to recover the purchase-money.[4]

[1] 6 T. R. 606.

[2] 3 Ex. 500.

[3] Eichholz *v.* Bannister, 17 C. B. N. S. 708; see also Benjamin on Sales, Bennett's Notes, 614.

[4] Steele *v.* Sanchez, 80 Iowa, 507; Coolidge *v.* Brigham, 1 Met. 547; Moyer *v.* Shoemaker, 5 Barb. 319.

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If, however, the retention of the property will not enrich the plaintiff at the defendant's expense, then the property need not be returned as a condition of recovering the purchase-money. For this reason it was held in Phillips *v.* O'Neal[1] that the defendant who purchased under mistake his own land from the plaintiff in possession need not return the same as a condition of defeating an action for the recovery of the purchase-money.

Where failure of title is only partial, consideration must be apportionable.

Where the failure of title is only partial, there can be no recovery of the purchase-money, unless the consideration is apportionable.[2] If, however, the consideration is apportionable, a recovery *pro tanto* will be allowed where no injustice will result therefrom.[3]

Mistake as to the existence of the subject-matter of sale.

A plaintiff may claim a right to recover, as for a failure of consideration, money paid in the purchase of what has proved to be a non-existing thing, he supposing the thing to be in existence when he paid the money of which a recovery is sought.

In this class of cases the material question is, what was the contract between the parties; upon what assumption was it based? Was it the understanding of the parties that the plaintiff was buying, and the defendant selling, an existing thing; or did the parties understand that it was simply the transfer of the right to the subject matter of the sale, if such subject matter existed, the plaintiff taking his chances as to the existence or non-existence thereof?

If it was the understanding of the parties that the plaintiff was purchasing an existing thing, then the money paid can be recovered. If the plaintiff was purchasing simply a chance, then it is the plaintiff's misfortune that the *res* did not exist, and there can be no recovery of the money paid by him. In

[1] 87 Ga. 727.

[2] Smart *v.* Gale, 62 N. H. 62. See also Mauzy *v.* Hardy, 13 Neb. 36.

[3] Laflin *v.* Howe, 112 Ill. 253. See also Wright *v.* Dickinson, 67 Mich. 580.

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Strickland *v.* Turner[1] it was held that the plaintiff, who failed to acquire title to an annuity because of the death of the annuitant, both parties supposing the annuitant to be alive, could recover the money so paid, since the contract presupposed the existence of the annuity, and was a sale thereof. So in Gurney *v.* Womersley[2] it was held that the plaintiff, who purchased a bill genuine only as to the endorsement thereon, could recover the money so paid. So in Wood *v.* Sheldon[3] it was held that the plaintiff who had purchased from the defendant a script dividend certificate, which the courts had declared null and void, because of illegality in the issue thereof, could recover the money so paid, since both parties thought the plaintiff was obtaining a valid obligation, whereas in fact what was passed to him was a nullity. So in Jones *v.* Ryde[4] a plaintiff who had purchased from the defendant a naval bill, which, though it had a valid and legal inception, had ceased to exist, because of the fraudulent alteration thereof, was allowed to recover from the defendant to the extent that the defendant was unjustly enriched at the expense of the plaintiff. In that case the government, though under no obligation to pay, honored the bill, and in fact paid to the plaintiff the amount for which the bill was originally issued. It was held that the plaintiff could recover from the defendant the difference between what he had paid to the defendant and what he had received from the government. So in Gompertz *v.* Bartlett[5] the plaintiff, who had purchased from the defendant, without endorsement, a bill of exchange, apparently a foreign bill, and therefore not requiring a stamp, was allowed to recover the money paid therefor, the bill being in fact a domestic bill, and payment thereof being refused because the bill was not stamped.

In Bree *v.* Holbech[6] the plaintiff purchased from the

[1] 7 Ex. 208.
[2] 4 E. & B. 133.
[3] 42 N. J. L. 421.
[4] 5 Taunt. 488.
[5] 2 E. & B. 849.
[6] 2 Doug. 654.

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defendant what purported to be a note secured by a mortgage of real estate; both the note and mortgage were forgeries. The court treated the transaction as if it were a purchase by the plaintiff of real estate, and held that as the deed contained no covenants for title, there could be no recovery. It seems difficult to reconcile this decision with the decision in Hitchcock *v.* Giddings,[1] where it was held that a plaintiff could be relieved from the payment of a bond that had been given by him in the purchase of property, which the defendant professed to hold by way of remainder in fee, when in fact the defendant's interest had been destroyed by a recovery suffered by a tenant in tail. Richard, C. B., delivering the opinion of the court, said: —

"Both parties at the time of the contract treated on the supposition that a recovery had not then been suffered. The whole of the evidence shows that that was the object in contemplation of the purchaser. If no recovery had been then suffered, the defendant had a remainder; if there had, he had no sort of interest whatever. But they agreed for the sale of the remainder, subject to the subsequent possible contingency of there being no recovery suffered. Now, if a person sell any estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase money, that is certainly a fraud, although both parties should be ignorant of it at the time; and that I believe to have been the case here. A contingency may certainly be sold on speculation, but not such as was sold here. Two parties are not to be allowed to enter into an agreement to deceive each other. But there was not even a contingency sold here; it was not selling an interest, subject to a chance, for the defendant had no interest at all to which a chance could attach.

"I am therefore clearly of opinion that this bond must be relieved against. Bonds are not conclusive, as has been said, though they may be used to show that the party had acted deliberately; but wherever it can be made to appear that they were not fairly taken, or that the money was not satisfactorily due, courts of equity will order them to be cancelled; for they will not suffer a party to recover on a bond against which a defendant has no defence at law,

[1] 4 Price, 135.

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although it were given without such a consideration as would entitle the plaintiff at law to receive the money, the payment of which it is given to secure. That is undoubtedly the present case. And if more had been done here, — if the money had been paid into court, — the defendant would not have been permitted to take it out if the plaintiff could have shown, as he does now, that at the time of the sale the defendant had no interest.

"Then as to the money which has been already paid: the same equity which attaches to the bond must also attach to the interest which has been paid on it; for if an application for an injunction has been made immediately it must have been granted, and then no interest would have accrued."

It does not seem to the writer that these two cases can be distinguished in principle. In both cases the parties had contracted on the supposition of the existence of an interest, which in the one case had never existed, and in the other case had ceased to exist. In each case the transaction had been completed in form by the execution of a conveyance. In neither case did the conveyance contain a covenant for title. It is true that in Hitchcock *v.* Giddings the plaintiff had not paid the purchase-money, but had only given his bond therefor. But if, because of the absence of the covenants in the deed, in the one case, the plaintiff had no equitable claim to the money paid by him, it is submitted that in the other case he had no equitable claim to the surrender of the bond.

It would seem that in a case like Bree *v.* Holbech the court should treat the purchase of a debt secured by mortgage, not as they would treat an ordinary purchase of real estate, but should consider the transaction as it is looked upon by the parties thereto. It is submitted that where a mortgage debt is sold it is looked upon as something quite distinct from the ownership of the land, the debt being the subject-matter of the sale, and the mortgage, which is regarded merely as giving a lien upon the land, rendering the purchase more desirable because of the security afforded thereby. From this

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point of view it is submitted, that the note and mortgage in Bree *v.* Holbech being forgeries, the sale should have been treated as the sale of a non-existing thing, and not simply as a transaction in which one party purchased land from another by a deed containing no covenants.

In McGoren *v.* Avery *et al.*,[1] the plaintiff, who had purchased from the defendants, as executors of one Forster, a certificate which had been issued to Forster on an execution sale, was allowed to recover the money paid therefor, the fact being that the sale was conducted and the certificate issued under what purported to be a judgment in favor of Forster against one Burch, whose lands were the subject of the levy and sale, when, in fact, no such judgment had been obtained.

In Martin *v.* McCormick,[2] the plaintiff, whose estate had been sold for a term of one hundred years for the non-payment of taxes, but who had redeemed the same within the statutory period of time before the conveyance thereof to the defendant, purchased from the defendant what both the plaintiff and the defendant supposed to be a leasehold interest, which did not, however, in fact exist, because of the payment of the taxes by the plaintiff, as aforesaid. The plaintiff, at the time of purchase, was in possession of the premises, and the defendant held an instrument under the seal of the corporation of the city of New York purporting to give him a leasehold interest therein. It was held that the plaintiff could recover the money so paid.

In Moore *v.* DesArts,[3] the defendant sold to the plaintiff certain goods which he had imported, and on which he had paid the duties exacted by the collector of customs. The goods if subject to duty were entitled to a drawback if exported within three years, and were sold in the market at two prices, "a long price," which included the amount of the duties and gave the purchaser a right to the drawback, and "a short price," which

[1] 37 Mich. 120.
[2] 8 N. Y. 331.
[3] 1 N. Y. 359.

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left the right of drawback with the seller, the purchaser, however, obligating himself to export the goods within the time necessary to enable the seller to receive the drawback from the government. The plaintiff purchased at the "long price." After his purchase, and while he was still the owner of the goods, the secretary of the treasury declared that class of goods not to be subject to duty. As a consequence of this decision the market price of the goods was reduced by about the amount of the duties that had been exacted. The right of drawback which the plaintiff supposed he had purchased was by this decision lost. The defendant refused to assign to the plaintiff his right to collect the money which had been paid as a duty on the goods, and himself received that sum of money from the government. It was held that the plaintiff was not entitled to recover from the defendant any part of the purchase-money. Bronson, J., delivering the opinion of the court, said: —

"Although there is a seeming equity in favor of the complainant, I have not been able to discover any principle upon which his claim can be supported. There was no warranty when the complainant purchased that the goods were dutiable, and no fraud of any kind is imputed to the defendant. So far as appears, the parties dealt upon equal terms, each knowing all that was known by the other. As the government officers have decided both ways on the question whether the spelter was subject to duties, it may fairly be presumed that these merchants knew that was a debatable question; they knew that the decision which had been made by the collector might be overruled by the secretary of the treasury, and the duties be refunded to the importer. With this knowledge the defendant sold and the complainant purchased the spelter, with a right to the drawback should that right ever become perfect. But there was no sale or purchase of the duties in case they should be refunded by the government on the ground that the goods were not dutiable. At the time of the sale there were two contingencies in which the duties might be restored to the importer: he might receive them as a drawback on exporting the goods, or the money might be refunded on the ground that it was improperly

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demanded at the first. The complainant purchased the right to the drawback; but he did not purchase the other right, and I do not see how we can give it to him without making a contract for the parties."

It is submitted that the only ground upon which this decision can be supported is, that the plaintiff made a mistake of law in supposing the goods to be subject to the payment of a duty. What the plaintiff in fact purchased was two distinct things; the goods without the right of drawback had a certain ascertained value; the plaintiff, by paying the "long price," acquired title to the goods, and, as the plaintiff and the defendant supposed, the rights arising against the government from the exportation thereof. What he in fact got was the goods, but no right against the government. Although the defendant cannot be said technically to have collected from the government the drawback, because the drawback presupposed the goods to be subject to duty, and its collection depended upon the exportation thereof, whereas the defendant's claim against the government presupposed the goods not to be subject to duty, and existed without regard to the disposition made of the goods; yet, the fact is, that the defendant has received for the goods, by the amount of the duty paid by him, a sum in excess of what he would have received had the duty never been levied, or had he not sold the goods at the "long price." The plaintiff and the defendant intended that the right which the defendant had against the government in consequence of the payment of the duty should go with the goods to the plaintiff. It is true that because of the fact that both parties supposed that right to be a right of drawback no other right was thought of.

It hardly seems probable that had the plaintiff exported the goods and collected the drawback before the goods were declared not to be subject to duty, that the defendant could have collected from the government the amount which had been paid by him to the collector of customs, since the gov-

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ernment could say in such a case that the mistake made by the plaintiff had not damaged him, because of the sale of the goods by him at the "long price." It seems equally improbable that the defendant in such circumstances could have collected from the plaintiff the money which had been paid to him by the government as a drawback. Such a result would have involved no one in a loss. Why should an accident enable the defendant to involve the plaintiff in a loss?

As the plaintiff and the defendant were equally innocent, no recovery should be allowed which would throw a loss upon the defendant, and, therefore, the plaintiff should not have been allowed to recover a sum which would have reduced the purchase-price of the goods below the "short price," which the defendant could have obtained for the goods at the time he sold them to the plaintiff.

In The Bank of England *v.* Tomkins,[1] where a plaintiff sought to recover from the defendant because of the purchase of a forged exchequer bill, the defendant contended that, granting the bill to be a forgery, still the plaintiff had no cause of action against him, for the reason that the exchequer office was estopped from denying the genuineness of the bill. It was held, that as the bill was a forgery, the plaintiff was entitled to maintain his action, without regard to the question of estoppel. Parke, Baron, delivering the opinion of the court, said: —

"The defendant's argument is that the exchequer office is bound to pay these bills in their present state, — namely, good in three of the essential requisites, but bad in the fourth, as having a forged signature. Now that is a question which we are not at all called on to determine at present. Whenever it comes before the proper tribunal it will be decided; it is enough for us to say that the plaintiffs did not bargain for a bill imperfect in any respect, or which might be enforceable against the exchequer by petition of right or otherwise, but for a bill good in all respects, and which would at once be paid or exchanged in the usual course

[1] 6 Jur. 347.

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and practice of the office. Now it is abundantly clear that this is not such a bill, that the plaintiffs have, therefore, not got what they bargained for, and are therefore entitled to be repaid their money."

While at first blush the suggestion seems plausible, that an estoppel will put a party in as good a position as he would have occupied had the claim been genuine, still such is not the fact, unless the party against whom the estoppel exists recognizes the estoppel, and pays the claim as readily as he would have paid it had it been genuine. A result reached after litigation is not usually as beneficial to one as the same result reached without litigation. Therefore it cannot be said in The Bank of England *v.* Tomkins that the plaintiff did not suffer in consequence of the exchequer bill being a forgery.

Furthermore it would seem that if an instrument is admitted to be in fact a forgery, a court should not in an action to recover the money paid for such instrument, on the basis of its being genuine, attempt to pass upon the question of estoppel, since no finding thereon would bind the third party, he not being a party to the action.

When a plaintiff under mistake as to the existence of the *res* must make restitution.

Since in this class of cases, as in the cases where the defendant seeks a recovery of the purchase-money because of failure of title, the basis of the recovery is the unjust enrichment of the defendant, a plaintiff, if he has received anything of value from the defendant, must, as a condition of recovering the purchase-money or any part thereof, restore to the defendant what he received, unless he is in a position, without fault on his part, where he is unable to make restitution, in which event he will be allowed to recover the amount paid to the defendant less the value of that received from him.[1] If the thing received by the plaintiff is of no possible value to the defendant, then it seems it need not be returned.[2]

[1] Lawton *v.* Howe, 14 Wis. 241. Wis. 266; Brewster *v.* Burnett, 125

[2] Kent *v.* Bornstein, 12 Allen, Mass. 68.
342; Paul *v.* City of Kenosha, 22

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To maintain an action for money paid under mistake, it is not sufficient for a plaintiff to prove that he has conferred a benefit upon the defendant under mistake. It must appear that the defendant has actually received money, or that which the parties treated as money.[1] Thus it is not sufficient to maintain an action for money paid under mistake, that the defendant received a credit in account to which he was not entitled.[2] In Hendricks *v.* Goodrich[3] it appeared that the plaintiff had delivered to the defendant a horse of the value of $150 in settlement of his indebtedness to the defendant, supposing the amount thereof to be $150. The amount of the indebtedness was in fact only $53, and this was known to the defendant, as was also the fact that the plaintiff supposed the indebtedness to be $150. The plaintiff on discovering his mistake brought an action to recover $100 as paid to the defendant under mistake. It was held that as the horse was not received as money, the plaintiff was not entitled to recover. In Standish *v.* Ross,[4] it appeared that the plaintiff, who, as sheriff, had levied execution to satisfy a judgment obtained in favor of the defendant, had assigned the goods to the defendant by bill of sale, and had returned the execution as satisfied. It was held that though no money had in fact passed, the transaction was the same as if the defendant had paid the amount of the judgment to the plaintiff for the goods, and had then received the money as the amount realized on execution, and that the plaintiff was therefore entitled to recover in a count for money had and received.

To maintain an action for money paid, money or its equivalent must have been received.

Assuming the mistake to be of a character otherwise sufficient to entitle the plaintiff to recover as for money paid under mistake, the question arises as to the necessity of

[1] Lee *v.* Merrett, 8 Q. B. 820; Brundage *v.* Port Chester, 102 N. Y. 494; Hendricks *v.* Goodrich, 15 Wis. 679. See, however, Sinslar *v.* May, 8 Wend. 561.

[2] Lee *v.* Merrett, 8 Q. B. 820; Brundage *v.* Village of Port Chester, 102 N. Y. 494.

[3] 15 Wis. 679.

[4] 3 Ex. 527.

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Necessity of demand or notice as a condition of maintaining an action.

notifying the defendant of the mistake or of making a demand upon him as a condition of bringing an action. This question may arise:

1. Where the money was paid and received under a mutual mistake, the defendant not knowing of the mistake at the time when the action was brought.

2. Where although the plaintiff paid the money under mistake, the defendant knew at the time of payment that the money was not due and that the plaintiff was paying the same under a mistake.

3. Where though the mistake was mutual at the time when the money was paid, the defendant has subsequently become aware thereof, though not notified by the plaintiff.

It must be remembered in considering this question that to render a defendant liable at law, it is necessary to show that he is a wrong-doer, that he has violated some right *in rem* or some right *in personam* of the plaintiff.[1] And especially must it be remembered that to render a defendant liable in the count for money had and received or in any corresponding form of action, it is necessary to show that the defendant has acted inequitably and against conscience.[2]

In considering the question as to the necessity of a demand or notice, it is necessary to determine the character of the defendant's act in receiving the money and retaining it.

If it be assumed that the plaintiff paid, and the defendant received, the money under a mutual mistake, the defendant receiving only what the plaintiff intended to deliver to him, it seems impossible to predicate any wrong-doing in such receipt; since what he received he received innocently and with the plaintiff's assent, accompanied by circumstances sufficient to confer the legal title thereto upon him.[3]

It would seem to be impossible to predicate wrong-doing

[1] Holland, Jurisprudence, 5th ed. 128, 144. Markby, Elements of Law, 3 ed. 417.

[2] *Supra*, p. 43.

[3] *Supra*, p. 63.

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either legally or equitably on the part of the defendant in receiving innocently property, the title to which the plaintiff intended to vest and did vest in him. If he did no wrong in receiving the property, it seems difficult to say that he has become a wrong-doer in keeping that which he did no wrong in receiving, and which he has no reason to suppose he should not continue to hold. Surely he is doing nothing inequitable or against conscience in innocently taking with the consent of the plaintiff and in keeping, with his supposed consent, that which the plaintiff intended he should have. Accordingly it has been held,[1] although there is a conflict of authority,[2] that a defendant who innocently receives money paid by plaintiff under mistake cannot be sued therefor until he is made aware by notice from the plaintiff or otherwise of the fact of the payment having been made under mistake.

A defendant ignorant of mistake is entitled to notice thereof.

In Freeman *v.* Jeffries,[3] one of the grounds upon which the decision in favor of the defendant was put, by three of the four judges, was, that no demand had been made upon the defendant, who had no notice of the mistake before action brought. Bramwell, B., who rested his decision solely on that ground, said: —

"But if the plaintiff were under the circumstances entitled to be repaid the sum he claims, he ought to have given notice to the defendant of the facts by reason of which he was so entitled, because until he did so there could be no duty on the defendant to pay it over. Put the claim of this action, which is in the

[1] Freeman *v.* Jeffries, L. R. 4 Ex. 189; Worley *v.* Moore, 77 Ind. 567; Ford *v.* Brownell, 13 Minn. 184; Southwick *v.* First National Bank of Memphis, 84 N. Y. 420 (*semble*); Sharkey *v.* Mansfield, 90 N. Y. 227 (*semble*); Bower *v.* Thompson, 19 N. Y. Supp. 503 (*semble*); Gillett *v.* Brewster, 62 Vt. 312; Lawton *v.* Howe, 14 Wis. 241; Stocks *v.* City of Sheboygan, 42 Wis. 315; Stebbins *v.* Union Pacific Railway Company, 2 Wy. 71 (*semble*).

[2] Leather Manufacturers Bank *v.* Merchants Bank, 128 U. S. 26; Rutherford *v.* McIvor, 21 Ala 750 (*semble*); Sturgis *v.* Preston, 134 Mass. 372; Beadenbaugh *v.* Cowper, 13 Rich. Law, 42.

[3] L. R. 4 Ex. 189.

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technical form of an action for money had and received, in a rational way, and it amounts to this. The plaintiff says: 'I, in the belief that a certain valuation had been made, paid certain moneys to you; I have since found that the valuation was not made; I therefore say there is a duty on your part to repay me.' Would the duty of repayment arise until this notice was given? I apprehend not; for at what other time could it have arisen? Not at the moment when the money was paid; for it was paid with the intention that the defendant should keep it. Was it, then, at the moment when the mistake was discovered? This would be most unjust; the mistake was the plaintiff's, and the discovery is the plaintiff's, and the defendant may still think that everything is right, and that no mistake at all was committed. Therefore until notice no duty would arise, and therefore no cause of action. . . . It is contended that no demand is necessary where there is already a cause of action. But this is begging the question; for the contention of the other side is, that there can be no cause of action till demand."

In Leather Manufacturers Bank *v.* Merchants Bank [1] it was held however that where the drawee of a check pays money upon a forged endorsement, the drawee and the holder of the check both supposing the endorsement to be genuine, the cause of action to recover the money so paid arises immediately upon the receipt of the money by the defendant without demand by the plaintiff, although the defendant is ignorant of the mistake made by the plaintiff. After referring to the relative rights and duties of a bank and its depositor, Mr. Justice Gray, delivering the opinion of the court, said: —

"But as between the bank and the person obtaining money on a forged check the case is quite different. The first step in bringing about the payment is the act of the holder of the check in assuming and representing himself to have a right, which he has not, to receive the money. One who by presenting forged paper to a bank procures the payment of the amount thereof to him, even if he makes no express warranty, in law, represents that the paper is genuine, and if the payment is made in ignorance of the forgery,

[1] 128 U. S. 26.

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is liable to an action by the bank to recover back the money which, in equity and good conscience, has never ceased to be its property. . . . Wherever money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to receive the money paid, when in fact he has no such title or authority, then although there be no fraud or intentional misrepresentation on his part, yet there is no consideration for the payment, and the money remains in equity and good conscience the property of the payee, and may be recovered back by him without any previous demand as money had and received to his use. His right of action accrues, and the statute of limitation begins to run immediately upon the payment."

It will be noticed that the language just quoted is confined in terms to cases where the defendant is regarded as making a representation, and therefore this case cannot be said to decide that no demand would be necessary in a case where the defendant could not be said to have made any representation expressed or implied; and where without any representation on his part a sum of money has been paid to him by mistake, as for example a plaintiff believing himself to be indebted to the defendant in a certain sum of money tenders it to the defendant unsolicited, and the defendant receives it because of the plaintiff's statement that the amount in question is owing to him. Clearly in such a case the defendant could not be said to have made any representations, and therefore such a case would not be governed by the reasons given by the learned justice.[1]

[1] If the defendant in Leather Manufacturers Bank *v.* Merchants Bank is to be regarded as liable to the plaintiff on the theory that he has made a representation to the plaintiff, then he must be liable either because of a breach of warranty or in an action on the case in tort for the injury inflicted upon the plaintiff by his false, though unintentional, misrepresentation. The writer does not believe that the defendant should be held liable on either theory. As a defendant would be guilty of fraud who should present a check for payment knowing that he had no title thereto because of a forgery, the inference would seem to be a fair one, that he asserts his belief in his right to collect the

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Many of the cases cited by Mr. Justice Gray in support of the proposition that the cause of action arises immediately on the payment of money, notwithstanding a mutual mistake, it is submitted, do not fairly support the proposition in question.

In favor of this proposition the court cited: Bree *v.*

check. But it is submitted that the presentation of the check for payment by the holder cannot be fairly regarded as a representation on his part of anything more than that he is acting in good faith, and believes the instrument to be genuine.

In The Corn Exchange Bank *v.* The Nassau Bank, 91 N. Y. 74, the plaintiff sought to recover on the theory of an implied warranty from the defendant, to whom he had paid a sum of money under mistake as to the genuineness of the endorsement of a check held by the defendant, not only the amount so paid, but the expenses that he had incurred in defending an action by the drawer of the check to recover from him the amount of money which he claimed as a credit in his account with the drawer, because of his payment to the defendant. This claim was not allowed, the court holding that the defendant's liability was not for a breach of warranty, but was simply an obligation arising from a failure of consideration.

It is submitted that this decision is inconsistent with the reasoning of the court in Leather Manufacturers Bank *v.* The Merchants Bank, and is to be preferred thereto; for while in The Corn Exchange Bank *v.* The Nassau Bank, the court distinguished clearly between the attitude of a party selling a bill of exchange or check and the attitude of one presenting the same for payment, holding that there is a warranty in the former case but not in the latter, Mr. Justice Gray, in the opinion just quoted, treats the two cases as analogous, saying: "Wherever money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to receive the money paid, when in fact he has no such title or authority, then . . . there is no consideration for the payment, and the money . . . may be recovered back by him without any previous demand as money had and received to his use."

It is clear under the authorities that where there is a failure of title, the reason why the money paid by the purchaser can be recovered, is that there is either an expressed or an implied warranty of title, for in the absence thereof, the doctrine of *caveat emptor* applies, and there can be no recovery, notwithstanding the failure of title; and when the learned justice treats the cases as analogous, as he does in the paragraph just quoted, he introduces the idea of a warranty of authority or title, and makes the breach of warranty and not mistake the basis of recovery.

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Holbech, 2 Doug. 654; Utica Bank *v.* Van Gieson, 18 Johns. 485; Dill *v.* Inhabitants of Wareham, 7 Met. 438; Earle *v.* Bickford, 6 Allen, 549; Blethen *v.* Lovering, 58 Me. 437; Sturgis *v.* Preston, 134 Mass. 372; Corn Exchange Bank *v.* The Nassau Bank, 91 N. Y. 74; Bank of the United States *v.* Daniel, 12 Pet. 32. While it is true that it was held in Bree *v.* Holbech[1] that a claim was barred within six years after payment, the case was one in which the question of the necessity of a demand or notice before bringing an action was not raised by counsel. The case was presented to the court on a demurrer to a replication to a plea of statute of limitations. The plaintiff contended that the defendant in selling him a mortgage which was a forgery was guilty of fraud, and that in the case of concealed fraud the statute of limitations ran only from the time of the discovery thereof. The case therefore should not be cited to support a proposition which was not presented for the consideration of the court, and which, if it had been presented, for all that appears in the case, might have led to a different conclusion.

In Utica Bank *v.* Van Gieson,[2] the decision was rested by the court upon two grounds, first, that no demand or notice was necessary; second, if notice was necessary, sufficient notice had been given. What the court said as to the necessity of a demand may, therefore, be characterized as purely *obiter dictum* with the same propriety as was the statement of the court in Southwick *v.* First National Bank,[3] as to the necessity of a demand characterized by Mr. Justice Gray. In each case the court might have reached the same conclusion without considering the question of demand. Still if it be assumed that the court decided in Utica Bank *v.* Van Gieson that no demand was necessary, it seems sufficient to say of the case that at the time it was

[1] 2 Doug. 654.
[2] 18 Johns. 485.
[3] 84 N. Y., page 420.

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cited in Leather Manufacturers Bank *v.* Merchants Bank it was not regarded as representing the law of New York, nor is it so regarded to-day.[1]

While it is true that in Bank of the United States *v.* Daniel[2] the court said, that "the cause of action arose at the time when the payment was made under mistake," it is also true that the point was conceded by counsel for the defendant, who addressed himself solely to the question as to whether the facts would warrant the claim that the money had been paid at a certain time.

In Dill *v.* Inhabitants of Wareham,[3] the town of Wareham, which had contracted with the plaintiff for the transfer to him of certain rights in oyster beds, subsequently refused to allow the plaintiff to exercise the rights. The plaintiff brought an action against the town to recover damages for a breach of contract. The court held that as the town had no authority to transfer these rights there was no liability on the contract. The plaintiff also sued in a count for money had and received, and to support this count proved that he had deposited $500 with the defendant as security for the payment of oysters which he might take during the ensuing year; and it appearing that the defendant had refused to allow him to take any oysters, the court held that in consequence of the refusal on the part of the defendant to perform the contract there arose an immediate duty on its part to return the money intended simply as a security for the performance of the plaintiff's contract. It would seem that no other result could have been reached. The defendant, on its refusal to perform the contract, was plainly acting inequitably in retaining the money which it had received from the plaintiff as security for the performance by the plaintiff of his side of the contract. Since the only object of a demand on the part of the plaintiff would be to make the defendant's

[1] See *supra*, p. 141, n. 1.

[2] 12 Pet. 32, 56.

[3] 7 Met. 438.

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retention of the money inequitable, such a demand was quite unnecessary, the defendant being already in the position of retaining money which in good conscience it should have returned to the plaintiff.[1] The statement by Chief Justice Shaw that no special demand is necessary "where there is a debt, or duty to pay money presently, not dependent upon any conditions or contingency," it is submitted, cannot be quoted as authority for the proposition that money paid under mutual mistake can be recovered without demand, against the defendant, still ignorant of the mistake. The question in such a case is whether there is a duty to pay money presently "not dependent upon any conditions or contingency."

In Earle *v.* Bickford,[2] the plaintiff sued to recover money which he had paid in the purchase of property from the defendant, which the defendant sold as an assignee in insolvency of the owner thereof. Subsequent to the sale and receipt of the money by the defendant, his appointment was set aside and another assignee appointed. It was held that the plaintiff could recover the money received by the defendant without first making a demand upon him. The court apparently put the case on the ground that he warranted his authority as assignee. If he did, there was clearly a breach of warranty, and no demand was necessary, the defendant being already in default as to his warranty. If, however, the case is to be regarded as resting not on a failure of consideration arising out of a breach of warranty, but as involving the question simply of money paid under mistake, still the decision is distinguishable from The Leather Manufacturers Bank *v.* Merchants Bank, for the reason that the defendant, having received the money as assignee of property which, it had been held, the defendant had no authority to sell, was aware of the fact that he held money which the plaintiff had paid him without consideration under a

[1] See *infra*, p. 152. [2] 6 Allen, 519.

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mistake, and should therefore have returned the same immediately to the plaintiff without demand.

The case of Blethen *v.* Lovering,[1] it is submitted, cannot be cited in support of the proposition that money paid under mistake can be recovered without demand. In that case the plaintiff sought to recover from the defendant not only a sum of money which he had paid the defendant in exchange for a note endorsed by the defendant "without recourse," but in addition thereto, the cost and expense attending his unsuccessful attempt to collect the same from the maker. The action was brought therefore not simply to recover money which had been paid under mistake, but to recover damages, and was an action, not for money had and received, but in special assumpsit for a breach of warranty. This is clear from the opinion of the court. Said Appleton, C. J.:

"On the 14th of September, 1866, the plaintiffs brought this action on the ground of an implied promise or warranty on the part of the defendant at the time of the transfer, that the amount purporting to be due, was due, when in truth nothing was due, the note having been given without consideration. . . . If there was a promise or a warranty it was, according to the statement of facts, broken as soon as made. . . . The liability of the defendant accruing then, at the time of his endorsement, the statute of limitation constitutes a bar."

The case of The Corn Exchange Bank *v.* The Nassau Bank[2] is also cited as authority for the proposition that no demand or notice is necessary as a condition of suing to recover money paid and received under a mistake. Speaking of this case the court says: —

"A bank which has paid a check upon a forged endorsement, supposed by both parties to be genuine, was held entitled to recover the money with interest from the time of payment, necessarily implying that the right of action accrued at that time."

It is submitted that the case cannot be cited as an author-

[1] 58 Me. 437 [2] 91 N. Y. 74.

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ity for this proposition.[1] For all that appears a demand may have been made upon the defendant. In this case the plaintiff, the drawee of a check who had paid money upon a forged endorsement, recovered from the defendant to whom the money was paid the amount of a judgment which had been recovered against the plaintiff by its depositor, and interest on such judgment, making compound interest, and it was objected that the defendant was not entitled to recover compound interest. The argument of counsel was addressed entirely to that point, and his exception was sustained, the court holding that the plaintiff was not entitled to compound interest, but to simple interest only to the time of the rendition of the verdict. It is evident then that the point of the necessity of a demand as a condition of bringing an action was not presented for the consideration of the court; and while if the point had been made that interest could run only from the time when the cause of action arose, the court would have had to decide when the cause of action did arise, or whether they would allow the running of interest before the right of action arose, still that question was not presented by counsel or considered by the court. The attention of counsel and the court was given entirely to considering the question of the defendant's liability to pay compound as distinguished from simple interest.

While giving undue weight to the decision in Corn Exchange Bank *v.* The Nassau Bank, the court seems not to have given the weight to the case of Southwick *v.* The First National Bank which the case had at that time and still has in New York on the question of the necessity of making a demand upon, or giving notice to, a defendant who has received and innocently holds money paid to him by the plaintiff.[2] It is true that in Southwick *v.* The First National Bank the court held that the plaintiff could not recover on the theory

[1] See Leach *v.* Vining, 18 N. Y. Sup. 822.

[2] See *supra*, p. 141, n. 1.

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of mistake, for any one of three or four reasons. But the court considered at length the question, of whether the plaintiff was entitled to recover without making a demand upon the defendant, and in reversing the judgment obtained by the plaintiff distinctly stated the absence of a demand on the part of the plaintiff as one of the grounds for denying a recovery by him. In considering the weight to be attached to the expression of the court on this point it must be remembered that it was not the case of a court affirming a judgment, as in Utica Bank *v.* Van Gieson,[1] and simply in passing making a remark which might have been casually dropped, but uttered in a case where the court were reversing a judgment and granting a new trial, and where they considered the question thoughtfully with a view to fixing the rights of the parties on a possible second trial. After holding that the complaint did not state a cause of action on the theory of mistake and that this fact could not be ignored on appeal by the plaintiff seeking to sustain a judgment entered in his favor, the court said: —

"But passing this point, the defendant further contends that the plaintiff ought to have proved a demand upon it for the draft, or the money paid thereon before commencement of the suit, but that he failed to prove such demand. It is not disputed by the plaintiff that such a demand was necessary unless it was in some way waived by the defendant, or unless it was in some way estopped from insisting upon a demand. Whether the action be stated as one for the conversion of the draft, or of the money paid thereon, or for the recovery of money paid by mistake, a demand was a prerequisite to the maintenance of the action against the defendant, who lawfully and innocently received the draft and the money paid thereon. The obligation of a party to refund money voluntarily paid by mistake can arise only after the notification of the mistake and the demand for payment."

The case of Sturgis *v.* Preston,[2] cited by the court, is in point. The court in that case held that one who had made

[1] *Supra*, p. 145. [2] 134 Mass. 372.

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an overpayment in the purchase of land, paying for a quantity in excess of what was conveyed, could not recover after the expiration of six years from the date of payment, notwithstanding the fact that he did not discover the mistake until nine years after the payment was made, when he immediately notified the defendant thereof.

In support of the decision that no demand was necessary the court cited Dill *v.* Inhabitants of Wareham,[1] Earle *v.* Bickford,[2] Utica Bank *v.* Van Gieson,[3] — cases which the writer has attempted to show should not be regarded as supporting the proposition in question, — and in addition thereto Hawley *v.* Sage.[4] In that case defendant held for the benefit of himself and the plaintiff a draft, payable to his own order, which he was to collect, and having collected, pay one third thereof to the plaintiff. It was held that the defendant having collected the draft was under an obligation to pay one third of the proceeds thereof to the plaintiff within a reasonable time; and that having failed to do so, the plaintiff could sue him without making a demand upon him. It is submitted that this case is not an authority in point. The defendant took upon himself the obligation of paying over to the plaintiff a certain sum of money, and no notice on the part of the plaintiff to the defendant that he had failed to do so, could increase the obligation which the defendant had entered into, that obligation being well defined and known to him. The case, instead of presenting the question of suing a defendant who holds money with the consent of the plaintiff and ignorant of any fact which would lead him to suspect that he should return it, presents the ordinary question involved where a defendant is sued in consequence of a failure on his part to perform a legal obligation which he has assumed in favor of a plaintiff.

[1] *Supra*, p. 146.
[2] *Supra*, p. 147.
[3] *Supra*, p. 145.
[4] 15 Conn. 52.

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No demand or notice necessary where defendant knows of the mistake.

If it be assumed that the defendant at the time he received the money from the plaintiff knew that the money was not due, and was paid by the plaintiff under a mistake, then the defendant acts inequitably and against conscience in receiving the money. In such a case, as the defendant is already holding it against conscience, it is unnecessary for the plaintiff to make a demand or to give notice of the mistake as a condition of suing to recover the money so paid.[1]

In Sharkey *v.* Mansfield,[2] the court thus stated this conclusion: —

"Where the mistake is mutual, both parties are innocent, and neither is in the wrong. The necessity of a demand does not, therefore, exist in a case where the party receiving the money, instead of acting innocently and under an honest mistake, knows the whole truth, and consciously received what does not belong to him, taking advantage of the mistake or oversight of the other party, and claiming to hold the money thus obtained as his own. In such case he cannot assume the attitude of bailee or trustee, for he holds the money as his own, and his duty to return it arises at the instant of the wrongful receipt of the overpayment. He is already in the wrong, and it needs no request to put him in that position."

The object of a demand or notice being to put the defendant in the position of wrongfully retaining the money paid by the plaintiff under a mistake, it seems clear that no demand is necessary where the knowledge of the mistake is acquired subsequently to the receipt of the money, though the receipt was not wrongful because innocent and with the consent of the plaintiff. The retention thereof with knowledge is against conscience, and therefore inequitable.[3]

Running of statute of limitations.

The question as to the necessity of making a demand or giving notice as a condition of bringing an action to recover

[1] Sharkey *v.* Mansfield, 90 N. Y. 227; Bower *v.* Thompson, 19 N. Y. Supp. 503.

[2] 90 N. Y. 227.

[3] Bishop *v.* Brown, 51 Vt. 330 (*semble*).

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money paid under a mistake, is important not only because it involves the right of the plaintiff to involve the defendant in litigation and the payment of the costs, but also for the reason that the determination of that question fixes the time when the plaintiff's right is barred by the statute of limitations. For if the plaintiff's cause of action arises immediately upon the payment of the money, though both the plaintiff and the defendant are acting under a mistake and therefore the defendant is acting innocently, the statute of limitations begins to run immediately, and as a consequence the plaintiff's claim may be barred before either the plaintiff or the defendant had any reason for supposing that there was any obligation existing on the part of the defendant; and it was so held in the Leather Manufacturers Bank *v.* The Merchants Bank.[1]

The result of holding that the statute of limitations begins to run from the time when the plaintiff's right of action accrues, is that where the defendant receives the money with knowledge of the mistake on the part of the plaintiff, or where the defendant, though receiving the money innocently, afterwards becomes aware of the plaintiff's mistake in paying the same, the statute of limitations will in each case begin to run from the time when the defendant first knew of the mistake, and the plaintiff may therefore be barred of his right before he becomes aware of its ever having existed. In jurisdictions, therefore, where it is held that where money is paid under mutual mistake of fact, the plaintiff cannot sue the defendant until the defendant has notice of the mistake, a curious though logical result follows: that a defendant acting fraudulently can claim the benefit of the statute of limitations against a plaintiff ignorant of his rights, while an innocent defendant, because of a rule invoked in his favor, still remains liable to the plaintiff.

[1] *Supra*, p. 142.

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Recovery of interest.

It remains to consider the question of the recovery of interest, where money is recovered as paid under mistake.

Since the defendant is required to return money so paid, for the reason that having received the money without consideration, he should not profit at the expense of the plaintiff because of the plaintiff's mistake, it would seem that unless he is to be allowed to profit in part by such mistake, he should pay the plaintiff for its use, if in fact the money has been used by him. Since, however, interest is recovered in an action of law by the way of damages for a wrong done, it is held that there can be no recovery of interest where money has been paid under mistake, except from the time when the defendant can be said to be in the position of unjustly keeping the money paid to him.[1]

[1] Georgia Railroad Co. *v.* Smith, 83 Ga. 626; Sibley *v.* County of Pine, 31 Minn. 201; Leach *v.* Vining, 18 N. Y. Sup. 822; Grim's Estate, 147 Pa. St. 190.

The writer has reserved for consideration in a note the cases arising from payment of money under mistake as to the genuineness of negotiable instruments, for the reason that it is impossible to reconcile with the principles that have been considered in this chapter many of the results reached. Thus, while it is held that the drawee cannot recover money paid under mistake as to the genuineness of the drawer's signature (Price *v.* Neal, 3 Burr. 1354), unless the mistake was induced by the holder of the bill (National Bank of North America *v.* Bangs, 106 Mass. 441), he can recover money paid under mistake as to the genuineness of the body of an instrument (The Bank of Commerce *v.* Union Bank, 3 Comst. 230), or of an endorsement thereon (Canal Bank *v.* Bank of Albany, 1 Hill, 287). While he can recover money paid on a forged endorsement, he is not allowed to recover money paid upon a bill of exchange on the faith of a forged bill of lading given as security (Hoffman *v.* Bank of Milwaukee, 12 Wall. 181).

While it is held that the drawee of a bill cannot recover money paid under mistake as to the drawer's signature, it has been held that one accepting or paying for the honor of the drawer can recover, if he were requested by the holder to pay (Wilkinson *v.* Johnson, 3 B. & C. 428), or if he paid the bill without inspecting the same (Goddard *v.* The Merchants Bank, 4 Comst. 147).

The apparent conflict of decision consequent upon denying a recovery where the drawer's name is forged, and allowing a recovery where an endorsement is forged, is avoided by the statement that one upon whom a bill is drawn is required to ascer-

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tain at his peril the genuineness of the drawer's signature; but as the drawer of the bill has no peculiar knowledge as to the endorser's signature, no such responsibility is put upon him.

It has been suggested that the ground upon which the drawee is denied a right of recovery, where the drawer's signature has been forged, is that he was guilty of negligence in paying the bill. But if negligence is to be treated as the ground for denying a recovery, it is an exception to the rule that negligence is not a bar to an action brought to recover money paid under mistake. Furthermore, if negligence is the ground for denying relief in such cases, it should follow that where the plaintiff can show the absence of negligence he will be allowed to recover. Such, however, is not the law (Hardy *v.* Chesapeake Bank, 51 Md. 562, 565).

It has been suggested that the principle upon which the drawee is denied a recovery is, that as between parties having equal equities, one of whom must suffer, the law will leave the loss where it finds it (Ames, The Doctrine of Price *v.* Neal, 4 Harv. Law Rev. 297, 299). To establish the equality of equities between the parties it is said that from the point of view of natural justice the time of the loss is immaterial; that "if one looks to the fraudulent transaction in its entirety, the equalities of the equities between the holder and the drawee is just as obvious as the equality of the equities between the purchaser and the equitable encumbrancer." And as an illustration of this proposition this further case is given. A creditor sells his claim to A and afterwards, concealing this sale, sells the claim to B, who in good faith collects it of the debtor.

In the case of the equitable encumbrancer and purchaser, it is submitted, that a sufficient ground upon which to rest the decision would be that the purchaser is in fact a holder for value of a legal title, having taken the land as the defendant did the money in Ins. Co. *v.* Abbott, *supra*, p. 78, in extinguishment of his claim against the vendor; that as the right *in personam* was extinguished by the taking of the property, to deprive him of the property would be to violate the rule that an equity cannot be asserted against a holder for value.

Furthermore, viewed from the point of equal equities the facts establish that each party parted with his money on the faith of the obligor's personal obligation; each party therefore had simply a right *in personam*. While the equitable encumbrancer would and should prevail so long as the rights remain *in personam*, for the reason that as between equal equities the prior equity prevails, an innocent party should not for that reason be deprived of a right *in rem* in order that the law may confer it upon a party who never had more than a right *in personam*.

The same suggestion is true of the illustration of the successive assignments of the same chose in action; the second assignee by reducing the chose in action to possession acquired, as in the preceding case, a right *in rem*, while the first assignee

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had only a right *in personam* against the creditor. This right *in personam* existed by virtue of a power of attorney, by which, as against the creditor, either assignee had a right to reduce the chose in action into possession. So long as the claim remained *in personam* the prior claimant would prevail, on the principle of equal equities.

Where money is paid under mistake as to the signature of the drawer, it is submitted, that the equity of the party making the payment is superior to that of the party receiving payment: unless some other principle than that of equal equities can be invoked the plaintiff should be allowed to recover. It seems to the writer a fiction to speak of viewing the fraudulent transaction as an entirety. The transactions, it is submitted, are entirely distinct, and follow each other in point of time, the transaction between the defendant and the party from whom he purchased being complete in itself, and being followed by an entirely independent transaction between the plaintiff and the defendant, resulting in the payment of the money by the plaintiff.

If the transaction is to be viewed as an entirety it ought to follow that if the holder purchase the bill innocently, knowledge acquired by him after the purchase, but before the presentment for payment, will not enable the drawee to recover the money paid.

By the purchase of the bill, the defendant would have acquired no right against the drawee, even had the bill been genuine; and his equity is, that he innocently parted with money in the belief that he was acquiring a right to call for the payment of a bill of exchange by the drawer, when, in fact, he got no such right because the instrument was forged. If at the time when he purchased the forged bill, he acquired no right under the bill against any one, then at the time of purchase he suffered a loss; and to deny a recovery to the drawee who paid the bill, supposing the drawer's signature to be genuine, is in effect to allow the defendant to recoup his loss at the expense of the plaintiff.

The loss of the defendant, it is submitted, should be regarded as the consequence of his purchasing a worthless security, which loss must remain with him, unless he is allowed to throw the loss upon another innocent party, by receiving from that party, and retaining, money paid under mistake. The maxim that as between equally innocent parties the law will leave the loss where it finds it, it is submitted, should only be applied when parties cannot be placed in *statu quo;* and that to determine whether as between the plaintiff and the defendant the defendant can be placed in *statu quo*, one must look to the time when the plaintiff and the defendant dealt with each other. If a recovery by the plaintiff will result simply in the defendant occupying the position which he occupied at the time of payment, then the plaintiff should be allowed to recover, since in such a case if the defendant suffers a loss, he only incurs a loss which would have been incurred had the plaintiff not made the payment.

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Many of the cases doubtless where a recovery is denied of money paid under mistake as to the genuineness of the drawer's signature could be put simply upon the principles suggested in Aiken *v.* Short, 1 H. & N. 210; Chambers *v.* Miller, 13 C. B. N. S. 125; Southwick *v.* National Bank, 84 N. Y. 420; Merchants Ins. Co. *v.* Abbott, 131 Mass. 397, — namely, that where a party having certain rights receives from the plaintiff money in extinguishment thereof, he is in a position to say that he surrendered value for the money received, and should not therefore be required to return the money so paid. See *supra*, p. 77.

The recognition of this principle, however, would forbid a recovery in cases where a recovery is now allowed, namely, where, owing to the existence of genuine endorsements on the bill, the holder had rights thereunder notwithstanding some of the endorsements were forged.

The doctrine of equal equities heretofore suggested is fatal to a recovery of money paid under mistake as to the genuineness of an endorsement. It cannot be and is not contended that in point of equal equities, any distinction can be drawn between the recovery of money paid under mistake as to the genuineness of an endorsement, or of a drawing. But it has been suggested (Ames, The Doctrine of Price *v.* Neal, 4 Harv. Law Rev. 297, 307) that the decisions allowing a recovery against one to whom money has been paid under a forged endorsement can be justified on the doctrine of subrogation, for the reason that if the drawee of the bill should subsequently pay the true owner, he would be entitled to be subrogated to his rights against all subsequent holders, and that as against subsequent holders the true owner would have the authority to sue either for a conversion of the bill, or to waive the tort and sue for money had and received.

The fact that the action is brought at law in the name of the party who made the payment, is fatal to allowing a recovery on the theory of subrogation, unless the result is to be regarded as anomalous in point of procedure. Equally fatal to this theory is the fact that the plaintiff is allowed to recover without first paying the true owner. The theory of subrogation, however, is open to the further objection that a recovery would undoubtedly be allowed in cases on the line of reasoning adopted by the courts, where on the theory of subrogation it would have to be denied.

Subrogation of course implies a right in another which a party seeks to acquire against the defendant. A party claiming through subrogation claims by virtue of a derivative right, and a derivative right necessarily presupposes an original right. If, therefore, for any reason the true owner of the bill could not maintain an action against the holder thereof for a conversion of the bill, or could not sue at law in a count for money had and received to recover the proceeds received in payment thereof, then a drawee dependent upon the doctrine of subrogation could not on the theory of subrogation recover the money paid by him

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under mistake as to the genuineness of an endorsement.

Suppose, for example, that the husband of a wife in a jurisdiction where a wife is allowed to hold separate property, but where no action is allowed between husband and wife, should, being an innocent holder of negotiable paper on which his wife's endorsement is forged, receive payment thereof from the drawee. The doctrine of subrogation could not in such a case assist the drawee to recover at law in a count for money had and received against the husband, since the wife could maintain no such action; and yet undoubtedly a recovery could be had in a count for money had and received as for money paid under mistake.

In conclusion it is submitted that on no theory of quasi-contract can the decisions reached in the cases considered in this note be reconciled, or the results reached in many of the cases be justified.

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CHAPTER III.

WAIVER OF TORT.

Waiver of Tor is an election of remedies.

If any one in the commission of a tort enriches himself by taking or using the property of another, the latter may in some cases, instead of suing in tort to recover damages for the injury done, sue in *assumpsit* to recover the value of that which has been tortiously taken or used. The remedies in tort and assumpsit not being concurrent, a plaintiff is compelled to elect which remedy he will pursue; and if he elect to sue in assumpsit, he is said to waive the tort. The doctrine of waiver of tort is simply a question of the election of remedies.[1] Said Allen, J., in Cooper *v.* Cooper:[2] —

"The same act or transaction may constitute both a cause of action in contract and in tort, and a party may have an election to pursue either remedy; and in that sense may be said to waive the tort and sue in contract. But a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained."

With equal propriety, therefore, when an election is made to sue in tort, one could say that the quasi-contractual obligation is waived. It is usual, however, to speak of waiver of tort only for the reason that the remedy in tort is the older. The tort is, however, waived only in the sense that a party having a right to sue in tort or assumpsit will not,

[1] Cooper *v.* Cooper, 147 Mass. 370; Huffman *v.* Hughlett, 11 Lea, 549.

[2] 147 Mass. 370.

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after he has elected to sue in assumpsit, be allowed to sue in tort. By such an election that which was before the election tortious does not cease to be so. In fact, when the assumpsit is brought, it is only by showing that the defendant did a tortious act that the plaintiff is able to recover. There being no contract between the parties, unless the defendant is guilty of some wrong the plaintiff can establish no cause of action against him.[1] Had not this almost self-evident proposition been lost sight of, because of the fiction of a promise involved in the action of *indebitatus assumpsit* when brought to enforce a right of action not resting on contract,[2] much of the confusion in, and conflict of, decisions now existing would have been avoided. The continuance of such a fiction (existing for the purposes of a remedy only) cannot be justified, to say nothing of its extension, in those jurisdictions where all forms of action have been abolished. In such jurisdictions the inquiry should be, not as to the remedy formerly given at common law, but as to the real nature of the right.

Unjust enrichment of the tort feasor the basis of waiver of tort.

Assuming a defendant to be a tort feasor, in order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby. That the plaintiff has been impoverished by the tort is not sufficient. If the plaintiff's claim, then, is in reality to recover damages for an injury done, his sole remedy is to sue in tort.[3]

Thus in the National Trust Company *v.* Gleason[4] the plaintiff sued to recover from the defendant money which he had loaned to third parties, receiving as security for said loan

[1] Huffman *v.* Hughlett, 11 Lea, 549.

[2] Louisiana *v.* Mayor, &c., 109 U. S. 285; People *v.* Speir, 77 N. Y. 144; Sceva *v.* True, 53 N. H. 627.

[3] Hambly *v.* Trott, Cow. 371 (*semble*); Powell *v.* Rees, 7 A. & E. 426 (*semble*); *Ex parte* Adamson, 8 Ch. D. 807 (*semble*); Patterson *v.* Prior, 18 Ind. 440; Tightmyer *v.* Mongold, 20 Kan. 90; Fauson *v.* Linsley, 20 Kan. 235; National Trust Co. *v.* Gleason, 77 N. Y. 400; New York Guaranty Co. *v.* Gleason, 78 N. Y. 503.

[4] 77 N. Y. 400.

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certain forged bonds, it being claimed that the defendant assisted in the forgery of the bonds. At the trial the jury were charged that simply participating or aiding in the forgery was sufficient to render the defendant liable in an action *ex contractu* for money had and received to one who had loaned money on the forged instrument. On appeal from a judgment entered on a verdict in favor of the plaintiff, the judgment was set aside. Rapallo, J., delivering the opinion of the court, said: —

"To maintain such an action it is necessary to establish that the defendants have received money belonging to the plaintiff or to which it is entitled. That is the fundamental fact upon which the right of action depends. It is not sufficient to show that they have by fraud or wrong caused the plaintiff to pay money to others, or to sustain loss or damage. That is not the issue presented in the action. . . . It was not necessary to establish that each defendant personally received a share of the proceeds of the bonds. If the whole proceeds were received by a common agent, those for whose benefit it was thus received were jointly liable for the entire sum; and this result would not be varied by the circumstance that the common agent failed to account, and absconded with the proceeds. . . . Not a single authority has been cited in support of the theory on which the case was submitted to the jury. All the authorities cited by the plaintiff's counsel relate to actions for conspiracies and torts, and in his points he treats this as an action for damages for a conspiracy. But it is impossible to sustain this position, as the complaint contains no allegations showing any wrong done by the defendants, but rests purely and simply upon the allegation that the defendants received the money which was advanced upon the forged bonds, and are indebted for it as money had and received to the plaintiff's use, and the point is expressly taken, throughout the trial, that the action cannot be maintained without proof of this essential allegation. If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser and turned into money, he may maintain trespass for the forcible injury, or waiving the force he may maintain trover for the wrong, or waiving the tort altogether he may sue for money had and received. . . . And the rule is the same here, even if the goods are stolen.

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But to maintain the action for money had and received, the goods must have been turned into money and the defendant must have received the proceeds, directly or indirectly. To maintain such an action it is necessary that a certain amount of money belonging to one person should have improperly come into the hands of another, and there must be some privity between them. It is difficult to conceive upon what legal principle a wife who merely aids and abets her husband in the commission of a forgery, or a mechanic who is employed to execute some part of the work and is paid for his services, having no concern with or interest in the fruits of the crime, can be held liable in an action *ex contractu* for money advanced upon the forged instrument, whatever may be their responsibility in a criminal prosecution for the offence."

On this principle in Patterson *v.* Prior,[1] the plaintiff, who brought an action for the value of his services against both the warden of a prison and a lessee of convicts, claiming that his imprisonment was illegal and void, while allowed to recover against the lessee because he had derived a benefit from the services of the plaintiff, was not allowed to recover against the warden, for the reason that though he had been a tort feasor, he had derived no profit in the commission of the wrong. So in Tightmyer *v.* Mongold[2] the plaintiff was not allowed to recover against a defendant in assumpsit for the injury done to land by the defendant's cattle straying thereon and grazing, it not appearing that the defendant needed pasturage, nor that he had pastured his cattle there. For the same reason the plaintiff who sued in assumpsit was defeated in Fanson *v.* Linsley,[3] it appearing that his claim was really for an injury done to a machine, but an injury from which the defendant derived no benefit.

The doctrine of waiver of tort, so far as it involves the doctrine of enrichment, is thus ably summed up by Lord Mansfield, in Hambly *v.* Trott:[4] —

[1] 18 Ind. 440.
[2] 20 Kan. 90.
[3] 20 Kan. 235.
[4] Cowp. 371.

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"If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, beside the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.

"So far as the tort itself goes, an executor shall not be liable; and therefore it is that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged."

It is true that you cannot sue in assumpsit a person who commits an assault and battery, while you can sue in assumpsit one who steals your goods and sells them. But it is submitted that the true reason is not that suggested by a learned writer,[1] that it would be absurd in the one case to assume that the defendant promised to make compensation for the damage done, while in the other case there are facts which would support the implication of a promise. In the one case there is no enrichment, in the other there is; hence in the one case your remedy is in tort only, while in the other you can sue in quasi-contract.

Right of a plaintiff whose estate has not been diminished by the tort.

It has been held that it is not sufficient for the plaintiff to prove that the defendant has committed a tort whereby he has enriched himself. It must further appear that what has been added to the defendant's estate has been taken from the plaintiff's. That is to say, the facts must show, not only a plus, but a minus quantity.[2]

In Phillips *v.* Homfray,[3] one of the questions raised was whether the plaintiff could recover against the defendant as

[1] Cooley on Torts, 108.

[2] Phillips *v.* Homfray, 24 Ch. D. 439.

[3] 24 Ch. D. 439.

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executor of one who had used plaintiff's underground roadway for the carrying of coal without the plaintiff's consent. The majority of the court (Lords Justices Bowen and Cotton) held that he could not, Baggallay, L. J., dissenting. The following paragraphs, from the opinion of Lord Justice Bowen, give sufficiently the ground of the decision.

"The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. But it is not every wrongful act by which a wrong-doer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued merely because it was worth the wrong-doer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby. The mere fact that the wrongful act or neglect saved the testator from expense is not sufficient justification for suing his executor.

"The deceased, R. Fothergill, by carrying his coal and ironstone in secret over the plaintiffs' roads, took nothing from the plaintiffs. The circumstances under which he used the road appear to us to negative the idea that he meant to pay for it. Nor have the assets of the deceased defendant been necessarily swollen by what he has done. He saved *his estate expense, but he did not bring into it any additional property or value belonging to another person.*"

It is respectfully submitted that the decision in Phillips *v.* Homfray unnecessarily limits the scope of the doctrine of waiver of tort. While it is true that the theory of restitution requires the existence of minus and plus quantities, it

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is equally true that enrichment can be negative as well as positive, and that one who saves an expenditure by using the property of another, as in Phillips *v.* Homfray, does thereby enrich himself. From an equitable point of view it would seem that wrongful *user*, and not wrongful deprivation, of another's property, resulting in the enrichment of the tort feasor, should be the principle underlying the doctrine of waiver of tort. Should not the estate of one who has used, without the consent of the patentee, a patented idea, respond to the patentee to the extent of the tort feasor's unjust enrichment? Yet it would seem difficult, except on the principle of wrongful user, to reach the estate. The tort feasor, owing to the nature of the right which he has violated, has not deprived the patentee of his property, or excluded him from the enjoyment thereof.[1] At the same time that the tort feasor is violating the patentee's right, the latter, and any number of persons with his consent, can use the same. During the commission of the tort he has every right which he had before; namely, the right to the exclusive use of the idea. Except on the principle of wrongful user, it seems impossible to support the right of a carrier to waive the tort and sue for freight where one fraudulently and in violation of the rights of the carrier has his goods carried from one place to another, it not appearing that the presence of the goods has required any additional effort on the part of the carrier, or has caused him to lose the carriage of other goods.[2]

[1] Schillinger *v.* United States, 24 Ct. Cl. 278, 298.

[2] See Rumsey *v.* N. E. R. W. Co., 32 L. J. C. P. 244.

In McSorley *v.* Faulkner, 18 N. Y. Supplement, 460, it appeared that the plaintiff, who had sold his business to the defendant and vacated the premises on which it was conducted, the defendant taking immediate possession thereof, left on the premises a telephone, which he had leased for a year; the privilege of using the telephone was not granted to the defendant, who, however, used it continuously for a certain period. The plaintiff sought and was allowed to recover the charges paid by him to the company during the period of its use by the defendant.

If the charges paid by the plain-

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But it does not follow that the measure of the recovery is to bear any relation to the amount of profit made by the defendant. The plaintiff in a case of this sort should recover such a sum as the jury would have been authorized to give, had there been a contract between the plaintiff and the defendant that the latter should pay the reasonable value of the user. Any question as to incidental or collateral profit made by the tort feasor — in fact, the entire question of profit — should be excluded. Thus, if A, by the wrongful use of B's roadway, should perform a contract which could not otherwise have been performed, and thereby make a profit of $10,000, the question in determining the amount of B's recovery would be, not what profit did A make, but what amount should he have paid had he contracted to pay a reasonable sum for the use of the roadway.

tiff were charges due because of the defendant's use thereof, *e. g.* for out-of-town purposes for which a special charge was made, the case is within the principle of the cases hereafter considered, where it is held that one who causes another expense must indemnify him therefor. If, however, the charges were simply the rental charges due under the plaintiff's contract, which would have been payable whether the defendant used the telephone or not, it is difficult to support the decision, except on the principle suggested in the text in regard to the wrongful use of property. On this latter assumption it cannot be said that the plaintiff has been deprived of anything by the defendant; the plaintiff, when he surrendered the premises, reserved no right to enter thereon for the purpose of using the telephone. Furthermore, had he reserved such right it does not appear that the defendant interfered with the plaintiff's user.

It is true that the court attempts to distinguish the case from the case where one is sued for the wrongful use of a patented device, which it says "is an infringement upon a right, and not the taking of property." But it is submitted that in suggesting this distinction, the court lost sight of the fact that the defendant did not take from the plaintiff his property, and further that the right which the plaintiff had under his contract with the company was in its nature very similar to the right in the case of a patent, — both rights being incorporeal rather than corporeal. The real right of the plaintiff in regard to the telephone was not simply a right of property in a tangible object placed in his office, but a right to avail himself of the patented device for the purpose of transmitting and receiving messages.

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Right of a creditor against a defendant collecting money without authority.

There is a class of cases to be distinguished carefully from Phillips *v.* Homfray, in which the plaintiff is undoubtedly allowed to recover, although he in fact shows no damage. In these cases it will be found that the defendant has professed to act on behalf of the plaintiff, and that the plaintiff recovers, by virtue of the doctrine of ratification, on the theory of agency. Waiver of tort is not at all involved. This is made apparent by two illustrations. A, professing to act as agent for B, though really having no authority so to act, collects a debt due from C to B. By the collection of this money — assuming C not to have been thereby rendered insolvent — A has done B no injury. B's position is just what it was before; he is still a creditor of C, and has a right to collect from him the amount of his debt. A has in truth committed a tort, not towards B but towards C, who can sue him either in tort, in assumpsit for a breach of warranty of authority, or in a count for money had and received. Therefore, if B's right of action against A had to be worked out through the doctrine of waiver of tort, B would have none; since as between himself and A there has been no tort committed. But by ratifying A's act, the relation of principal and agent is created, and A becomes liable to B in a count for money had and received.[1] If, however, it be assumed that C is indebted to B, and that A, claiming not to act as B's agent but as C's creditor, collects the debt, then B has no claim whatever against A, — not on the theory of waiver of tort for the reasons just stated, and not on the theory of ratifying A's act because there can be no ratification, A not having professed to act for B.[2] It would seem

[1] Clarance *v.* Marshall, 2 Cr. & M. 495; Brown *v.* Brown, 40 Hun, 418. Conf. Andrews *v.* Hawley, 26 L. J. Ex. 323.

[2] Vaughan *v.* Matthews, 13 Q. B. 187; Hall *v.* Carpen, 27 Ill. 386, 29 Ill. 512; Rushville *v.* Rushville, 39 Ill. App. 503; Cecil *v.* Rose, 17 Md. 92 (*semble*); Moore *v.* Moore, 127 Mass. 22; Davis *v.* Smith, 29 Minn. 201; Nolan *v.* Manton, 46 N. J. L. 231; Patrick *v.* Metcalf, 37 N. Y. 332; Butterworth *v.* Gould, 41 N. Y. 450; Decker *v.* Saltzman,

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that in the case last supposed, B's remedy would be in tort alone, even if it appeared that by the collection of the money, C had been made insolvent, and that B had in consequence been unable to realize his debt. For in such a case the property which has been added to A's estate was not B's, but C's, and the right to recover the money or an equivalent sum is in C, and not in B.

In accordance with the principles stated in the preceding paragraph it has been held that if two or more independent claimants for compensation for the same service apply to the debtor for payment, and the debtor pays the claimant not entitled thereto, the unsuccessful claimant cannot maintain an action for money had and received against the successful claimant to recover the money so paid.[1]

On the same principle it was held in Moore *v.* Moore,[2] that the plaintiff, who was entitled to a legacy under a will, could not recover from the defendant money which had been paid to him by the executor, who under a mistaken interpretation of the will supposed that the defendant, and not the plaintiff, was entitled thereto.

If, however, the payment, though made to the wrong person, operates as a payment of the claim, so that the rightful claimant can no longer assert his claim against the party paying, then it would seem that the defendant has in fact received money which belonged to the plaintiff, and that the plaintiff should be allowed to recover the money so paid. In Webb *v.* Myers,[3] the plaintiff sought to recover from the defendant money received by him in the following circumstances. The plaintiff and the defendant were of the next of kin of a deceased member of the New York Stock Exchange.

59 N. Y. 275; Peckham *v.* Van Wagenen, 83 N. Y. 40; Dent *v.* Cotzhausen, 23 Wis. 120. See, *contra*, O'Conley *v.* City of Natchez, 9 Miss. 31.

[1] Patrick *v.* Metcalf, 37 N. Y. 332; Butterworth *v.* Gould, 41 N. Y. 450.

[2] 127 Mass. 22.

[3] 64 Hun, 11.

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Under the constitution of the Exchange a certain sum of money was given as a gratuity to the next of kin of a deceased member. The defendant claimed a portion of this fund as legatee, and was paid by the Exchange. Under its constitution this payment released the Exchange from any further liability to any one. It was held that the testator had no power to dispose of the money in question by will, and that the plaintiff could recover from the defendant the money received by him from the Exchange.

In Vaughan *v.* Matthews,[1] the plaintiff, as executor, sought to recover from the defendant money which the defendant had collected in the following circumstances: the plaintiff's testatrix had loaned money, taking in exchange a note payable either to "Miss Vaughan" (the testatrix), or to "the Miss Vaughans." The jury were unable to decide in which form the note was made. The plaintiff's testatrix died, leaving a sister, who afterwards died, leaving the defendant her executor. The defendant, the note when it reached his hands being in form payable to "the Miss Vaughans," collected the amount thereof. The plaintiff claimed that the note was made payable to his testatrix, and had been fraudulently altered so as to make it purport to be payable to "the Miss Vaughans," and consequently to the defendant's testatrix as survivor. It was held that on these facts the plaintiff was not entitled to recover: not on the theory of following the proceeds of property tortiously taken from the plaintiff or his testatrix, because by the fraudulent alteration the note given to the plaintiff had ceased absolutely to exist, and consequently the money collected by the defendant was not the proceeds of property belonging to the plaintiff; and not on the theory of agency, because the defendant claimed to be acting, not for the plaintiff, but in his own right.

This decision seems open to criticism. Assuming the note

[1] 13 Q. B. 187.

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to have been absolutely destroyed and extinguished by the alteration, still the note held by the defendant was the proceeds of the original one. Of this second note the defendant should have been treated as a constructive trustee, and as a consequence the plaintiff should have been allowed to recover the proceeds of the note held on the constructive trust.

As the foregoing principles have not been uniformly applied in all cases where a tort feasor, by the commission of a tort, has enriched himself, it becomes necessary to consider in detail the several classes of cases in which the question of waiver of tort has arisen.

Count for money had and received lies to recover proceeds of wrongful sale.

If the defendant has converted the plaintiff's property, and in the act of conversion, or thereafter, sells the same, the plaintiff may, unless the question of title to land is involved in the controversy,[1] waive the tort and sue in assumpsit, using the count for money had and received to recover the proceeds of the sale.[2]

In Lamine *v.* Dorrell,[3] which is the case most often cited for this proposition, it would seem that the defendant fraudulently procured letters of administration on an estate upon which the plaintiff was entitled to administer, and that, acting under these letters, he sold certain debentures belonging to the estate. The defendant's letters being subsequently revoked, and others being granted to the plaintiff, the latter sued the defendant, in a count for money had and received, to recover the proceeds arising from the sale of the debentures, and was allowed to recover.

[1] See *infra*, p. 429, n. 2.

[2] Lamine *v.* Dorrell, 2 Ld. Ray. 1216; Oughton *v.* Seppings, 1 B. & Ad. 241; Young *v.* Marshall, 8 Bing. 43; Powell *v.* Rees, 7 A. & E. 426; Thornton *v.* Strauss, 79 Ala. 164; Hudson *v.* Gilliland, 25 Ark. 100; Staat *v.* Evans, 35 Ill. 455; Leighton *v.* Preston, 9 Gill, 201; Gilmore *v.* Wilbur, 12 Pick. 120; Knapp *v.* Hobbs, 50 N. H. 476; Budd *v.* Hiler, 3 Dutch. 43; Comstock *v.* Hier, 73 N. Y. 269; Olive *v.* Olive, 95 N. C. 485; Hall *v.* Peckham, 8 R. I. 370; Thompson *v.* Thompson, 5 W. Va. 190.

[3] 2 Ld. Ray. 1216.

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The reasoning of the court in this case will appear from the following extracts: —

"POWELL, J. When the act that is done is in its nature tortious, it is hard to turn that into a contract, and against the reasons of assumpsits. But the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an action for the money they were sold for, as for money received to his use."

And Chief Justice Holt, speaking of the effect of a recovery in this form of action upon the right to sue in tort, said: —

"This recovery may be given in evidence upon *not guilty* in the action of trover, because by this action the plaintiff makes and affirms the act of the defendant in the sale of the debentures to be lawful, and consequently the sale of them is no conversion."

Lamine *v.* Dorrell would seem to have been a proper case for a true ratification, since the defendant professed to be acting for the estate represented by the plaintiff. But if we deal with it as an ordinary case of waiver of tort, it is evident that the theory of treating the sale as made with the plaintiff's consent is a pure fiction, adopted to meet the supposed difficulties of the action of assumpsit. This action in its origin, whether brought in the form of special assumpsit or *indebitatus assumpsit*, was intended to give a remedy for a breach of a true contract.[1] That is what is meant by Powell, J., when he says it is hard to turn a tortious act into a contract and against the reasons of assumpsits. It must also be remembered that when this case was decided (1705) the doctrine of waiver of tort was in its infancy. It had been ruled as late as 1675[2] that in the case of a conversion and sale of goods, an action of assumpsit for money had and received could not be maintained. While it must be admitted that notwithstanding the establishment of the doctrine of

[1] Ames, History of Assumpsit, 2 Harv. Law Rev. 53.

[2] Phillips *v.* Thompson, 3 Lev. 191.

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waiver of tort, many of the courts, even in jurisdictions where all forms of action have been abolished, continue to use much the same phraseology as that in Lamine *v.* Dorrell, still, the preferable form of statement is that employed by Parke, J., in Marsh *v.* Keating,[1] in the House of Lords: —

"Here the former owner of the stock does not seek to confirm the title of the transferee of the stock. No act done by her is done *eo intuitu;* it is perfectly indifferent to her whether the right of the transferee to hold the stock be strengthened or not. She is looking only to the right of recovering the purchase-money. In fact, however, the interest of the purchaser of the stock is so far collaterally and incidentally strengthened that after recovering the price for which it was sold, she would effectually be stopped from seeking any remedy against, or questioning in any manner, the title of the purchaser of the stock." [2]

As the desire to give a remedy in assumpsit begot the fiction, and not the fiction the desire, and as the fiction does not reach all the cases where the doctrine of waiver of tort applies, but must give place, if fictions are to be adopted, to others, if possible, even more violent, — for example, when an action is brought in assumpsit against a thief or embezzler to recover money stolen or embezzled, — there is no reason or excuse for continuing the fiction at the present day.

Right to proceeds of sale presupposes a right to thing sold.

As the plaintiff's right to the proceeds of property arising from a sale thereof presupposes a right to the property itself, and a failure to establish such right will be fatal to a recovery, a disseisee of land cannot maintain an action for money had and received against the disseisor to recover the proceeds arising from the sale of timber cut from the land while in possession of the disseisor.[3]

[1] 1 M. & A. 582.

[2] It is only fair to state that in another part of his opinion the learned judge states in substance the reasoning of the court in Lamine *v.* Dorrell.

[3] Bigelow *v.* Jones, 10 Pick. 161.

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To maintain count for money had and received, amount received must be ascertainable.

As the amount of the plaintiff's recovery is limited to the proceeds received by the defendant,[1] it will be fatal to this form of action that the amount is not ascertainable. Hence it has been held that where goods placed by the plaintiff with the debtor of defendant were received by the defendant from his debtor on account of the debt, with other goods belonging to the debtor himself, the plaintiff could not recover because of his inability to prove the valuation put upon his goods.[2]

Barter or exchange will not support count for money had and received.

While in order to support the count for money had and received, the tort being waived, it is not sufficient to prove that the defendant has disposed of the plaintiff's property by way of barter or exchange,[3] still it is not in all cases necessary to show that he has actually received money itself. If, having a right to receive money, he accepts something in lieu thereof, the transaction will be treated as if he had first received the money, and then had bought with it that which in fact he received in the first instance in lieu of the money.[4]

Sale of property not sufficient, money must have been received.

On the other hand, though the defendant has sold the goods, if he has not collected the purchase-money, or received its equivalent as just explained, he will not be liable in a count for money had and received.[5] Thus, in Budd *v.* Hiler,[6] the defendant tortiously sold property belonging to the plaintiff, receiving at the time of the sale only a part of the purchase-money, and taking a note for the remainder. The plaintiff sought to charge him in a count for money had and received, with the entire purchase-money; but his recovery was limited to the amount of cash actually received.

[1] Lindon *v.* Hooper, Cowp. 414 (*semble*); Budd *v.* Hiler, 3 Dutch. 43.

[2] Saville *v.* Welch, 48 Vt. 683; see also Glasscock *v.* Hazell, 109 N. C. 145.

[3] Kidney *v.* Pinous, 41 Vt. 386; see also Balch *v.* Patton, 45 Me. 41; Rogers *v.* Greenbush, 57 Me. 451.

[4] Ainslie *v.* Wilson, 7 Cow. 662; Miller *v.* Miller, 7 Pick. 133; Doon *v.* Ravey, 49 Vt. 293.

[5] Moody *v.* Walker, 89 Ala. 619; Budd *v.* Hiler, 3 Dutch. 43.

[6] 3 Dutch. 43.

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The principle that in the count for money had and received the plaintiff's recovery is limited to the amount received by the defendant, seems to have been lost sight of in the *dictum* in Comstock *v.* Hier.[1] In that case the defendant had transferred to an innocent holder a promissory note, that belonged to the plaintiff. The plaintiff, who was endorser of the note, refusing to pay the holder thereof at maturity, was sued, and a judgment recovered against him, which judgment he paid, and to recover the amount of that judgment, brought an action against the defendant in consequence of whose tortious act he was rendered liable to the holder of the note, and recovered judgment against the defendant for the amount paid by him as endorser thereof. The court was of the opinion that the case was one in which the plaintiff had an election between trover for the conversion of the note, and money had and received to recover the proceeds arising from the discount thereof by the defendant, and that the complaint contained sufficient averments to support the action in either form. What the court said in regard to the defendant's liability in a count for money had and received, the plaintiff suing to recover the amount of the judgment which he had been compelled to pay, must therefore be regarded as *obiter dictum;* on this point, Allen, J., delivering the opinion of the court, said: —

"The result must be the same if the action be regarded as an action for money had and received instead of trover for the conversion of the note. By the transfer of the note, the defendant received in money the full amount of the note less the discount, — that is, the full value of it, — to which they had no title; and as by such transfer the note became a legal obligation against the plaintiff, who was compelled to pay the same, the money equitably belonged to him, and for it the defendant should account to him."

The foregoing statement is in perfect accord with the principle hereinbefore stated, but the conclusion drawn therefrom

[1] 73 N. Y. 269.

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is a complete *non-sequitur*. The principle stated would establish the right of the plaintiff to recover, not what he paid, but what the defendant had received. To recover in *quasi-contract* the amount of the judgment paid by the plaintiff, the action should have been treated as one to recover money paid to the use of the defendant.

Statute of limitations runs from time money is actually received.

Since to maintain an action for money had and received in this class of cases the plaintiff must prove the receipt of money by the defendant as well as a wrongful conversion, his cause of action does not arise until the defendant has received the proceeds of the sale; and therefore the statute of limitations begins to run only from that time, and it is no answer to a count for money had and received that since the sale and receipt of the proceeds, and before action brought, the right to sue in trover has been barred. The period of limitation in such a case is that applicable to actions of assumpsit.[1]

Recovery of interest.

In Dougherty *v.* Chapman,[2] it was held that where a count for money had and received is brought to recover the proceeds arising from the sale of property converted, interest is recoverable only from the time when a demand is made for the proceeds, the action being a sufficient demand. The following extract from the opinion of Hall, J., shows the line of reasoning adopted by the court:—

"The plaintiff's right to waive the tort and sue in assumpsit for the proceeds of the sale was authorized by an implied promise, raised by law, on the part of the defendant that he would pay the money to the plaintiff. This right of election on the part of the plaintiff rests upon the fiction imposed at his pleasure upon the misconduct of the defendant. By electing to waive the tort, the plaintiff became entitled to the proceeds of the sale; but up to that time he was not entitled to such proceeds. The right to the proceeds accrued by force, and at the moment of election, and not before. As the plaintiff was not entitled to the proceeds of the sale until he made the election, as a matter of course he was not entitled to interest thereon prior thereto."

[1] Miller *v.* Miller, 7 Pick. 133. [2] 29 Mo. Ap. 233.

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This case is certainly inconsistent in principle with the rule laid down in Miller *v.* Miller as to the statute of limitations, and in the opinion of the writer is not to be supported. The decision rests entirely upon a proposition which the writer has attempted to show is fallacious;[1] namely, that by suing in assumpsit, one in some mysterious way converts that which was until then simply a tort into a contract; whereas in truth one has an election of remedies because he has independent rights, and does not acquire rights, as the court here assumes, by electing remedies. If, for example, a man deals with an agent whose agency is not disclosed, — where, upon the doctrines applicable to an undisclosed agency, the party with whom the agent deals can elect to hold the undisclosed principal, — no one would say that his right did not accrue until he so elected. But in truth there is no difference in principle: in the case of the undisclosed principal, the alternative rights are acquired by the making of the contract; in the case of property being converted and sold, the right to recover the proceeds arises from the receipt of the money. At that moment of time the tort feasor has imposed upon him the obligation to deliver the money to the party whose property has been converted. If he is under no such obligation then, and dies before an election is made to sue in assumpsit instead of in tort, upon what principle can his executor or administrator be held liable? The representative of the deceased has committed no tort, and confessedly is not liable at common law for the tort of the deceased. How can he be held liable for money had and received, as he clearly is, if no such right existed against the tort feasor?

Tort feasor can retain proceeds of property not sold until after action in tort is barred by statute of limitations.

Assuming that the statute of limitations runs, not from the time of the conversion of the property, but from the time of the receipt of the money arising from the sale, the question arises, Within what time must the money be received?

[1] See *supra*, p. 160.

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Suppose, for example, that property is sold either at the time of conversion or afterwards, and that the money is not received until after the statute of limitations has barred an action for the tort. Can the plaintiff still recover the proceeds? If the sale is not made until the injured party has lost his right to sue for the conversion, the tort feasor has acquired title, and the sale was a sale of his own property.[1] In such an event, therefore, though the writer knows of no case in point, it would seem clear that the injured party has no right to receive the proceeds.[2] If, however, the title to

Effect of running of statute of limitations after sale of property but before receipt of purchase money.

[1] Ames, The Disseisin of Chattels, 3 Harv. Law Rev. 321, 322.

[2] Since the above was written the question has been decided in accordance with the suggestion contained in the text in Currier *v.* Studley, 33 N. E. Rep. 709 (Massachusetts Supreme Court). In that case a seat in a stock exchange was purchased with partnership funds, but in the name of one of the partners. Seventeen years after the dissolution of the firm, the partner in whose name the seat was taken sold the seat. It was held that as the plaintiff had no enforceable claim against the defendant with reference to the seat at the time it was sold, no action could be maintained to recover the proceeds. Said Knowlton, J.:—

"The plaintiff contends that a right to maintain an action for money had and received grew up on the sale of the seat by the defendant. In most jurisdictions it is the rule that the statute of limitations affects only the remedy, and does not destroy the right. It is local in its application, and a debt barred by it is not extinguished, but may be a consideration for a new promise, or may be collected if jurisdiction is obtained in another State, where the statute is not in force. But, as is shown by Mr. Justice Story in Le Roy *v.* Crowninshield, 2 Mason, 151, 168, the loss of the means of enforcing a right leaves of the right nothing of which the law can take hold against the will of the debtor, and, within the jurisdiction, differs little in practical effect from the destruction of the right. It is held everywhere that adverse possession of real estate for the period prescribed in the statute of limitations not only bars a suit to recover it, but gives a good title against the former owner; and there are decisions and dicta in many courts applying the same rule to adverse possession of personal property. Cockfield *v.* Hudson, 1 Brev. 311; Howell *v.* Hair, 15 Ala. 194; Jones *v.* Jones, 18 Ala. 248, 253; Clark *v.* Slaughter, 34 Miss. 65; Winburn *v.* Cochran, 9 Tex. 123; Vandever *v.* Vandever, 3 Met. (Ky.) 137; Ewell *v.* Tidwell, 20 Ark. 136; Kirkman *v.* Philips' Heirs, 7 Heisk. 222; Preston *v.* Briggs, 16 Vt. 124, 130; Baker *v.*

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the property is in the injured party at the time of the sale, it would seem that the running of the statute subsequent

Chase, 55 N. H. 61, 63; Campbell *v.* Holt, 115 U. S. 620, 6 Sup. Ct. Rep. 209; Brown *v.* Parker, 28 Wis. 21. By many of these courts it is held that there is a distinction between the statute of limitations as applied to debts, where it affects the remedy only, and as applied to a suit to recover property, where it is held to transfer the title; while by others it is decided that in all cases the statute extinguishes the right. In this commonwealth it has been held that an owner of personal property, whose right to replevy it has been barred by the statute of limitations, cannot take and hold it against one who has had possession of it for more than six years, or against one to whom it has been sold by the person who held it adversely for that length of time. Chapin *v.* Freeland, 142 Mass. 383, 8 N. E. Rep. 128. The court did not find it necessary to decide whether such a possession would work a change of title for all purposes and under all circumstances, but in holding that the remedy by peaceably taking possession is as effectually barred in this jurisdiction as the remedy by suit, and that a purchaser from one against whom the remedy is barred stands in as good a position as his vendor, they went further than is necessary for the decision of the case now before us. Under the authority of this decision, if the property had been an ordinary chattel, with the title in a stranger, instead of a seat in the stock exchange owned by the defendant, subject to a resulting trust, adverse possession for six years would have made it impossible for the owner to recover possession of it by suit, or to obtain it and hold it in any other way against the possessor or against a purchaser from him. If the holder of such property, having a possession effectual against all the world for the protection of his right to use and dispose of it, and to give a purchaser an equally good title, should sell it professedly on his own account, how could it be said that the proceeds of it were received to the use of the former owner, instead of himself? But in the present case the defendant was the owner, and could do with the property as he chose, except as he was restrained by the trust. The trust ceased to be cognizable in law or equity, and he used and sold the property as his own. Having from the beginning the legal title to the seat, the money which he got for it he received as his own, and the attempt to treat it as received to the use of the firm is an attempt to impose a trust upon the proceeds of a sale when there was no trust enforceable against the thing sold. For this reason, as well as for others, the doctrine which has been stated in some cases that, where specific articles belonging to a firm are retained for more than six years after the dissolution of the copartnership, and then sold by one of the partners, an action may be maintained by the others for money had and received, does not apply.

"The defendant, in waiving the

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thereto, but prior to the receipt of the money by the defendant, should not affect the plaintiff's right. He is equitably entitled to the debt as the proceeds of his property, and hence to the money realized on it. The tort feasor, so long as a specific *res* exists into which the injured party's property can be traced, is in fact a constructive trustee.

Right of one in possession to maintain count for money had and received.

To entitle one to waive the tort and sue for the proceeds arising from the sale of converted property, it has been held to be sufficient if he proves that he had *possession;* it is said that he need not establish title to the property.[1] This result was deduced from the well-established rule of law that possession is a sufficient basis for the action of trover or trespass. Thus, in Oughton *v.* Seppings,[2] a widow who sued for the proceeds of personal property sold by the defendant, was allowed to recover, although the defendant proved that the property was purchased in the lifetime of the plaintiff's husband; Lord Tenterden, C. J., saying, —

"There was evidence here, though perhaps slight, that the plaintiff was in possession of the pony. If she was in possession at the time when it was seized, she might clearly have maintained trespass against a wrong-doer; and if she might maintain trespass, she may waive the tort and maintain this action."

defence that the remedy should be in equity, did not waive his right to set up the statute of limitations with the same effect as if the suit were in equity, and the case stands as if the plaintiff had sued in equity to enforce a trust against the proceeds of the sale, as he might have done. The answer to such a suit would have been: 'Your right to enforce a trust against the seat in the hands of the defendant was barred before the sale, and the change of the form of the property does not revive it. The legal title to the money is in the person who had the legal title to the seat, and you cannot avail yourself of the money as received in any part to your use, except by the enforcement of the trust. Your cause of action for the enforcement of a trust against the money is the same that you had for the enforcement of a trust against the seat before it was sold, and you have lost it by lapse of time.' We are of opinion that the money was not received by the defendant to the use of the firm, and that no trust can be enforced against it."

[1] Oughton *v.* Seppings, 1 B. & Ad. 241.

[2] 1 B. & Ad. 241.

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Money had and received will lie to recover money tortiously obtained.

Since one has a right to recover the proceeds of property wrongfully converted and sold, it necessarily follows that where the plaintiff's *money* has been tortiously obtained by the defendant, the tort may be waived and an action for money had and received be brought.[1]

In Neate *v.* Harding,[2] the defendants entered the house of the plaintiff's mother and wrongfully took money belonging to the plaintiff. This money they deposited in a bank to their joint account. The plaintiff was allowed to recover against them in a count for money had and received.

Martin, B., had some difficulty in allowing the recovery, but favored a recovery for the following reasons: —

"If the case had stood simply upon the taking of the money out of the house, I should have had some doubt whether the action for money had and received would lie, for that is an action on a contract; and torts and contracts are of a very different nature. I own to me the more sensible rule is, that if there be a contract, the party should bring an action for money had and received; and if there be a trespass, he should bring trespass or trover. But when it was proved, as in this case, that after the money was taken both defendants went and paid it into the bank on their joint account, that makes them both responsible as upon a contract, for they enter into a contract with the bank in respect of the money; and therefore I think that the action for money had and received is maintainable. I should always be disposed to act upon the principle laid down in the case of Turner *v.* Cameron's Coalbrook Steam Coal Company, which treats the case of a tort, as in truth it is, as a tort, and the case of a contract, as a contract."

It is certainly a novelty in the law to establish a contract between a plaintiff and a defendant by proving that the

[1] Clarke *v.* Shee, Cow. 197; Neate *v.* Harding, 6 Ex. 349; Catts *v.* Phalen, 2 How. 376; Burton *v.* Driggs, 20 Wall. 125; Dashaway Association *v.* Rogers, 79 Cal. 211; Jones *v.* Inness, 32 Kan. 177; Cory *v.* Freeholders, 47 N. J. L. 181; People *v.* Wood, 121 N. Y. 522; Webb *v.* Fulchire, 3 Ire. (L.), 485; Heindill *v.* White, 34 Vt. 558; Kiewert *v.* Rindkopf, 46 Wis. 481; Western Assurance Co. *v.* Towle, 65 Wis. 247.

[2] 6 Ex. 349.

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defendant tortiously took the plaintiff's money and deposited it with a third party, the deposit with a third party creating a contract between the plaintiff and the defendant, where but for the deposit there would have been no such relation.

Illegality no defence to an action for money had and received, if plaintiff not a party to the illegality.

It is of course no defence to such an action that the money was obtained, not from the plaintiff, but from one to whom the plaintiff intrusted it, and with whom defendant was engaged in an illegal transaction. For in such a case the plaintiff claims in his own right and not through his agent, and therefore the illegality of the transaction is immaterial. Thus, in Clarke *v.* Shee[1] the plaintiff sued the defendant in a count for money had and received to recover money which had been received by the plaintiff's clerk in the course of the plaintiff's business, and used by the clerk in the purchase of lottery tickets from the defendant in violation of the Lottery Act. It was held that the plaintiff was entitled to recover. Lord Mansfield, delivering the opinion of the court, said: —

"I think the plaintiff does not sue as standing in the place of Wood, his clerk, for the money and notes which Wood paid to the defendants are the identical notes and money of the plaintiff. Where money or notes are paid *bona fide*, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come *mala fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover."

Plaintiff's intention to do an illegal act immaterial, if act not done and money obtained by fraud.

It has also been held to be no defence to an action brought to recover money fraudulently obtained, that the plaintiff supposed the payment of the money to be called for by an illegal contract which he had made with the defendant, if in fact the money was not payable under the contract, but was obtained by the defendant's fraud.[2] In Catts *v.* Phalen[3] the plaintiff

[1] Cow. 197.

[2] Catts *v.* Phalen, 2 How. 376; Northwestern Ins. Co. *v.* Elliott, 7 Sawyer, 17; Webb *v.* Fulchire, 3 Ire. (L.), 485; Kiewert *v.* Rindkopf, 46 Wis. 481.

[3] 2 How. 376.

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sued to recover money paid to the defendant in the belief that the latter was entitled to it under a lottery drawing. The defendant, who was employed to draw the tickets from the wheel, in fact obtained the money by concealing in his sleeve a ticket with a number corresponding to the number of the ticket held by him, and pretending to draw the ticket from the wheel. He pleaded the illegality of the lottery. The court, assuming the drawing to be illegal, decided for the plaintiff, Baldwin, J., saying: —

"In the argument for the plaintiff in error here, it has been contended that this lottery was illegal by the Suppression Act of 1834, which precluded a recovery of the money he received; but as, in our opinion, this case can be decided without an examination of that question, we shall proceed to the other points of the case, assuming for present purposes the illegality of the lottery.

"Taking, as we must, the evidence adduced by the plaintiffs below to be in all respects true, after verdict, the facts of the case present a scene of a deeply concocted, deliberate, gross, and most wicked fraud, which the defendant neither attempted to disprove or to mitigate at the trial, the consequence of which is that he has not and cannot have any better standing in court than if he had never owned a ticket in the lottery, or it had never been drawn. So far as he is concerned the law annuls the pretended drawing of the prize he claimed; and in point of law he did not draw the lottery; his fraud avoids not only his acts, but places him in the same position as if there had been no drawing in fact, and he had claimed and received the money of the plaintiff, by means of any other false pretence; and he is estopped from avowing that the lottery was in fact drawn.

"Such being the legal position of Catts, the case before us is simply this: Phalen and Morris had in their possession $12,500, either in their own right or as trustees for others interested in the lottery, no matter which; the legal right to this sum was in them; the defendant claimed and received it by false and fraudulent pretences as morally criminal as by larceny, forgery, or perjury; and the only question before us, is whether he can retain it by any principle or rule of law. The transaction between the parties did not originate in the drawing of an illegal lottery; the money was

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not paid on a ticket which was entitled to or drew the prize, — it was paid and received on the false assertion of that fact; the contract which the law raises between them is not founded on the drawing of the lottery, but on the obligation to refund the money which has been received by a falsehood and fraud by the assertion of a drawing which never took place."

Measure of recovery is the amount which the defendant cannot in conscience keep.

Since the plaintiff's claim rests upon the fact that the defendant cannot be allowed in good conscience to keep what he has obtained, the measure of the plaintiff's recovery is not the entire amount paid by the plaintiff, but the amount which it is against conscience for the defendant to keep.[1] In the Western Assurance Co. *v.* Towle,[2] the defendant by false and fraudulent overstatements as to the amount of a loss got from the plaintiff the amount of the policy as for a total loss. There was a clause in the policy declaring a forfeiture thereof in such an event. The plaintiff having recovered a verdict for the amount of the policy, it was set aside, the court holding that the recovery should have been limited to the money received over and above the actual loss suffered. Taylor, J., said:

"... The action for money had and received is in some sense an equitable action, and the insurance company having voluntarily paid the money on an alleged loss claimed by the defendants, they can only recover back so much as in equity and good conscience they ought not to have paid. ... False swearing and false valuation in proof of loss might have been a good defence to a recovery upon the policy, had the plaintiff refused to pay the loss; but it cannot be made the basis of a right to recover back money already paid upon the policy. The plaintiff's right to recover depends upon proof establishing the fact that the company has paid more money than covered the loss sustained by the defendants, and that such payment was procured by the false and fraudulent acts of the defendants."

Right of recovery may be asserted against third parties.

Since the right to recover money which has been stolen, fraudulently obtained, or wrongfully converted to another's

[1] Lindon *v.* Hooper, Cowp. 414 (*semble*); The Western Assurance Co. *v.* Towle, 65 Wis. 247.

[2] 65 Wis. 247.

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use, rests on the equitable principle of unjust enrichment, the claim may be asserted, not only against the immediate tort feasor, but against any one into whose possession the money may be traced, until it reaches the hands of a holder for value without notice.[1]

In Bayne *v.* The United States,[2] the United States sought to recover money received by the defendant in the following circumstances. The Government had given a draft to a paymaster in the army, and the paymaster, after depositing the same in his official capacity in a bank designated as a public depository, drew checks payable to the order of Bayne & Company, who collected the same. It was held that the Government was entitled to recover from the assignees of Bayne & Company, who had become insolvent, the amount received by Bayne & Company on said checks.

In Atlantic Mills *v.* Indian Orchard Mills,[3] the defendant pleaded by way of set-off against the plaintiff a right to recover from the plaintiff money received by the plaintiff in the following circumstances: The plaintiff and the defendant had been accustomed to lending each other funds by means of checks drawn by the one in favor of the other. One Gray, who was the treasurer of both corporations, in order to make good a deficit to the plaintiff had drawn a check in the usual form in favor of the plaintiff in the name of the defendant, and had cashed the check and used the proceeds thereof in the business of the plaintiff. It was held that the defendant was entitled to recover from the plaintiff the money so received, and could therefore use the same by way of a set-off. C. Allen, J., delivering the opinion of the court, said: —

[1] Calland *v.* Lloyd, 6 M. & W. 26; Heilbut *v.* Nevill, L. R. 5 C. P. 478; Bayne *v.* United States, 93 U. S. 642; United States Bank *v.* State Bank, 96 U. S. 30; Atlantic Cotton Mills *v.* Indian Orchard Mills, 147 Mass. 268; Causidere *v.* Beers, 1 Abb. Ap. Dec. 333; Mason *v.* Pendergrast, 120 N. Y. 536; Hindemarch *v.* Hoffman, 127 Pa. St. 284.

[2] 93 U. S. 642.

[3] 147 Mass. 268.

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"The grounds on which the plaintiff asserts a right to retain the money is, that Gray had embezzled its funds as well as the funds of the defendant to a large amount, and that it is entitled to apply the money thus received from him to reduce his indebtedness for such embezzlements, and treat the same as a payment *pro tanto;* that from the nature of the transactions, the law stamps it as a payment, and that thus the plaintiff is a holder of the funds for a valuable consideration. There is no doubt that a thief may use stolen money, or stolen negotiable securities, before their maturity, to pay his debts; and in such a case an innocent creditor may retain the payment. But this doctrine is not applicable to the present case, for two reasons: in the first place, under the circumstances disclosed in the auditor's report the plaintiff cannot be considered as an innocent creditor, — that is, a creditor without notice; and moreover the transaction did not amount to a payment."

The claim cannot be asserted against an innocent holder for value.

As the claim is maintained only on strict equitable principles, it cannot be asserted against a holder for value without notice.[1]

In State Bank *v.* The United States,[2] the plaintiff sought to recover money received by the defendant in the following circumstances. One Hartwell, cashier of the Sub-Treasury in Boston, embezzled funds belonging to the Government, and lent the same to Mellen, Ward, & Co. To enable him to balance his account it was agreed between Mellen, Ward, & Co. and Hartwell that they should pay into the Sub-Treasury a fund sufficient to meet Hartwell's deficit, Hartwell agreeing to return the same the next day.

Mellen, Ward, & Co. procured by fraud from the plaintiff a draft which enabled them to realize funds, which funds they deposited with the Sub-Treasury to make good the deficiency. The money was received, not by Hartwell, but by another officer, who though he had been informed by Hartwell of his embezzlement and that the same was to be made good by

[1] State Bank *v.* United States Bank, 114 U. S. 401; Thacher *v.* Pray, 113 Mass. 291; Bank of Charleston *v.* State Bank, 13 Rich. Cas. 291.

[2] 114 U. S. 401.

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Mellen, Ward, & Co., was not told by Hartwell that the payment by Mellen, Ward, & Co. was to be returned to them after the examination of the Sub-Treasury had been completed. It was held that there could be no recovery. Mr. Justice Harlan, delivering the opinion of the court, said: —

"The present case differs materially from United States *v.* State Bank (96 U S. 30). Our judgment there proceeded upon the ground, that the gold certificates deposited in the sub-treasury by Smith, the cashier of the State National Bank of Boston, were known by Hartwell at the time he received them to be the property of that bank, and not of Mellen, Ward, & Co. It was adjudged that money or property of an innocent person, which had gotten into the coffers of the nation by means of fraud to which its agent was a party, could not be held by the Government against the claim of the wronged and injured party.

"There is no room in the present case for the application of that principle. Apart from his responsibility for the crime committed in using the money of the United States, Carter, representing Mellen, Ward, & Co., was under a legal obligation to replace the amount abstracted from the sub-treasury. Of his purpose to do so, Hartwell was informed. But he had no reason to believe that Carter would bring him money or securities which belonged to some one else, and which he could not rightfully deliver in the discharge of his indebtedness to the Government. When the draft of $125,000 was delivered by Carter to Hartwell, the latter was unaware of the means by which the former had obtained it from Smith, the cashier of appellant. It was, on its face, the property of Mellen, Ward, & Co. Upon its receipt by Hartwell for the United States, the Government acquired the same rights in reference to it that any private citizen, receiving it in the course of business, would have acquired. . . . The essential difference, therefore, between United States *v.* State Bank, *ubi supra*, and this case, is, that in the former the agents of the Government appropriated to its use the property of an innocent person, knowing at the time that it belonged to that person and not to the Government; while in the present case, they received, in the discharge of a debt due the Government, a draft belonging to the debtor, without any knowledge or notice that the debtor had obtained it upon conditions which had not been complied with, or by means of fraudulent representations."



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This principle is well illustrated by the case of Thacher *v.* Pray.[1] In that case one Gray, professing to have but in fact having no authority from the plaintiff to sell plaintiff's horse, sold the horse to the defendant, the defendant giving him a check payable to his order for $100. This check Gray endorsed and delivered to the plaintiff, in payment of a debt; and the plaintiff, ignorant of the sale of the horse, received the check, collected same, and applied the proceeds in payment thereof.

In an action brought by the plaintiff against the defendant for the conversion of his horse, the defendant claimed that the plaintiff was not entitled to recover the horse while retaining the proceeds of the check given by the defendant to Gray. This defence, which was sustained by the trial judge, was repudiated by the court on appeal, Endicott, J., saying:

"It does not affect the rights of the parties that the same check which defendant gave Gray was given to the plaintiff, if it was applied to the payment of an existing account between them, without any notice that it was part of the proceeds of the unauthorized sale of the horse. Being endorsed by Gray it was in the plaintiff's hands, transferable by delivery and subject to the same rules as bank bills, coupons, or other instruments payable in money to bearer. It is as if Gray had cashed the check and sent the identical or other bills to the plaintiff."

Opposed to this case is Evans *v.* Garlock.[2] In that case it was held that the defendant was entitled to recover, by way of counter-claim from the plaintiff, money received by the plaintiff in the following circumstances: The plaintiff had leased to the wife of one Rogers a farm, which was managed by Rogers as the agent of his wife. Rogers, falsely representing himself to be the agent of the plaintiff, contracted as such agent to sell to the defendant a portion of said farm, receiving from him at the time when the contract was entered into $450 as a part payment. With this money he purchased a bill of exchange, and sent the same to the plaintiff in

[1] 113 Mass. 291. [2] 37 Hun, 588.

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payment of rent due. The plaintiff, having no notice of the fraud practised by Rogers, received the draft and appropriated the money.

It is submitted that this decision is inconsistent with one of the grounds of decision in Southwick *v.* First National Bank of Memphis.[1] While it is true, as was said by the court in Evans *v.* Garlock, that in Southwick *v.* First National Bank the mistake made by the plaintiff was as to the disposition that the defendant intended to make of the proceeds of the draft, it is not true that the court there intimated that while money received in payment of a debt could not be recovered back in such a case, it might be recovered in a case where the money was paid by reason of a "pertinent mistake of fact." The character of the mistake was one of the reasons given by the court in Southwick *v.* First National Bank for not allowing the plaintiff to recover; but the proposition that the plaintiff could not recover because the defendant had received the money in extinguishment of a debt, is given as an entirely distinct ground, regardless of the character of the mistake.

Payment over after notice, no defence in an action against third party.

Of course payment to the tort feasor after notice of plaintiff's claim is no answer to the action.

In Hindemarch *v.* Hoffman[2] the plaintiff sought to recover from the defendant money which had been stolen from the plaintiff, and deposited with the defendant by the thief, to be returned to the thief by the defendant upon his order. The defendant did not know of the theft at the time when he received the money, but was notified by the plaintiff of that fact before he returned the money to the thief. It was held that the plaintiff was entitled to recover.

Recovery of fees incident to an office.

As the fees incident to an office belong equitably to the rightful claimant, and not to the usurper, the latter is liable for all such fees received.[3] Since, however, the claimant's

[1] *Supra* p. 74, 77

[2] 127 Pa. St. 284.

[3] Howard *v.* Wood, 2 Lev. 245; Arris *v.* Stukeley, 2 Mod. 260; Kessel *v.* Zeiser, 102 N. Y. 114.

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right to receive the fees for services actually rendered by another rests upon his right of occupancy, it follows that he can only recover the fees necessarily incident to the office. Consequently mere gratuities received by the usurper cannot be recovered.[1] In such a case the plaintiff cannot make out his right, since what was given to the defendant might not have been given to the plaintiff. It is true that but for the tort the defendant could not have received the gratuity, but *non constat* that the plaintiff, if the defendant had not committed the tort, would have received it.

Right of recovery against one enticing away an apprentice.

Where the defendant entices away the plaintiff's apprentice and induces the latter to work for him, the plaintiff is entitled to recover the value of the services received by the defendant.[2] The opinion of Mansfield, C. J., in Lightly *v.* Clouston, 1 Taunt. 112, in which this proposition of law was first announced, was as follows: —

"I should have thought it better for the law to have kept its course; but it has now been long settled that in cases of sale, if the plaintiff choose to sue for the produce of that sale, he may do it. In the present case the defendant wrongfully acquires the labor of the apprentice; and the master may bring his action for the seduction. But he may also waive his right to recover damages for the tort, and may say that he is entitled to the labor of his apprentice; that he is consequently entitled to an equivalent for that labor which has been bestowed in the service of the defendant. It is not competent for the defendant to answer that he obtained that labor, not by contract with the master, but by wrong, and that therefore he will not pay for it. This case approaches as nearly as possible to the case where goods are sold and the money has found its way into the pocket of the defendant."

In Foster *v.* Stewart[3] the plaintiff's apprentice deserted plaintiff's vessel and secreted himself on board the defend-

[1] Boyter *v.* Dodsworth, 6 T. R. 681.

[2] Lightly *v.* Clouston, 1 Taunt. 112; Foster *v.* Stewart, 3 M. & S. 191; James *v.* Le Roy, 6 Johns. 274; Stockett *v.* Watkins' Adm'rs 2 G. & J. 326. See, however, *contra*, Crow *v.* Boyd, 17 Ala. 51.

[3] 3 M. & S. 191.

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ant's vessel, not making his presence known until the vessel had sailed. He then worked his passage to Halifax, receiving therefor his food. The defendant was at one time before reaching Halifax within hailing distance of the plaintiff's vessel, but did not communicate with plaintiff. On reaching Halifax the defendant induced the apprentice to continue in his employ, offering to pay him wages or to supply him with clothes and pocket-money. The apprentice continued in his employ during the voyage, but received no compensation of any kind from the defendant. The plaintiff sued the defendant in assumpsit for work and labor, and recovered for the services of the apprentice from Halifax to Shields, the port of discharge, no claim apparently being made for the services rendered on the voyage to Halifax. This case is in principle the same as Lightly *v.* Clouston, and rests simply on the principle, as does Lightly *v.* Clouston, that the defendant, having unjustly profited by services to which the plaintiff was entitled, must compensate the plaintiff therefor. This view of the case was fully recognized by Le Blanc and Bayley, JJ. Le Blanc, J., in his opinion said: —

"Here undoubtedly the plaintiff might have maintained tort for the wrongful detaining of his apprentice; but, inasmuch as the defendant has had a beneficial service of the apprentice, the plaintiff may waive the tort and require of him the value of the benefit."

Right of recovery for wrongful user of personal property.

If one is liable to the master for the benefit received from the services of an apprentice whom he has enticed from the service of the master, it would seem necessarily to follow that one who has wrongfully deprived another of his personal property and used it, should be liable in quasi-contract for the benefit derived from the use thereof. Lord Mansfield was clearly of this opinion, the following illustration, used by him in Hambly *v.* Trott,[1] being in point: "So if a man take a horse from another and bring him back again, an

[1] 3 Cowp. 377.

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action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor."

It has accordingly been held that the action will lie to recover the value of personal property wrongfully taken and used.[1] The right has also been denied in at least two cases.[2] The decision in Carson *v.* River Lumbering Co. is, however, much weakened by the admission of the court that if the tort feasor were dead, the action might be allowed against his executor or administrator. But if not against him, why against his representative, since the tort feasor, and not the representative, is the one who did the wrong and derived the benefit? If it be answered that the remedy in tort against the tort feasor is adequate, it may be replied that the whole doctrine of waiver of tort exists, notwithstanding the existence of the remedy in tort. Likewise, the argument by which the plaintiff was defeated in Wynne *v.* Latham could be used to defeat every plaintiff proceeding on the theory of waiver of tort. In that case Ruffin, J., said: "Most actions will only lie on a contract express or implied, and the contract here is supposed to be one of the latter kind. But the law cannot imply a contract between these parties when it is clear from the facts stated that the defendants derived their possession and title from another person, under whom they claimed the slaves adversely to the plaintiff and all the world." This is of course treating a fiction as if it were a fact, and applying it, not to further the ends for which it was adopted, but to defeat them.

Count for use and occupation will not lie against tort feasor.

Logically one who has been dispossessed of his land should be allowed to sue the wrongful occupant in a count for use and occupation, to recover its rental value; but it is not

[1] Fanson *v.* Linsley, 20 Kan. 235; Philadelphia Co. *v.* Park Brothers, 138 Pa. St. 346.

[2] Carson River Lumbering Co. *v.* Bassett, 2 Nev. 249; Wynne *v.* Latham, 6 Jones L. 329. See Phillips *v.* Homfray, 24 Ch. D. 439, 460.

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permitted.[1] The failure to extend the doctrine to this class of cases is due to purely historical reasons. Where the tort was waived at common law, and an action brought to enforce the quasi-contractual obligation, the form of action used was the *indebitatus assumpsit* counts. But it was a cardinal principle of the common law that in bringing an action a plaintiff must pursue his highest remedy. Where land was leased and rent reserved, the remedy given by the common law was debt; and that being regarded as a higher remedy than *indebitatus assumpsit*, the rent could not be recovered in an *indebitatus assumpsit* count. It would have been extraordinary had the courts given a remedy against a tort feasor which they did not allow on a contract against a tenant. And although by statute the scope of *indebitatus assumpsit* has been extended to cases where the relation of landlord and tenant exists, the courts have not permitted its use in the absence of a true contract between the parties;[2] and even in jurisdictions where all forms of action are abolished, this doctrine, originating in a distinction drawn between different forms of action, is perpetuated.[3] As assumpsit will not lie for a wrongful use and occupation, of course the rent received by such an occupant cannot be recovered in a count for money had and received.[4]

ight to maintain a count for oods sold and elivered gainst a tort easor.

The question of waiving the tort has arisen in a class of cases suggested by, and yet differing from, those in which

[1] Tew *v.* Jones, 13 M. & W. 12; Stringfellow *v.* Curry, 76 Ala. 394; Stockett *v.* Walker, 2 G. & J. 326; Central Mills Co. *v.* Hart, 124 Mass. 123; Lockwood *v.* Thunder Bay Co., 42 Mich. 536; Henderson *v.* Detroit, 61 Mich. 378; Crosby *v.* Horne Co., 45 Minn. 249; Aull Savings Bank *v.* Aull, 80 Mo. 199; Dixon *v.* Ahern, 19 Nev. 422; Preston *v.* Hawley, 101 N. Y. 586; Collyer *v.* Collyer, 113 N. Y. 442.

[2] See, however, *infra*, p. 278.

[3] The reader who may be interested in studying the history of this doctrine will do well to consult an article by Professor Ames, on "Assumpsit for Use and Occupation," in 2 Harv. Law Rev. 377.

[4] Clarance *v.* Marshall, 2 C. & M. 495; Lockard *v.* Barton, 78 Ala. 189; King *v.* Mason, 42 Ill. 223.

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the defendant has wrongfully used the plaintiff's personal property; namely, where the defendant has converted the property, but, instead of selling, either keeps it or has consumed it. Here the decisions are in conflict. In Russell *v.* Bell,[1] the plaintiff, as assignee of a bankrupt, sought to recover against the defendant, in a count *for goods sold and delivered*, the value of goods delivered to the defendant by the bankrupt after he had committed an act of bankruptcy. A motion by the defendant's counsel to enter a non-suit, on the ground that the plaintiff had failed to prove a contract of sale, was denied. Alderson, B., thought the evidence warranted the finding of such a contract. Lord Abinger thought that it was not necessary for the plaintiff to prove a contract in order to recover in the count for goods sold and delivered, saying: —

"Mr. Crompton says that if you treat this as a sale, you must treat it as a sale with all the circumstances belonging to it. That proposition is true, with this qualification, — if the sale is made by an agent, and properly conducted for the supposed vendor, and the person buying is an honest buyer, the vendor must stand to the sale, and is bound by the contract; *but if a stranger takes my goods, and delivers them to another man, no doubt a contract may be implied, and I may bring an action either of trover for them, or of assumpsit. This is a declaration framed on a contract implied by law. When a man gets hold of goods without any actual contract, the law allows the owner to bring assumpsit, — that is the solution of it, — and gets rid of the whole difficulty.*[2] Here the bankrupt took these goods and delivered them to the defendants; on that an implied assumpsit arises that they are to pay the owners the value of the goods."

Gurney, B., concurred in the decision of the court, but gave no opinion. On this question the authorities in America are pretty evenly divided.[3]

[1] 10 M. & W. 340.

[2] The italics are the author's.

[3] The action has been allowed in the following States: *California*, Lehmann *v.* Schmidt, 87 Cal. 15; *Georgia*, Newton Manuf. Co. *v.*

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In Jones *v.* Hoar [1] — a leading case in this country denying the right of waiver of tort in such circumstances — the court seemed to proceed on the short ground that they could not, without greatly extending the doctrine of waiver of tort beyond any of the decided cases, apply to the count for goods sold and delivered the principles which had been applied to the count for money had and received. As against the tort feasor himself, they were not willing to take this step; though they left the question open as to whether such an action might not be brought against his executor or administrator. But, as the writer has had occasion to remark, how can such an action be maintained against the representative, if not against the tort feasor? It is the latter, and not the former, who committed the tort, and has directly profited by it. If the action is denied against the tort feasor because of the adequacy of the remedy in tort, then the court, to be consistent, should reach the same result in all cases where the defendant can be sued in tort. If one can sue a tort feasor to recover, not the actual money which he has taken from the plaintiff by fraud or force, but its value, — that is, an equivalent sum, — or to recover the value of services of which the

White, 53 Ga. 395; *Illinois*, T. W. W. R. R. Co. *v.* Chew, 67 Ill. 378; *Indiana*, Morford *v.* White, 53 Ind. 547; *Kansas*, Fanson *v.* Linsley, 20 Kan. 325; *Michigan*, Aldine Manuf. Co. *v.* Barnard, 84 Mich. 632; *Mississippi*, Evans *v.* Miller, 58 Miss. 120; *New York*, Goodwin *v.* Griffis, 88 N. Y. 629; *North Carolina*, Logan *v.* Wallis, 76 N. C. 416; *Tennessee*, Kirkman *v.* Phillips, 7 Heisk. 222; *Texas*, Ferrill *v.* Mooney, 33 Tex. 219; *West Virginia*, McDonald *v.* Peacemaker, 5 W. Va. 439; *Wisconsin*, Walker *v.* Duncan, 68 Wis. 624.

The action has been disallowed in the following States: *Alabama*, Strother *v.* Butler, 17 Ala. 733; *Arkansas*, Bowman *v.* Browning, 17 Ark. 599; *Delaware*, Hutton *v.* Wetherald, 5 Harr. 38; *Maine*, Androscoggin Co. *v.* Metcalf, 65 Me. 40; *Massachusetts*, Jones *v.* Hoar, 5 Pick. 285; *Missouri*, Sandeen *v.* Kansas City R. R. Co., 79 Mo. 278; *New Hampshire*, Smith *v.* Smith, 43 N. H. 536; *Pennsylvania*, Bethlehem Borough *v.* Perseverance Fire Ins. Co., 81 Pa. St. 445; *South Carolina*, Schweizer *v.* Weiber, 6 Rich. L. 159; *Vermont*, Winchell *v.* Noyes, 23 Vt. 303.

[1] 5 Pick. 285.

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defendant tortiously deprived the plaintiff to his own benefit, then why not allow an action to recover the value of goods which he has tortiously taken? That you are suing in a count *for goods sold and delivered*, whereas in fact there is no sale, but a tort, is an objection no more insurmountable in this case than when the same count is used to charge a lunatic for necessaries furnished to him by one who knew him to be insane. In the latter instance there is no contract of sale, because the lunatic cannot contract; and yet, as he has received the plaintiff's goods in circumstances which render it inequitable for him to keep them without making compensation, the plaintiff is allowed to recover their value.[1] If, then, the count can be successfully used in a case where there is no contract of sale because the defendant is incapable of assenting to one, why can it not be used where there is no assent because the defendant is a tort feasor? In truth, the two cases involve a common element, which is universally recognized in the one case, and should be in the other, as furnishing a ground for recovery; namely, that the defendant has that for which in conscience he should give the plaintiff an equivalent in money.

The objection arising out of the form of action should, of course, have no force in jurisdictions where all forms of action have been abolished. It is not to be supposed that the estate of the tort feasor would not be required, when the tort feasor has taken and consumed the plaintiff's goods, to make good their value to the plaintiff; and yet every argument that can be urged against the tort feasor can be urged against allowing it against his representatives, except the argument that an adequate remedy exists in the first case, but not in the second. And this argument, applying with no more force here than elsewhere, has been generally ignored in the law of quasi-contract.[2]

[1] *In re* Rhodes, 44 Ch. D. 94; Sceva v. True, 53 N. H. 627.

[2] Whether a plaintiff has a right to waive the tort in a case of this

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Liability of a third party for goods sold and delivered under a contract induced by fraud.

If the plaintiff can trace goods into the possession of the defendant which were procured from the former under a contract made with a third person, the contract being induced by fraud in which the defendant co-operated, it would necessarily result, if the principle contended for in the preceding paragraph be granted, that the plaintiff can waive the tort and sue for goods sold and delivered, the fraud entitling him to rescind the contract under which he parted with the goods. And such is the law.[1] In Hill *v.* Perrott,[2] where this point was first decided, the plaintiff sold goods to one Dacosta, who was to pay for them by a six-months bill of exchange, to be accepted by the defendant and endorsed by Dacosta. The plaintiff, discovering the transaction to be a swindling scheme to enable Dacosta to pay a debt which he owed to the defendant, and finding the goods in the defendant's possession, sued in assumpsit, the declaration containing two counts, — one for goods sold, and one in special assumpsit. He recovered judgment on the count for goods sold.

kind, is of great importance in jurisdictions where the statute of limitations prescribes a shorter period of time within which actions in tort must be brought than that prescribed for the bringing of actions in assumpsit or contract. Thus, in Kirkman *v.* Phillips, 7 Heisk. 222, where the plaintiff sued for the value of goods converted by the defendant, the latter pleaded that three years — the time allowed by the Tennessee statute for actions of tort — had elapsed. This plea was held bad, the action sounding, not in tort, but in quasi-contract. "It is true," said the court, "as argued, that the wrong-doer may obtain a title to the property by three years' adverse possession, and yet be liable, for three years after his title is perfected, to pay the original owner the value thereof. This is a necessary consequence of the right, which the original owner has, to elect whether he will sue for property or its value. During six years his right for the value is as perfect as his right to sue for the property within three years. This right is not interfered with by the provisions of the Code abolishing the distinctions in the form of actions. The statute of limitations applicable to the cause depends upon the nature and character of the action, and not upon its form."

[1] Hill *v.* Perrott, 3 Taunt. 274; Abbotts *v.* Barry, 2 B. & B. 369; Daning *v.* Freeman, 13 Me. 90; Isaacs *v.* Herman, 49 Miss. 499.

[2] 3 Taunt. 274.

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While the decision in this case is unquestionably sound, it seems impossible to support the reasoning of the court. The opinion of the court is reported as follows: —

"The court held that the law would imply a contract to pay for the goods, from the circumstance of their having been the plaintiff's property, and having come to the defendant's possession, if unaccounted for; and he could not be permitted to account for the possession by setting up the sale to Dacosta, which he had himself procured by the most nefarious fraud, because no man must take advantage of his own fraud; therefore *indebitatus assumpsit* lay for the goods, and the verdict could be supported."

To support this reasoning, it must be presumed that if goods are found in the possession of one, which it can be proved were at one time the property of another, this evidence will of itself, without the introduction of further evidence, in the absence of an explanation by the person in whose possession they are found, entitle the plaintiff to recover in a count for goods sold. One hazards little in saying that no such case has been or will ever be found. The phrase, "the law would imply a contract," is evidently used to indicate a true contract, or a contract implied in fact, — in other words, an obligation based on the consent of the parties, as distinguished from an obligation imposed by law; for if the latter were its meaning, it would not be necessary to estop the defendant from proving the sale to Dacosta, since the short answer to such a plea would be that the sale to Dacosta being rescinded, the plea is irrelevant to an action based on the obligation imposed by law on the defendant because of his unjust enrichment. But if its meaning were that the law would impose an obligation in such circumstances, it is equally indefensible; for surely the fact of the defendant's present possession, coupled with the plaintiff's former ownership, does not prove the defendant a tort feasor.

In Ferguson *v.* Carrington [1] the plaintiff sued for goods sold

[1] 9 B. & C. 59.

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Right of recovery against a party to fraudulent contract, in disregard of the terms thereof.

and delivered. It appeared that the period of credit given when the goods were sold by the plaintiff to the defendant had not expired. It was objected that the action was prematurely brought; but the plaintiff contended that as the sale was induced by the fraud of the defendant, he might waive the tort and sue in assumpsit. The plaintiff was non-suited, and a rule for a new trial was refused; the court holding that by bringing that form of action he had affirmed the contract, and so was bound by its terms, including the time of credit.

Parke, J., whose opinion represents that of the other judges, expressed himself as follows: —

"As long as the contract existed, the plaintiffs were bound to sue on that contract. They might have treated that contract as void on the ground of fraud, and brought trover. By bringing this action they affirm the contract made between them and the defendant."

With all deference to so eminent an authority, it is submitted that this decision cannot be supported. To do so, one must say that the count for goods sold and delivered can only be used to enforce a genuine contract obligation. But this view is not sustained by either the English or the American courts.[1] If the count can be used where there has been no contractual relation, it must follow that a plaintiff does not in using the count necessarily allege the existence of a contract. If he does not, then in a case where he has a right to disregard the contract and sue in tort, why cannot he waive the tort and sue in assumpsit for goods sold and delivered, without affirming a contract which was in fact made, but which he has a right to rescind? The result of the English authorities, if Lord Abinger's statement in Russell *v.* Bell[2] is to be regarded as law, is to leave the law in an anomalous state. As against a tort feasor whose tort consists in getting your goods by means of a fraudulent contract, you cannot waive the tort and sue in assumpsit for goods sold and deliv-

[1] See *supra*, pp. 20–23. [2] 10 M. & W. 340.

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ered; but you may bring a count for goods sold and delivered against a person whose tort consists in procuring your goods otherwise than by a fraudulent contract.

Ferguson *v.* Carrington has been followed in Massachusetts.[1] Although it was followed in an early case in Michigan,[2] that decision can no longer be regarded as law, it having since been decided in the same State[3] that this count can be used for a taking and retention where there has been no contract whatever. In Kentucky,[4] in New York,[5] and in Georgia,[6] a recovery is allowed in cases like Ferguson *v.* Carrington.

Extent and nature of liability of two or more joint tort feasors where tort is waived.

Assuming the existence of a case where the doctrine of waiver applies, the question arises — if the tort has been committed by two or more persons — as to the nature and extent of their liability: Are they jointly, severally, or jointly and severally liable? Must each answer *in solido*, or each only for the amount actually or constructively received by him?

[1] Allen *v.* Ford, 19 Pick. 217.

[2] Galloway *v.* Holmes, 1 Doug. 330.

[3] See *supra*, p. 193, n. 3.

[4] Dietz's Assignee *v.* Sutcliffe, 80 Ky. 650.

[5] Wilson *v.* Force, 6 Johns. 110; Weigand *v.* Sichel, 4 Abb. Ap. Dec. 592. The reason given by the court in Wilson *v.* Force, 6 Johns. 110, is as follows: "The basis of every contract is good faith. If the special contract be void on the ground of fraud, the plaintiff may disregard it, and bring assumpsit for the goods sold." Substituting the word "voidable" for "void," this is a concise and accurate statement of the reasoning by which the result can be reached, and is in striking contrast with the following fanciful statement found in the opinion of the court in Weigand *v.* Sichel, 4 Abb. App. Dec. 592 "It is not accurate to say that the plaintiffs sought to avoid the contract of sale; it is the credit only that is sought to be avoided. It was the sale of goods which the plaintiffs by their action affirmed. It was, however, a sale where the credit was obtained by fraud, and in law amounted to a sale for cash. In stating it in their complaint, therefore, to be a sale, and for cash, the plaintiffs but stated the contract according to its legal effect. They did not seek to avoid the contract of sale; they endeavored, merely, by proof of the act of fraud, to reduce the transaction to a cash sale. The complaint and the proofs were to the same purport."

[6] Blalock *v.* Phillips, 38 Ga. 216.

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In seeking an answer to these questions, it must be borne in mind that the object of the action is not to recover damages, but to make the defendant *disgorge*.[1] In National Trust Co. *v.* Gleason,[2] Rapallo, J., thus expressed the distinction:

"To charge a party in an action of that character, the receipt of the money by him, directly or indirectly, must be established. His complicity in the crime is not the cause of action, but only an item of evidence tending to establish his interest in the proceeds."

Although in England the liability in tort of two or more joint tort feasors is held to be joint,[3] while in this country the liability is joint and several,[4] in all jurisdictions each tort feasor is liable to make good the entire damage done, since the damage is traceable to him as a moving cause. If, however, a wrong-doer is not liable in quasi-contract unless he has received some part of the plaintiff's property in the commission of the wrong, the extent of his liability would seem necessarily to be limited to that which he has received. This proposition, which is not disputed where the defendant is a sole tort feasor, would seem also to determine the extent of the liability where there are joint tort feasors. For if in the case of a sole tort feasor the defendant is only liable in quasi-contract for that which he has received, on what principle can he be made liable in quasi-contract in the case of a joint tort *for what has been received by another for himself, and not for the defendant?* Of course it is not necessary that the property come into the physical possession of the defendant; it is sufficient if it has been received for him by another acting under his authority.[5] And the fact of his agent's having absconded would constitute no defence.[6]

[1] *Supra*, p. 160.

[2] 77 N. Y. 400.

[3] Brinsmead *v.* Harrison, L. R. 7 C. P. 547.

[4] Lovejoy *v.* Murray, 3 Wall. 1; Elliott *v.* Hayden, 104 Mass. 180.

[5] National Trust Co. *v.* Gleason, 77 N. Y. 400 (*semble*); Carew *v.* Rutherford, 106 Mass. 1.

[6] National Trust Co. *v.* Gleason, 77 N. Y. 400 (*semble*); New York Guaranty Co. *v.* Gleason, 78 N. Y. 503 (*semble*).

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But where that which has in fact been received by another is received only in part for the defendant and the action is not in tort, the tort, to use the language of Rapallo, J., in National Trust Co. *v.* Gleason,[1] being "only an item of evidence tending to establish his interest in the proceeds," it seems that on principle the extent of his interest in the property should be the limit of the recovery against him. If this view is correct, then his liability should be several, and not joint, or joint and several; for each obligation would depend upon questions differing in one particular, namely, the extent of the defendant's enrichment. Opposed to this view, however, both as to the liability being several and as to its extent, will be found *dicta* in the National Trust Co. *v.* Gleason,[2] and in the New York Guaranty and Indemnity Co. *v.* Gleason,[3] — *dicta* entitled, it must be admitted, to the weight of a decision because of the consideration given to the question. And in accord with the *dicta* of these cases is the case of Carew *v.* Rutherford.[4] In all of these cases, however, the argument of counsel seems to have been addressed rather to the fact of liability than to its extent.

In City National Bank *v.* National Park Bank,[5] the defendant sought to counter-claim against the plaintiff the sum of $25,661, loaned by it to one Hardie, a former president of the plaintiff, under the following circumstances. Hardie being indebted to the plaintiff, the latter, although removing him from its management, allowed him to remain as a figure-head, to facilitate his obtaining money with which to pay off his debt; and for that purpose it conspired with him in securing money on certain worthless securities. In this way he was enabled to borrow from the defendant $25,661, $13,000 of which was applied in payment of his indebtedness to the plaintiff. The trial judge having refused to

[1] 77 N. Y. 400.
[2] *Ibid.*
[3] 78 N. Y. 503.
[4] 106 Mass. 1.
[5] 32 Hun, 105.

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allow the counter-claim, on the ground that the liability was joint and not several, a new trial was granted.

Davis, P. J., delivering the opinion of the court, said:

"But it is insisted, in substance, that such an action on the implied promise would be on a joint and not several contract, and that for that reason, inasmuch as Hardie is not a party to the action as plaintiff or otherwise, the implied contract cannot be set up in this suit as a counter-claim. We think the implied contract in such case which arises upon waiver of an action for tort is joint and several, and not joint alone. Such was the nature of the tort, and each party could have been separately sued upon it; and the same reason extends to the implied contract. Either conspirator may be sued upon his implied promise, and be made to answer for the whole of the money obtained by the fraud consummated under the conspiracy."

It is perfectly clear that the plaintiff should have been held liable to the defendant to the extent of $13,000, the amount which it actually received from Hardie. But it seems impossible in point of principle to support the decision so far as it holds the plaintiff liable for the entire amount received by Hardie from the defendant; nor can one reconcile it with the decision in National Trust Co. *v.* Gleason.[1] Hardie clearly did not borrow the money for the plaintiff, and was therefore not the plaintiff's agent; and while the plaintiff's assisting Hardie in defrauding the defendant would render the plaintiff liable, if sued in tort by the defendant, to make good the damage done by Hardie, that fact should not render it liable to refund either severally or jointly that which had not been received by it.

So far as the case holds that the liability is several, it should and would be followed. It does not result from this suggestion that the tort feasor into whose possession the property is actually traced can reduce the amount of his liability by showing that he has transferred the property in

[1] *Supra*, p. 160.

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whole, or in part, to another, for whom he always held the whole or a part of it. The moment it actually came into his possession the obligation was imposed upon him of restoring it to the plaintiff; and that obligation he cannot escape by otherwise disposing of the property.

What amounts to an election, and the effect thereof.

There remains to be considered the question of what amounts to a conclusive election, and the effect thereof. A person having the right to sue in quasi-contract or in tort may, by his conduct before action brought, lose one or both rights. Thus, for example, if one having the right to sue another for a conversion, demand and receive from the tort feasor the money received from a sale of the property, he has of course, by the receipt of the money, extinguished the claim for money had and received; and since he should not have both the property and its proceeds, he can no longer sue in tort.[1] If, however, the money is taken, not as the proceeds of the property, but in diminution of damages, such a receipt will not be treated as an election. Unless, however, the facts warrant the inference that the money is received not as the proceeds of the sale or transfer, but in mitigation of damages simply, then by such receipt the plaintiff precludes himself from suing in tort.[2]

An unsatisfied demand will not preclude the plaintiff from electing between remedies. Thus, in Valpy *v.* Sanders,[3] the defendant bought goods from the servant of an absconding tradesman in circumstances rendering him guilty of a conversion as against the plaintiff, afterwards appointed assignee. The plaintiff sent an invoice of the goods to the defendant, demanding payment. The defendant refused to pay, claiming a set-off against the bankrupt. It was held that this demand did not prevent the plaintiff's suing in tort.

[1] Brewer *v.* Sparrow, 7 B. & C. 180; Bradley *v.* Brigham, 149 Mass. 310; Smith *v.* Baker, L. R. 8 C. P. 141.
350.

[2] Vernon *v.* Lythgoe, 5 H. & N.

[3] 5 C. B. 887. See also Morris *v.* Robinson, 3 B. & C. 196.

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Assuming an unsatisfied demand not to preclude one from electing between the two rights, the question arises as to the effect of an action brought, but not prosecuted to judgment. In Thompson *v.* Howard,[1] the defendant was sued in tort for enticing the plaintiff's minor son into his service. He pleaded in bar that he had been previously sued in assumpsit by the plaintiff seeking to recover the value of his son's services. It was held that notwithstanding the action had been discontinued the plaintiff could not sue in tort after a disagreement of the jury.

Graves, C. J., delivering the opinion of the court, said:

"A man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.

"*As there was no evidence or claim that the parties ever actually agreed together at all in regard to the minor's services,*[2] it was not possible to refer the assumpsit to any real agreement of a date later than that of the defendant's supposed wrongful enticement, and not possible to infer that the assumpsit rested on a distinct arrangement, and left the original wrong as a ground for a separate suit.

"The first action extended to the minor's services from the beginning; and, when the plaintiff brought it, he thereby virtually affirmed that his son was with defendant in virtue of a contract between the latter and himself, and not by means of conduct which was tortious against him.

"His proceeding necessarily implied that defendant had the young man's services during the time with plaintiff's assent, and this was absolutely repugnant to the foundation of this suit, which is that the young man was drawn away and into defendant's service against the plaintiff's assent.

"The case is, then, subject to the doctrine before stated, and the election involved in the first suit precluded the plaintiff from maintaining this action for the wrong."

[1] 31 Mich. 309.

[2] The italics are the author's.

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It is respectfully submitted that the doctrine invoked by the court had no application to the case under consideration. Indeed, the court, for the purpose of defeating the plaintiff, assumes as a fact what it knows and states to be not a fact, namely, the existence of a contract between the plaintiff and the defendant. Having shown that the plaintiff must have made the same state of facts the basis of both actions, since there was really no contract between the plaintiff and the defendant, the court then assumes the existence of a contract for the purpose of defeating the plaintiff in the action of tort.

The plaintiff in Thompson *v.* Howard, notwithstanding the discontinuance of his former action, could have brought another action in assumpsit. The defendant, therefore, is not in a position to avail himself of the rule of law expressed in the maxim: *Nemo debet bis vexari pro eadem causa;* for there is no more double vexation involved in an action of assumpsit followed by an action in tort, than if the action of assumpsit were followed by another action in the same form. Nor does the court rest the decision on the ground of double vexation, but on the plaintiff's attempting to take contradictory positions. Its definition of a contradictory position is the use of remedies "so inconsistent that the assertion of one involves the negation or repudiation of the other." Now a non-suit in trover would not prevent trespass, nor would a non-suit in account prevent debt. Why then, should assumpsit preclude the bringing of tort? They are both personal actions and actions on the case, and according to the *dicta* of the early cases the bringing of the one if not prosecuted to judgment should not preclude one's resorting to the other.[1]

The only possible way in which the one can be said to be "the negation or repudiation of the other" is to use, in

[1] Holt, C.J., in Lamine *v.* Dorrell, 2 Ld. Ray. 1216; Hitchins *v.* Campbell, 2 Wm. Bl. 827.

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order to deny a remedy, a fiction adopted solely to give a remedy.[1]

The most common illustration of the doctrine *misapplied* in Thompson *v.* Howard is the case where a party having a right to rescind a contract because of fraud, repudiates the contract and sues in tort, or with full knowledge of the facts sues on the contract. In such a case the assertion of the two rights would involve the plaintiff, in the language of the court in Thompson *v.* Howard, in "contradictory positions," the assertion of the one involving the negation or repudiation of the other. Since he must deny the validity of the contract to take advantage of the fraud, having sued for the fraud, he cannot afterwards treat the contract as unobjectionable;[1] and since he cannot sue on such a contract without

[1] Of the cases cited by the court in Thompson *v.* Howard, none support the decision. In Smith *v.* Hodson, 4 T. R. 211, the court held that a party who sues on a contract which he might have disaffirmed, thereby enables the defendant to plead a set-off; though had the plaintiff sued in trover, he could not have so pleaded. And of the soundness of this decision there can be no question. In Rodermund *v.* Clark, 46 N. Y. 354, it was held that one who retains possession of a vessel, of which he was part owner, refusing to deliver it to one to whom the co-owner had sold the whole vessel, could not afterwards by suffering a judgment by default in favor of the purchaser, sue the co-owner as for a conversion; although had he suffered the purchaser to take the vessel at the time of the purchase under the bill of sale, he could have maintained the action. As the surrender of the possession by him was held essential to make the act of the co-owner effectual and tortious, it is clear that when he retained the possession and refused to deliver under the bill of sale, the force of the act done by the co-owner was spent, and no independent act of the plaintiff — such as suffering a judgment by default — could revive it. And while a *dictum* of Bovill, C. J., in Smith *v.* Baker, L. R. 8 C. P. 350, supports the decision in Thompson *v.* Howard, this is not at all true of the decision. It was simply held that one who had under an order of court received the proceeds of sale could not afterwards bring an action in trover because of such a sale. That is to say, as one is not entitled to both the property and its proceeds, he cannot recover the proceeds, and yet complain of the sale which produced the proceeds. In Jewett *v.* Petit, 4 Mich. 508, it was simply held that one cannot repudiate in part a compromise induced by fraud.

[1] Moller *v.* Tuska, 87 New York. 166.

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affirming its validity, it is highly proper that he should not be allowed to blow hot and cold, and thereafter to treat the contract as invalid.[1]

But in cases of waiver of tort, instead of the tort disappearing when the action of assumpsit is brought, the action of assumpsit could not be maintained without proof of the tort.[2] How can one be said to occupy "contradictory positions," *in which the assertion of the one involves the negation or repudiation of the other*, when to recover in either action he must establish that the defendant is a tort feasor?

Where an action is prosecuted to judgment, the rule, *Nemo debet bis vexari pro eadem causa*, of course applies, and all rights are merged therein.[3] That this maxim may be invoked, the remedies must, however, have been co-existent.[4] Thus in Browning *v.* Bancroft the defendant, who by fraudulent representations had obtained from the plaintiff certain goods, and who had sold part of them, pleaded, in bar to an action of replevin for the remainder, the fact that the plaintiff had recovered in an action for money had and received the proceeds of the goods sold. But the action of replevin was allowed; the remedies were not co-existent. Of course, if in the action for money had and received it had been decided that the defendant was not guilty of the fraud charged, that fact could have been pleaded in bar of the action of replevin, the question being *res adjudicata*.[5]

[1] Seavey *v.* Potter, 121 Mass. 297; Acer *v.* Hotchkiss, 97 N. Y. 395.

[2] Huffman *v.* Hughlett, 11 Lea, 549.

[3] Hitchin *v.* Campbell, 2 Wm. Bl. 827; Buckland *v.* Johnson, 15 C. B. 145 (*semble*); Bradley *v.* Brigham, 149 Mass. 141; Boots *v.* Ferguson, 46 Hun, 129.

[4] Browning *v.* Bancroft, 8 Met. 278.

[5] Hitchin *v.* Campbell, 2 Wm. Bl. 827.

It has been assumed up to this time that the tort is waived either by the act of the injured party before action brought, or by the bringing of an action. The waiver may, however, be asserted by counterclaim or set-off. Allen *v.* United States, 17 Wall. 207; Fanson *v.* Linsley, 20 Kan. 235; Challeis *v.* Wylie, 35 Kan. 506; Eversole *v.* Moore, 3 Bush, 49; Gordon *v.* Bunner, 49 Mo. 570; Andrews *v.* Artisans' Bank, 26 N. Y. 298. See, however,

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fect of waiver tort as to e of two joint t feasors on plaintiff's ghts against e other tort tsor.

Thus far the effect of waiving the tort has been considered on the assumption of there being a sole tort feasor. The question naturally arises as to the effect of the waiver in the case of joint tort feasors. Suppose A and B join in the commission of a wrong: what effect has the waiver of tort as to A upon the right to sue B in tort? Or suppose A to be sued in tort: what effect has the failure to waive the tort as to A upon the right to sue B in *quasi*-contract? In Buckland *v.* Johnson,[1] the plaintiff, having recovered a judgment in trover against one of two joint tort feasors for a conversion of property by a wrongful sale, and being unable to realize upon the judgment, sued the defendant, the other tort feasor, in a count for money had and received to recover the proceeds of the sale. The money arising from the sale was received by the defendant alone, and not by the tort feasors jointly. It was held that the judgment in trover was a bar to the action.

The reasoning by which this conclusion was reached will be found in the following extract from the opinion of Jervis, C. J.: —

contra, Rickey *v.* Bly, 115 Ind. 232; Woods *v.* Ayres, 39 Mich. 345.

In Eversole *v.* Moore, 3 Bush, 49, the defendant, being sued as administratrix, pleaded as a set-off the conversion by plaintiff of personal property of the intestate by the forcible taking thereof. The plea was sustained on demurrer. Robertson, J., delivering the opinion of the court, said: "And although tort cannot be set off against contract, yet the trespass in this case may be waived, and instead of suing for indeterminate damages arising *ex delicto*, an action *ex contractu* might be maintained for the value of the property converted on an implied promise to pay the value of it; consequently *indebitatus assumpsit* might be maintained for that value. And that which the appellant might have recovered in such an action, she may plead as a set-off in this case, as the demands of both parties arise from contract, express or implied, to pay a certain sum in money (*the value of property, not damage*). . . . And though the answer shows a tortious conversion, yet its election to demand only the value of the property waived the tort, and relied on implied contract, which might be enforced by *indebitatus assumpsit*."

[1] 15 C. B. 145.

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"The authorities show, and indeed it is not denied, that if Thomas Barber Johnson, the son, had received the money as well as converted the goods, and Buckland had sued him in trover and obtained a judgment against him, even though it had produced no fruits, that judgment would have been a bar to another action against him for money had and received. . . . The whole fallacy of the plaintiff's argument arises from his losing sight of the fact that by the judgment in the action of trover the property in the goods was changed, by relation, from the time of the conversion, and that, consequently, the goods from that moment became the goods of Thomas Barber Johnson, and that when the now defendant received the proceeds of the sale, he received his son's money, the property in the goods being then in him."

In considering this decision it must be remembered that two of the premises from which the court drew its conclusions are not law in this country. The court assumed first that a judgment unsatisfied against one of two joint tort feasors barred an action against the other. This is not true in the United States.[1] It was further taken for granted that by the judgment the title was vested in the defendant in the first action as of the time of the conversion. This does not represent the American law.[2]

If, then, the decision is to be followed here, it cannot be justified on either of the above assumptions.

It is true, as stated by the court, that a judgment in trover, though unsatisfied, bars an action against the same defendant for money had and received, assuming him to have sold the goods and to have received the proceeds. This is because no one should be subjected to double vexation. But as the doctrine of double vexation is not involved where a plaintiff having an unsatisfied judgment against one of two joint tort feasors seeks to recover against the other, the two cases are not, as the court thought, analogous. Assuming, however,

[1] Lovejoy *v.* Murray, 3 Wall. 1; Atwater *v.* Tupper, 45 Conn. 144; Elliott *v.* Hayden, 104 Mass. 180. United Society *v.* Underwood, 11 Bush, 265.

[2] Dow *v.* King, 52 Ark. 282;

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the correctness of the English doctrine that the liability in tort is joint, and not joint and several, it still seems impossible to support the conclusion reached in Buckland *v.* Johnson. The plaintiff recovered in the first action in tort, and not in the count for money had and received, because it appeared that the money had been received, not by the then defendant, but by the present defendant, whose liability in the count for money had and received was therefore several, and not joint; yet the court held this several liability to be barred by an unsatisfied judgment obtained against a third party. In Floyd *v.* Browne [1] the same decision was reached.

In Terry *v.* Munger [2] it was held that an unsatisfied judgment against one of two joint tort feasors obtained on a count for goods sold and delivered, could be pleaded in bar by the other tort feasor when sued in trover for a wrongful conversion of the property. The following extracts from the opinion of Peckham, J., shows the line of reasoning adopted: —

"The contract implied is one to pay the value of the property *as if it had been sold* [3] to the wrong-doer by the owner. If the transaction is thus held by the plaintiff as a sale, of course the title to the property passes to the wrong-doer when the plaintiff elects so to treat it. . . .

"The plaintiffs having treated the title to the property as having passed in that suit by such sale, can the plaintiffs now maintain an action against another person, who was not a party to that action, to recover damages from him for his alleged conversion of the same property, which conversion is founded upon his participation in the same acts which plaintiffs, in the old suit, have already treated as constituting a sale of the property? We think not. . . .

"The proof that an action of that nature had been in fact commenced, would have been just as conclusive upon the plaintiffs, upon the question of election (proof of knowledge of all the facts

[1] 1 Rawle, 121.
[2] 121 N. Y. 161.
[3] The italics are the author's.

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at that time being given), as would the judgment have been. It was not necessary that a judgment should follow upon the action thus commenced. . . .

"It was their election to treat the transactions as a sale which accomplished that. . . .

"If the title really once passed, that would be a fact actually existing, which anybody ought to have the right to prove if it became material in protecting his own rights, unless there were some equitable considerations in such case, which should prevent it. I cannot see that they exist here. . . .

"If not, then the fact that the plaintiff sold the property by virtue of the transaction which they now seek to treat as a conversion of it by the defendant, must and ought to operate as a perfect bar to the maintenance of this action. It is upon the principle that the plaintiffs by their own free choice decided to sell the property; and having done so, it necessarily follows that they have no cause of action against the defendant for an alleged conversion of the same property by the same acts which they have already treated as amounting to a sale.

"The plaintiffs having by their former action in effect sold this very property, it must follow that at the time of this one, they had no cause of action for a conversion in existence against the defendant herein. The transfer of the title did not depend upon the plaintiff's recovering satisfaction in such action for the purchase price."

The writer has endeavored heretofore to show that the fiction of a promise invoked in the cases treated under this title was originally adopted simply for the purpose of pleading; the action of assumpsit, which is in form, and originally always was in fact, based on a promise, being the only remedy open to the plaintiff seeking to enforce a quasi-contractual obligation, and that the real ground of liability is the fact that it would be unjust if the defendant were not compelled, at the option of the plaintiff, to pay for value received. If such is the case, then the use of the fiction should cease with the necessity which gave rise to it; and when used it should be recognized as a fiction, and treated as a fact only for the purpose for which it was invented.

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Having been adopted for the purpose of giving a remedy, under a system in which forms were paramount to substance, it should not be used for the purpose of denying a remedy. And certainly its use for such a purpose cannot be justified in a jurisdiction, as in New York, where forms of action are no longer recognized, the substance being everything and the form nothing. Now, every one knows that where one man tortiously takes the goods of another, there is no sale between those parties; and yet the highest court in the State of New York gravely asserts that there was. In other words, a fiction to which it is no longer necessary to resort in New York in order to give a remedy is there resorted to to deny a right: and the court says that there is no tort where but for the proof of a tort there could have been no recovery against any one. The decision will probably never be cited as illustrating the maxim, *In fictione juris subsistit equitas;* and it is certainly at variance with Lord Mansfield's notions of fictions, who said, in Morris *v.* Pugh,[1] "But fictions of law hold only in respect *of the ends and purposes for which they were invented:* when they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth."

Opposed to Terry *v.* Munger is the decision in Huffman *v.* Hughlett.[2] In that case an action was brought to recover the value of lumber which had been converted by one Springer and sold by him to the defendant. The latter pleaded that the plaintiff had previously sued Springer to recover the value of the lumber; that by the bringing of that action in assumpsit (which had been discontinued) the original tort had been waived; and that as a consequence the lumber bought by the defendants was the property, not of the plaintiff, but of Springer. This claim was denied by the court. Cooper, J., delivering the opinion, said: —

[1] 3 Burr. 1243. [2] 11 Lea, 549.

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"If the action be in contract, it is not strictly a waiver of the tort, for the tort is the very foundation of the action, but, as Nicholson, C. J., has more accurately expressed it, a waiver of the 'damages for the conversion,' and a suing for the value of the property.[1] It is simply an election between remedies for an act done, leaving the rights of the injured party against the wrong-doer unimpaired until he has obtained legal satisfaction. If it were otherwise, the suing of any one of a series of tort feasors, even the last, on an implied promise, where there was clearly no contract, would give him a good title and release all the others. No authority has been produced sustaining such a conclusion, and we are not inclined to make one."

It is respectfully submitted that this decision, which is founded on sound common sense, not only violates no legal principle, but, on the contrary, is a striking illustration of the proper theory underlying the principle involved in the doctrine of waiver of tort generally, and relegates the fiction to its proper province.

[1] Kirkman *v.* Phillips, 7 Heisk. 222, 224.

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CHAPTER IV.

RIGHTS OF A PLAINTIFF IN DEFAULT UNDER A CONTRACT.

aintiff's right recovery ts upon uitable inciples.

THERE can be no recovery upon a contract only partly performed unless the conditions thereof have been performed. These conditions may be express, implied in fact, or implied in law. In the absence of express conditions, or conditions implied in fact, if the breach occurs after part performance, and does not go to the essence, the plaintiff may, notwithstanding he has failed to perform his side of the contract, recover against the defendant on the contract.

It is proposed to consider in this chapter the right of recovery in quasi-contract in those cases, where, because of a breach of condition, a plaintiff is unable to recover on the contract itself.

As the defendant in such a case is not a *tort feasor*, and as *ex concessu* he is not liable on the only contract which he has made, the right, if any exists, is clearly an obligation imposed by law as distinguished from one created by act of the parties, and must therefore rest on principles independent of the law of contract. Furthermore, as a defendant who has not received some benefit under a contract is never in the absence of waiver, or of a tortious act on his part, liable to a plaintiff who has failed to perform the conditions thereof, the liability, if there be any, must rest on the equitable principle, that no one shall be allowed to enrich himself unjustly at the expense of another. The obligation is, therefore, an equitable, as distinguished from a legal obligation.

A plaintiff unable to recover on the contract itself because of his failure to perform the conditions thereof may seek a recovery in quasi-contract:

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1. Where the circumstances would not excuse the non-performance of a promise;

2. Where though the failure to perform is wilful, and in violation of his contract, the plaintiff cannot, because of the statute of frauds, be sued for a breach thereof;

3. Where the failure to perform the condition is due to an impossibility of performance, excusing the non-performance of a promise;

4. Where the plaintiff has repudiated the contract because of the illegality thereof.

SECTION I.

WHERE THE PLAINTIFF'S DEFAULT IS WILFUL OR INEXCUSABLE.

The failure to perform a condition which affords the defendant not only a defence to an action brought on the contract, but which also gives rise to an action for a breach of contract in the event of the plaintiff's having promised to perform, may have been wilful on the part of the plaintiff, or entirely unintentional.

Right of recovery when breach is wilful.

Subject to the qualification hereinafter stated[1] it is generally held that if a party wilfully refuses to perform the conditions of a contract, he can recover no compensation for the benefits conferred by him upon the defendant by a part performance thereof.[2]

[1] See *infra*, p. 227.

[2] Turner *v.* Robinson, 5 B. & Ad. 789; Collins *v.* Stimson, 11 Q. B. D. 142; Wright *v.* Turner, 1 Stew. 29; Hogan *v.* Titlow, 14 Cal. 255 (*semble*); Eldridge *v.* Rowe, 7 Ill. 91; Thrift *v.* Payne, 71 Ill. 408; Escott *v.* White, 10 Bush, 169 (*semble*); Miller *v.* Goddard, 34 Me. 102; Chapman *v.* Eames, 67 Me. 452 (*semble*); Stark *v.* Parker, 2 Pick. 267; Hapgood *v.* Shaw, 105 Mass. 276; Hanley *v.* Walker, 79 Mich. 607; Peterson *v.* Mayer, 46 Minn 468; Haslack *v.* Mayers, 2 Dutch. 284; Brown *v.* Fitch, 33 N. J. L. 418; Lantry *v.* Parks, 8 Cow. 63; Lawrence *v.* Miller, 86 N. Y. 131; The Empire State Foundry Co. *v.* Grant, 114 N. Y. 40; Larkin *v.* Buck, 11 Oh. St. 561; Shaw *v.* The Turnpike, 3 Pa. 445; Bragg *v.* Town of Bradford, 33 Vt. 35 (*semble*); Patnote *v.* Sanders, 41 Vt. 66; Malbon *v.* Birney, 11 Wis. 107; Moritz *v.* Larsen, 70 Wis. 569.

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Thus in Stark *v.* Parker,[1] the plaintiff, who had agreed to work for the defendant for a year, and who had left his service without cause before the expiration thereof, brought an action to recover the value of the services performed by him prior to leaving the defendant's employment. It was held that the plaintiff was not entitled to recover.

Lincoln, J., delivering the opinion of the court, said: —

"The exceptions present a precise abstract question of law for consideration, namely, whether upon an entire contract for a term of service for a stipulated sum, and a part performance, without any excuse for neglect, of its completion, the party guilty of the neglect can maintain an action against the party contracted with, for an apportionment of the price, or a *quantum meruit* for the services actually performed. . . .

"It cannot but seem strange to those who are in any degree familiar with the fundamental principles of law that doubts should ever be entertained upon a question of this nature. Courts of justice are eminently characterized by their obligation and office to enforce the performance of contracts, and to withhold aid and countenance from those who seek through their instrumentality impunity or excuse for the violation of them. And it is no less repugnant to the well-established rules of civil jurisprudence than to the dictates of moral sense, that a party who deliberately and understandingly enters into an engagement and voluntarily breaks it, should be permitted to make that very engagement the foundation of a claim to compensation to services under it. . . .

"The law, indeed, is most reasonable in itself. It denies only to a party an advantage from his own wrong. It requires him to act justly by a faithful performance of his own engagements before he exacts the fulfilment of dependent obligations on the part of others. It will not admit of the monstrous absurdity that a man may voluntarily and without cause violate his agreement, and make the very breach of that agreement the foundation of an action which he could not maintain under it. Any apprehension that this rule may be abused to the purposes of oppression by holding out an inducement to the employer, by unkind treatment near the close of a term of service, to drive the laborer from his engage-

[1] 2 Pick. 267.

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ment to the sacrifice of his wages, is wholly groundless. It is only in cases where the desertion is voluntary and without cause on the part of the laborer, or fault or consent on the part of the employer, that the principle applies."

In Lantry *v.* Parks[1] it was held that the refusal of the defendant to allow the plaintiff, who had wilfully deserted his service, to resume his former employment, did not take the case out of the general rule, and that the plaintiff could not recover on a *quantum meruit* for services rendered.

The rule denying a recovery when the plaintiff has wilfully broken the conditions of a contract, applies equally in the absence of waiver to a case where that fact can be established, though the plaintiff continued to serve the defendant for the time specified in the contract. Thus it was held in Peterson *v.* Mayer,[2] that one who had habitually during his term of service been guilty of embezzling the funds of his employer, could not recover anything for the services rendered by him.

In accordance with the principle under consideration it is held that money paid in part performance of a contract[3] cannot be recovered by one wilfully refusing to perform the conditions thereof.

If, however, the money was not paid in part performance of the contract, but was furnished by the plaintiff simply as security for his performance thereof, then in the event of a default by him, though the default be wilful, the extent of the defendant's right as to money so received is to use the same to compensate himself for the damage done him by the breach of contract; the surplus, if there be any, must be returned.[4]

The rule under consideration is curiously illustrated by the case of Hapgood *v.* Shaw.[5] In that case Hapgood had agreed to

[1] 8 Cow. 63. See also Tennessee Mfg. Co. *v.* James, 91 Tenn. 154.

[2] 46 Minn. 468.

[3] Collins *v.* Stimson, 11 Q. B. D. 142; Hapgood *v.* Shaw, 105 Mass. 276; The Empire State Foundry Co. *v.* Grant, 114 N. Y. 40.

[4] Chaude *v.* Shepard, 122 N. Y. 397.

[5] 105 Mass. 276.

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purchase from Shaw certain goods, agreeing to receive them on or before June 1st, and had paid to Shaw when he entered into the contract one hundred dollars on account. Shaw had agreed with Hapgood to deliver the goods to him June 1st. Neither party made a tender to the other until June 6th, when Shaw requested Hapgood to receive the goods and to pay the remainder of the purchase-money, which Hapgood refused to do. It was held that neither could sue the other for a breach of contract for the reason that the conditions in the contract were mutual and concurrent, and neither party had put the other in default by making a tender on June 1st. It was further held that as the defendant was not in default, no tender having been made by the plaintiff, and the contract remained unrescinded, the plaintiff could not recover the money paid on account, though it was no more his duty than the defendant's to take the initiative in the performance of the contract.

Although the rule generally prevails that one guilty of a wilful breach of a condition is without remedy, this rule is not universal. In Britton *v.* Turner[1] the plaintiff, who in violation of his agreement to work for the defendant for one year, left the defendant's service without defendant's consent and without cause, was allowed to recover from the defendant the value of the services rendered by him in excess of the damage suffered by the defendant in consequence of his breach of contract; and this decision has been followed in some jurisdictions.[2] In this case the court assumed as a basis of its decision the existence of a rule of law which did not in fact exist at that time, and does not exist to-day, except where Britton *v.* Turner has been followed, — namely, that one furnishing material to be used in the construction of buildings, or

[1] 6 N. H. 481.

[2] Pixler *v.* Nichols, 8 Ia. 106; Wheatly *v.* Miscal, 5 Ind. 142 (*semble*); Duncan *v.* Baker, 21 Kan. 107; Parcell *v.* McComber, 11 Neb. 209; Britton *v.* Turner, 6 N. H. 481; Chamblee *v.* Baker, 95 N. C. 98; Carroll *v.* Welch, 26 Tex. 147.

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furnishing merchandise, could recover for the value of such material or merchandise, notwithstanding his wilful breach of contract, if the same had been used, even though it was used before the plaintiff had refused to further perform the contract. Mr. Justice Parker, assuming this to be the law, thought, and thought properly, that the case of labor furnished under a contract in part performance thereof could not be distinguished from either of the cases supposed. The learned judge also failed to distinguish the case at bar from a case where a defendant knowing that the plaintiff is in default as to the contract, receives from the plaintiff a part performance thereof. In such a case it is held that the party receiving such part performance must pay therefor; and this is clearly correct, for the reason that, as the defendant need not accept such performance, he should not accept if he is not willing to pay therefor, but should resort to his remedy for breach of contract.

But the case supposed is very different from the case of Britton *v.* Turner. There the defendant at the time when he received the plaintiff's services could not have refused to receive them without rendering himself liable to an action for breach of contract, whereas in the case suggested by the court, the defendant had a perfect right to refuse to receive the part performance; and having that right it is properly said that if he suffer the plaintiff to perform, it is only equitable that he should compensate the plaintiff for his performance, and if he has suffered damage in consequence of the plaintiff's breach of contract, the plaintiff must make good that damage in an action brought by the defendant. In fact it would seem difficult to put the distinction between the cases more tersely than it was put by the court itself. "In both," says Parker, J., "the parties have assented to receive what is done; the only difference is that in one case the assent is without a knowledge that all may not be performed, in the other it is subsequent, with a knowledge that the whole has not been accomplished."

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The case of Britton *v.* Turner has been so often discussed that it seems proper to refer at length to the arguments urged by the court. The reasons assigned by the court apart from the analogies hereinbefore referred to for allowing a recovery, were two:

First, that a plaintiff should be allowed to recover, notwithstanding a wilful breach of contract, for the reason that were he sued by the defendant, the defendant might not be able to recover more than nominal damages, and in such a case to refuse the plaintiff a right of action would be to give the defendant substantial damage;

Second, that the understanding of the community in such a case, is, that a laborer shall receive compensation for the services actually performed by him, and that such understanding must be taken as a term of the contract of hiring.

On the first point, namely, that a plaintiff should recover for the reason that were he sued he would be liable for nominal damages only, Mr. Justice Parker expressed himself as follows: —

"A party who contracts to perform certain specified labor, and who breaks the contract in the first instance, can only be made liable to pay the damages which the other party has sustained by reason of such non-performance, which in many instances might be nominal; whereas a party who in good faith has entered upon performance of his contract and nearly completed it, and then abandons the further performance, although the defendant has had the full benefit of all that has been done, and has perhaps sustained no actual damage, is in fact subjected to a loss of all that has been performed, in the nature of damages for the non-fulfilment of the labor done under the technical rule that the contract must be fully performed in order to a recovery of any part of the compensation.

"By the operation of this rule, then, the party might be placed in a much worse situation than he who wilfully disregards his contract, and the other party may receive much more by the breach of the contract than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action."

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This statement confuses the question of rights and liabilities. If one has in fact violated another's right, that other has a right of action against him; but as he is entitled simply to indemnity for the invasion of his right if the damage done is small, the recovery will be correspondingly small. But it is a novel suggestion that because the damage which one has done another is small, the person who has done the injury has therefore a right against the person injured. One who fails to acquire a right against another can in no sense be said to be paying damages. He is a loser not because he is paying damages, but simply because by his conduct he has failed to acquire a right against the defendant; and it seems difficult to make his right against the defendant rest upon the amount of damages which he must pay the defendant for the violation by him of the defendant's right.

In regard to the second suggestion made by the court, it need only be said that the court contradicts itself on this point. The court says: —

"In fact we think the technical reasoning that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it; that the contract being entire there can be no apportionment; and that there being an express contract no other can be implied, even upon the subsequent performance of service, — is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe that the general understanding of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary.

"Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, so as to make them mutual conditions, the one precedent to the other, without a specific proviso to that effect."[1]

[1] Boon *v.* Eyre, 1 H. Bl. 273 n.; *v.* Atkinson, 10 East. 295; Burn *v.* Campbell *v.* Jones, 6 F. 570; Ritchie Miller, 4 Taunt. 745.

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If this statement means anything, it means that the plaintiff is entitled to recover on the contract, and such was in fact the decision in the cases cited by the court. And yet the court says that the plaintiff can recover, not on the contract itself, but only upon the obligation imposed by law. If, however, a recovery can be had only upon an obligation imposed by law, then it cannot be a term of the contract under which the service was performed that the plaintiff shall receive compensation for the services actually rendered.

In Missouri the unique position is taken that while generally one cannot recover for benefits conferred by a part performance of a contract, the conditions of which have been wilfully broken by him,[1] a recovery will be allowed in such circumstances in the case of a building contract.[2]

The case of a wilful breach of condition may be considered from two points of view:

First, where the condition is express or implied in fact;

Second, where the condition is one implied in law.

Express and implied conditions distinguished.

A condition implied in fact is a true condition, and differs from an express condition only in the manner in which it is proved. An express condition is proved by the language used, and a condition implied in fact by circumstantial evidence; but each rests upon the intention of the parties as manifested in the contract. Whatever is true of the one, then, must be true of the other, and they can therefore be considered together. It would seem to be a clear usurpation on the part of a court to say that a plaintiff shall recover compensation from a defendant in circumstances in which both the plaintiff and defendant have agreed that the plaintiff should have no compensation, and yet, if a plaintiff who has failed to perform a true condition in the contract is allowed to exact compensation from the defendant in quasi-contract, when the failure would prevent his recovering on the contract itself, a court is practising such usurpation.

[1] Gruetzner *v.* Aude Furniture Co., 28 Mo. App. 263.

[2] Gregg *v.* Dunn, 38 Mo. App. 283.

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It would seem, however, that if the condition of a contract was clearly not directed to the event which has brought about a breach thereof, a court might well say in the absence of evidence that the parties intended that the plaintiff should receive no compensation on the happening of the event in question, that they are free to deal with it on equitable principles. While proof of this fact could never render the defendant liable in contract because, were the proof admitted in an action on the contract, it would still remain a fact that the defendant had only promised to pay in a certain event, and that event has never happened, and the plaintiff to recover on the contract must prove a breach of the promise as made by the defendant, — still in a suit in quasi-contract the evidence should be admitted, to show that while the parties never expressed an intention that the plaintiff should be compensated on the happening of the event in question, for which reason the defendant is not liable in contract, still it was never present to their minds that he should not receive compensation, and therefore the court is at liberty to deal with it on equitable principles.

Where the plaintiff is unable to recover on the contract because of the breach of a condition implied in law, the considerations involved are somewhat different. Until 1773 [1] a plaintiff, notwithstanding a clear breach of contract on his part, was allowed to recover against a defendant who refused to perform because of the plaintiff's breach of promise, there being until that time no recognition of what is now known as a condition implied in law. If the contract contained neither an express condition nor one implied in fact, each party was compelled to perform the contract, and sue the other for a breach thereof, a breach by the plaintiff not justifying the defendant in refusing to perform. It being however clearly inequitable for a plaintiff who had committed a substantial breach of contract to compel the defendant to perform as if

[1] Langdell, Summary of Contracts, 2d ed. p. 183.

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no breach had been committed, Lord Mansfield introduced the doctrine of conditions implied in law. And this doctrine was afterwards extended by courts of law to some cases where the plaintiff's breach of contract, though it did not go to the essence, was *in limine*. The condition implied in law is that the plaintiff shall not break his contract *in limine* or after part performance in a particular that goes to the essence. Although Lord Mansfield treated this innovation as if it had always existed in the law, there was no trace of it until his time.

Had Mr. Justice Willes had the disregard for precedent that was shown by Lord Mansfield in this matter, the doctrine of implied conditions as they now exist in the law would have been introduced into the law on a different basis. In Thomas *v.* Cadwallader,[1] Willes, J., thus expressed himself: —

"But I expressed my dislike of those cases, though they are too many to be now overruled, where it is determined that the breach of one covenant, though plainly relative to the other, cannot be pleaded in bar to an action brought for the breach of the other, but the other party must be left to bring his action for the breach of the other; as where there are two covenants in a deed, the one for repairing and the other for finding timber for the reparations; this notion plainly tending to make two actions instead of one, and to a circuity of action and multiplying actions, both which the law so much abhors. If, therefore, this were a new point I should be inclined to be of opinion that, though where there are mutual covenants relative to one another in the same deed, a plaintiff is not obliged, in an action brought for the breach of them, to aver the performance of a covenant which is to be performed on his part, yet that the defendant in such action may in his plea insist on the non-performance of the covenant to be performed on the part of the plaintiff; but this has been so often determined otherwise that it is too late now to alter the law in this respect."

It is evident from these remarks of Mr. Justice Willes that had he felt at liberty to break away from the authorities, he

[1] Willes, 496.



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would have allowed a breach of contract to have been pleaded as an affirmative or equitable defence.

That conditions implied in law are not true conditions is as evident on reflection as that a quasi-contract is not a contract. A true condition is as much dependent upon actual intention as is a true contract, and conditions implied in law are only found where a party to a contract failed to protect himself by the insertion of conditions, express or implied in fact. A condition implied in law being then a creature of the law as distinguished from the creation of the parties to the contract, cannot be properly regarded as a true condition. If this be conceded, the argument heretofore suggested in support of the proposition that a court shall not allow a plaintiff to recover who has failed to perform a true condition, — namely, that the court has no right to impose terms differing from and contradicting what has been agreed upon by the parties, — does not apply to conditions implied in law, as it is the fact that the parties have not indicated an intention on the subject that gives rise to these conditions. And as the law has imposed these conditions upon the plaintiff in favor of the defendant simply for the purpose of reaching equitable results, the court creating this condition should be at liberty, if it is deemed desirable, to create an obligation upon equitable principles in favor of the plaintiff against the defendant, it being one thing to say that the plaintiff shall not recover against the defendant under the contract, and quite another thing to say that he shall not recover in any form whatever.

But it would seem that a sound policy would require the courts to establish in the case of a wilful breach of conditions implied in law the same rule as exists in the case of express conditions. To do otherwise would be to put a premium upon a breach of contract.

As a matter of law, the results reached in this class of cases have been reached without any recognition of the

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difference between a true condition and a condition implied in law, both classes being treated alike.

In Oxendale *v.* Wetherell[1] the plaintiff sued to recover the price of 130 bushels of wheat delivered to the defendant. The jury found that the defendant made an entire contract with the plaintiff for the purchase of 250 bushels of wheat to be delivered within six weeks. It was held that the plaintiff, notwithstanding he had delivered only 130 bushels, could recover for the wheat delivered. The facts of this case are so meagrely reported that it is difficult to determine just what the case decides. If there was to be but one delivery of wheat, and the defendant, having a right to call for 250 bushels, received a smaller quantity, knowing that the plaintiff did not intend to make a further delivery, the decision is unquestionably sound. The defendant, having a right to refuse to accept the wheat tendered, and knowing that the plaintiff did not intend to furnish the remainder, should have refused to receive the wheat tendered, and have relied upon his right to sue for a breach of contract.

If, however, it be assumed that the plaintiff had a right to make several deliveries, the mere receipt of one delivery should not render the defendant liable to pay therefor, since he would have been guilty of a breach of contract had he not accepted the wheat tendered.[2]

Furthermore, if it be assumed that though the contract called for one delivery, the defendant permitted the plaintiff to deliver a smaller quantity than the contract called for, with the understanding that the remainder was to be delivered within the six weeks, the reasoning suggested cannot be applied, since the defendant could say in such a case that but for the expectation of receiving the remainder, he would not have accepted such part performance.

[1] 9 B. & C. 386.

[2] Champlin *v.* Rowley, 18 Wend. 187; Catlin *v.* Tobias, 26 N. Y. 217

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In Shipton *v.* Casson [1] it was held that if one who has a right to return goods delivered in part performance of a contract elects to retain the goods so delivered, he cannot defeat an action to recover the value of the goods by relying upon the plaintiff's failure to perform fully.

The liability of the defendant in Oxendale *v.* Wetherell, as in Shipton *v.* Casson, seemed to turn upon his retention of the property. But to reconcile the cases, from this point of view, with the English authorities denying a plaintiff a right of recovery who has failed to entitle himself to a recovery under a contract, it must be assumed that the goods were still in the possession of or under the control of the defendant, and could therefore be returned. If the goods could not be returned, then the cases are not distinguishable from the case where a defendant has received services for which it is held he need not pay because of the plaintiff's breach of condition,[2] or the case where the plaintiff has repaired the defendant's house, or built upon the defendant's land, under a contract which he cannot enforce because of his default,[3] and where it is held that he cannot recover for value received.

If it be assumed that the ground of the defendant's liability is the fact that he is able to but will not return the goods, such a distinction seems to be questionable. That which the defendant received under the contract became his at the time when it was received. The plaintiff clearly cannot by a breach of his contract re-acquire title thereto, and the fact that the defendant is able to return it does not make the benefit which the defendant has received any greater than if he had used it. If the defendant has used it, and is not therefore in a position to return it, he is to that extent clearly enriched at the expense of the plaintiff; and yet he is not required to

[1] 5 B. & C. 378.

[2] Turner *v.* Robinson, 5 B. & Ad. 789.

[3] Munro *v.* Butt, 8 E. & B. 738; Ellis *v.* Hamlen, 3 Taunt. 52.

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make him compensation therefor. It would seem to be no more inequitable for him to keep without compensation that which is *in esse* but which belongs to him, than to refuse to make compensation for that which is not *in esse* but of which he has received the full benefit.

In Bowker *v.* Hoyt[1] it appeared that subsequently to a delivery of corn by the plaintiff to the defendant, a dispute arose as to the quantity which the plaintiff had contracted to sell. The plaintiff, who had delivered 410 bushels, contended that he had contracted to deliver 500 bushels only, and offered to complete the delivery of that quantity. The defendant claimed that he was entitled to the delivery of 1000 bushels, and refused to receive any more unless the plaintiff would deliver that quantity. It was held that the acceptance of the 410 bushels of corn was a severance of the entirety of the contract, and that as the sale was a cash transaction, creating an immediate liability, from which the defendant could not be released by any subsequent default of the plaintiff, the plaintiff was entitled to recover. If the plaintiff delivered the corn thinking that his contract only required him to deliver ninety more bushels, and the circumstances were such that the defendant could not demand a further delivery, the case would seem to be correctly decided. But if it is to be regarded as the ordinary case of a vendor in wilful default, it is submitted that the decision is inconsistent with the Massachusetts decisions hereinbefore referred to,[2] holding that a plaintiff in wilful default cannot recover on a *quantum meruit*.

Right of a plaintiff refusing to perform a contract which the defendant could not have performed.

In the cases heretofore considered, while the plaintiff has been in default, the defendant has been ready, able, and willing to perform his side of the contract. It remains to consider the right of a plaintiff who, having wilfully refused to perform

[1] 18 Pick. 555.

[2] See *supra*, p. 215. See also Witherow *v.* Witherow, 16 Oh. 238. Champlin *v.* Rowley, 18 Wend. 187; Catlin *v.* Tobias, 26 N. Y. 217;

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a contract, afterwards discovers that had he been willing to perform he would have been under no obligation to do so because of the defendant's inability to perform.

In Soper *v.* Arnold [1] the plaintiff sought to recover a deposit of money made by him under a contract for the purchase of real estate. The plaintiff had accepted the title offered by the defendant, and the money paid by him was by the terms of the contract forfeited because of his failure to complete the purchase within the time stated. After the abandonment of the contract by the parties it was discovered that the defendant could not have transferred a title to the plaintiff. It was held that the plaintiff could not recover the money so paid. Cotton, L. J., said: —

"The case is not one where the contract is still *in fieri*, and the vendor or the purchaser is insisting on specific performance; but one where the vendors had, in consequence of the default of the purchaser, put an end to the contract as far as they could, and claimed to retain the deposit. Under those circumstances the purchaser is in the position of a man who has repudiated his contract. . . .

"Then it is said that here, even if there had been a completion by conveyance to the plaintiff, he ought, on afterwards discovering the badness of the title, to get the money back again. Cases were quoted to show that the rule *ignorantia juris quod quisque tenetur scire neminem excusat* does not apply to a case like the present. Assuming that to be so, where is there an authority that after the conveyance taken and the money paid, the purchaser who has taken the conveyance and accepted the title can, merely because he afterwards finds out in consequence of his being ejected that the title is a bad one, recover the purchase money? In my opinion that is not the law. What is the use of covenants for title, and what is the use of limiting covenants for title, if whenever any purchaser who has taken a conveyance is ejected he can come to the vendor and say, 'Take back the estate for what it is worth and give me back my money'?"

The soundness of this decision seems to depend upon the form of conveyance that the plaintiff had a right to demand

[1] 37 Ch. D. 96.

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under the contract. If the defendant could have performed his contract by giving a quit-claim deed, then the contract was in fact not a contract for the purchase of a title to real estate, but a contract for the purchase of the interest, if any, of the defendant; and, therefore, since the plaintiff could not, after the execution of the deed, have recovered the money because of the failure of title, he should not have been allowed to recover the money where, because of his own default, the deed was not executed.

If, however, the plaintiff had a right under the contract to call for a deed with covenants, which would have entitled him to indemnity, in the event of a failure of title on the part of the defendant, then since the loss would have fallen upon the defendant had he executed the deed, the plaintiff should have been allowed to recover that which could have been recovered had the plaintiff paid to the defendant the remainder of the purchase money and taken a deed of conveyance.

The real reason why a plaintiff who is in default under a contract cannot recover money paid thereunder is, that it is because of his default that he has not received from the defendant the subject-matter of the contract. But if it be assumed that the contract on the part of the defendant is to convey a title, and that the plaintiff could have refused to perform the contract on his part had he known the facts, then it cannot be said, even though he is in default, that his failure to obtain performance of the contract is a consequence of his default. To allow a defendant in such circumstances to retain the purchase money that has been paid, is to allow him to profit because of the plaintiff's ignorance of his right to refuse to perform.

It is held in many jurisdictions,[1] though there is a conflict

[1] Dermott *v.* Jones, 2 Wall. 1 (*semble*); Beha *v.* Ottenberg, 6 D. C. 348; Blakeslee *v.* Holt, 42 Conn. 226; Pinches *v.* Swedish Lutheran Church, 55 Conn. 183; White *v.* Oliver, 36 Me. 92; Hayward *v.* Leonard, 7 Pick. 181; Blood *v.* Wilson, 141 Mass. 25; Atkins *v.* Barn-

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of authority,[1] that a party who has endeavored in good faith to perform a contract can recover on a *quantum meruit* for the benefits conferred by a part performance, notwithstanding his inability to recover on the contract itself because of his failure to perform the conditions thereof. Right of a plaintiff unintentionally in default.

In this class of cases, as in the cases where the breach of condition has been wilful, the courts that have adopted this rule have drawn apparently no distinction between true conditions and conditions implied in law. Where the conditions are expressed or implied in fact it seems difficult in many cases to allow a recovery, since the condition was inserted to secure performance by the plaintiff, where performance is possible, and not simply to guard against a wilful breach of contract. Where the condition is not expressed, but implied in law, if the equitable nature of the condition were recognized a court could, consistently with a denial of the right of the plaintiff to recover in the case of the express condition, allow a recovery in the case of the condition implied in law. To allow a recovery in such cases is equitable, and not against public policy, as the burden is on the plaintiff to show that the breach was not wilful, and that he endeavored in good faith to perform the contract.[2]

SECTION II.

WHERE THE PLAINTIFF RELIES UPON THE STATUTE OF FRAUDS.

In considering the rights of a plaintiff who has wilfully refused to perform a contract, relying upon the statute of Effect of statute of frauds upon contracts.

stable, 97 Mass. 428; Gove *v.* Island City Co., 19 Ore. 363; Parker *v.* Steed, 1 Lea, 206; Bragg *v.* Bradford, 33 Vt. 35; Taylor *v.* Williams, 6 Wis. 363.

[1] Ellis *v.* Hamlen, 3 Taunt. 52; Munro *v.* Butt, 8 E. & B. 738; Bozarth *v.* Dudley, 44 N. J. L. 304 (*semble*); Champlin *v.* Rowley, 18 Wend. 187; Catlin *v.* Tobias, 26 N. Y. 217.

[2] See, as to measure of recovery in cases under this section, *infra*, p. 313, n. 2.

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frauds, it will be assumed that but for the statute he would have no right to recover compensation for the benefit conferred upon the defendant by his part performance. It is important in this connection to consider the effect of the statute of frauds.

There are three views taken by the courts as to the effect of a failure to comply with the statute of frauds:

1. That the statute affects not the contract, but simply the remedy for a breach thereof;[1]

2. That the effect thereof is to make the contract a nullity;[2]

3. That the effect thereof is to enable either party to rescind the contract.[3]

It is nowhere contended that the contract is illegal because of the failure to comply with the statute of frauds. There is, therefore, no objection in law to either or both parties performing the contract.

Generally a plaintiff in default has no rights in quasi-contract.

Either party being at liberty to perform the contract, and it not being the policy of the statute to discourage the performance of such contracts, it is generally held that there can be no recovery against a defendant not in default for benefits received. Thus it is held that money paid in performance in whole or in part of an oral contract for the purchase of land, cannot be recovered if the vendor is willing to convey the property on the performance of the conditions by the plaintiff.[4]

[1] Leroux *v.* Brown, 12 C. B. 801; Kleeman *v.* Collins, 9 Bush. 460. Townsend *v.* Hargraves, 118 Mass. 325.

[2] Wilkinson *v.* Heavenrich, 58 Mich. 574; Crawford *v.* Parsons, 18 N. H. 293; Koch *v.* Williams, 82 Wis. 186.

[3] Winters *v.* Elliott, 1 Lea, 676; Brakefield *v.* Anderson, 87 Tenn. 206 (*semble*).

[4] Thomas *v.* Brown, 1 Q. B. D. 714; Hoskins *v.* Mitcheson, 14 U. C. Q. B. 551; Mitchell *v.* McNab, 1 Ill. App. 297, Gray *v.* Gray, 2 J. J. M. 21; Plummer *v.* Bucknam, 55 Me. 105; Sennett *v.* Shehan, 27 Minn. 328; McKinney *v.* Harvie, 38 Minn. 18; Lane *v.* Shackford, 5 N. H. 130; Ketchum *v.* Evertson, 13 Johns. 359; Abbott *v.* Draper, 4 Den. 51; Collier *v.* Coates, 17 Barb. 471. See, however, *infra*, pp. 236-240.

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In Collier *v.* Coates[1] the reason for reaching this result was thus stated by Johnson, J.: —

"The contract here upon which the money was paid, although it was so far void that the law would lend no aid in enforcing it, was not contrary to law. It was neither immoral nor illegal. It was one which the parties had a right to make and carry out. There was no fraud or mistake. The money was voluntarily paid by the plaintiff upon a promise made by the defendant. The former knew at the time he could not oblige the latter to perform, but which promise, nevertheless, he agreed to accept as a sufficient consideration for the money. The money was not received by the defendant as a loan but as a payment. It was not received for the plaintiff's use, and as long as the defendant is willing to do what he agrees to do in consideration of the payment, the law will not presume any promise to repay it, but will leave the parties to stand where they voluntarily placed themselves by their arrangement until the defendant refuses to carry it out."

For the same reason one who has refused to execute a conveyance of premises cannot recover for use and occupation against the vendee, who has occupied the same under an oral agreement for the purchase thereof, and who was ready to perform the contract.[2]

For the same reason it is held that one who has paid money or rendered services under a contract, not to be performed within a year, and who refuses to perform further on his side because of the statute of frauds, cannot recover for the benefit conferred upon a defendant who is not in default.[3]

In Philbrook *v.* Belknap,[4] Phelps, J., delivering the opinion of the court, said: —

"It is argued, however, that the contract is void, by force of the statute of frauds. Admitting that this contract is within the term

[1] 17 Barb. 471.

[2] Greton *v.* Smith, 33 N. Y. 245.

[3] Clark *v* Terry, 25 Conn. 395, Kriger *v.* Leppel, 42 Minn 6; Lockwood *v.* Barnes, 3 Hill, 128; Galvin *v.* Prentice, 45 N. Y. 162; Abbott *v.* Inskip, 29 Oh. St. 59; Philbrook *v.* Belknap, 6 Vt. 383.

[4] 6 Vt. 383.

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of the statute, yet it may be well to inquire, what is the effect of the statute upon it? Although it is common to speak of a contract as void by the statute of frauds, yet, strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it to enforce it. The statute provides that no action shall be sustained upon certain contracts unless they are evidenced by writing. It operates therefore upon the contract only while it is executory. It does not make the performance of such a contract unlawful; but if the parties choose to perform it, the contract remains in full force notwithstanding the statute, so far as relates to the legal effect and consequences of what has been done under it. . . . This very case affords an illustration of the effect of the statute. If the defendant had sued the plaintiff for not performing the contract, in not serving the full period, the case would be open to a defence under that statute; the contract being to the purposes of such a suit executory, and the attempt being to sustain an action on it as such. But in this case the contract, so far as the service has been performed, is executed and is relied on as regulating and determining the right of the plaintiff to compensation for what has been done under it. We are here concerned only with what has been done. The question is what the plaintiff is entitled to for his labor; and this depends upon the terms of the contract under which he performed the service. Had the whole service been performed, the rate of compensation would, without doubt, be regulated by the terms of the contract. No court would discard the contract and resort to a *quantum meruit*. The principle is the same as to a performance in part. The defendant may be without remedy for the desertion of the plaintiff, but he may certainly protect himself as to what has been done."

In King *v.* Welcome[1] the plaintiff, who had contracted to serve the defendant for a year from a future date, and who left the defendant's employ during the year without cause, was allowed to recover against the defendant to the extent of the benefit conferred upon the defendant by part performance. The court admitted that the case was not within the letter of the statute, the statute enacting that "no action shall

[1] 5 Gray, 41. See, to same effect, Bernier *v.* Cabot Mfg. Co., 71 Me. 506.

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be brought unless the promise, contract, or agreement upon which such action is brought shall be in writing, signed by the party to be charged therewith;" but contended that if the plaintiff were not allowed to recover, the defendant was in fact "charging the plaintiff therewith."

It is submitted that the defendant in such a case is not "charging the plaintiff therewith" within the spirit even of the statute, it not being possible to charge one with an agreement within either the letter or the spirit of the statute, unless a judgment be given for a plaintiff against a defendant pleading the statute of frauds. The statute says that no action shall be brought on the contract to charge one therewith. The statute was intended to prevent actions being brought upon certain agreements, the phrase, "to charge therewith," meaning that one should not be liable for the breach of such an agreement. But it is one thing to hold one liable for the breach of a contract, and quite another to confer rights on him, notwithstanding his failure to perform the contract. It often, for example, happens that the law, because of the impossibility of the performance of a contract, excuses the non-performance thereof, and relieves a party from any liability for a breach thereof, where it refuses because he has not performed the conditions of a contract to allow him to sue thereon. It does not seem to have occurred to the courts that in defeating a recovery by him, they were charging him with a performance of the contract. Thus, in Poussard *v.* Spiers,[1] where a recovery was denied the plaintiff, notwithstanding his failure to perform the conditions of the contract was caused by illness, Blackburn, J., distinguished between a liability for a breach of contract and a right of action thereon. He said: —

"This inability having been occasioned by sickness, was not any breach of contract by the plaintiff, and no action can lie against him for the failure thus occasioned. But the damage to the defend-

[1] 1 Q. B. D. 410.

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ants and consequent failure of consideration is just as much as if it had been occasioned by the plaintiff's fault, instead of by his wife's misfortune. The analogy is complete between this case and that of a charter party in ordinary terms, where a ship is to proceed in ballast (the act of God, etc., excepted), to a port and there unload a cargo. If the delay is occasioned by expected perils, the ship-owner (plaintiff) is excused; but if it is so great as to go to the root of the matter, it frees the charterer (defendant) from his obligation to furnish a cargo."

In King *v.* Welcome, it was not the defendant but the plaintiff who relied upon the statute of frauds. The statute being intended, however, to afford a defence where one is sued for a breach of contract, should be used as a shield and not as a sword. It is a strange result to reach that a statute enacted to give a defence, where but for the statute the party would be liable for breach of contract, not only gives a defence, but also confers upon the party guilty of a breach of contract a right against the party not in default.

If the defendant, in the absence of the statute, as is generally held, is doing nothing inequitable in refusing to compensate a plaintiff for a part performance of the contract, who wilfully refuses to perform the conditions thereof, it seems difficult to see upon what principles such a plaintiff can charge the defendant, by simply showing that although he broke his contract he cannot be sued therefor.

Indeed, the concessions made by the court in King *v.* Welcome furnish the strongest possible argument against the decision. The court admits that if the plaintiff instead of rendering services had paid the purchase money under an oral contract for the purchase of land, he could not recover back his money if the defendant stood ready to convey the land. Thomas, J., delivering the opinion of the court, said: —

"So where money has been paid upon a parol contract for the sale of the land, it cannot be recovered back if the vendor is willing to fulfil the contract on his part. This was settled in the recent case of

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Coughlin *v.* Knowles (7 Met. 57), a case which certainly resembles the one at bar, but which may be clearly distinguished from it. That action rests upon an implied assumpsit. The implied promise arises only upon failure of the consideration upon which the money was paid. The plaintiff fails to show any failure of consideration. He shows money paid under a contract not void, and which the defendant is ready to perform. . . .

"In the case of the money paid upon a contract for a sale of land, the action fails because no failure is shown of the consideration from which the implied promise springs.

"In the case at bar the defendant fails because the contract upon which the defendant relies is not evidenced as the statute requires for its verification and enforcement. For it is the whole contract of which the defendant seeks to avail himself. His defence is not that as to so much as is executed, as to so much time as the plaintiff has labored, he labored under the contract, and the price stipulated is to govern. But he relies upon the contract not only so far as executed, but so far as it is still executory. He seeks first to establish the parol agreement as a valid subsisting contract, and then to charge the plaintiff with a breach of it."

The distinction suggested in King *v.* Welcome has led in Massachusetts to this queer result, — that one who refuses to perform an oral contract to which the statute of frauds applies, is more favored by the courts than one who performs such a contract. Thus in Riley *v.* Williams[1] it was held that the plaintiff, who had performed a contract not enforceable because of the statute of frauds, could not recover on a *quantum meruit*, the defendant being ready and willing to pay in land and labor according to the terms of the contract. In other words, the court disregards the terms of the contract in favor of a party only partly performing it, but enforces the terms thereof against one fully performing.

A distinction leading to such a questionable result should be carefully considered before it is accepted.

The statute of frauds aside, the case where a plaintiff seeks to recover money paid under a contract of which the

[1] 123 Mass. 506.

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defendant tenders full performance, or the case where a plaintiff seeks to recover on a *quantum meruit* for work done under a contract for which the defendant offers to pay according to the terms of the contract is quite distinguishable from King *v.* Welcome. In King *v.* Welcome, the defendant, while willing to perform his contract, was not willing to pay the plaintiff for what he had received from the plaintiff in part performance thereof; whereas, in the cases suggested, the curious spectacle is presented of a plaintiff complaining of a defendant who is ready to give what the plaintiff agreed to accept as an equivalent of, and in exchange for, that which the defendant received.

But however extraordinary such a claim may be, it is a claim which should be allowed under the statute of frauds, as that statute is treated in King *v.* Welcome.

Of course, but for the statute of frauds, it would be held the world over that a defendant who tenders to the plaintiff what the plaintiff contracted for, and who has not performed his contract simply because the plaintiff would not allow him to perform it, cannot be charged by the plaintiff in entire disgard of the terms of the contract. But since no distinction is made in Massachusetts, in the absence of the statute of frauds, between such cases and cases like King *v.* Welcome, if a different result is reached because of the statute of frauds, it must be for the reason that to defeat the plaintiff in the one case would be to charge him with the statute of frauds, while defeating him in the other case does not so charge him.

It is submitted that when it is held that the statute applies to cases other than where one seeks to recover on the contract for a breach thereof, the real suggestion is that you are compelling a party who, because of the statute of frauds, is not liable for a breach of contract, to perform the contract as if the statute of frauds did not apply, under the penalty of losing what he has performed thereunder if he repudiates it. In this sense the plaintiff, in the case where the court refuses

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to allow him to recover the purchase money, which he has paid in performance of an oral contract for the purchase and sale of property, the vendor being ready and willing to convey, is charged equally, as is the plaintiff in the case where you refuse to allow him to recover for services rendered. In neither case can it be properly said that the plaintiff is charged with the contract. But in both cases the fact of refusing to allow him rights in violation of the terms of the contract, is to compel him, in order to avoid a loss, to treat the contract as if the statute of frauds had no application. And when the court holds, as it did in Riley *v.* Williams,[1] that one who has fully performed his side of the contract cannot recover except according to the terms thereof, the effect is certainly to compel him, if he wishes to avoid a loss, to treat the contract as if the statute of frauds did not apply. So far as the statute of frauds is concerned it is submitted that the same question is presented in the three cases, and that the cases should have been decided without regard to the statute of frauds.

Effect of holding that statute of frauds renders contract void.

If it be assumed that the statute, while not rendering the contract illegal, does render it void, still it would seem that the plaintiff should not be allowed to recover against a defendant not in default. While under this interpretation of the statute there cannot be said to be a contract existing between the parties, it can be said that so long as the defendant stands ready to compensate the plaintiff in the only event in which the plaintiff expected compensation, — namely, in the event of the plaintiff doing certain things, — there can be no failure of consideration.

In such a case the defendant seeks to defeat a recovery by the plaintiff, not because of a contract existing between them, but because that which was given to him, it was understood, should not be paid for, except in a certain event; and, therefore, to allow a recovery would be to defeat the intention of the parties as expressed between them. If the contract between the parties is void, then if the statute declaring the contract

[1] 123 Mass. 506.

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a nullity does not in terms direct or authorize a recovery for benefits conferred under such a contract, a court is at liberty to deal with the question on purely equitable principles.

In some jurisdictions, however,[1] it has been held that if a contract is to be regarded as void under the statute of frauds, a plaintiff should be allowed to recover in quasi-contract in disregard of the terms of the contract.

In Koch *v.* Williams[2] the court went so far as to hold that a plaintiff who had entirely performed an oral contract whereby it was agreed that for the services rendered thereunder by him, the defendant should convey to him certain land, could refuse to accept a conveyance of the land and recover the value of his services on a *quantum meruit.*

As the statute conferred no rights upon the plaintiff, and as the defendant stood ready to give to the plaintiff all that the one expected to receive or the other to give in exchange for the services, it is submitted that there is no principle of law or equity either requiring or justifying the result reached in this case.

Recovery of money given as security for the performance of a contract.

Within the principle heretofore referred to,[3] money received by a defendant under a contract, unenforceable because of the statute of frauds, not in performance of the contract, but as security for its performance, should be recoverable by a plaintiff refusing to perform.

Effect of holding that statute of frauds gives a right of rescission.

Where the statute of frauds is regarded as giving either party a right to rescind a contract, a party exercising such right should be allowed to recover money paid or other benefits conferred thereunder,[4] since the right of rescission implies the right to demand restitution.

[1] Swift *v.* Swift, 46 Cal. 266; Scott *v.* Bush, 26 Mich. 418, 29 Mich. 523; Crawford *v.* Parsons, 18 N. H. 293; Koch *v.* Williams, 82 Wis. 186.

[2] 82 Wis. 186. See also Scotten *v.* Brown, 4 Harr. 324.

[3] *Supra*, p. 217. See, also, Scott *v.* Bush, 29 Mich. 523.

[4] Winters *v.* Elliott, 1 Lea, 676, Brakefield *v.* Anderson, 87 Tenn. 206 (*semble*). As to the measure of recovery in cases under this section, see *infra*, p. 313, n. 2.

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SECTION III.

PERFORMANCE BY PLAINTIFF IMPOSSIBLE.

Assuming a plaintiff's failure to perform a condition necessary to entitle him to recover on the contract to be due to the fact that the performance of the condition was impossible, and that such impossibility excuses a breach of contract on his part in the event of his having promised to perform, the question arises as to the obligation of the defendant to make compensation to the plaintiff to the extent that he has been benefited by a part performance of the contract.

Distinction between conditions express and implied in fact

Before considering this question, however, it is important to consider the reason why the plaintiff should not be allowed to recover on the contract itself; and the consideration of this question involves the consideration of the subject of conditions in contracts. The conditions which the plaintiff has failed to perform may have been inserted by the parties themselves, or may have been imposed by law upon the plaintiff in favor of the defendant, the defendant having failed to protect himself by the insertion of a condition exempting him against liability in the event which has happened. If the condition was inserted by the defendant, it is either an express condition or one implied in fact, — an express condition, if it is found in the language used by the parties; a condition implied in fact, if it is to be gathered from the circumstances of the transaction, not that such would have been the defendant's intention, had the contingency been present to his mind, but that although the defendant has not expressed his intention in words, a reasonable interpretation of the contract in the light of surrounding circumstances, requires the court to say that the parties had in mind the event which has happened, and did regard as a condition of the contract that which is now insisted upon as such.

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Distinction between genuine conditions and conditions implied in law.

If the court is unable to say that this contingency was present to the minds of the parties, and can only say that, had this contingency been present to their minds, the parties would have provided for it by inserting a condition in favor of the defendant, then in truth there is no real or true condition; but the defendant having failed to protect himself by the terms of his contract, the court raises a bar to a recovery by the plaintiff, because it would be inequitable for the plaintiff to sue the defendant.

Importance of distinguishing as to the nature of a condition.

The consideration of the question of whether in a given case a plaintiff seeking to recover on a contract has been guilty of a breach of a condition thereof, may involve, therefore, a consideration of principles of law differing entirely in their nature, depending upon whether the condition was created by the parties or was simply a creature of the law. But in either case the object sought to be accomplished by the condition should be ascertained, and having been ascertained, the question should be asked, would the recovery by the plaintiff in quasi-contract defeat the object for which the conditions were inserted? To allow a plaintiff who has failed to perform a condition expressed, or implied in fact, to recover on the contract, would be to convert a conditional promise into an absolute promise; for if a recovery is to be had upon a contract, a recovery must be had upon the promise which was made, and the only promise which was made was *ex concessu* a conditional promise. But a court can never regard a conditional promise as an absolute promise unless the defendant has waived the condition and is therefore not in a position to avail himself of it as a defence. This is true even though the parties would have, had the event which has happened been present to their minds, made provision in the contract by which the plaintiff would have been given contract rights. The fact that the parties would have provided for the contingency in question had it been present to their minds, does not establish that they did provide for it, and therefore does not

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establish that the defendant has made a promise other than the conditional promise found in the contract.

The plaintiff cannot therefore recover on the contract, because he has not performed, and the defendant has not waived, the condition thereof. But if the plaintiff is seeking to recover, not on the contract, but in quasi-contract, the question should be, assuming a recovery to be equitable, would it violate any principle of public policy, or violate the intention which the parties had when the contract was entered into, to allow a recovery? If a recovery would be against public policy, or would defeat the intention of the parties, then, of course, there should be no recovery in quasi-contract. But if it is found that, though there cannot be a recovery on the contract, for the reasons stated, yet a recovery in quasi-contract will not violate the intention entertained by the parties when the contract was made, a recovery should, if the principles of equity and justice require it, be allowed in quasi-contract. An inquiry therefore should be instituted in every case as to why the condition was inserted by the parties, because it is only by ascertaining the object for which the condition was inserted, that one can ascertain whether a recovery in quasi-contract would violate the intention which the parties had at the time when the contract was made.

In the case of conditions implied in law, however, as the condition is imposed by law upon the plaintiff in favor of the defendant on equitable principles, the court is not trammelled by the intention of the parties to the contract. Why should not the law therefore impose an equitable obligation upon the defendant in favor of the plaintiff? To say that a plaintiff who has not performed his contract should not recover against the defendant as if he, the plaintiff, had in fact performed it, is far from saying that a plaintiff should have no rights whatever.

Neither in England nor in the United States, in considering the plaintiff's right to sue in quasi-contract, has there been any

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distinction taken between true conditions and conditions implied in law; nor has there been in England any consideration apparently given to the question of why the express condition was inserted in the contract, the English courts apparently holding that if the plaintiff cannot recover on the contract because of a failure to perform a condition, it necessarily follows that he has no rights in quasi-contract. While in the United States there has been no distinction taken between express conditions and conditions implied in law, still the American courts seem to have considered in some cases the object to secure which the condition was inserted, allowing a recovery in quasi-contract if a recovery is consistent with that object.

Right of recovery where full performance is prevented by sickness, death, or law.

Accordingly, it is held in this country that where a contract is not fully completed because of sickness or death there can be a recovery in quasi-contract for the benefits conferred by part performance.[1] On the same principle, if complete performance is prevented by law a recovery is allowed for benefits conferred by part performance.[2] It has been held, however, that there can be no recovery where the sickness should have been foreseen.[3]

Cutter *v.* Powell[4] is usually cited as establishing the proposition in English law that a plaintiff failing to perform a condition because of impossibility has no rights in quasi-contract. Though the doctrine is established by other English cases, that point was not involved in the decision there rendered. In Cutter *v.* Powell the plaintiff's intestate had shipped with the defendant as second mate from Jamaica to Liverpool, under a contract by which the defendant contracted to pay him thirty guineas on the arrival of the vessel at Liverpool, the intestate performing the duties of second mate from

[1] Lakeman *v.* Pollard, 43 Me. 463; Wolfe *v.* Howes, 20 N. Y. 197; Green *v.* Gilbert, 21 Wis. 395. See, also, Ryan *v.* Dayton, 25 Conn. 188.

[2] Jones *v.* Judd, 4 Comst. 412.

[3] Jennings *v.* Lyons, 39 Wis. 553.

[4] 6 T. R. 320.

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Jamaica to Liverpool. The intestate having died on the voyage before reaching Liverpool, the defendant refused to make any compensation for the services rendered by the intestate as second mate, and it was held that the plaintiff could not recover. The case, however, was put distinctly on the ground that it was the understanding of the parties that the intestate was to receive no compensation unless he completed the entire voyage, and that in consideration of the risk assumed by him his compensation in the event of his completing the voyage was to be larger than it would have been but for this understanding. Lord Kenyon said in his opinion: —

"But it seems to me at present that the decision of this case may proceed on the particular words of this contract, and the precise facts here stated, without touching marine contracts in general; that where the parties have come to an express contract, none can be implied. Here the defendant expressly promised to pay the intestate thirty guineas, provided he proceeded, continued, and did his duties as second mate in the ship from Jamaica to Liverpool; and the accompanying circumstances disclosed in the case are, that the common rate of wages is four pounds per month, when the party is paid in proportion to the time he serves; and that this voyage is generally performed in two months. . . . He stipulated to receive the larger sum if the whole duty were performed, and nothing unless the whole duty was performed. It was a kind of insurance."

Assuming that the facts warranted this interpretation of the contract, there should be no question as to the correctness of the decision, since from this point of view it is the ordinary case of parties competent to contract, agreeing that the plaintiff shall receive no compensation for his services except in a certain event. To say that notwithstanding such a contract the plaintiff shall be allowed to recover in disregard of the agreement, is to say that the law will give to a party rights which he has stipulated in advance he should not have, and will impose upon a defendant an obligation which it was agreed he should not assume. Such in fact seems to be the

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effect of the decision in the Manhattan Life Insurance Co. *v.* Buck.[1] In that case the plaintiff, who had taken out a life-insurance policy, was prevented because of war from paying the premium to the company. The policy taken by the plaintiff contained this clause: "That in case the assured shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured or in any part thereof, and this policy shall cease and determine." It was further provided in the policy that in every case where the policy should cease and determine, all previous payments thereon should be forfeited to the company. The court held that while there could be no recovery on the policy itself because of the condition prohibiting such a recovery, yet, as it was inequitable for the defendant to keep money received from the plaintiff without giving the plaintiff an equivalent therefor, that the plaintiff could recover from the defendant so much of the premiums paid by him as exceeded the value of the insurance he had received from the company. Mr. Justice Bradley, delivering the opinion of the court, said: —

"We are of the opinion that an action cannot be maintained for the amount assured on a policy of life insurance by payment of the premium, even though the payment was prevented by the existence of the war. The question then arises, must the insured lose all the money which has been paid for premiums on their respective policies? If they must they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush, it seems manifest that justice requires that there should be some compensation or return for the money already paid, otherwise the companies would be the gainers from their loss; and that from a cause for which neither party is to blame. . . .

"And so in the present case whilst the insurance company has a right to insist on the materiality of time in the condition of pay-

[1] 93 U. S. 24.

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ment of premiums, and to hold the contract ended by reason of non-payment, they cannot insist upon the condition, as it requires the forfeiture of the premiums already paid; that would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy. . . . To forfeit this excess which fairly belongs to the assured and is fairly due from the company, and which the latter actually has in its coffers, and to do this for a cause beyond individual control, would be rank injustice. It would be taking away from the assured that which had become substantially his property. It would be contrary to the maxim that no one shall be made rich by making another poor."

Now it is submitted that no distinction can be drawn between Cutter *v.* Powell and the Manhattan Life Insurance Co. *v.* Buck. In each case there was an express condition to the effect that in the event in question the plaintiff should have no claim upon the defendant; in each case it is conceded that the plaintiff had no rights against the defendant on the contract itself. But by the terms of the contract, which provided that the plaintiff should have no rights on the contract in the event which has happened, it was distinctly stated in the case of Manhattan Life Insurance Co. *v.* Buck *that the plaintiff was to have no rights of any kind against the defendant.* If, then, the case of the Manhattan Life Insurance Co. *v.* Buck is to be supported, it must be put upon the ground that the court will relieve against a forfeiture, and will therefore disregard a clause of the kind found in the policy. But if the court will disregard such a clause in favor of a plaintiff who had paid money, the same court should certainly disregard the clause in favor of a plaintiff who has rendered services, since in the one case as much as in the other the defendant has received from the plaintiff that for which he has not given the plaintiff an equivalent. In each case the relation, if any, the defendant bears to the plaintiff, by virtue of which the plaintiff has a

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claim against the defendant, must be that of an equitable debtor, and not that of a trustee, for in neither case has the defendant anything belonging to the plaintiff. This, of course, is clear in a case like Cutter *v.* Powell, where the basis of the plaintiff's claim is the service rendered by the plaintiff for the defendant; but it is equally true in a case where a plaintiff has paid money to a defendant in performance of a contract. The moment the money is paid to the defendant the money ceases to be the plaintiff's, and becomes the property of the defendant. It is a figure of speech then to say that the defendant has in his possession money belonging to the plaintiff. He has in each case received value from the plaintiff, and if in the event which has happened he is required in the one case to return an equivalent, he should be required to do so in the other. If he is not required to do so in the one case, he should not be required to do so in the other. The only way in which relief can be given in either case is to say that a court will in such a case impose an obligation in favor of the plaintiff, notwithstanding the fact that the plaintiff agreed that unless he, the plaintiff, did certain things, which it is conceded he has not done, the defendant should be under no obligation in any form of action.

It is true that a court of law in laying down such a rule would be doing no more than the court of equity did in relieving a mortgagor from the effect of a failure to perform the condition of the mortgage. It is fair to assume, however, that the courts of law are not prepared to take this step.

Non-performance of a condition should not necessarily even in the absence of waiver preclude a recovery in quasi-contract.

While it seems difficult to support on principle the decision in the Manhattan Life Insurance Co. *v.* Buck, for the reason that the court confers upon the plaintiff a right which by the agreement of the parties it was understood that he should not have, still the English decisions seem to have gone to the other extreme in holding that the finding of a condition necessarily precludes the plaintiff from suing in quasi-contract.

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Thus it was held in Appleby *v.* Dodds [1] that a vessel on which a seaman shipped having been lost on her return voyage, the plaintiff, who had assisted in navigating the vessel from the time of her departure from the home port until her loss, could not recover for services rendered to the time of the loss, for the reason that it was stipulated in the contract that no wages should be payable until the vessel had reached her home port. Lord Ellenborough, C. J., said: —

"And though the reason of this stipulation was no doubt to oblige the mariner to return home with the ship and not to desert her in the West Indies, yet the terms of it are general and include the present case; and we cannot say against the express contract of the parties that the seaman shall recover *pro rata*, although the ship did not reach her port of discharge named."

It is submitted that this decision is not to be supported. The reason why the law will not impose an obligation in violation of the terms of a contract is, that when a party has agreed to the terms of a contract, the court has no right to impose obligations upon the defendant which not only the defendant but the plaintiff has said should not be created. But where it can be shown, as was assumed by Lord Ellenborough in Appleby *v.* Dodds, that the object of inserting the condition was to guard against a contingency other than that which has happened, there does not appear to be any reason why a court should not impose an obligation on the defendant to compensate the plaintiff for value received, notwithstanding the fact that the plaintiff cannot recover on the contract. To have allowed the plaintiff in Appleby *v.* Dodds to recover on the contract itself would have been equivalent to saying that a defendant who in fact had only promised to pay the plaintiff a sum of money on the arrival of a vessel in London had promised to pay though the vessel did not arrive. But as neither the plaintiff nor the defendant ever intended that the plaintiff should give to the defendant the services which he had

[1] 8 East. 300.

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rendered, if without any fault on the part of the plaintiff the vessel did not reach the port of London, it would seem that the existence of the contract should not have prevented a recovery in quasi-contract. While the terms of the contract did not establish an intention to make compensation in the event that happened, neither did they establish an intention that no compensation should be made. The court, it is submitted, was at liberty therefore to deal with the question upon equitable principles.

But the question may arise as to whether you can introduce evidence to show that a condition inserted in a contract was inserted to meet a contingency which has not arisen. Whether this evidence should be allowed or not would seem to depend upon the purpose for which it is offered. If it is offered for the purpose of varying the terms of a contract, and to enable the plaintiff to recover on the contract itself, the evidence should not be admitted, for the reason that it would convert what is in form a conditional promise into an absolute promise. But when the plaintiff concedes that the promise is a conditional promise, and that therefore he cannot recover upon that promise, and offers the evidence, not for the purpose of claiming rights under the contract, but for the purpose of showing that a recovery by him would not violate any intention that existed in the mind of either himself or the defendant at the time when the contract was made, such evidence it is submitted is not open to the objection of varying a written instrument by parol evidence. The contract between the plaintiff and the defendant is conceded by the plaintiff to be just what it was before he introduced the evidence, namely, a conditional contract, and it is the fact that he admits the promise to be conditional that compels him to sue in quasi-contract, and not on the contract itself.

Had this principle been recognized, a different result might have been reached in a line of decisions which have produced great hardship. While the fact that a hardship results from

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a given decision should not be taken as conclusive, or even as evidence in itself of its unsoundness, still a decision violating the commonly accepted ideas of justice and honesty should never be reached until all possible grounds of decision have been examined.

It is held that a plaintiff who undertakes the carriage of goods, the freight to be paid on the right delivery thereof, is not entitled, the vessel being lost or the voyage becoming impossible of performance by some *vis major*, to freight *pro rata*, unless it can be shown that the plaintiff would have completed the carriage of the goods, had not the defendant relieved him from such obligation by taking the goods at some intermediate point. Thus in Hopper *v.* Burness,[1] the plaintiff had contracted to carry for the defendant a cargo of coals from Cadiff to Point de Galle at a freight of twenty-one shillings per ton on the delivery of the cargo at the latter place. The defendant duly shipped the cargo of coals. On her voyage the ship, becoming unseaworthy in consequence of bad weather, put into the Cape of Good Hope for repairs, and the captain, having no funds with which to make the repairs, sold in the exercise of the right conferred upon him by maritime law a portion of the defendant's cargo of coals, and with the proceeds repaired the vessel, treating the proceeds as a loan from the defendant to himself. The coal sold for a price in excess of that which it would have brought had it been carried to its destination. The plaintiff having repaid to the defendant the forced loan, claimed from the defendant freight *pro rata* for the goods carried as far as the Cape of Good Hope and sold there in the circumstances stated. It was held that as he had not completed the voyage as to these coals and that as the defendant had not relieved him from the performance of the voyage, he was not entitled to freight *pro rata*. Brett, J., said: —

[1] L. R. 1 C. P. D. 137.

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"The coals so sold fetched more at the Cape of Good Hope than they would have done at Point de Galle, and the suggestion is that under these circumstances the plaintiff is entitled not only to freight on the cargo actually delivered at the port of destination, but also to freight in respect to the coals sold at the Cape of Good Hope. Now it is obvious that the only freight expressed to be payable is the freight of twenty-one shillings per ton for a cargo delivered at Point de Galle, so that this freight now claimed is not the charter freight. I know not how freight can become due under such a charter as this is, in respect of goods not carried to the port of destination, otherwise than with reference to the doctrine of freight *pro rata*. It is only payable when there is a mutual agreement between the charterer and the ship-owner, whereby the latter being willing and able to carry on the cargo to the port of destination, but the former desiring to have the goods delivered to him at some intermediate port, it is agreed that they should be so delivered, and the law then implies a contract to pay freight *pro rata itineris*. Do the present circumstances come within that principle? The captain here is not willing and able to carry the coals on. It is said by Mr. Compton that the charterer has an option. I agree that he has, but I do not think that any implication of a promise to pay freight *pro rata* can be drawn from it. He has, I think, an option to treat the proceeds of the sale as a loan, or he may say, 'You have sold my goods against my will, and though by the maritime law that is not a wrongful sale, still I am entitled to and claim an indemnity against any loss occasioned by the sale.' What is there to give rise to an implication that freight *pro rata* is payable? If he thinks that the goods have fetched more at the intermediate port, then why may he not treat the transaction as a loan at once, and sue for the amount before the ship arrives at her destination?"

If the proper construction of the charter party in Hopper *v.* Burness was that the plaintiff was to have no compensation whatever unless the goods were delivered at Point de Galle, then, notwithstanding the apparent hardship involved, the plaintiff should not have recovered. Unless, however, the reason for inserting the condition in the contract required such interpretation, it is submitted that the mere existence of the condition does not justify the decision.

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No recovery unless a benefit has been conferred.

. Since in quasi-contracts the benefit received by the defendant, and not the detriment incurred by the plaintiff, is the basis of the defendant's liability, a plaintiff should not be allowed to recover from a defendant unless it be shown that the defendant has received some benefit from the part performance by the plaintiff. This fact seems to have been lost sight of by Lord Mansfield in an early case[1] in which he, contrary to the present English law, allowed a plaintiff to recover freight *pro rata itineris*, the vessel having been captured by an enemy. Lord Mansfield held that the plaintiff, who had performed $\frac{1}{2}\frac{7}{1}$ parts of a voyage when the vessel was captured, could recover freight *pro rata* from the owner, notwithstanding the fact that the freight from Biddeford — at which place there was no market for the goods, and where the vessel, which had been retaken, was abandoned by the plaintiff — to Lisbon, the point to which the goods were originally shipped, was higher than from Newfoundland, the point from which the goods were originally shipped by the defendant. Had the defendant reshipped the goods from Biddeford to Lisbon, it would have been clearly erroneous to compel him to pay the plaintiff freight *pro rata itineris*, for the reason that he could have derived no benefit from the service rendered by the plaintiff. The freight from Biddeford to Lisbon exceeded the freight which the defendant would have paid for the carriage of the goods from New foundland to Lisbon. It is true that the defendant did not ship the goods to Lisbon, but shipped them to Bilboa, Spain. But how can that fact, even assuming the freight paid by him from Biddeford to Bilboa to have been less than he would have paid for the carriage of the goods from Newfoundland to Lisbon, entitle the plaintiff to freight *pro rata itineris?* If we assume Bilboa to have been as good a market to ship to from Newfoundland as Lisbon, then the only possible benefit conferred by the plaintiff's part performance

[1] Luke *v.* Lyde, 2 Burr. 882.

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was the difference in the freight, if any, which he contracted to pay the plaintiff on the delivery of the goods in Lisbon, and the freight which he had to pay for their delivery at Bilboa.

For the same reason it seems impossible to support the decision in Cleary *v.* Sohier,[1] where the plaintiff was allowed to recover against the defendant for work and labor done under a contract to lathe and plaster a building, which was destroyed by fire without the fault of either party when the plaintiff had only put on the first coat of plaster. As the plaintiff had not completed his contract, and as the defendant was deriving no benefit from the work done by the plaintiff, the house being in the course of erection, it seems impossible to support the decision except on the theory of the New York decisions, — namely, that in such a case the defendant in fact agrees to keep the building in existence.[2] If this suggestion is sound, the plaintiff is entitled to recover not on the theory of quasi-contract, but on the theory of a special contract, and for a breach thereof, and he should recover from the defendant not simply the value received by him, but the damage done the plaintiff.

In Cleary *v.* Sohier, the court gives no reason for the conclusion reached, simply stating that the plaintiff is entitled to recover, and citing the cases of Lord *v.* Wheeler,[3] and Welles *v.* Calnan.[4] But in Welles *v.* Calnan the defendant was sued for damages because of his refusal to accept a conveyance of land, the buildings on which had been destroyed by fire after the making of the contract, and before the time for the performance thereof. And the question which the court had to consider was whether the tender of a deed of a house as well as of land was a condition to the defendant's obligation to accept the transfer, and pay the purchase money,

[1] 120 Mass. 210. See, also, Hollis *v.* Chapman, 36 Tex. 1.

[2] See *infra*, p. 256.

[3] 1 Gray, 282.

[4] 107 Mass. 514.

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and the court held that it was, and that the plaintiff, not being in a position to perform the condition, could not sue the defendant for a breach of contract. In Lord *v.* Wheeler the plaintiff sued to recover the value of repairs made by him on a house, the house having been destroyed by fire before the completion of the repairs, but after the defendant had entered into the use and occupation thereof. The court held that as the defendant had by occupying the house enjoyed the labor and materials furnished by the plaintiff, such enjoyment was a severance of the contract and an acceptance *pro tanto* by the defendant of the work done. Thomas, J., delivering the opinion of the court, said:

"It by no means follows that if the work is partially done when the casualty occurs, a party having contracted to do the entire work for a specific sum can recover for the partial performance. It may well be that both must lose, the one his labor and the other the thing on which it has been expended. And the precise ground on which the plaintiff can recover in this case is, that when the repairs upon the house were substantially done, and before the fire, the defendant by his tenant entered into and occupied it, and so used and enjoyed the labor and material of the plaintiff, and that such use and enjoyment were a severance of the contract, and an acceptance *pro tanto* by the defendant. And the instruction by the presiding judge, not as stating the abstract provisions of law without reference to the evidence, but as giving a practical rule for the guidance of the jury upon the facts before them, was correct. For the partial performance upon the facts in this case, the plaintiff might recover."

The ground therefore upon which the court decided in favor of the plaintiff in Lord *v.* Wheeler cannot be used to support the decision of the court in Cleary *v.* Sohier, since the defendant had not enjoyed the work done by the plaintiff by using and occupying the premises.

It seems, however, difficult to support the decision of Lord *v.* Wheeler upon the reasoning of the court. When the court speaks of the occupation of the house by the defendant causing

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a severance of the contract and an acceptance *pro tanto* by the defendant, the court must mean one of two things: either that by this act on his part the defendant thereby rendered himself liable to the plaintiff for the work done, even though the plaintiff had immediately ceased without cause to work upon the premises; or that the defendant must make compensation to the plaintiff for the work done, because he had enjoyed the plaintiff's labor. It would seem impossible to contend that the defendant by using his own property rendered himself liable in contract to the plaintiff, unless his user of the property was such as to prevent the plaintiff performing his contract; he was simply exercising a right incident to ownership. It would seem that a defendant, so long as he does no act to interfere with the performance by a plaintiff of his contract, and is not under a contract to surrender exclusive possession of his property while repairs are being made, should be allowed, if he is willing to undergo the inconvenience consequent upon living in a house which is being repaired, to live therein without being held to waive the conditions of the contract.

If the meaning of the court is that as the defendant has in fact received some benefit from the plaintiff's services he must pay the plaintiff therefor, then it is submitted that the measure of the plaintiff's recovery should not have been the expense incurred and the time spent by the plaintiff in doing the work, but the value received by the defendant from the work.[1]

In Niblo *v.* Binsse[2] the plaintiff, who had only partly performed a contract for the repair of a building, was allowed to recover for the reason that the defendant was under a contract to keep the building in existence. Johnson, J., delivering the opinion of the court, said: —

[1] As to the measure of recovery in cases under this section, see *infra*, p. 313, n. 2.

[2] 3 Abb. App. Dec. 375.

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"I rest the right of the plaintiff to maintain his action distinctly upon the ground that his assignor was prevented from performing his contract by the default of the other party in failing to keep on hand and in readiness the building in which the work was to be done, and that the other party was clearly in default whether the building was destroyed with or without fault on his part." [1]

In this case, the action was brought not for a breach of contract, but for the value of services rendered and materials furnished by the plaintiff; and if we assume for argument's sake the theory of the court to be correct, — namely, that the defendant contracted to keep the building in existence, — it seems difficult to support the decision. That the amount of damage suffered by the plaintiff would be at least equivalent to the market value of services rendered by the plaintiff, is no reason for saying that the defendant received a corresponding benefit; and when a defendant is sued in quasi-contract, the measure of the plaintiff's recovery should be, not the damage that the plaintiff would have recovered had he sued in *special assumpsit*, but the benefit which has been conferred by the plaintiff upon the defendant.[2] Furthermore, as has been before suggested, on the theory of Niblo *v.* Binsse, a plaintiff would be able to recover from a defendant not only an amount corresponding to the market-value of the services rendered or material furnished by him, but also any damage following as a natural result from the house having been destroyed by fire, though without fault on the defendant's part. Any profit which a plaintiff would have made had the house been kept in existence should therefore be taken into consideration, should a plaintiff, the property being destroyed, choose to avail himself of the contract made by the defendant, and seek to recover damages for a breach thereof. But

[1] See to same effect, Haynes *v.* Baptist Church, 12 Mo. App. 536; Wheelan *v.* Ansonia Clock Co., 97 N. Y. 293.

[2] See, however, Gilbert & Basher Co. *v.* Butler, 146 Mass. 82.

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in Niblo *v.* Binsse the action was not to recover damages for a breach of this contract, but to recover the value of work, labor, and material furnished. And while the theory of the court established that an actionable wrong had been done the plaintiff, it did not show the amount of benefit received by the defendant.

While these decisions must be taken as representing the American[1] as distinguished from the English law,[2] the American doctrine seems to be subject to the important limitation that to recover against a defendant who has not in fact received a benefit from the part performance, the impossibility of performance must not have been brought about by the fault of the plaintiff.[3] If in a case of the kind under consideration it should appear that the defendant had in fact received a benefit, as, for example, by insuring the property and collecting the insurance money,[4] there should be a recovery to the extent that he has thereby profited by the plaintiff's services.[5]

SECTION IV.

CONTRACT ILLEGAL.

Right of recovery based on disaffirmance of contract.

It is proposed to consider in this section the rights of a plaintiff to recover for benefits conferred by him under a contract, upon which, if the contract were legal, he could not maintain an action for the reason that the defendant is not in default, and under which he would have no rights

[1] See, however, Brumby *v.* Smith, 3 Ala. 123.

[2] Appleby *v.* Myers, L. R. 2 C. P. 651.

[3] Parker *v.* Scott, 82 Ia. 266.

[4] Cook *v.* McCabe, 53 Wis. 250.

[5] The class of cases that have been considered in the text are to be distinguished carefully from the cases where it is held that if one agrees, not to repair, but to build a house, the destruction of a house which was nearly completed will afford no defence to an action for a breach of contract in refusing to rebuild.

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if the defendant were in default, because of the illegality thereof. These cases are to be distinguished from the cases where a plaintiff seeks to recover for benefits conferred under an illegal contract which the defendant has abandoned. For while in the latter class of cases the defendant seeks to justify the act of abandonment by pleading the illegality of the contract, in the cases under consideration it is the plaintiff who seeks to justify an abandonment of the contract and brings his action in quasi-contract in disaffirmance thereof.

Importance of distinguishing between an act *malum in se*, and an act *malum prohibitum*.

The fact which renders a contract illegal may be a fact which is regarded in law as *malum in se*, or it may be a fact which but for some positive prohibition of the law would not be open to the objection of illegality, and is therefore *malum prohibitum* merely. The distinction is an important one, for the reason that, even though the plaintiff sue in disaffirmance of a contract, he is not allowed to maintain an action if the fact rendering the contract illegal is *malum in se*;[1] while if the illegality is *malum prohibitum* merely, the plaintiff can, so long as the contract remains executory, disaffirm the contract and recover money paid or property delivered thereunder.[2] That the parties are *in pari delicto* is immaterial.[3]

In White *v.* Franklin Bank,[4] it was held that while the plaintiff, who had deposited money with the defendant under

[1] Tappenden *v.* Randall, 2 B & P. 467 (*semble*); Spring Co. *v.* Knowlton, 103 U. S. 49 (*semble*); Tracy *v.* Talmage, 14 N. Y. 162 (*semble*); White *v.* Franklin Bank, 22 Pick. 181 (*semble*).

[2] Walker *v.* Chapman, Lofft, 342; Taylor *v.* Bowers, 1 Q. B. D. 291; Spring Co. *v.* Knowlton, 103 U. S. 49; White *v.* Franklin Bank, 22 Pick. 181; Morgan *v.* Beaumont, 121 Mass. 7. See, however, Knowlton *v.* Congress Spring Co., 57 N. Y. 518.

[3] Taylor *v.* Bowers, 1 Q. B. D. 291; Spring Co. *v.* Knowlton, 103 U. S. 49; White *v.* Franklin Bank, 22 Pick. 181.

Apparently in Massachusetts if the plaintiff is acting in disaffirmance, that fact of itself prevents his being *in pari delicto*. Morgan *v.* Beaumont, 121 Mass. 7.

See further on this point, *infra*, p. 273.

[4] 22 Pick. 181.

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Recovery of money paid under an illegal contract.

an agreement that the money should remain on deposit for a stated time, could not recover on the contract itself because the contract was made in violation of a statute prohibiting a bank from contracting for the payment of money at a fixed future time, he could nevertheless recover in a count for money had and received brought before the expiration of the time named in the agreement, and brought in disaffirmance of the contract.

In Keasley *v.* Thomson[1] the plaintiff sought to recover money paid by him to the defendant in consideration of the defendant undertaking not to appear at the examination of the plaintiff as a bankrupt, and not to oppose his discharge. The defendant did not appear at the examination, and before the plaintiff made an application for his discharge in bankruptcy he demanded a return of the money so paid. It was held that he was not entitled to recover. Lord Justice Fry, who was inclined to repudiate the entire doctrine of allowing a recovery after complete performance by the plaintiff, said:

"But even assuming the exception to exist, does it apply to the present case? What is the condition of things if the illegal purpose has been carried into effect in a material part, but remains unperformed in another material part? As I have already pointed out in the present case, the contract was that the defendants should not appear at the public examination of the bankrupt, or at the application for an order of discharge. It was performed as regards the first, but the other application has not yet been made. Can it be contended that if the illegal contract has been partly carried into effect and partly remains unperformed, the money can still be recovered? In my judgment, it cannot be so contended with success. Let me put an illustration of the doctrine contended for, which was that partial performance did not prevent the recovery of the money. Suppose a payment of £100 by A to B on a contract that the latter shall murder C and D. He has murdered C, but not D. Can the money be recovered back? In my opinion it cannot be. I think that case illustrates and determines the present one."

[1] 24 Q. B. D. 742.

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The illustration used by the learned lord justice, of a party who has paid money on a contract having for its object the commission of murder, is not in point, for the reason that such a contract would fall within the rule that money paid on a contract *malum in se* can in no event be recovered.

Right of recovery against a stakeholder.

Since the plaintiff is acting in disaffirmance of the contract, money deposited with a stakeholder on an illegal wager can be recovered before payment over, or after payment over if the stakeholder paid the money to the winner after notice not to do so.[1] That the plaintiff did not signify an intention to disaffirm the contract until the determination of the wager against him has been held to be immaterial.[2]

It is also held[3] that money paid by a stakeholder after notice from the plaintiff not to pay the same, can be recovered even where the plaintiff, instead of demanding a return simply of the money paid by himself, demands the entire sum as the winner thereof. These decisions seem open to question, if a stakeholder is to be regarded as anything more than an agent. Clearly one who demands the stakes as a winner is affirming, and not disaffirming, a contract. Love *v.* Harvey was decided on the authority of McKee *v.* Maurice.[4] That case was, however, the ordinary case of payment over by a stakeholder, after the plaintiff had demanded not the stakes, but a return of the money which he had paid.

If a stakeholder is to be treated as agent simply, there seems to be great force in the suggestion of Parke, J., the dissenting judge in Hale *v.* Sherwood,[5] that in many cases where the whole sum might be claimed, the facts would not justify the inference of a revocation of authority because of the illegality of the contract, since the plaintiff, had he

[1] Cotton *v.* Thurland, 5 T.R. 405; Corson *v.* Neatheny, 9 Col. 212; Hale *v.* Sherwood, 40 Conn. 332; Love *v.* Harvey, 114 Mass. 80; Deaver *v.* Bennett, 29 Neb. 812; McGrath *v.* Kennedy, 15 R. I. 208.

[2] *Ibid.*

[3] Hastelow *v.* Jackson, 8 B. & C. 221; Hale *v.* Sherwood, 40 Conn. 332; Love *v.* Harvey, 114 Mass. 80.

[4] 11 Cush. 357.

[5] 40 Conn. 332.

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regarded the defendant as the winner thereof, would have treated the suggestion of his disaffirming the contract because of illegality as an insult.

Right of recovery for services rendered under an illegal contract.

On the principle of the disaffirmance of an illegal contract while it remains executory, a recovery should be allowed for services rendered or goods delivered by a plaintiff who repudiates the contract because of illegality before he has fully performed his side, and before he is entitled to payment under the terms of the contract to the extent that he has performed. In such a case he should recover from the defendant the equivalent in money of what the defendant received under the contract. A recovery on this principle and to this extent can be no more objectionable than a recovery of money lent or paid in such circumstances, since what the plaintiff recovers in such a case is not the identical money which he paid, but its equivalent.[1]

It would seem, however, that if a recovery is had against a defendant after *full performance* by the plaintiff, such recovery should be restricted to cases where the effect of the recovery is simply to reinstate him to his former position, as distinguished from the position which he would have occupied had the illegal contract been performed by the defendant. For example, if a plaintiff is allowed to recover property delivered under an illegal contract, in effect treating the contract as if it were rescinded, he cannot be said in any sense to get the benefit of the contract. If, however, he reclaims, not the return of money paid by him or its equivalent, or the return of property delivered by him, but compensation for services rendered, if the contract was a fair one, the recovery by him would seem to be as objectionable in point of public policy as a recovery on the contract, since in quasi-contract he would recover the value of his services, which in the ordinary case would be the sum stated in the contract.

[1] See, however, Arnot *v.* Pittston Coal Co., 68 N. Y. 558.

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Right of recovery where contract is performable in instalments.

It has been held that where a contract is performable by instalments, a plaintiff cannot by disaffirming the contract as to the future performance thereof recover for part performances as to which the defendant has by the terms of the contract become a debtor. To that extent the contract is treated as an executed, and not an executory contract to which the doctrine of disaffirmance has no application.[1]

Rights arising on rescission of illegal contract.

If parties innocently enter into a contract which proves to be illegal, and on the discovery thereof mutually agree to rescind, money paid thereunder prior to such rescission can be recovered.[2]

No recovery where contract has been fully performed on both sides.

Where the contract has been fully performed on both sides,[3] there can be no recovery by the plaintiff, for not only has he by performing and accepting performance affirmed the contract, but in many cases to allow a recovery would be unjust to the defendant.

In Herman *v.* Jeuchner[4] the plaintiff sought to recover money which he had paid to the defendant to indemnify him against liability on a bond on which the plaintiff desired the defendant to become his surety in a criminal proceeding brought against the plaintiff. While the bond was still in force, the plaintiff sued to recover the money so paid. It was held that the contract between the parties was executed by the payment of the money on the part of the plaintiff and by the execution of the bond by the defendant, and that there could be no recovery of the money so paid. Brett, M. R., said:—

[1] Peck *v.* Burr, 10 N. Y. 294; Arnot *v.* Pittston Coal Co., 68 N. Y. 558.

[2] Skinner *v.* Henderson, 10 Mo. 205.

[3] Herman *v.* Jeuchner, 15 Q. B. D. 561; White *v.* Barber, 123 U. S. 392; Clark *v.* United States, 102 U. S. 322; Jeff *v.* Wade, 4 Bibb, 322; Wyman *v.* Fiske, 3 Allen, 238; Lusk *v.* Patton, 70 N. C. 701.

It has been held, however, that a sum received in excess of the amount still due according to the terms of the contract can be recovered. Shaw *v.* Gardner, 30 Iowa, 111.

[4] 15 Q. B. D. 561.

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"It was first argued that the action is brought too soon, because it is brought before the expiration of the two years. If the contract were legal, the action would have been brought too soon; and in this point of view the action can be maintained only if the contract is illegal. For the defendant it may be said that the illegal object itself would be sufficient to prevent the plaintiff from recovering; and further, that if it is necessary in order to defeat the action that the illegal contract should be performed, the illegal contract has in this case been performed. I will not stop to say whether in order to defeat the plaintiff in an action like this, the defendant must be able to prove that the illegal object is performed, or whether it is sufficient that the contract itself shall be tainted with illegality; for if the contract is illegal and has been performed, then the person vouching the illegality cannot recover. In this case the illegal purpose has been wholly performed, and therefore the plaintiff cannot recover. We differ from Stephen, J., only in this, that we think that the contract was fully concluded; Stephen, J., thought that the contract was not fully concluded. We think that it was fully performed, for this reason: that the defendant did not contract with the plaintiff to pay the amount of the recognizance. The payment of that amount was not part of the illegal purpose existing between the plaintiff and the defendant; it was an obligation imposed by the law upon the defendant. The illegal purpose was fully completed when the defendant became surety. The time for returning the money has not as yet arrived; but when it does, I cannot think that the plaintiff will be in any better position than he is now. I cannot agree with the view of Stephen, J., or with his decision."

In Spring Co. *v.* Knowlton[1] the defendant, a corporation, acting on the suggestion and advice of the plaintiff, a trustee and vice-president, had voted in violation of law to increase its capital stock. The plaintiff subscribed for some of the stock, and paid to the corporation a part of his subscription. By the terms of the subscription the money paid was to be forfeited unless the remainder was paid within a given time; the plaintiff failing to complete his subscription within the

[1] 103 U. S. 49. See, however, Knowlton *v.* Congress Spring Co., 57 N. Y. 518.

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time named, the money paid by him was forfeited to the company; thereafter the company rescinded its resolution authorizing the increase of stock, and issued bonds to subscribers for the stock in settlement of their claims against the company; bonds were not demanded by or tendered to the plaintiff, who sued to recover the subscription paid by him. It was held that the plaintiff was entitled to recover. Mr. Justice Woods said:—

"So that all that was done amounted only to a proposition by the company, on the one hand, to increase its stock, and an agreement by Knowlton to take certain shares of the new stock when issued, and the payment by him of an instalment of twenty per cent thereon. There was no performance of the contract whatever by the company, and only a part performance by Knowlton.

"It is to be observed that the making of the illegal contract was *malum prohibitum*, and not *malum in se*. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud.

"The question presented is, therefore, whether, conceding the contract to be illegal, money paid by one of the parties to it in performance can be recovered, the other party not having performed the contract or any part of it, and both parties having abandoned the illegal agreement before it was consummated.

"We think the authorities sustain the affirmative of this proposition."

The case differs in one particular from any other case known to the writer, and must for that reason be regarded as an extension of the doctrine that an action can be maintained to recover money paid under an illegal contract by a plaintiff in default as to the performance thereof.

In Spring Co. *v.* Knowlton, at the time when the plaintiff claimed a right to abandon the contract and recover the money paid by him, there was no contract for him to abandon. He had refused to pay his subscription for reasons other than the illegality of the contract. The company in the exercise of a right conferred upon it by the contract had

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declared the contract forfeited. Therefore by the terms of the contract the company was under no obligation to the plaintiff. The cases where the doctrine has been applied that a contract could be abandoned by the plaintiff, have been cases where either the plaintiff had not fully performed his side, or where by the terms of the contract some obligation existed on the part of the defendant in favor of the plaintiff at the time when the plaintiff sought a recovery of that which he had paid or given under the contract. It seems difficult to allow on the theory of disaffirmance a recovery where a plaintiff has refused to perform a contract for reasons not connected with the illegality thereof, and where in consequence of such refusal the defendant has exercised the right conferred upon it by the plaintiff of abandoning the contract and forfeiting the payment made by the plaintiff.

Necessity of demand or notice of disaffirmance of contract.

Where a plaintiff disaffirms a contract because of the illegality thereof, and seeks to recover in quasi-contract, it would seem only equitable to require him as a condition of suing to give notice to the defendant of his disaffirmance of the contract, and of his claim in quasi-contract. It must be remembered, that though the contract is illegal, the defendant has not refused to perform it. Why should one who has not refused to do that which the plaintiff stipulated for, be liable to an action for not doing something else which he has had no reason to suppose the plaintiff desired him to do? It was held, however, in White *v.* Franklin National Bank,[1] that no demand was necessary.

[1] *Supra*, p. 259. See, also, Jones *v.* Cavanaugh, 149 Mass. 124.

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CHAPTER V.

OBLIGATION OF A DEFENDANT IN DEFAULT UNDER A CONTRACT.

It is proposed to consider in this chapter the quasi-contractual rights of a plaintiff who has conferred a benefit upon a defendant under a contract which the defendant has failed to perform. A plaintiff may seek a recovery for benefits so conferred:

1. Where he has no contractual rights because of the illegality of the contract under which the benefit was conferred;

2. Where the benefit was conferred under a contract unenforceable because of the statute of frauds;

3. Where the non-performance by the defendant of the contract which has been performed in whole or in part by the plaintiff is excused because of the impossibility of performance;

4. Where the defendant's failure to perform the contract is wilful or inexcusable.

SECTION I.

CONTRACT UNENFORCEABLE BECAUSE OF ILLEGALITY.

The cases to be considered in this section differ from the cases considered in the last chapter in that the defendant, and not the plaintiff, is in default under the contract. Assuming the contract as to which a defendant is in default to be illegal and therefore unenforceable, the question arises

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as to the rights of a plaintiff who, notwithstanding the illegality, performed the same in whole or in part, and thereby conferred a benefit on the defendant.

In Jaques *v.* Golightly,[1] a defendant who refused to perform a contract, relying on the illegality thereof, and yet insisted on retaining the money received thereunder, was made to refund to the plaintiff the money so received. De Grey, Chief Justice, apparently allowed the plaintiff to recover on the broad ground that the law would compel one who had conscientious scruples against the performance of an illegal contract to be equally scrupulous in regard to the retention of ill-gotten gains. He said: —

"This is an application for favor by a man knowingly transgressing. He says, and says rightly, that the insurance contract was null and void. He has therefore a scruple in conscience not to pay the money won by the plaintiff, because the play was illegal; but he has no scruple to receive and retain the consideration money. I think the verdict right."

Blackstone, J., however, thought the plaintiff was entitled to recover because the parties were not *in pari delicto.*

"These Lottery Acts," said he, "differ from the Stockjobbing Act of the 7 Geo. 2, c. 8, because there both parties are made criminal and subject to penalties, but the losing party is indemnified from those penalties in case he sues and recovers back the money lost from the winner. It was therefore necessary in the preceding clause to give the loser a power to maintain such an action. But here (on the part of the insured) the contract on which he has paid his money is not criminal, but merely void; and therefore, having advanced his premium without any consideration, he is entitled to recover it back."

No recovery where the parties are *in pari delicto.*

It is only on this latter suggestion, that the case can be supported at the present time. Subject to the limitation hereinafter stated,[2] — if the parties to an illegal contract are *in pari delicto* the plaintiff will not be allowed to recover

[1] 2 Wm. Bl. 1073. [2] *Infra*, p. 273.

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for a benefit conferred thereunder upon a defendant refusing to perform.[1]

Thus it is held that money paid under an illegal contract cannot be recovered, the parties being *in pari delicto*, on the defendant's refusal to perform the contract.[2] On the same principle it is held that when the parties are *in pari delicto*, a defendant who has refused to perform the contract is not liable in quasi-contract for the value of the services rendered by the plaintiff under the contract.[3] Nor can an action be maintained in similar circumstances for goods sold and delivered.[4] For the same reason, if the contract is illegal, an action cannot be maintained against a defendant in default under a lease for use and occupation.[5]

In Morgan *v.* Groff[6] the plaintiff sued to recover money which he had delivered to the defendant with directions that it be bet on the result of an election. The defendant did not make the bet in question, and the plaintiff on learning that fact demanded a return of the money. It was held that there could be no recovery.

The principle under consideration seems to have been lost sight of in Douville *v.* Merrick,[7] where it was held that not-

[1] Vandyck *v.* Hewitt, 1 East 96; Morck *v.* Abel, 3 B. & P. 35; Simpson *v.* Nichols, 3 M. & W. 240; Thomas *v.* City of Richmond, 12 Wall. 349; Gibbs *v.* Baltimore Gas Light Co., 130 U. S. 396; Pucket *v.* Roquemore, 55 Ga. 235; Shaffner *v.* Pinchback, 133 Ill. 410; Harvey *v.* Merrill, 150 Mass. 1; Ashbrook *v.* Dale, 27 Mo. App. 649; Thompson *v.* Williams, 58 N. H. 248; Morgan *v.* Groff, 5 Den. 364; Arnot *v.* Pittston Coal Co., 68 N. Y. 558; Hooker *v.* De Palos, 28 Oh. St. 251; Troewert *v.* Decker, 51 Wis. 46.

[2] Browning *v.* Morris, Cowp. 790; Vandyck *v.* Hewitt, 1 East. 96; Morck *v.* Abel, 3 B. & P. 35, Thomas *v.* City of Richmond, 12 Wall. 349; Pucket *v.* Roquemore, 55 Ga. 235; Shaffner *v.* Pinchback, 133 Ill. 410; Morgan *v.* Groff, 5 Den. 364; Hooker *v.* De Palos, 28 Oh. St. 251; Troewert *v.* Decker, 51 Wis. 46.

[3] Gibbs *v.* Baltimore Gas Light Co., 130 U. S. 396; Harvey *v.* Merrill, 150 Mass. 1.

[4] Simpson *v.* Nichols, 3 M. & W. 240; Arnot *v.* Pittston Coal Co., 68 N. Y. 558; Thompson *v.* Williams, 58 N. H. 248.

[5] Ashbrook *v.* Dale, 27 Mo. App. 649.

[6] 5 Den. 364.

[7] 25 Wis. 688.

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withstanding the illegality of the contract, money deposited by the plaintiff with the defendant, an attorney at law, to procure him a divorce from his wife, the defendant agreeing to procure the divorce within thirty days, could be recovered, the defendant having refused to begin the proceedings, and having converted the money to his own use. Dixon, C. J., said: —

"The consideration for which the plaintiff deposited with or paid the money to the defendant, has entirely failed, or rather there was never any consideration; and he is entitled to have it restored to him. The idea that the defendant can retain the money upon the void or illegal agreement between the plaintiff and his wife for procuring a judgment of divorce, and which the defendant, as their attorney, advised, is not to be tolerated."

To have allowed the defendant to retain the money in the circumstances established in Douville *v.* Merrick, would have been to allow him to profit by his dishonesty. Had the court allowed this to be done, it would have allowed no more than is allowed in any case where a defendant in default, having no other defence, successfully pleads the illegality of the contract as a defence to an action brought to recover the value of the benefits received by him under the contract.

The principle under consideration is strikingly illustrated by the decision in Thompson *v.* Williams.[1] The plaintiff sued the defendant in assumpsit for the price of two cows, sold to the defendant on Sunday. Some time after the delivery of the cows to the defendant, the plaintiff had taken the cows from the defendant because of his refusal to pay for them. Thereupon the defendant sued the plaintiff in an action of trespass and recovered judgment (which he afterwards collected) for the value of the cows, the jury assessing the damages at the contract price agreed upon between the plaintiff and the defendant when the cows were purchased.

[1] 58 N. H. 248.

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It was held that the plaintiff, notwithstanding this assertion of title on the part of the defendant, could not recover in an action of assumpsit. Smith, J., delivering the opinion of the court, said: —

"The defendant is not estopped by the judgment in the trespass suit from setting up the Sunday law as a defence. The maxim *in pari delicto*, etc., was not established for the benefit of one party or of the other. The law does not leave the weaker at the mercy of the stronger, nor give the vendor a remedy by allowing him to retake the property illegally sold. It leaves the parties where their illegal contract left them; when executed, it will not assist the party who has parted with his money or property to recover it back; when executory, it will not compel performance. It would not leave the parties where their illegal contract left them if it did not maintain the title acquired by the contract. Williams was in possession of the cows, as of his own property, by the assent of Thompson. When the latter retook them, Williams was enabled to maintain trespass because Thompson could not be heard to controvert his title. (Smith *v.* Bean, 15 N. H. 579; Coburn *v.* Odell, 30 N. H. 540, 552.) The verdict must be set aside."[1]

Right of recovery where the plaintiff is not *in pari delicto*.

Although a recovery cannot be had on a contract because of the illegality thereof, if the parties are not *in pari delicto* a plaintiff will be allowed to recover in quasi-contract for benefits conferred.[2] In Tracy *v.* Talmage[3] it was held that

[1] Probably no better illustration can be found in our law of the importance of distinguishing between a right *in rem* and a right *in personam* than is afforded by the case of Thompson *v.* Williams. The plaintiff in the action of trespass succeeded because having acquired a title by the purchase of the property the source of his title was immaterial. The vendor, by interfering with the possession of the vendee, to whom the title had passed, was a tort feasor, as any stranger would have been in similar circumstances. But when the vendor sought to recover in assumpsit against the vendee for the value of the property sold, he was seeking the aid of the court to reduce a *chose in action* into possession, and to acquire as a result of such reduction a right *in rem*.

[2] Smith *v.* Bromley, 2 Doug. 696; Gray *v.* Roberts, 2 A. K. Marsh. 208; Morville *v.* American Tract Society, 123 Mass. 129; Tracy *v.* Talmage, 14 N. Y. 162; Duval *v.* Wellman, 124 N. Y. 156.

[3] 14 N. Y. 162.

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although a banking association could not be sued on certificates issued *ultra vires* and contrary to an act prohibiting such issue, yet since the parties were not *in pari delicto*, the penalties being imposed exclusively upon corporations and their officers, the plaintiff could recover in quasi-contract for the value received by the defendant. Selden, J., said: —

"The illegal contract itself is of course void, and no part of it can be enforced. It is impossible, I think, to sustain the reasoning adopted in the Utica Insurance cases, by which that part of the contract which embraces the loan (in this case the sale) is separated from the portion relating to the security, and upheld as a distinct and valid contract. The contract there, as here, was entire; and it is contrary to all the rules which have been applied to illegal contracts to discriminate between their different parts, and hold one portion valid and the other void. Recoveries are not had in such cases upon the basis of the express contract, which is tainted with illegality, but upon an implied contract, founded upon the moral obligation resting upon the defendant to account for the money or property received."[1]

[1] Although it is beyond the scope of the present work to enter into a discussion of the nature of corporate powers, and the liabilities dependent thereon, it is submitted that the liability of a corporation for benefits received under a contract which is regarded as illegal and void must rest on quasi-contract, and not on the theory of contract, as is so often stated. This was the view taken by Mr. Justice Gray in Central Transportation Company *v.* Pullman's Car Company, 139 U. S. 24, 59. "The view," said the learned justice, "which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: —

"A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no effect. . . . No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it. . .

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be

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Right of recovery where illegality unknown to the parties.

The doctrine that there can be no recovery in quasi-contract where a contract is illegal, and the parties are *in pari delicto*, is subject to the limitation that if the illegality of the contract is due to a fact not known to either party, and with knowledge of which neither party can be charged, then, though the contract cannot be enforced, a recovery can be had in quasi-contract.[1]

The right to recover against a defendant in default under an illegal contract being confined to cases where the parties are not *in pari delicto*, it is necessary to consider the tests to be adopted in determining this question.

Plaintiff acting in violation of a statute enacted for his protection is not *in pari delicto*.

When the illegality arises from the violation of a statute which has for its object the protection of a class to which the plaintiff belongs, against a class to which the defendant belongs, the parties are not regarded as *in pari delicto*.[2]

Thus in Smith *v.* Bromley,[3] it appeared that the plaintiff, whose brother had committed an act of bankruptcy, and against whom the defendant, a creditor, had taken out a commission, had paid to the defendant the money demanded by him as a condition of signing a certificate consenting to the bankrupt's obtaining his discharge. It was held that as the statute declaring this transaction illegal was enacted to protect debtors and their families from the extortion of creditors, the parties were not *in pari delicto*, and the plaintiff could recover.

Where a penalty is imposed on the defendant only for a violation of a statute, the plaintiff is not *in pari delicto*.

Where an act is prohibited by statute, and a penalty for a

done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

"In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or failing to do that, to make compensation for, property or money which it has no right to retain."

[1] Hentig *v.* Staniforth, 5 M. & S. 122.

[2] Clark *v.* Shee, Cowp. 197 (*semble*); Smith *v.* Bromley, 2 Doug. 696.

[3] 2 Doug. 696.

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violation of the statute is imposed upon one of the parties only, the parties are not *in pari delicto*.[1]

When debtor complying with illegal demand of creditor is not *in pari delicto*.

Where a creditor makes compliance with his illegal demands a condition of his doing acts necessary for the relief of an embarrassed debtor, the parties are not *in pari delicto*.[2]

If illegality depends upon facts known to defendant but unknown to the plaintiff, the parties are not *in pari delicto*.

If the illegality depends upon the existence of facts unknown to the plaintiff but known to the defendant, the parties are not *in pari delicto*.[3] Thus where the validity of certain bonds depended upon the date of issue, and the defendant falsely dated them, so that they appeared to have been legally issued, it was held that notwithstanding the bonds were invalid because of illegality, the plaintiff could recover the money loaned thereon, as the parties were not *in pari delicto*.[4]

On this principle it was held in Bloxsome *v.* Williams,[5] that the Sunday law only forbidding the following of a vocation on Sunday, the plaintiff, who was ignorant that the defendant was following his vocation and not an avocation, could recover money paid by him as on a consideration that had failed.

Equality of delict should not depend upon order of proof.

It has been suggested that a plaintiff is necessarily *in pari delicto* if, in order to establish his claim, he must introduce evidence of the illegal contract.[6] In Taylor *v.* Chester,[7] Mellor, J., said : —

[1] Williams *v.* Hedley, 8 East. 376; Thomas *v.* City of Richmond, 12 Wall. 349 (*semble*); Gray *v.* Roberts, 2 A. K. Marsh. 208; Smart *v.* Hyde, 73 Me. 332; White *v.* Franklin Bank, 22 Pick. 181; Curtis *v.* Leavitt, 15 N. Y. 9; Tracy *v.* Talmage, *supra*, p. 271.

[2] Smith *v.* Cuff, 6 M. & S. 160; Atkinson *v.* Denby, 6 H. & N. 778. See for a discussion of these cases, *infra* p. 435.

[3] Bloxsome *v.* Williams, 3 B. & C. 232; Louisiana *v.* Wood, 102 U. S. 294.

[4] Louisiana *v.* Wood, 102 U. S. 294.

[5] 3 B. & C. 232.

[6] Taylor *v.* Chester, L. R. 4 Q. B. 309; Heffner *v.* Lewis, 73 Pa. St. 302.

[7] L. R. 4 Q. B. 309, 314.

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"The true test for determining whether or not the plaintiff and the defendant were *in pari delicto* is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party (Simpson *v.* Bloss, 7 Taunt. 246; Frivaz *v.* Nichols, 2 C. B. 501)."

It is submitted that the test suggested is artificial, making the question depend not upon substance, but upon form, namely, the order of proof. Furthermore, it would seem that such a test would practically eliminate this class of cases from the law, since it is necessary for the plaintiff to show a failure of consideration, and this he can do only by showing that the defendant has failed to perform a contract in exchange for which the benefit was conferred by the plaintiff. But to establish the defendant's default or failure to perform, he must necessarily establish the terms of the contract, and these when established would usually show the illegality, if any existed.

This test was rejected in Sampson *v.* Shaw,[1] where Wells, J., said: —

"It is argued on the plaintiff's behalf that the claim which he makes is for money had and received, traced distinctly to Thaxter's hands, and held by a contract tainted with no illegality; that the defendant in order to resist the claim is obliged to set up an illegal agreement, and rely upon it, and that this necessity is the test as to the equality of the delict. However ingenious this suggestion may be, it can hardly prevent the court from taking the whole transaction together and considering what it is in substance and effect. The application of the maxim *in pari delicto*, etc., does not depend upon any technical rule as to which party is the first to urge it upon the court in the pleadings."

In Duval *v.* Wellman[2] the plaintiff sought a recovery of money paid in the following circumstances: the plaintiff's

[1] 101 Mass. 145, 151.

[2] 124 N. Y. 156 (Second Division of the Court of Appeal); see also Goldsmith *v.* Bruning, 1 Eq. Cas. Ap. 89; s. c. sub nom. Smith *v.* Bruning, 2 Vern. 392. But see White *v.* Equitable Nuptial Benefit Union, 76 Ala. 251.

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assignor, a widow, paid to defendant, the proprietor of a matrimonial bureau, a sum of money in exchange for a promise on his part to find her a satisfactory husband, or, in the event of his failing to do so, to refund the money. Although a number of matrimonial candidates were submitted to the widow for inspection and approval, she failed to find a congenial companion, and demanded a return of the money. It was held that though the contract was illegal, the parties were not *in pari delicto*, and the plaintiff was entitled to recover. Brown, J., delivering the opinion of the court, said:

"The question in this and kindred cases, therefore, must always be whether the parties are equal in guilt. . . . But where a party carries on a business of promoting marriage, as the defendant appears to have done, it is plain to be seen that the natural tendency of such a business is immoral, and it would be so clearly the policy of the law to suppress it, and public interest would be so greatly promoted by its suppression, that there would be no hesitation upon the part of the courts to aid the party who had patronized such a business by relieving him or her from all contracts made, and grant restitution of any money paid or property transferred. In that way only could the policy of the law be enforced and public interests promoted.

"Contracts of this sort are considered as fraudulent in their character, and parties who pay money for the purpose of procuring a husband or a wife will be regarded as under a species of imposition or undue influence. . . .

"It is true there is no evidence of actual over-persuasion or undue influence.

"But at most the inferences to be drawn from these facts were for the jury.

"The prominent fact in the case is that such a place as the defendant maintained, existed in the community, with its evil surroundings and immoral tendencies.

"What influence was exerted upon the mind of the widow by the mere fact of the existence of such a place to which resort could be had, cannot of course appear except by inference. But if the evidence was not sufficiently strong to authorize the court to hold as a question of law that the parties were not *in pari delicto*, it at least presented a question of mixed fact and law for the jury.

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"Our opinion is that the same reasons that have induced courts to declare contracts for the promotion of marriage void dictate with equal force that they should be set aside and the parties restored to their original position. To decide that money could not be recovered back would be to establish the rules by which the defendant and others of the same ilk could ply their trade and secure themselves in the fruits of their illegal transactions."

In the foregoing quotation the court suggests three possible grounds of decision: 1, that the parties should not be treated as *in pari delicto* because the defendant's vocation was illegal; 2, that the transaction was a fraudulent one; 3, that the defendant exerted an undue influence by conducting the resort in question.

While the writer is not prepared to say that it would not be well to adopt as a rule the first ground suggested, namely, that public policy is best served by compelling one following as a vocation an illegal business to make restitution to individuals not so engaged, the cases do not seem to support such a discrimination in favor of the *amateur* against the *professional.* The suggestion of fraud seems hardly supported by the facts of the case.

To allow a recovery on the ground that the defendant, by inviting the public to such a resort, exerted an undue influence over the plaintiff, would, if adopted, have rather a far-reaching influence, unless a discrimination should be made between a resort such as was illegally conducted by the defendant and others of an equally immoral and illegal character.

SECTION II.

CONTRACT UNENFORCEABLE BECAUSE OF THE STATUTE OF FRAUDS.

A defendant relying on statute of fraud liable for benefits received.

In considering the rights of a plaintiff against a defendant who refuses to perform a contract to which the statute of frauds applies, after having received a benefit from the plain-

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tiff's performance thereof, it will be assumed that because of the statute of frauds the plaintiff is not able to recover on the contract itself. The contract not being illegal, however, and there being no objection in law to the performance thereof by the defendant, a defendant who has received a benefit from the performance by a plaintiff of such a contract, either in whole or in part, must compensate the plaintiff for the benefit so conferred.

Recovery of money paid under an oral contract for the sale of land.

On this principle, payments made under an oral contract for the purchase of land or an interest therein, which the vendor cannot or will not perform, can be recovered. Although a recovery in this class of cases was first allowed in equity,[1] a remedy to recover money paid in these circumstances is now given at law.[2]

Recovery for services rendered under an oral contract for the conveyance of land.

On the same principle it is held that one who has rendered services on the faith of an oral promise to convey, while not able to maintain an action on the contract itself, can maintain an action in quasi-contract to recover the value of the services rendered, the defendant refusing to perform the oral contract.[3]

Recovery for use and occupation under an oral contract.

So a lessee or vendee[4] in default under an oral contract for the lease or purchase of land and who has been in possession under such contract, will be compelled in an action for use and occupation to make compensation to the lessor or vendor for the use of the land.

Recovery for services rendered under an oral contract not performable within a year.

For the same reason a plaintiff who has rendered services under a contract to which the statute of fraud applies, because the contract is not performable within a year, can recover for

[1] Anonymous, Freeman, 486.

[2] Pulbrook *v.* Lawes, 1 Q. B. D. 284; Wiley *v.* Bradley, 60 Ind. 62; Jaboe *v.* Severin, 85 Ind. 496; Segars *v.* Segars, 71 Me. 530; Cook *v.* Doggett, 2 Allen, 439; Herrick *v.* Newell, 49 Minn. 198.

[3] Dowling *v.* McKenney, 124 Mass. 478; Ellis *v.* Cary, 74 Wis. 176.

[4] Little *v.* Martin, 3 Wend. 219; Smith *v.* Wooding, 20 Ala. 324; Gould *v.* Thompson, 4 Met. 224; Clough *v.* Hosford, 6 N. H. 231 (*semble*). See, however, *contra*, Smith *v.* Stewart, 6 Johns. 46.

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the value of the services so rendered if the defendant refuse to perform the contract.[1]

The unjust enrichment of defendant, not damage to the plaintiff, the basis of recovery.

It is not, however, sufficient to enable a plaintiff to recover for him to prove that he has suffered damage in consequence of the defendant's breach of contract. He must show that the defendant will, if he is not compelled to pay the plaintiff for that which he has received from the plaintiff, unjustly enrich himself at the plaintiff's expense. Thus in Dowling *v.* McKenney[2] the plaintiff and the defendant agreed for the purchase of land by the plaintiff from the defendant on the following terms; the plaintiff was to pay the defendant $200 and to complete a partly finished monument which he had on hand, of the value of $200, in exchange for which the defendant agreed orally to convey to the plaintiff a piece of land. The monument when completed was to be put upon a burial plot belonging to the defendant, the plaintiff to prepare the plot for the reception of the monument. The defendant, after the plaintiff had prepared the burial plot, but before the plaintiff had finished the monument, notified the plaintiff that she would not convey the land. The plaintiff thereupon brought an action to recover for work and labor. It was held that if the jury found as a fact that the defendant had been benefited by the labor done upon defendant's land by plaintiff, the plaintiff was entitled to recover from the defendant for work and labor. But that as the defendant had received nothing of value from the labor done by the plaintiff on the monument, the monument being the property, not of the defendant, but of the plaintiff, there could be no recovery by the plaintiff for the labor expended on the monument. Endicott, J., delivering the opinion of the court, said: —

"But the plaintiff contends that he may, under his third count, recover for his labor in completing the monument. It is true that

[1] Wonsettler *v.* Lee, 40 Kan. 367; Montague *v.* Garnet, 3 Bush, 297; Cadman *v.* Markle, 76 Mich. 448.

[2] 124 Mass. 478.

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when a person pays money, or renders service, or makes a conveyance, under an agreement within the prohibition of the statute of frauds, and the other party refuses to perform it, an action will lie to recover the money so paid, or the value of the services rendered or the property conveyed; but it is on the ground that a party who has received a benefit under an agreement which he has repudiated, shall be held to pay upon an implied assumpsit for that which he has received. Dix *v.* Marcy, 116 Mass. 416, and cases cited. In the case at bar, the defendant received no benefit from the labor performed in completing the monument, although the plaintiff may have suffered a loss because he is unable to enforce his contract, and no recovery can be had for the labor on the monument, as charged in the account annexed to the third count.

"But this rule does not apply to the item for services performed by the plaintiff in preparing the land and foundation. If this refers to the lot of the defendant where the monument was to stand, and the work was done upon it, we cannot say as a matter of law that it was not of benefit to the defendant. That is a question of fact to be determined by a jury."

This principle seems to have been lost sight of in Parker *v.* Tainter.[1] In that case the defendant, a lessee of land, agreed orally with the plaintiff to lease to the plaintiff for a term of years the land occupied by him as lessee, and the plaintiff under this agreement went into possession and erected a building on the land. Before the execution of the lease, the defendant's landlord in the exercise of a right under a clause of the lease under which the defendant held, terminated the lease and compelled both the plaintiff and defendant to surrender the premises, notifying the plaintiff to remove the building therefrom. This the plaintiff failed to do, and the defendant's landlord removed the building. The plaintiff then brought an action against the defendant for the value of the building erected on the land, and was allowed to recover. Grey, C. J., delivering the opinion of the court, said: "The defendants had an estate though not an absolute title, in fee in the land. If the plaintiffs in consideration of an agree-

[1] 123 Mass. 185.

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ment which is within the statute of frauds, and which the defendants declined to carry out, expended money in building upon his land, they might maintain an action to recover the cost of such building."

It is respectfully submitted that if a plaintiff who in the performance of a contract confers no benefit upon a defendant cannot recover because of the absence of a benefit, the extent of a plaintiff's recovery who does confer a benefit upon a defendant should be determined by the extent of the benefit received; and it would seem, therefore, that the plaintiff's recovery in Parker *v.* Tainter was excessive, for if there was any benefit conferred it could be nothing more than the value of the building to be removed from the premises, and whether this benefit was in fact conferred upon the defendant would depend upon whether the defendant had the right to remove the building. The case of Dix *v.* Marcy[1] cited by the court shows clearly that the cost to the plaintiff is not the criterion by which the defendant's liability is to be fixed; and if that is not the criterion, then the benefit to the defendant must be the criterion, and in Parker *v.* Tainter the cost of the building was not the benefit which was received by the defendant. As a matter of fact, the defendant received no benefit whatever, since the building, the plaintiffs refusing to move the same, was removed not by the defendant, but by the defendant's landlord, though if the defendant possessed the right to remove the building, his neglect to exercise that right would be immaterial, and the measure of recovery would be the value of the building in such circumstances.

Right of defendant to a credit for value received.

As the plaintiff's right of recovery rests upon the defendant's unjust enrichment, the plaintiff must credit the defendant with everything he has received in exchange for that for which he seeks a recovery from the defendant.

If he has received from the defendant the value of that which he gave the defendant, then he will have no right

[1] 116 Mass. 416.

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of action against the defendant, notwithstanding, had the defendant performed his contract, the plaintiff would have received much more than the value of that which the defendant received from him.[1] The fact that the plaintiff would have received more than the value bestowed by him upon the defendant, had the defendant performed his contract, shows that the plaintiff has been damaged by the defendant's refusal, but it does not establish the benefit which the plaintiff has conferred upon the defendant. Thus in Day *v.* N. Y. C. R. R. Co.,[2] the plaintiff conveyed land and a right of way to the defendant, and agreed to build certain sheds on his own land to house live stock, to be delivered to him by the defendant. The defendant agreed to give the plaintiff the temporary keep and feed of certain stock brought over its road. After performing the contract in part, the defendant refused to perform further. It was held that if the plaintiff had received from the defendant the value of the land, he had no cause of action against the defendant, notwithstanding the performance of the contract by the defendant would have given to the plaintiff a sum of money largely in excess of the value of the land. While in such a case the plaintiff would be entitled to recover if the performance by the defendant did not equal in value the land conveyed by the plaintiff, the plaintiff's recovery should be limited to the difference between the value of the part performance and the actual value of the land. In delivering the opinion of the court in Day *v.* The R. R. Co., Earl, C., said: —

"Here the plaintiff was to receive for his land one dollar and the stock business at his yards. The one dollar may be regarded as merely nominal, and the other must be held to be the substantial consideration. The plaintiff expected to get the value of his land in the profits which he should make out of the business which the defendant should give him. This business the defendant gave to the plaintiff for one year at least, just as it agreed to, and out of it

[1] Day *v.* N. Y. C. R. R. Co., 51 N. Y. 583.

[2] 51 N. Y. 583.

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the plaintiff appears to have made profits much greater than the land conveyed. These profits were the consideration contemplated by the parties for the conveyance of the land, and to the extent that the plaintiff has had the business and profits, he has had the very consideration he contracted for. Suppose the defendant had agreed to pay plaintiff $100 and also to give him the stock business, could the plaintiff in this action after receiving the $100 recover the whole value of the land, entirely ignoring the money payment? Suppose instead of giving the defendant land, the plaintiff had paid it money for the same consideration; could he, under the circumstances of this case, recover back all the money paid in an action for money had and received? Clearly not. The very basis upon which the action rests forbids it. It would be against both equity and good conscience to allow the plaintiff in the case supposed to recover all the consideration which he had paid, when he had already received a part of the benefit and consideration which he had contracted for. . . . Within the principles laid down in the cases cited he would be permitted to recover the balance only of the money paid by him after deducting the value of so much of the consideration as he had received, and if it could be shown in such case by the defendant that plaintiff had actually received from the defendant upon the agreement more than he had paid, there would be no basis of law or equity for the action to stand on. The same principles of justice and equity should be applied to this case. The plaintiff's equities can be no greater that he paid in land rather than in money. The agreement cannot be enforced. Neither party can in this action be allowed any benefit from it or any damage for its breach. The defendant having repudiated the agreement, the plaintiff can recover for his land as if there had been no agreement as to the amount of the consideration, but he must allow so much of the consideration as has been paid; and if he has received more in the profits of the business which the defendant brought to him under the agreement than the value of his land, he can recover nothing. If the profits are less than the value of the land, then he can recover the balance."

Should a plaintiff who has been in possession of land under an oral contract for the purchase thereof, which the vendor has refused to perform, be required to credit the defendant with the value of the use and occupation in an action brought by him to recover the purchase money?

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In Richards *v.* Allen,[1] it was held that a plaintiff who had been in possession of land for some years, under an oral contract for the purchase thereof, which the defendant refused to perform, should deduct from the purchase money paid by him the value of the use and occupation of the land. This case suggests an extension of the doctrine of Day *v.* N. Y. C. R. R. Co.[2] In that case the credit which was allowed the defendant in an action brought by the plaintiff was the amount that the defendant had paid the plaintiff under the contract in exchange for the land.

If it can be fairly said in Richards *v.* Allen that the use and occupation of the land was given to the plaintiff in part performance by the defendant of the contract, and in exchange for the money received by the defendant from the plaintiff, a correct result was reached, since a defendant in default should not be made to restore that for which he has given the plaintiff an equivalent, as provided by the contract. If, however, the payment by the plaintiff had no reference to the possession of the land, and was given and received solely with reference to the execution of a deed of conveyance by the defendant, then to allow the defendant to defeat a recovery *pro tanto* by the plaintiff, would be to allow the defendant, when sued by the plaintiff, to obtain compensation for benefits conferred by him under a contract, as to which he is in default, where he would have no standing in court as a plaintiff.

If, however, the principle is adopted that a plaintiff, although the money was not paid with any reference to the use and occupation, must allow for the value received by him in consequence of such use and occupation, it is clear that he in turn should be allowed interest on the money paid by him, or value given to the defendant, from the time when such payment was made or value given, since he is as much entitled to compensation for the use of the money by the defendant,

[1] 17 Me. 296 [2] *Supra*, p. 282.

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as the defendant is entitled to compensation for the use of the land by the plaintiff. Furthermore, it would seem that no allowance should be made for the use and occupation of the land if in fact the plaintiff has suffered damages in consequence of the defendant's breach of contract, equal to or in excess of the rental value of the land. If the damage suffered is not equal to rental value, the defendant should only be allowed the difference between the value of such use and occupation and the damage suffered by the plaintiff in consequence of the defendant's breach of contract.

This suggestion, it is submitted, is not in conflict with the rule that a party refusing to perform a contract relying upon the statute of frauds, is not liable to pay damages for a breach thereof. The defendant does not come into court in the attitude of one counter-claiming against the plaintiff; he simply claims that to allow the plaintiff to recover from him the entire sum paid, without regard to benefits received, would be to allow the plaintiff to unjustly enrich himself at the expense of the defendant. The plaintiff, to meet this contention, shows that he has in fact suffered damage in consequence of the breach of contract. The object of such evidence is simply to meet the *prima facie* case made by the defendant of the plaintiff's being unjustly enriched if he is given the recovery which he seeks.

In Hawley *v.* Moody [1] the defendant agreed orally to execute a lease to the plaintiff of certain premises, the plaintiff agreeing to accept the lease and to pay therefor $600, and he paid the defendant at the time $100 in a gold watch, which the defendant received as a payment of $100 towards the rent. The defendant subsequently refused to execute the lease and tendered the watch back to the plaintiff, but the plaintiff refused to receive it. The watch was afterwards attached in the hands of the defendant by one of the plaintiff's creditors,

[1] 24 Vt. 603.

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and sold to satisfy an execution issued against the plaintiff. The plaintiff then brought an action of assumpsit against the defendant to recover $100, and was allowed to recover. The court was of the opinion that the statute of frauds did not invalidate a contract, except for the purpose of maintaining an action for a breach thereof, or render a contract rescindable at the instance of either party, and that to defeat the plaintiff would be to hold that the defendant had a right to rescind the contract.

The obligation of the defendant is to make restitution.

This case raises the question as to the nature of the obligation imposed upon a defendant who refuses to perform a contract which the plaintiff has performed on his side. It is submitted that the true nature of the obligation is that of restitution, the law compelling the party who is not willing or able to make specific restitution, to make restitution in value, a court of law, as distinguished from a court of equity, having no means by which to compel the defendant to make specific restitution. The true nature of this obligation becomes more apparent if we consider a case where, because of the subject-matter of the contract, a court of equity will take jurisdiction. Take the case of a defendant receiving from a plaintiff a conveyance of land, in exchange for which he agrees orally to convey to the plaintiff another piece of land. If he refuses to convey this land the obligation which a court of equity will impose upon him is to restore specifically to the plaintiff that which he received from him, the court treating him for this purpose as a constructive trustee of the land conveyed to him. The obligation of specific restitution is imposed upon him for the reason that it is the unjust detention of that piece of property which enriches him at the expense of the plaintiff, and therefore renders his conduct inequitable and against conscience. Now, the fact that in a given case the subject-matter of a contract is such that a court of equity will not take jurisdiction, should not change the character of the obligation when a court of law adopting

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equitable principles attempts to give to a plaintiff at law such relief as its machinery enables it to give. If the plaintiff has paid the defendant money instead of conveying to him a house, it is the unjust retention of the money in the one case, as much as the unjust retention of the house in the other, that constitutes the unjust enrichment, and makes the defendant's conduct inequitable; and the fact that the one court is able to make him do specifically what he ought to do, and can therefore compel him to make specific reparation for his misconduct, while the other court can only compel him to make pecuniary reparation, furnishes no reason for a court of law imposing a primary obligation differing from that imposed by a court of equity. If a defendant, on refusing to convey land which he had orally agreed to convey in exchange for real estate received from the plaintiff, should tender, and the plaintiff should refuse to accept, a reconveyance thereof, should a court of equity, if the property were subsequently destroyed without fault on the part of the defendant, throw the loss on him? Is the defendant doing anything inequitable in holding subject to the order of the plaintiff that which the plaintiff will not allow the defendant to give him? In other words, should the court, because the defendant was prevented by the plaintiff from performing the obligation which the court, at the request of the plaintiff, would have compelled him to perform, throw a loss upon him which he would not have suffered had the plaintiff allowed him to perform the obligation imposed upon him by the court of equity? And yet, if a court of equity should not in such a case throw the loss upon the defendant, why should a court of law compel a defendant to restore in value to the plaintiff, at a time when to do so will throw a loss upon him, that which he would have restored specifically had not the plaintiff refused to receive it? The defendant in pleading the statute of frauds simply avails himself of his statutory right and does nothing inequitable, that is, nothing that a court can say is inequitable. His inequitable conduct consists in his attempting to

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enrich himself at the plaintiff's expense, not simply in pleading the statute of frauds. And if, when he avails himself of the statute of frauds, he offers to return to the plaintiff all that he has received under the contract, what unjust act has he done by which he is enriching himself at the plaintiff's expense?

It would seem that if, in Hawley *v.* Moody, the watch is to be treated as a watch, and not as money, the defendant should have been regarded, after his offer to return it, as holding the watch as a constructive trustee for the plaintiff. And though the result thus reached would be the same as would have been reached on the theory of the defendant's having the right to rescind, this fact is simply a coincidence; for the recognition of a right to rescind would give a party to a contract unenforceable because of the statute of frauds the right to demand a return of what he had given thereunder, on returning what he had received. And the effect of this would be that the statute could be used, not simply as a defence, but as conferring a right of action. If, indeed, the watch is to be regarded as received by the defendant as money, that is to say, if the transaction is to be treated as if the defendant had received $100 from the plaintiff and then had paid him back the $100 in purchase of the watch, the obligation on the part of the defendant was of course to return, not the watch, but $100,[1] and the decision should be supported.

It is only on the principle that a defendant who refuses to perform a contract because of the statute of frauds is under an obligation to make restitution, that the decision in Smith *v.* Hatch[2] can be supported. In that case it was held that a

[1] Kneeland *v.* Fuller, 51 Me. 518.

[2] 46 N. H. 146.

In Jarboe *v.* Severin, 85 Ind. 496, 499, it was said that the promise which the law implies against a vendor in default under a contract to which the statute of frauds applies is, "that a vendor, unable or unwilling to perform his special agreement, will return whatever he has received thereunder or its value, as being held by him upon a consideration which has failed."

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plaintiff who had conveyed land to the defendant in consideration of an oral promise on the part of the defendant to convey certain land to the plaintiff, could recover, in a count for money had and received, the proceeds of a sale by the defendant of the land so conveyed to him, the defendant having refused to perform the contract.

Value received, not contract price, the measure of recovery.

It remains to consider the amount which the plaintiff should recover for the benefits conferred by him upon the defendant. Since the recovery in this class of cases is not upon the contract, the contract price cannot be recovered as such; and if the contract price exceeds the value of the services rendered, the value of the services as found, and not the contract price, will be the measure of the plaintiff's recovery.[1]

Suppose, however, that the benefit conferred by the plaintiff on the defendant in default is in excess of the contract price, shall the plaintiff be allowed to recover the real value of his services, or shall his recovery be limited to the contract price? It is submitted that in such a case the contract price should not be the measure of the plaintiff's recovery. The defendant should not be allowed to blow hot and cold, — to use the statute of frauds for the purpose of escaping the burdens of the contract, and then to use the contract itself for the purpose of availing himself of the benefits thereof.

Furthermore, if the obligation imposed upon the defendant is to make restitution of value received, the contract price, in the case supposed, cannot constitute the measure of recovery, since the payment thereof would not mean restitution. Accordingly it is held that the plaintiff's recovery should be measured by the extent of the value received by the defendant, and not the contract price.[2]

Use of contract as evidence of value.

It does not follow, however, that the defendant can make no use of the contract. Although the authorities are in con-

[1] Graham *v.* Graham's Executors, 34 Pa. St. 475.

[2] William Butcher Steel Works *v.* Atkinson, 68 Ill. 421; Emery *v.* Smith, 46 N. H. 151; Erben *v.* Lorillard, 19 N. Y. 299.

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flict,[1] it seems clear on principle, that while the price named in the contract cannot determine the amount of the plaintiff's recovery, yet as the contract has stated in terms the valuation put by each party on the service rendered, the contract should be admitted as containing evidence legally relevant on the question of the actual value of the plaintiff's services, and for that purpose either party should be allowed to use it as an admission against interest.

Should a plaintiff or a defendant make a statement to a third party, as to the value of the plaintiff's services, such statement could be introduced in evidence as an admission against interest. Should the fact that the statement is found in an instrument purporting in terms to be a contract render it the less relevant as to the value which either party put upon the services rendered?

It is submitted that in the decisions holding that the contract cannot be used for the purposes of proving the value of the plaintiff's services, the fact is lost sight of that one and the same instrument may be used for several purposes, and that an instrument invalid or unenforceable as a contract may be used in evidence, not as a contract but as an admission against interest, without reference to the fact that the instrument is in terms also a contract.

The objection that to allow evidence to be given of the contract price in an action on a *quantum meruit* is to hold the defendant on the contract, was thus disposed of by Kelly, C. B., in Scarisbrick *v.* Parkinson:[2] —

"The only question," said the learned chief baron, "is whether or not the agreement which could not be recovered on by reason of

[1] See holding that the contract can be as evidence of value, Scarisbrick *v.* Parkinson, 20 L. J. N. S. 175; Ham *v.* Goodrich, 37 N. H. 185 (*semble*); but see *contra* Fuller *v.* Reed, 38 Cal. 99 (conf. Reynolds *v.* Jourdan, 6 Cal. 108); Hillebrands *v.* Nibbelink, 40 Mich. 646; Sutton *v.* Rowley, 44 Mich. 112; Erben *v.* Lorillard, 19 N. Y. 299. (See, however, Galvin *v.* Prentice, 45 N. Y. 162.)

[2] 20 L. J. N. S. 175, 177.

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its coming within the prohibition of the statute of frauds could be referred to on the trial of the action for any other purpose. It was contended by the counsel for the defendant that it could not; for that to do so was to charge the defendant by means of it. But I do not think that is the case. Suppose, for instance, that an agreement to precisely the same effect as the one in the present case had been made between the defendant and a third person, — another person altogether than the plaintiff, but a young man of the same age and position, — it is quite clear that the plaintiff could not have recovered in the present action upon that agreement; but can it be said that he could not have referred to it for the purpose of showing the value which the defendant had put upon his services, and so of enabling the jury to estimate such services? Surely not."

The weight to be given to this evidence, when admitted, would, as in other cases where evidence is admitted on the principle of an admission against interest, be a question for the jury, and would depend on the circumstances of each case. The circumstances might be such that the contract price would not be even *prima facie* evidence of the amount which a plaintiff should recover on a *quantum meruit*. Thus in Galvin *v.* Prentice[1] it appeared that the plaintiff, who sued to recover the value of services rendered under a contract unenforceable because of the statute of frauds, had contracted to serve the defendant as an apprentice in a certain business, for three years, for wages varying with the term of service. It was held that, as the contract price was fixed with reference to a continuous service, during which the value of the work done by the plaintiff for the defendant varied, it was error to charge the jury that the contract price was *prima facie* evidence of the value of the plaintiff's services.

It is submitted, with all deference, that to allow evidence to be admitted showing that an unenforceable contract was made between the parties, under which the plaintiff conferred the benefit for which he seeks a recovery, as must be done

[1] 45 N. Y. 162.

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where a recovery is sought in such circumstances, whether the plaintiff or the defendant is in default, and yet to refuse to allow the contract to be used as evidence of value, is to strain at a gnat and swallow a camel.

SECTION III.

CONTRACT UNENFORCEABLE BECAUSE OF THE IMPOSSIBILITY OF PERFORMANCE.

Defendant liable for benefits received when failure of consideration total or apportionable.

The fact that a contract has become impossible of performance by the defendant in circumstances excusing him from answering in damages for a breach thereof, is no reason for allowing him to enrich himself at the expense of the other party to the contract. To say that a defendant in certain cases shall not respond in damages for a failure to do that which could not be done, is to announce a proposition entirely different from the statement that in such an event he need not make restitution of, or compensation for, benefits received by him, and conferred by the plaintiff, in expectation of the performance of the contract by him.

Accordingly a defendant who has failed to perform a contract because of the impossibility of performance, must, if the failure of consideration resulting therefrom is total, or if partial only, is apportionable, compensate the plaintiff for benefits received.

It is on this principle held in jurisdictions where a vendor is required to bear the loss consequent upon the destruction of property which he has contracted to sell, but which is destroyed before the time arrives for the performance of the contract, that the purchase money paid in such circumstances by the vendee to the vendor can be recovered.[1]

[1] Thompson *v.* Gould, 20 Pick. 134; Kelly *v.* Bliss, 54 Wis. 187 (*semble*).

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It is on the same principle held in this country that freight paid in advance of the completion of a voyage can be recovered in the event of the voyage being rendered impossible of performance.[1]

In Griggs *v.* Austin the reason for reaching this result was thus stated by Parker, C. J., :—

"It is certainly a clear principle of the common law, that when money is paid or a promise made by one party in contemplation of some act to be done by the other, which is the sole consideration of the payment or promise, and the thing stipulated to be done is not performed, the money can be recovered back, or the promise founded on such consideration may be avoided between the parties to the contract. This general principle is the foundation of perhaps the largest class of cases which have been sustained under the action for money had and received. Exceptions may be made by a stipulation of the parties, but without such exceptions the rule seems to be universal.

While the opposite result has been reached in this particular class of cases in England,[2] the English doctrine was sustained in Byrne *v.* Schiller by Cockburn, C. J., with great reluctance.[3]

The ground upon which these cases were decided seems to have been that as freight is not in the absence of express stipulations payable until earned, and is therefore not payable until the completion of the voyage, the parties by

[1] Griggs *v.* Austin, 3 Pick. 20.

[2] De Silvale *v.* Kendall, 4 M. & S. 37; Byrne *v.* Schiller, L. R. 6 Ex. 319.

[3] "It is settled," said the learned chief justice, "by the authorities referred to in the course of the argument, that by the law of England a payment made in advance on account of freight cannot be recovered back in the event of the goods being lost and the freight therefore not becoming payable. I regret that the law is so. I think it founded on an erroneous principle, and anything but satisfactory; and I am emboldened to say this by finding that the American authorities have settled the law upon directly opposite principles, and that the law of every European country is in conformity to the American doctrine and contrary to ours."

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stipulating for the payment of freight in advance must have intended that as to the freight paid, the plaintiff should assume the risk of the voyage; that had they not so intended, there would be found in the charter party an express stipulation requiring the return of the freight so paid in the event of a failure to complete the voyage.

On this line of reasoning, money paid in advance for a personal service to be rendered, by one who never enters upon the service because of sickness or death, could not be recovered for the reason that but for the stipulation in the contract requiring the payment to be made in advance, the money would not have been payable until the service was rendered, and had the parties intended that the money should be returned in the event of the service not being rendered, they would have so stipulated.

It is submitted that this line of cases is to be supported, if at all, on the suggestion made by Mr. Justice Brett in Allison *v.* Bristol Insurance Company,[1] — namely, that for a consideration the party advancing the money takes upon himself the risk of the completion of the voyage.

In Anglo-Egyptian Navigation Company *v.* Rennie,[2] it appeared that the plaintiff and the defendant had entered into a contract whereby the defendant agreed to manufacture and put into a vessel owned by the plaintiff certain machinery at an agreed price payable in instalments as the work progressed. The plaintiff had paid two instalments

[1] L. R. 1 Ap. Cas. 209, 225.

"Although I have said," said the learned justice, "that this course of business may in theory be anomalous, I think its origin and existence are capable of a reasonable explanation. It arose in the case of the long Indian voyages. The length of voyage would keep the shipper for too long a time out of money; and freight is much more difficult to pledge as a security to third persons than goods represented by a bill of lading. Therefore the shipper agreed to make the advance on what he would ultimately have to pay, and for a consideration took the risk in order to obviate a repayment, which disarranges business transactions."

[2] L. R. 10 C. P. 271.

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when his vessel was lost, and performance of the contract became impossible. The defendant refusing to make restitution, the plaintiff sued in a count for money had and received to recover the money so paid. It was held that as the parties would not be placed *in statu quo* by the repayment, the plaintiff could not recover. The case differs from the cases heretofore considered in that the defendant was unable to complete his contract because of the inability of the plaintiff to perform his side of the contract, namely, to surrender to the defendant the vessel. As the court decided that the title to the machinery was in the defendant, there was clearly a failure of consideration as to the instalments paid by the plaintiff. The decision, if it is to be supported, must be put upon the ground that the defendant, having performed work and labor under a contract as to which the plaintiff was in default, though in circumstances excusing his non-performance, could not in conscience be called upon to refund money, the return of which would involve him in a loss corresponding to that which the plaintiff was seeking to avert; that while the plaintiff was not liable in damages for a breach of the contract, the equities of the parties were equal, and the law should leave the loss where it found it.

In Knowles *v.* Bovill [1] it appeared that the plaintiff had bought from the defendant's testator the right to have an application made by the testator for the granting of one patent, and for the prolongation of another. In consequence of the testator's death neither application was made. It was held that the money so paid could be recovered. Martin, B., said: —

"In my opinion the plaintiff is entitled to our judgment. The true test in this case is the question, What did he buy? In my opinion he bought an application for the grant of one patent and the prolongation of the other. By the contract he was to take the chance of the failure or success of such application. But what he

[1] 22 L. T. R. 70.

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bought was an application. The result is that the consideration in this case wholly fails, because it is admitted such application never was and now never will be made. The law in some cases implies a contract when the parties have not expressly made one. In cases of the total failure of consideration for a simple contract, it implies a contract to repay the money which has been paid for the consideration that has so failed."

In Whincup *v.* Hughes [1] the plaintiff sued to recover a portion of the premium paid by him to the defendant's testator on the testator's receiving the plaintiff's son as an apprentice to learn the trade of a jeweller. The term of apprenticeship was to be six years. The testator died within a year after the apprentice entered his service. It was held that the plaintiff could not recover any part of the premium so paid. Bovill, C. J., said:—

"This is an action brought to recover a part of the premium paid upon the execution of an apprenticeship deed, on the ground of failure of consideration. The general rule of law is, that where a contract has been in part performed no part of the money paid under such contract can be recovered back. There may be some cases of partial performance which form exceptions to this rule, as, for instance, if there were a contract to deliver ten sacks of wheat and six only were delivered, the price of the remaining four might be recovered back. But there the consideration is clearly severable. The general rule being what I have stated, is there anything in the present case to take it out of this rule? The master instructed the apprentice under the deed for the period of a year, and then died. It is clear law that the contract being one of a personal nature, the death of the master, in the absence of any stipulation to the contrary, puts an end to it for the future. . . .

"The contract having been in part performed, it would seem that the general rule must apply unless the consideration be in its nature apportionable. I am at a loss to see on what principle such apportionment could be made. It would not properly be made with reference to the proportion which the period during which the apprentice was instructed bears to the whole term. In the early

[1] L. R. 6 C. P. 78.

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part of the term the teaching would be most onerous, and the services of the apprentice of little value; as time went on his services would probably be worth more, and he would require less teaching. . . . With regard to the justice of such a case, it is clear that it would be almost impossible to estimate what the master might on his side have lost by the loss of the service of the apprentice. Again, the person receiving the premium naturally assumes that it becomes his property to be dealt with as he pleases; he is perfectly ready to perform his part of the contract: he never undertakes to return any part of the premium, and the necessity for such return is never contemplated."

That the plaintiff should not be allowed to recover because, owing to the impossibility of apportioning the consideration, it cannot be said what recovery he is equitably entitled to, is an intelligible and satisfactory principle, which makes the correctness of the decision turn on a question of fact, namely, whether the consideration really can be apportioned with justice to the defendant.[1] But when the learned justice makes the suggestion that the money should not be refunded because the testator when it was paid to him assumed it was his to do with as he pleased, and therefore never undertook to return any part of it, he makes a suggestion which involves the proposition that because of the death of a contracting party, his estate should not only be relieved from liability to answer in damages for an act which the deceased failed to do because of his death, but that in addition thereto the estate shall profit, because of his death, at the expense of the plaintiff.

The suggestion, that it could not be implied from the contract that the parties intended that any part of the money should be returned in case of death, ignores the true ground of recovery in this and similar cases. The plaintiff recovers, not because the contract provides or because the intention is to be gathered from the contract that the plaintiff should

[1] As to the apportionment of consideration, see *infra*, p. 305.

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recover in the event that has happened, but for the reason that there is nothing in the contract forbidding a recovery, and in the absence of an agreement between the parties that there should be no recovery, it is only equitable that a recovery be allowed.

SECTION IV.

DEFENDANT WILFULLY OR INEXCUSABLY IN DEFAULT UNDER A CONTRACT.

Money paid under contract as to which the defendant is in default can be recovered.

In the cases heretofore considered this chapter, the plaintiff was not able, because of the defendant's ability to plead illegality, the statute of frauds, or impossibility of performance, to maintain an action for breach of contract. It was necessary, therefore, to allow a recovery in quasi-contract if the defendant were not to be allowed to enrich himself at the expense of the plaintiff. In the cases now to be considered, however, the plaintiff can, if he desires, sue the defendant for a breach of contract; and the question arises whether he has in addition thereto the right to sue in quasi-contract to recover the value of the benefit which the defendant has received under the contract. This question was apparently presented for decision for the first time at Michaelmas term, 1721, in the cases of Dutch *v.* Warren,[1] and Anonymous,[2] where it was held that the plaintiff, who had paid money under a contract as to which the defendant was in default, could maintain an action for money had and received, and the right of recovery in quasi-contract in such circumstances has been recognized since that time.[3]

Recovery not limited to damages suffered.

Although the question was apparently not considered in Anonymous, the court in Dutch *v.* Warren[4] were of the

[1] 1 Str. 406.
[2] 1 Str. 407.
[3] 1 Str. 406.
[4] Trinkle *v.* Reeves, 25 Ill. 214; Ballou *v.* Billings, 136 Mass. 307; Cockroft *v* Muller, 71 N. Y. 367.

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opinion, that the plaintiff, though allowed to sue in a count for money had and received, could not thereby put himself in a better position than if he sued in special assumpsit for a breach of contract; that he would not be allowed to recover in an action on the count for money had and received more than indemnity for the loss caused by the defendant's breach of contract. Had this view prevailed, the amount of money received by the defendant would have been the limit, but not the measure of the plaintiff's recovery: and the measure of recovery would have been the damage suffered by the plaintiff because of the defendant's breach of contract.

This suggestion presents for consideration the theory upon which a plaintiff who has a right to sue for a breach of contract is allowed to sue in *indebitatus assumpsit*. If this right is to be given a plaintiff, it would seem to be for the reason that the defendant should not be allowed to blow hot and cold, and to profit by a contract the burdens of which he refuses to perform. The obligation imposed by law in such a case then should be that the defendant make restitution in value to the plaintiff of that which he received. On no other theory can the count for money had and received which does not sound in damages be maintained.

If the plaintiff is entitled to use the count, it must be for the reason that the defendant ought not to be allowed after breaking a contract to keep that which is given to him in expectation of the performance thereof. If restitution is to be accepted as the theory upon which this action proceeds, then the damage suffered by the plaintiff is immaterial, the question being, not what has the plaintiff suffered, but what did he give to the defendant in expectation of the performance of the contract by the defendant? Such in fact is the measure of the plaintiff's recovery at the present time who sues in the count for money had and received, or its equivalent, to recover money paid under a contract as to which the defendant is in default.

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Thus it was held in Nash *v.* Towne[1] that where the defendant received from the plaintiff $5,500 in exchange for a promise on the defendant's part to deliver goods to the plaintiff, and the defendant refused to deliver the goods, the plaintiff was entitled to recover, on a count for money had and received, the amount paid, regardless of the value of the property which the defendant contracted to deliver.

Right of recovery for services rendered or property transferred.

If restitution be the theory upon which the plaintiff recovers, when that which he gave the defendant was money, and if the amount paid is the measure of recovery in such cases, it would seem to follow logically that where the plaintiff renders services, or transfers property other than money, and the defendant fails to perform the contract, the plaintiff can if he desires sue in *indebitatus assumpsit*. Such is the law.[2] Not only should this result follow, but it should follow that the measure of the plaintiff's recovery should be not what the defendant contracted to pay, but the actual value received by defendant from the plaintiff. When a plaintiff sues in a count for money had and received, what he recovers is not the money that he paid, but an equivalent amount; and the law says that he is entitled to recover an equivalent amount, for the reason that it is unjust for the defendant to keep what the plaintiff gave him without performing the contract on his side. But if this be true of money, why should it not be equally true in the case of services or property which a defendant in default has received from a plaintiff? Why should not the plaintiff recover on the theory of restitution in value, and not upon the theory of compensation, as much where services have been rendered or property transferred, as in the case of money paid, since what the plaintiff receives is not the money paid but its equivalent? If the contract price is less than the real value

[1] 5 Wall. 689.

[2] Planchè *v.* Colburn, 8 Bing. 14; Prickett *v.* Badger, 1 C. B. N. S. 295; Chicago *v.* Tilley, 103 U. S. 146; Gilbert & Basher Manufacturing Co. *v.* Butler, 146 Mass. 82.

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of the property or services, and the plaintiff's recovery is restricted to the contract price, the defendant is in fact profiting by a contract which he has repudiated. To follow this suggestion further, suppose a plaintiff to convey to a defendant a piece of real estate in exchange for the defendant's promise to pay him upon a certain day a given sum of money. If in fact it is inequitable for the defendant to retain the land when he has refused to perform a contract, then it is a case where the court, had it the machinery by which it could compel it to be done, should compel a defendant in a position to return the land to make specific restitution. If not able to make specific restitution, why should he not make restitution in value?

Limit of recovery.

The courts have, however, treated the action where the plaintiff, who has fully performed his side of the contract, sues a defendant in default under a contract in *indebitatus assumpsit*, to recover for services rendered or property delivered as if it were an action to recover the contract price from the defendant, the performance by the plaintiff creating a debt in his favor for that amount against the defendant.[1]

While it is true that the plaintiff should, if he so desire, be allowed to sue in debt or in *indebitatus assumpsit*, simply to recover the contract price, treating the performance on his side as creating a debt, still it would seem that logically he should be allowed to claim restitution in value in such cases as much as in the case where he seeks and is allowed to recover not the money, which he in fact paid the defendant, but an equivalent sum of money. When the plaintiff paid the money he did not expect its return, but its equivalent; and the promised performance by the defendant, which subsequent events have shown to be less in value than the parties supposed, was treated by the parties as the equivalent of the plaintiff's money; and yet the plaintiff is allowed, regardless of this fact, to recover from the defendant the full amount

[1] Porter *v.* Dunn, 61 Hun, 310; s. c. 131 N. Y. 314 (*semble*).

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paid. But if a defendant in default is not allowed to return a sum less than the amount received by him where he has received money from the plaintiff, why should he be allowed to return less than the actual value of the services or property received by him under a contract which he has not performed?

When plaintiff must make restitution as a condition of maintaining an action.

In the cases heretofore considered where the plaintiff has been allowed to recover money paid by him under a contract, there has been an entire failure of consideration. That a plaintiff who has received a partial equivalent for the money paid by him should not, while retaining that which he received in part performance of the contract, recover the entire sum paid, is clear, unless he is to be allowed to enrich himself at the expense of the defendant.

If the plaintiff is in a position to return what he received, it seems equally clear that a defendant should have a right to insist on a return thereof, as a condition of refunding what he has received under the contract in preference to being credited with the value thereof in an action brought to recover the money received by him under the contract. Accordingly it is held that as a condition of maintaining an action to recover money so paid, the plaintiff must restore to the defendant what he has received under the contract.[1] Thus in Miner *v.* Bradley[2] the plaintiff, who had bought from the defendant a cow and a quantity of hay for a gross sum, on refusal of the defendant to deliver the hay, while retaining the cow, brought an action to recover the purchase money. It was held that the return of the cow to the defendant was a condition precedent to his right to maintain the action.

If, however, the plaintiff is not in a position to return to the defendant what he received from him, for the reason that he has been deprived thereof by one having a paramount title, then the defendant is no longer in a position to demand its return, and as a recovery would not result in the unjust

[1] Miner *v.* Bradley, 22 Pick. 457; Clark *v.* Baker, 5 Met. 452.

[2] 22 Pick. 457.

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enrichment of the plaintiff at the expense of the defendant, a recovery should be allowed.[1]

If the plaintiff offer to restore to the defendant all that he has received from him under the contract, and the defendant refuse to accept a return thereof, the action can be maintained.[2]

A recovery can be had without an offer on the part of the plaintiff to make restitution, however, if that which he received under the contract had no relation to the money which the plaintiff seeks to recover, and can be treated as something entirely separate and distinct. Thus in Wright *v.* Colls[3] it was held that one who, though he had been let into possession of premises, had paid without reference to the possession thereof a bonus for a lease, could recover the money so paid, the defendant failing to execute the lease.

On the same principle, it was held in Manning *v.* Humphreys[4] that a plaintiff who had purchased several articles of merchandise, each at a price fixed with sole reference to the sale of that particular article, could recover the money paid for any one article because of a failure of consideration as to that article, though he retained the others.

Plaintiff cannot sue in quasi-contract unless defendant's breach of contract amounts to an abandonment thereof.

To allow a plaintiff to make restitution, and maintain an action to recover the money paid by him under a contract, presupposes a right to treat the contract as if it had been rescinded. But it is not every breach of contract that will entitle one to treat a contract as rescinded and sue as on a failure of consideration. The breach must be a breach so materially affecting the essence of the contract as to be equivalent to a repudiation thereof. Thus it was held in Ehrensperger *v.* Anderson,[5] that a mere failure of the defendant to remit a bill of exchange did not entitle the plaintiff to sue

[1] Terry *v.* Allis, 16 Wis. 478.
[2] Potter *v.* Taggart, 54 Wis. 395.
[3] Wright *v.* Colls, 8 C. B. 150.
[4] 3 E. D. S. 218.
[5] 3 Ex. 148.

See, also, Leslie *v.* Keepers, 68 Wis. 123.

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for money had and received, the defendant's failure not indicating an intention on his part to abandon the contract. On this point Parke, B., said: —

> "In order to constitute a title to recover for money had and received, the contract on the one side must not only not be performed or neglected to be performed, but there must have been something equivalent to saying, 'I rescind this contract,' . . . a total refusal to perform it, or something equivalent to that, which would enable the plaintiff on his side to say, 'If you rescind the contract on your part, I will rescind it on mine.'"

To this principle must be referred the cases holding that one who has failed to give a bill of exchange or promissory note as required by the contract under which goods were sold to him, cannot be sued in *indebitatus assumpsit* until the expiration of the period of credit originally contemplated.[1] Accordingly it was held in Bartholomew *v.* Markwich[2] that as the defendant who had refused to allow the plaintiff to complete the delivery of goods which he had contracted to purchase, and for which he was to pay one half cash, and one half by bill of exchange payable in six months, could be treated as having entirely abandoned the contract, the plaintiff could maintain an action for goods sold and delivered notwithstanding the period of credit had not expired. For the same reason it is also held that after the time of credit has expired, an action of *indebitatus assumpsit* can be maintained.[3]

Right of recovery when failure of consideration partial only and not apportionable.

If, however, the failure of consideration is only partial, and the money paid by the plaintiff under the contract is not by the terms of the contract apportionable with reference to the performance of the defendant, there can be no recovery in the count for money had and received.[4] Thus, for example,

[1] Mussen *v.* Price, 4 East. 147; Dutton *v.* Solomonson, 3 B. & P. 582; Manton *v.* Gammon, 7 Ill. App. 201; Hanna *v.* Mills, 21 Wend. 90.

[2] 15 C. B. N. S. 711.

[3] Brooke *v.* White, 1 N. R. 330; Helps *v.* Winterbottom, 2 B. & Ad. 431.

[4] Towers *v.* Barrett, 1 T. R. 133; Hunt *v.* Silk, 5 East. 449; Stevens *v.* Cushing, 1 N. H. 17; Way *v.*

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it is held in jurisdictions where a breach of warranty does not entitle a vendee to rescind the contract, that the remedy of a vendee, where there has been a breach of warranty leading to a partial failure of consideration only, is an action to recover damages for a breach of contract, and not an action for money had and received.[1] On the same principle, it was held in Hunt *v.* Silk[2] that the plaintiff, who had been in occupation of premises under an agreement with the defendant, whereby the defendant agreed to make certain repairs, and on the completion thereof to execute a lease to the plaintiff, could not recover from the defendant, who failed to perform the contract, what he had paid thereunder, as his occupancy of the premises made the failure of consideration partial only.

That the plaintiff who has received a benefit under a contract should not recover from the defendant as if there had been an entire failure of consideration is only equitable. Any other rule would be manifestly unjust.[3] But it is not so clear why, in an action for money had and received, he should not recover to the extent that the money paid to the defendant exceeds in value the benefits received from the defendant. The statement found in most of the decisions, that unless the failure of consideration is total or is apportioned by the contract, the plaintiff's claim is not for restitution, but to recover damages, is the statement of a rule, and not the reason therefor. To say, as was said in Stevens *v* Cushing,[4] that where the defendant fails to perform any part of the contract on his side, the law presumes his assent

Cutting, 17 N. H. 450; Simmons *v.* Putnam, 11 Wis 193. See, also, Handforth *v.* Jackson, 150 Mass. 149.

[1] Towers *v.* Barrett, 1 T. R. 133. The fact that the defendant promised after the breach of warranty to return the money will not aid the plaintiff in action for money had and received. If the promise was given for a consideration, then the remedy of the plaintiff is to sue in special assumpsit for a breach thereof. If the promise is without consideration, then the promise is of no value. Payne *v.* Whale, 7 East. 274.

[2] 5 East. 449.

[3] Beed *v.* Blanford, 2 Y. & J. 278.

[4] 1 N. H. 17, 18.

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to a dissolution of the contract, and thereupon raises a promise to repay the money so received without consideration, is to resort to a fiction to justify a result.[1]

Nor is it a satisfactory explanation to say that a recovery cannot be had in the count for money had and received because it is impossible to apportion the consideration. If it is impossible to apportion the consideration, how can a jury assess damages in many of the cases where the plaintiff sues in special assumpsit to recover damages for the breach of contract? If, for example, a pair of horses five years old should be sold with a warranty that they were only four years old, the difference in value between the horses four and the horses five years old would, in an action to recover damages for breach of warranty, constitute the measure of the plaintiff's recovery.[2] But if a jury can determine this question in an action to recover damages, they can determine it as easily in an action to compel restitution.

Furthermore, if the reason for refusing a recovery in quasi-contract in this class of cases is the impossibility of determining the amount to which the plaintiff is entitled, then it would follow that if for any reason — for example, the statute of frauds — the defendant could not be sued in special assumpsit, the plaintiff would be remediless. In such a case, however, it is held that the remedy in quasi-contract can be maintained.[3] The true explanation would seem to be that the creation of a right in quasi-contract in the cases considered in this section, where an adequate remedy exists for a breach of contract is to be regarded as anomalous, and the courts have refused to extend the anomaly so as to allow a recovery in cases of partial failure of consideration.

[1] See *infra*, p. 310, n. 1.

[2] Towers *v.* Barrett, 1 T. R. 133, 136, *per* Bullen, J.

[3] Richards *v.* Allen, 17 Me. 296; Jellison *v.* Jordan, 68 Me. 373; Way *v.* Cutting, 17 N. H. 450 (*semble*); Watkins *v.* Rush, 2 Lans. 234 (*semble*). See, however, Spiller *v.* Cass, 58 N. H. 489. And see on the general question, Wright *v.* Dickinson, 67 Mich. 590.

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Since the action in quasi-contract is to prevent an unjust enrichment of the defendant, and not to recover damages for a breach of contract, a plaintiff cannot maintain an action in quasi-contract by showing that though he has not in fact performed the contract, he is entitled to recover from the defendant a sum equivalent to that to which he would have been entitled had he performed the contract.[1] Thus, in Fewings *v.* Tisdal[2] the plaintiff claimed to recover from the defendant on an *indebitatus* count for work and labor, one month's wages. It appeared on the trial that the defendant had, in violation of a custom, discharged the plaintiff without giving her a month's notice, and that in such circumstances the person was entitled to demand a month's wages. The action was dismissed, the court holding that special and not indebitatus assumpsit should have been brought.

Indebitatus assumpsit will not lie unless value has been received.

It has been held[3] that to entitle a plaintiff to sue a defendant in a count for goods sold and delivered, the contract must have been one for the sale of goods and not one of barter; that a contract of barter cannot be changed into a contract to pay money in the absence of an agreement by the parties to that effect. On the same principle it has been held that indebitatus assumpsit cannot be maintained for services rendered against a defendant in default who promised, not to pay money for the services rendered, but to deliver goods in exchange therefor.[4]

Right to sue in indebitatus assumpsit where defendant agreed to pay in property or labor.

[1] Fewings *v.* Tisdal, 1 Ex. 295; Allen *v.* Jarvis, 20 Conn. 38; Moore *v.* Nason, 48 Mich. 300. Though the case is meagrely reported, this principle seems to have been lost sight of in McCrowell *v.* Burson, 79 Va. 290.

[2] 1 Ex. 295.

[3] Harrison *v.* Luke, 14 M. & W. 139. See also Bernard *v.* Dickins, 22 Ark. 351; Slayton *v.* McDonald, 73 Me. 50; Pierson *v* Spaulding, 61 Mich. 90. See, however, Sullivan *v.* Boley, 24 Fla. 501; Stone *v.* Nichols, 43 Mich. 16; Straw *v.* Cunningham, 15 Vt. 215. If, however, that portion of the contract which contemplated an exchange has been performed, leaving only a sum of money due, *indebitatus assumpsit* is allowed. Sheldon *v.* Cox, 3 B. & C. 420.

[4] Anderson *v.* Rice, 20 Ala. 239; Cochran *v.* Tatum, 3 T. B. Mon.

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It would seem that the courts lost sight of the fact that in such a case the plaintiff is not suing upon the contract, but in quasi-contract to recover against the defendant for value received under a contract which he has refused to perform. It is submitted that it might be urged with equal force against a recovery in quasi-contract for goods sold and delivered, or for services rendered where the defendant has prevented full performance, that the defendant agreed to pay not for a part but a full performance, and that in the absence of such an agreement, the plaintiff should sue not in indebitatus but in special assumpsit for a breach of contract. Such a contention, however, would not be sustained.[1]

Liability of a defendant in default as to a contract under seal.

In the cases heretofore considered the defendant has been in default as to a simple contract. There remains for consideration the liability of a defendant in default as to a contract under seal. If the performance by the plaintiff in such a case has been a payment of money, it is held that he can sue in a count for money had and received, to recover an equivalent amount from the defendant.[2] It has been held,[3] however, that the sole remedy of a plaintiff who has rendered services or delivered property, is an action on the covenant, since that remedy is a higher remedy than the action of assumpsit. If the true theory on which the plaintiff recovers against a defendant in default under a simple contract is that of restitution, then it would seem that the same result should be reached where the defendant is in default, as to a contract under seal. If, indeed, it can properly be said that a plaintiff

404; Brooks *v.* Scott's Executors, 2 Munf. 344; Bradley *v.* Levy, 5 Wis. 400. See, however, Brown *v* St. Paul Railway Co. 36 Minn. 236.

[1] Planchè *v.* Colburn, 8 Bing. 14; Bartholomew *v.* Markwich, 15 C. B. N. S. 711; Carroll *v.* Giddings, 58 N. H. 333; Derby *v.* Johnson, 21 Vt. 17.

[2] Ballou *v.* Billings, 136 Mass. 307; Weaver *v.* Bentley, 1 Caines, 47.

[3] Atty *v.* Parish, 1 B. & P. N. R. 104; Middleditch *v.* Ellis, 2 Ex. 623; McManus *v.* Cassidy, 66 Pa. St. 260.

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who has paid money is seeking restitution in value, but that a plaintiff who has rendered services or has sold property is not seeking restitution, but is simply seeking to charge the defendant with the debt created by the contract, then of course the cases can be distinguished, and the rule of law requiring the plaintiff to pursue his highest remedy is applicable to the one case and not to the other, as that rule only applies where the theory of recovery is the same.

When cause of action in quasi-contract arises.

Assuming a plaintiff to have a right to sue in quasi-contract because of the defendant's breach of contract, the question arises as to the time when the cause of action is complete. If the theory heretofore suggested, that the law imposes upon a defendant in default the obligation to make restitution, is the explanation of the cases treated in this section, it should follow that the obligation arises immediately upon the default of the defendant. On this theory the plaintiff could maintain an action without first making a demand upon the defendant and it has been so held.[1] For the same reason, the remedy in quasi-contract will be barred by the statute of limitations at the same time that the remedy in special assumpsit for breach of contract is so barred.[2]

Effect of an election to sue in quasi-contract.

Assuming the existence of a case where the plaintiff has a right to sue either in contract, or in quasi-contract, the question arises as to the effect of pursuing one right rather than the other.

It is held that a pursuit of either remedy to judgment bars the right to pursue the other remedy. This doctrine is strikingly illustrated in Goodman *v.* Pocock,[3] where it was held that one who had sued in special assumpsit for a wrongful dismissal, could not afterwards sue in indebitatus assumpsit for work and labor, the fact being that at the time when he was dismissed, no sum had become payable under the con-

[1] Trinkle *v.* Reeves, 25 Ill. 214; Raymond *v.* Bearnard, 12 Johns. 274.

[2] Finch *v.* Parker, 49 N. Y. 1.

[3] 15 Q. B. 576.

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tract, and, therefore, the jury in assessing damages should have considered not only its effect upon the plaintiff's employment in the future, but also the fact that the plaintiff had worked up to the time of dismissal without receiving compensation. This result was reached notwithstanding the fact that in the trial of the action in special assumpsit, the trial judge had erroneously charged the jury that in estimating the damages suffered by the plaintiff, they were not to take into consideration the fact that the plaintiff had rendered work and labor under the contract up to the time of his discharge.

In delivering the opinion of the court, Lord Campbell, C. J., said : —

"I am extremely sorry if the plaintiff has sustained any hardship in consequence of the course which this litigation has taken; but we must decide this case according to the principles of law, and according to those principles, I have not the slightest doubt that this action must fail as to the claim now in question. The plaintiff was hired for a year at wages payable quarterly, and in the middle of a quarter he was wrongfully dismissed. He might then have rescinded the contract, and have recovered *pro rata* on a *quantum meruit*.[1] But he did not do this; he sued on the special contract, and recovered damages for a breach of it. By this course he treated the contract as subsisting, and he recovered damages on that footing. It is said that he recovered in that action in respect of no services except those of the past quarters. I receive with profound respect the opinion which the illustrious judge who tried the former action is said to have expressed; but I have a clear opinion, and I must act upon it, that the jury in assessing damages for the wrongful dismissal ought to have taken into account the plaintiff's salary up to the time of his dismissal. It is said that there is now no plea to raise the point. The plea of *non assumpsit* is quite sufficient; it obliges the plaintiff to show a debt due; and that could be only by showing that work was done for which payment could be claimed under the common count."

[1] In truth there is no rescission by the plaintiff, but a repudiation by the defendant which entitled the plaintiff to disregard the contract. A fallacy may possibly lurk in the use of the word "rescission." It is perfectly true that a contract, as it is made by the joint will of the two

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If, however, by the terms of the contract the benefit conferred by the plaintiff has made the defendant a debtor *pro tanto*, then this claim exists entirely separate and apart from any other claim, and could not be taken into consideration in an action charging the defendant with a subsequent default. In such a case, therefore, the fact of an action having been brought in special assumpsit to recover damages for a wrongful discharge subsequent to the creation of the debt, would not affect the plaintiff's right to sue in indebitatus assumpsit, since the jury in the action in special assumpsit could not take into consideration the value of the services which had resulted in a debt. In this particular Hartley *v.* Harman [1] where, the service being for a broken quarter, no debt was created, differs from Goodman *v.* Pocock.

Measure of recovery where plaintiff has partly performed the contract.

While it has been held that a plaintiff who has completely performed a contract cannot recover an amount in excess of the contract price, a plaintiff who has partly performed, but who has been prevented by the defendant from completely performing, is not necessarily restricted to the contract price. The question is simply one of just compensation for value received. Thus in Derby *v.* Johnson [2] the plaintiff, who was prevented by the defendant from further performing the contract after he had done a small part of the work contracted for, was allowed to recover an amount in excess of the contract price.

Hall, J., delivering the opinion of the court, said on this point. —

parties, can only be rescinded by the joint will of the two parties: but we are dealing here not with the right of one party to rescind the contract, but with his right to treat a wrongful repudiation of the contract by the other party as a complete renunciation of it. Per Bowen, L. J., in Mersey Steel & Iron Co. *v.* Naylor, 9 Q. B. D. 648, 671.

Cases of this kind are to be carefully distinguished from cases of genuine rescission, where the rights of the parties as to benefits conferred prior to the contract of rescission are determined by that contract. McCreery *v.* Day, 119 N. Y. 1.

[1] 11 A. & E. 798.

[2] 21 Vt. 17. See, also, Clark *v.* New York, 4 N. Y. 338.

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"Treating the plaintiffs as having been prevented from executing their part of the contract by the act of the defendants, we think the plaintiffs are entitled to recover as upon a *quantum meruit* the value of the services they had performed under it, without reference to the rate of compensation specified in the contract. They might doubtless have claimed the stipulated compensation and have introduced the contract as evidence of the defendant's admission of the value of the services. And they might, in addition, in another form of action, have recovered their damages for being prevented from completing the whole work. . . . But we think the plaintiffs, upon the facts stated in the report of the auditor, were at liberty to consider the contract as having been rescinded from the beginning, and to claim for the services they had performed, without reference to its terms.

"The defendants by their voluntary act put a stop to the execution of the work, when but a fractional part of that which had been contracted for has been done, and while a large portion of that which had been entered upon was in such an unfinished condition as to be incapable of being measured, and its price ascertained by the rate specified in the contract. Under these circumstances we think the defendants have no right to say, that the contract, which they have thus repudiated, shall still subsist for the purpose of defeating a recovery by the plaintiffs of the actual amount of labor and materials they have expended. . . .

"The claim now made in behalf of the defendants, that the rate of compensation specified in the contract should be the only rule of recovery, would, if sustained, impose upon the plaintiffs a contract which they never made. They did, indeed, agree to do all the work of a certain description on three miles of road, at a certain rate of compensation per cubic yard; but they did not agree to make all their preparations and do but a sixteenth part of the work at that rate. And it is not to be presumed they would have made any such agreement. We are not therefore disposed to enforce any such agreement against them."

No recovery where plaintiff has been paid according to the terms of the contract for the benefits conferred.

If, however, under the terms of the contract, the plaintiff was to be paid for the work as it progressed, and has in fact been paid therefor, the fact of the defendants subsequently refusing to allow the plaintiff to further perform cannot change the fact that he has been paid for the part done according to the terms of the contract. If he has suffered a

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loss in consequence of the defendant putting an end to the contract at the time he did, whereas, in fact, he would have made a profit had the defendant permitted him to perform the contract, he has established a right to recover damages in an action for breach of contract, for refusing to allow him to fully perform the contract. But the fact is not changed that he has received in extinguishment of the defendant's liability that which it was agreed before the work was begun should be paid by the defendant. Accordingly it was held in Doolittle *v.* McCullough,[1] that the plaintiff, who had contracted to make excavations at eleven cents per cubic yard, and who had made certain excavations, and been paid therefor according to the terms of the contract, could not, on the defendant's repudiating the contract, maintain an action to recover additional compensation for said work, the court holding that he had been paid for the services rendered, and that if he had suffered a loss in consequence of the defendant's breach of contract, that question could only arise in an action against the defendant for the breach thereof.[2]

[1] 12 Oh. St. 360.

[2] In considering the amount of the recovery that should be allowed in quasi-contract where a benefit has been conferred under a contract, it is important to distinguish between cases where the defendant is in default, and where he has been ready and willing to perform but the plaintiff has not performed sufficiently to entitle him to recover on the contract. While the reason for the plaintiff's failure to perform is important in determining his right to sue in quasi-contract, it should be considered absolutely immaterial where the question involved is not his right to recover, but the measure thereof.

While it is held in certain cases, where the defendant is in default, that the plaintiff shall be allowed to recover a sum in excess of the contract price, it is clear that in all cases where the plaintiff is in default the contract price should be the limit of his recovery, since to hold otherwise would be to allow the plaintiff to profit by his failure to fully perform the contract. Furthermore, as he has not performed the contract sufficiently to entitle himself to a recovery thereon, it would seem that the contract, while operating as the limit of his recovery, should not constitute the measure thereof. It is submitted that assuming a plaintiff in default to be entitled to recover in quasi-contract, the measure of his recovery should

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be the actual benefit conferred on the defendant, not exceeding the contract price. In Hayward *v.* Leonard, 7 Pick. 181, it was held that the amount of the plaintiff's recovery who contracted to build a house for the defendant, should be ascertained by deducting so much from the contract price as the house was worth less, on account of the plaintiff's failure to perform according to the contract. In other words, the plaintiff was allowed to recover the contract price less the damage suffered by the defendant in consequence of the plaintiff's breach of contract. Consequently, if the contract price was an excessive one, the plaintiff, although not entitled to recover on the contract, was given the benefit thereof. In Atkins *v.* County of Barnstable, 97 Mass 428, the trial judge charged that the plaintiff was entitled to recover what his services were "reasonably worth, not exceeding, however, the contract price." This charge was upheld, and the decision in Hayward *v.* Leonard cited in support thereof.

The two cases do not, however, suggest the same measure of recovery While under the rule suggested in Atkins *v.* Barnstable the plaintiff, though no damage had been done the defendant, would have recovered less than the contract price, had the jury been of the opinion that the contract price was in excess of the value of the plaintiff's services even had he fully performed the contract, under the decision in Hayward *v.* Leonard the question for the jury in this class of cases would be, how much should be deducted from the contract price because of the plaintiff's failure to perform fully.

Under the rule suggested in Hayward *v.* Leonard, if a plaintiff should contract to build for $10,000 a house worth in fact only $9000, and should, because of the breach of an express condition causing the defendant no damage, be unable to recover on the contract itself, he would, if allowed to recover in quasi-contract, recover $10,000. Under the rule suggested in Atkins *v.* Barnstable he would recover $9,000 only. In Blood *v.* Wilson, 141 Mass. 25, the rule suggested by the trial judge in Atkins *v.* Barnstable was, however, adopted by the court, and Hayward *v.* Leonard was cited in support thereof.

The language of the rule in Hayward *v.* Leonard has been adopted in a number of jurisdictions in this country. Pinches *v.* Swedish Lutheran Church, 55 Conn. 183; Aetna Iron Works *v.* Kossuth County, 79 Iowa, 40; White *v.* Oliver, 36 Me. 92. See, however, Coe *v.* Smith, 4 Ind. 79.

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CHAPTER VI.

RECOVERY FOR BENEFITS CONFERRED AT REQUEST, BUT IN THE ABSENCE OF CONTRACT.

ONE who has conferred a benefit upon another at his request, but in the absence of contract, may seek a recovery:

1. Where the plaintiff, with full knowledge of all material facts, intended to make a gift of the service rendered;

2. Where, though there was no intention to charge for the services rendered, the services were rendered under mistake as to a material fact;

3. Where the plaintiff supposed that he had acquired contract rights.

SECTION I.

BENEFITS CONFERRED AS A GRATUITY WITH KNOWLEDGE OF ALL MATERIAL FACTS.

No recovery in quasi-contract for benefits conferred by way of gift.

If the plaintiff, at the time when he conferred the benefit, intended, with full knowledge of all the facts, to make a gift thereof to the defendant, he cannot afterwards claim compensation for the benefit so conferred.[1] In Doyle *v.* Trinity Church,[2] the defendant, believing that the plaintiff was under an obligation to repair certain work that he had done, refused to pay him therefor unless he made the repairs at his own expense. The plaintiff agreed to make the repairs, although he was in fact under no obligation to do so, having properly

[1] Osborn *v.* Guy's Hospital, 2 Str. 728; Wyley *v.* Bull, 41 Kan. 206; Cicotte *v.* St. Anne's Church, 60 Mich. 562; Disbrow *v.* Durand, 24 Atl. Rep. 545 (N. J. 1892), Dye *v.* Kerr, 15 Barb. 444; Doyle *v.* Trinity Church, 133 N. Y. 372. See, also, cases *infra*, p. 317 n. 3.

[2] 133 N. Y. 372.

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done the work which the defendant insisted on his repairing. It was held that he could not charge for the repairs so made, as he intended when he made the repairs to make a gift thereof to the defendant, and acted voluntarily in making them.

That the benefit was conferred as a gift because of some ulterior motive is immaterial; disappointed expectations will not constitute a ground for recovery.[1] Thus, in Osborn *v.* Governors of Guy's Hospital,[2] where the plaintiff sought to recover for services rendered, it appeared that at the time he rendered the service he did not intend to charge therefor, hoping that the party upon whom he bestowed the service would remember him in his will. It was held that the fact that he was disappointed in his expectations did not entitle him to charge for services which were rendered with no expectation of compensation. It was on this principle, held in Brown *v.* Tuttle,[3] that a plaintiff, who had rendered services for the defendant in keeping house for him while the two were living together under a mutual agreement to live together as man and wife, though not in fact married, could not recover for the services so rendered after she was abandoned by the defendant, there being no intention on her part at the time the services were rendered to charge therefor, and the fact that they were rendered under a contract which the defendant had subsequently failed to perform could confer upon her no rights, since that contract was illegal and in violation of public policy.

In Collyer *v.* Collyer[4] the plaintiff sought to recover from the defendant for board and lodging furnished the defendant's intestate. It having been found as a fact that at the time when the board and lodging was furnished there was no intention on the part of the plaintiff to charge therefor, the

[1] Osborn *v.* Guy's Hospital, 2 Str. 728; Robeson *v.* Niles, 18 Dist. Col. 182.

[2] 2 Str. 728.

[3] 80 Me. 162.

[4] 113 N. Y. 442.

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services being rendered as a matter of kindness and liberality to the intestate, his sister, it was held that there could be no recovery.

"It is undoubtedly true," said Earl, J., delivering the opinion of the court, "that the plaintiff showed great kindness and liberality to his sister; but no one can read this evidence and draw therefrom any inference that he expected any reward from his sister during her lifetime. He knew that she was to the utmost degree penurious and miserly, and that she would hoard her pelf and cling to her property so long as she lived, but doubtless expected that by his kindness to her she would be induced to make a favorable disposition of her property in his favor at her death. The fact that his expectation has been disappointed furnishes no ground for now stamping what at the time were acts of kindness and generosity with the mercenary features of contract and compensation."

On this principle it is held that a child who has rendered services for a parent, not expecting compensation at the time when the services were rendered, cannot recover against the estate for the services so rendered, the parent failing to make satisfactory provision for the child by his will.[1]

It is important, however, to distinguish between a case where there was no intention to charge, as in Osborn *v.* Governors of Guy's Hospital, and a case where the plaintiff intended at the time when the service was rendered to charge therefor, but withheld his claim for the time being, in the hope that he might be remembered in the will of the person for whom the service was rendered. Thus, in Baxter *v.* Gray,[2] it was held that the plaintiff, a surgeon and apothecary, who had attended the testatrix of the defendant during an illness, intending to charge therefor, but who had refrained from rendering a bill in the hope that the testatrix would leave him a legacy, could nevertheless recover for the services rendered.[3]

[1] Houck's Executors *v.* Houck, 99 Pa. St. 552.

[2] 4 Scott N. R. 374.

[3] In this class of cases an important question involved is upon whom the burden rests of establish-

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SECTION II.

SERVICES RENDERED GRATUITOUSLY UNDER MISTAKE AS TO A MATERIAL FACT.

Right of recovery for services rendered under mistake as to a material fact.

Although there was no intention on the part of the plaintiff to charge for the services at the time when he rendered them, the question arises whether he can recover for them, notwithstanding the existence or absence of an intention to charge for the services rendered. It would seem that a party seeking to recover for services rendered should have the burden of establishing upon the whole evidence the fact that the circumstances are such that the defendant should pay therefor; and therefore, if on all the evidence the jury are not able to say that there was an intention to charge, judgment should be given for the defendant. In the ordinary case, where there is no relationship existing between the party rendering the service and the party for whom the service was rendered, proof that the service was rendered at the request and with the consent of such party would establish a *prima facie* case for the plaintiff, and therefore in the absence of other evidence the jury would be required to find a verdict for the plaintiff. But when elements of relationship are introduced, then the presumption, which is nothing more than a logical inference of fact, that there was an intention to charge for such services, would seem to be unwarranted; and it should be for the jury to say in view of all the circumstances of the case what was the understanding of the parties at the time when the services were rendered.

In Guild *v.* Guild, 15 Pick. 129, where a daughter who continued to reside in her father's family after arriving at the age of twenty-one, rendering the services customary for a daughter to perform, and receiving from her father the support usually given, sued to recover the value of the services so rendered, the trial judge charged the jury that she was entitled to recover compensation, unless it should appear that the understanding of the parties was that the services were rendered gratuitously, and that the burden of proof was on the defendant to establish that fact. The jury having rendered a verdict for the plaintiff, the charge of the judge was affirmed, because of an equal division of the court as to its correctness.

In Mosteller's Appeal, 30 Pa. St. 473, however, an auditor's report allowing a claim for services rendered by a son was disallowed, because the son failed to show that it was the understanding of the parties that he should be paid for his services, and this view seems to be supported by the weight of authority. Hogg *v.* Laster, 19 S. W. Rep. 975 (Ark. 1892); Hill *v.* Hill, 121 Ind. 255; Bundy *v.* Hyde, 50 N. H. 116; Disbrow *v.* Durand, 24 Atl. Rep. 545 (N. J. 1892); Dye *v.* Kerr,

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them, the services may have been rendered by him under mistake as to a material fact.

15 Barb. 444, Carpenter *v.* Weller, 15 Hun, 134.

This rule does not depend, as is often stated, upon the relationship of parent and child, but upon the *household* relationship existing between the parties. In Disbrow *v.* Durand, 24 Atl. Rep. 545 (N. J. 1892) where the plaintiff sought to recover against the estate of her deceased brother for services rendered as his housekeeper, it was held that there could be no recovery in the absence of proof of a contract on the part of the brother to pay therefor. McGill, Chancellor, said: "Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where the services are rendered by members of a family, living as one household, to each other, there will be no such implication from the mere rendition and acceptance of the services. In order to recover for the services, the plaintiff must affirmatively show either that an express contract for the remuneration existed, or that the circumstances under which the services were rendered were such as to exhibit a reasonable and proper expectation that there would be compensation. The reason of this exception to the ordinary rule is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of members of the family, and are gratuitously performed; and where that relationship appears, the ordinary implication of a promise to pay for services does not arise because the presumption which supports such implication is nullified by the presumption that between members of a household services are gratuitously rendered." See, to same effect, Carpenter *v.* Weller, 15 Hun, 134; Bundy *v.* Hyde, 50 N. H. 116.

In Hogg *v.* Laster, 19 S. W. Rep. 975 (Ark. 1892), the plaintiff, who when left an orphan without means of support was taken by the defendant into his family, though not related to the defendant, was held to have the burden of establishing a contract on the part of the defendant to pay her for services rendered by her in his household.

In speaking of the existence of a presumption in this class of cases, Shaw, C. J., said, in Guild *v.* Guild: "The conclusion that the question is of less practical importance than might at first appear, is founded upon the obvious consideration that it is scarcely possible that a case can be left to stand upon the mere naked presumption arising from the fact of the prolonged residence of a daughter in the family of her father, and the performance of services. There must of necessity be a great diversity of circumstances, distinguishing one case essentially from another."

It is true that it is scarcely possible that any case will have to be decided upon the bare presumption existing in favor of or against the

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In Alfred *v.* Marquis of Fitz James,[1] it was held that the plaintiff, who went from the Island of Martinique, where he was a slave of the defendant's wife, to England, could not recover for services rendered to the defendant in England prior to a promise on the part of the defendant to pay therefor. The facts of this case are so meagrely reported that it is difficult to say just what the case should be regarded as holding. If it is to be assumed as a fact that the plaintiff, at the time he rendered the services, knew that he was not a slave, and yet expected no compensation, then, of course, there should have been no recovery.

If the plaintiff, because of his ignorance of law, expected no compensation, and that fact was not known to the defendant, a recovery might have been denied.[2]

If, however, the defendant was guilty of fraud, it is submitted that the fact that the fraud related to a matter of law should not enable the defendant to defeat the plaintiff, since the plaintiff would not have rendered the services in question had he known that the defendant had no right thereto.[3] The reason why a man who does not intend to charge for services rendered is not allowed to recover compensation therefor, is because the gift of a thing is inconsistent with a sale or barter

existence of an intention or understanding to charge for services rendered. But it is important that the court should correctly charge as to the burden of establishing an intention, since the jury are entitled to know who shall have the benefit of a doubt in their minds upon this point.

The statement in the form of a rule of law of a logical inference of fact which exists in the ordinary case that where services are requested there is an intention to charge and to pay therefor, accounts for, but does not warrant, the statement made by some courts that the burden is on the defendant of disproving an intention to charge and pay for services rendered, where the party rendering the service rendered the service while living in the family as a member thereof, and received from the party for whom the services were rendered the care and assistance which was given to him before he became of age.

[1] 3 Esp. 3.

[2] See Burrows *v.* Ward, 15 R. I. 346.

[3] Hickam *v.* Hickam, 46 Mo. App. 496. See also Boardman *v.* Ward, 40 Minn. 399.

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thereof, and, therefore, one to whom a thing has been given, is not doing anything inequitable in refusing to pay therefor. The principle therefore clearly has no application to a case where the plaintiff has been induced by fraud to give services to the defendant, which the defendant knew he had no right to claim, and which he also knew would not have been rendered but for the belief of the plaintiff in the defendant's right thereto.

It is submitted that for these reasons the decision in Franklin *v.* Waters [1] cannot be supported, unless on the ground that the action involved the question of the plaintiff's right to freedom; to try which the Maryland statutes gave a remedy exclusive of the count for work and labor. In that case it was held that the defendant was not liable for services rendered his intestate by the plaintiff under the impression that he was his slave, the intestate concealing the fact that the plaintiff had been manumitted by the intestate's father. Opposed to the decision in Franklin *v.* Waters are the cases of Peter *v.* Steel,[2] Kinney *v.* Cook,[3] and Hickam *v.* Hickam.[4]

The plaintiff being in fact not a slave but a free man, the defendant was clearly guilty of fraud, and could be sued therefor in tort. Since the defendant in the commission of the tort not only injured the plaintiff but unjustly enriched himself, the plaintiff should have been allowed to waive the tort and recover from the defendant the amount of the unjust enrichment. If the defendant provided for the plaintiff, because of his occupying the supposed position of slave, that which would not have been given to him had he been serving in the capacity of a hired man, the jury should of course have taken that fact into consideration in determining the amount of plaintiff's recovery.

In Cooper *v.* Cooper [5] the plaintiff sued to recover for

[1] 8 Gill. 322.
[2] 13 Yeates, 250.
[3] 4 Ill. 232.
[4] 46 Mo. App. 496.
[5] 147 Mass. 370.

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services rendered the defendant's intestate in the following circumstances: The plaintiff and the intestate intermarried in the year 1869, and lived together as husband and wife until his death in 1885. After his death the plaintiff learned that the former wife, from whom he had not been divorced, was living, and brought the action against his administrator to recover for services rendered as housekeeper while living with the intestate. It was held that the plaintiff could not recover. Allen, J., delivering the opinion of the court, said: —

"The legal relations of the parties did not forbid an express contract between them; but their actual relations, and the circumstances under which the work was performed, negatived any implication of an agreement or promise that it should be paid for (Robbins *v.* Potter, 11 Allen, 588; s. c. 98 Mass. 532).

"The case at bar cannot be distinguished from that cited, unless upon the grounds that the plaintiff believed that her marriage was legal, and that the intestate induced her to marry him by falsely representing that he had been divorced from his former wife. But the fact that the plaintiff was led by mistake or deceit into assuming the relation of a wife has no tendency to show that she did not act in that relation; and the fact that she believed herself to be a wife excludes the inference that the society and assistance of a wife which she gave to her supposed husband were for hire. It shows that her intention in keeping his house was to act as a wife and mistress of a family, and not as a hired servant. There was clearly no obligation to pay wages arising from contract; and the plaintiff's case is rested on the ground that there was an obligation or duty imposed by law, from which the law raises a promise to pay money, upon which the action can be sustained.

"The plaintiff's remedy was by an action of tort for the deceit in inducing her to marry him by false representations, or by a false promise. (Blossom *v.* Barrett, 37 N. Y. 434.) The injury which was sustained by her was in being led by the promise, or the deceit, to give the fellowship and assistance of a wife to one who was not her husband, and to assume and act in a relation and condition that proved to be false and ignominious. The duty which the intestate owed to her was to make recompense for the wrong which

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he had done her. It is said that from this duty the law raised a promise to pay her money for the work performed by her in housekeeping. The obligation to make compensation for the breach of contract could be enforced only in an action upon the contract. The obligation to make recompense for the injury done by the tort was imposed by law, and could be enforced only in an action of tort; it was not a debt or duty upon which the law raised a promise which would support an action of contract. The same act or transaction may constitute a cause of action both in contract and in tort, and a party may have an election to pursue either remedy. In that sense he may be said to waive the tort and sue in contract. But a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained.

"But the objection to maintaining the plaintiff's action lies deeper. The work and labor never constituted a cause of action in tort. The plaintiff could have maintained no action of tort against the intestate for withholding payment for the work and labor in housekeeping, or for by false representations inducing her to perform the work without pay. The particular acts which she performed as a wife were not induced by the deceit, so that each would constitute a substantive cause of action, but by the position which she was deceived into assuming, and would be elements of damage in an action for that deceit. Labor in housekeeping was a small incident to a great wrong, and the intestate owed no duty, and had no right to single that out and offer payment for it alone; and the offer to do so might well have been deemed an aggravation of the injury to the plaintiff."

It is submitted with all deference that a different result should have been reached in this case.[1] It is true that the intestate's accepting the plaintiff's services was an incident of a previous wrong, and not an independent tort. But it is also true that the intestate, by accepting the services, wrongfully enriched himself at the plaintiff's expense; and while if he had received nothing of value from the plaintiff, the

[1] In Fox *v.* Dawson, 8 Martin, 493, a result opposed to the decision in Cooper *v.* Cooper was reached.

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plaintiff could only have sued for breach of promise to marry, or in tort for deceit, yet it is submitted that when he because of his tort enriched himself, the plaintiff, if she saw fit to sue, not for damages, but simply for compensation to the extent that the defendant had profited by his wrong, should have been allowed to do so.

The writer has attempted to show that the reason why there can be no claim to compensation when it was not the intention of the party to charge therefor, is that the defendant should not be required to pay for that which he had every reason to suppose the plaintiff intended to give and not to sell, and that therefore it would be unfair to require a defendant who has received a thing because it was given to him to pay a plaintiff who intentionally gave the service in question, not desiring any reward therefor. But in the case under consideration it could not be said that the defendant would be harshly or unjustly treated if in fact he were required to pay the plaintiff for the services rendered. When he received the services he knew that the plaintiff, if she were acquainted with the real facts, would not render the services. And it was the defendant's fraud that caused the plaintiff to be ignorant of the true state of facts. That the intestate would have had no right to single out the item of housekeeping, ignoring the wrong done the plaintiff, and to offer payment for it alone, goes without saying; since a defendant who has committed a tort has imposed upon him by law the obligation to indemnify the plaintiff for the injury done. But it does not follow, because the defendant could not deprive the plaintiff of a right to sue in tort, that the intestate had the right to insist on being sued in tort. In no case where the plaintiff is allowed to waive a tort would the defendant be allowed to say that a plaintiff must waive the tort and sue for value received.

If instead of receiving the services of the plaintiff, the defendant had in the exercise of his supposed common-law

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marital rights reduced to possession choses in action belonging to the plaintiff, it hardly seems possible that a court would hold that as the right to sue in tort had been lost by the death of the intestate, the plaintiff could not recover against his estate the money received in extinguishment of choses in action, which in fact belonged to the plaintiff, and which the defendant unlawfully appropriated to his own use. Had the plaintiff in this case surrendered to the defendant money or other chattels to which the defendant asserted a right because of his marital rights as husband, it does not seem possible that a court would hold that because of the loss of the right to sue in tort by the death of the intestate, no claim could be asserted against his estate for the value so received by him. And yet in point of principle it is submitted that it is impossible to distinguish between the receipt of money or other property by the defendant and the receipt of services. The plaintiff, whether she conferred a benefit on the intestate by rendering services or by delivering to him money or other personal property, in either case parted with a right *in rem* under a mistaken supposition, induced by the fraud of the defendant, that the defendant was entitled thereto.

At one time it seemed to the writer that it might be possible to support the decision on the ground that, as the parties had lived together as man and wife, the intestate treating the plaintiff as his wife and conferring upon her benefits which would not have been conferred upon her as a housekeeper, the case was one where it would be impossible for a jury to estimate the value of the plaintiff's services over and above the benefits received from the defendant; but on further consideration this position does not seem tenable. It must be true, as was stated by the court in this case, that had the plaintiff sued the intestate in tort to recover damages for the deceit practised upon her, the jury, in estimating the damages, would have had to take into consideration the fact that the plaintiff had during the continuance of the supposed relation

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of husband and wife rendered to the intestate services of a character ordinarily rendered by a housekeeper; and if the jury would be required in such a case to place a valuation upon such services, they could as easily make the valuation in a case, where that was the only question involved.

SECTION III.

BENEFITS CONFERRED UNDER MISTAKE AS TO THE EXISTENCE OF A CONTRACT.

Right of recovery where contract is not binding because of its form.

In Van Deusen *v.* Blum [1] the plaintiff furnished labor and material under a sealed contract binding, as he supposed, the defendants, who were engaged in business as co-partners. It was held that although the plaintiff could not recover on the contract against the firm, for the reason that the member of the firm executing the contract had no authority to bind the firm by an instrument under seal, he was nevertheless entitled to recover independently of the contract the value of the services rendered and material furnished. On this point, Morton, J., delivering the opinion of the court, said: —

"The services never were rendered either in conformity to or under such an agreement. The plaintiffs undertook to execute a contract between themselves and the company. But there being no such contract in existence, they are left to resort to their equitable claim for their labor and materials. So far as these benefited the company, the plaintiffs are entitled to recover against them."

On a similar state of facts in Bond *v.* Aitkin,[2] the plaintiff, who had lent money to a firm, sought to recover against the firm for money lent. The court not only refused, because of the want of authority on the part of the partner executing the instrument to bind the firm by a sealed instrument, to allow a recovery on the contract, but also held that as the

[1] 18 Pick. 229. [2] 6 W. & S. 165.

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instrument under seal bound one member of the firm, the plaintiff could not ignore the instrument, and recover against the members of the firm jointly on the count for money lent. Waiving for a moment the form of count used by the plaintiff, it seems impossible to reconcile this decision with the decision in Van Deusen *v.* Blum. That the plaintiff in the one case sued for work, labor, and material furnished, and in the other case for money lent, must be entirely immaterial, since the basis of recovery in either case, is that the defendant has received value from the plaintiff in exchange for which he ought in good conscience to return an equivalent. Why should the plaintiff be denied a right in quasi-contract because of the right existing under the law to sue one of a firm, not as a member of the firm, but as an individual, on a contract which was intended by both parties to be a firm contract only, binding the firm as such, and constituting the plaintiff not an individual but a firm creditor? Clearly, as to the plaintiff there has been a failure of consideration, in that he has not received that for which he paid his money. The plaintiff intended to receive from the defendants against whom he brought an action a contract giving him a right to call upon them for an equivalent for that which both in fact received from him. The plaintiff having delivered to the defendants what they desired, why should the defendants, because the plaintiff received a contract unauthorized in form, be allowed to keep without compensation that for which they expected to pay, when they received it. The plaintiff did not intend to treat with the acting partner as an individual simply; and when the plaintiff received a contract which both parties supposed bound the firm, but which in fact did not bind the firm, the fact that the partner signing the firm name is held in law to have made an individual contract, does not change the fact that the plaintiff has not received the obligation for which he contracted, and has not therefore received the equivalent which he intended to exact and thought he was receiving. If the instru-

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ment delivered to the plaintiff bound no one, then without question the plaintiff would be allowed to recover in quasi-contract against the firm. Why should the fact that the law gives to him a right which he did not wish to obtain, and of which he does not desire to avail himself, lead to a denial of a similar right in the case under consideration? Unless some positive rule of law requires such a result to be reached it is submitted that a decision bringing about such an inequitable result should not be followed.

The mistake on the part of the plaintiff in such case may be a mistake of fact or a mistake of law. If the mistake on his part is due to the fact that he supposed that the partner by virtue of being a partner had a right to bind the firm by an instrument under seal, then the mistake would be one of law. If he supposed, however, that the partner had had conferred upon him, for that particular transaction, authority in the proper form for executing the contract under seal, when in fact no such authority had been given, then the mistake would be one of fact. No such distinction has been taken in the cases however, and where the right to recover has been denied, it has been denied on the ground that as an express contract existed as to one, there could be no other obligation imposed by law. It is submitted that this is an entirely false application of the rule that the law will not imply a contract where there is an existing contract. That rule presupposes the existence of contract rights such as the parties contemplated, and the meaning of the rule is that a plaintiff will not be allowed to recover against a defendant in violation of the terms of a contract made between them. Thus if A should make a contract with B by which it was agreed that he should serve B for a given period of time, B to pay a certain sum of money at the end of that time, and A not to receive any compensation unless he served the whole time, the courts, applying the rule just stated, would, if A deliberately left the service of B before the end of the period in

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question, and attempted to recover for services rendered by him, refuse him any relief. This result is reached simply upon the principle that where parties agree upon certain rights and liabilities, there is not only no reason why the law should not impose an obligation involving liabilities, against the possibility of which the parties have, if they are permitted to do so by law, guarded; but every reason why the law should not impose such an obligation if any regard whatever is to be paid to the declared intention of the parties. But in a case like Bond *v.* Aitkin this principle cannot be invoked, because the plaintiff is only seeking to compel the defendants to do what they expected to do at the time when the plaintiff lent the money, and what the plaintiff expected they would do. Had the court compelled the defendants to pay for value received it would have compelled the parties to do exactly what all the parties thought they had obligated themselves to do, and instead of defeating, would have carried out the intention of the parties.

It is possible, although the point was not taken in Bond *v.* Aitkin, to support the result reached on a point of pleading. It would seem that in a case like Bond *v.* Aitkin the count should have been a count for money had and received rather than a count for money lent. While it is true that the plaintiff did in fact lend money to the firm, he did not receive from the firm a contract to repay the sum, the only contract which was made between the parties being the contract which did not bind the firm because it was put under seal. The real basis of the liability would seem to be that as the loan failed because of a failure to obtain a firm obligation, it was inequitable for the defendants to retain the money received from the plaintiffs; and therefore if they refused to ratify the contract so made, the money should be returned to the plaintiff. The obligation imposed in such a case is to make restitution in value, and the count for money had and received would seem to be the proper count.

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Recovery for services rendered under mistake as to the terms of a contract.

The case of Turner *v.* Webster[1] affords a good illustration of a failure of consideration arising from mistake, and the rights resulting therefrom. In that case the plaintiff rendered services for the defendant under a misunderstanding as to the terms of the defendant's offer, the offer being ambiguous on its face. The defendant not having agreed to what the plaintiff regarded as the contract price, the plaintiff was not entitled to recover that sum. As the plaintiff had not agreed to accept the price which the defendant had intended to pay, the court held that the defendant could not insist upon that sum as the limit of the plaintiff's compensation, and held that as there was no contract between the parties, the plaintiff should recover from the defendant the reasonable value of his services. Brewer, J., delivering the opinion of the court, said: —

"Here Webster never assented to a contract to work for $1.50 per day. He agreed to do certain work, and did it; but his understanding was that he was to receive $3 per day. Turner and Otis employed him to do that work, and knew that he did it, but their understanding was that they were to pay $1.50 per day. In other words the minds of the parties met upon everything but the compensation, and as to that there was no *aggregatio mentium*. What, then, should result? Should he receive nothing because there was no mutual assent to the compensation? That were manifest injustice. Should his understanding bind both parties? That were a wrong to them. Should theirs control? That were an equal wrong to him. The law, disregarding both, says, a reasonable compensation must be paid. . . . Justice is done to all parties by ignoring any promise or understanding as to compensation, and giving to the laborer compensation for the work done, and requiring the party receiving the benefit of such work to pay a just and reasonable price therefor."

Recovery of money lent under mistake as to the authority of an agent to borrow.

In Kelley *v.* Lindsey[2] the plaintiff had cashed a check drawn by one Coffin in the name of the defendant. It appeared that

[1] 24 Kan. 38. See also Tucker *v.* Preston, 60 Vt. 473.

[2] 7 Gray, 287.

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though Coffin obtained the money for the use of the defendant and applied it for the defendant's benefit in the defendant's business, he was not authorized to borrow the money or to give a check therefor. The plaintiff failing to recover on the check, resorted to the counts for money lent, and for money had and received. But the court held that although the money had been borrowed for use in the defendant's business, and had been actually expended therein, there could be no recovery.

If it be assumed that the plaintiff could not hold the defendant on the contract, and that the agent never made the money in fact a part of the funds of the defendant by mingling it therewith, the action for money had and received should not have been allowed, because the money being received in fact by one who, at most, was nothing more than an agent, was not either in fact or in legal contemplation received by the defendant. Nor would the count for money lent lie, assuming the money to have been applied by the agent, in extinguishment of claims existing against the defendant, since the application of the money by the agent could not convert its unauthorized receipt into an authorized loan. Assuming the money never to have reached his hands, or to have become part of his funds, the case would seem to have been a proper case, however, for the application of the doctrine of subrogation, since the plaintiff, having paid his money on the supposition that the agent had in fact authority to borrow, could not be regarded as an officious volunteer. And as subrogation would not harm the defendant, but would simply put the parties where the plaintiff and the defendant were prior to the borrowing of the money by the defendant's agent, justice would seem to demand that the plaintiff be subrogated to the rights of the party or parties whose claims were in fact extinguished by the money obtained from the plaintiff. It would seem also that in such a case the count for money paid to the use of the defendant

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should be allowed, since the defendant has clearly had the benefit thereof.

In the First Baptist Church *v.* Caughey[1] the plaintiff brought an action against the defendant to recover money which had been borrowed by the trustees for the defendant on a promissory note executed by the trustees. It was held that though the plaintiff could not recover on the note because the trustees had no authority to execute it, yet as they had authority to borrow money needed for the legitimate use of the corporation, he was entitled to recover on a common count.

The trial judge in his charge to the jury made the plaintiff's right of recovery depend upon the fact that the money had in fact been used for the benefit of the defendant, and the verdict for the plaintiff was supported on appeal on that ground. If the money in this case was borrowed by the trustees as trustees, in the exercise of a power conferred upon them by the corporation to borrow money, there seems to be no reason why the plaintiff's right to recover should depend upon the proper application of the money by the trustees. If the trustees had authority to borrow, and did in fact borrow the money not as individuals but as trustees, the moment the money was received by the trustees it was received by the corporation, and at that moment an obligation was created against the corporation in favor of the plaintiff. Since there was no excess of authority on the part of the trustees in borrowing money, there seems to be no reason why the loss in the event of a misappropriation should be thrown upon the plaintiff, simply because the trustees, when they borrowed the money, attempted to give the plaintiff a form of obligation which they had not the power to issue. Had the trustees, in the exercise of their authority, simply borrowed the money, and orally bound the corporation to pay the same, it would not be contended that the plaintiff should look to

[1] 85 Pa. St. 271.

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the application of the money; why then should he be required to look to its application simply because he has failed to receive the obligation which he expected?

If the facts are to be regarded as establishing that the trustees received the money not as trustees, but as individuals, and that the money was never received as such by the corporation, then the suggestions hereinbefore made with reference to Kelley *v.* Lindsey [1] are applicable, and the plaintiff's only right would be a right to be subrogated to the rights of the parties in extinguishment of whose claims the trustees had used the money, unless the count for money paid to the use of the defendant should be allowed.

If the note given in this case is to be regarded not as the note of the corporation, but as the note of the trustees as individuals, then, even though the money was in fact received by the corporation, it is difficult to reconcile the decision with the decision of the same court in Bond *v.* Aitken.[2]

In Billings *v.* Monmouth [3] it was held that a plaintiff, who had lent money to the town through its treasurer on the faith of promissory notes issued by him, could recover against the town in a count for money had and received, even though the treasurer exceeded his authority in issuing negotiable paper. The plaintiff's right of recovery was made to turn upon the fact that the town had in fact received the benefit of the money borrowed from the plaintiff, because of its application by the treasurer in extinguishment of claims existing against the town. If it be assumed that the treasurer had authority to borrow the money, and simply exceeded his authority in issuing the instrument which the plaintiff required in exchange for the money, then, for the reasons heretofore stated, it seems to the writer that the use made of the money by the treasurer is entirely immaterial in discussing the plaintiff's right of recovery. If, however, it be

[1] *Supra*, p. 330.
[2] *Supra*, p. 326.
[3] 72 Me. 174.

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assumed that the treasurer having no authority to borrow, did in fact borrow the money for the town, and did make the money a part of the funds of the town, still it would seem that the misuse thereof by the treasurer would have been a defence to an action brought by the plaintiff. For while the town, because of receiving the plaintiff's money, should be put under an obligation to make restitution, that obligation resting on the fact of an unjust enrichment on the part of the town, a loss arising from a misuse of the money, without any fault on the part of the town, should, it is submitted, fall on the plaintiff. On this assumption it would be a case where the plaintiff loaned the money to the treasurer, when the treasurer had no authority to borrow, and when the facts did not authorize the assumption that the treasurer had such authority. It would be unjust, therefore, to hold the town responsible for money put into its treasury without its authority and without its knowledge, and from which it had derived no benefit.

In Smout *v.* Ilbery [1] the plaintiff who sued the defendant to recover the value of food supplied on the credit of her husband, after his death, but while both the plaintiff and the defendant supposed him to be alive was not allowed to recover. It was properly held that she had not warranted her authority as agent, and that she had not contracted personally to pay for the supplies. But the writer is of the opinion that the plaintiff should have been allowed to recover, on the theory that as there was a failure of consideration, owing to the plaintiff's failure to acquire a contract right against the party whom both the plaintiff and defendant regarded as a principal, the defendant, who had in fact received the benefit of the consideration which the plaintiff supposed he was giving in exchange for an obligation, should in equity and good conscience pay therefor. It is true that there is no suggestion in the case of any theory independently of the

[1] 10 M. & W. 1.

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doctrines of agency by which the plaintiff might be entitled to recover from the defendant the value of the necessities received by her. In point of justice, however, it is submitted that there is no good reason why, in cases of this kind, a recovery should not be allowed against a defendant who has profited by the plaintiff's mistake. Why should the defendant, who would, had she known of her husband's death, have been under the necessity of supplying herself at her own expense with the necessaries of life, be permitted, because of her ignorance, to supply herself at the expense of the plaintiff?

The case differs from the ordinary case where goods are supplied to a person on the credit of another. If, for example, A supplies goods to C on the sole credit of B, and at the time of supplying the goods gets in fact an obligation by which B is bound to pay for the goods supplied to C, there would seem to be not only no reason why A should be allowed to look to C since when he got the obligation of B he got all that he expected, but to charge C. in such a case would be manifestly unjust. If in the case of Smout *v.* Ilbery it could be assumed that the facts warranted the inference that the understanding of the parties was that the plaintiff was in no event to charge the defendant, then of course it would be the ordinary case of a man taking his chances, and the chance proving worthless. For example, if it could be assumed that the defendant and the plaintiff dealt with each other on the understanding that the plaintiff should have a right to charge the husband if alive, and should charge no one if the husband was dead, then of course it would be manifestly unjust to compel the defendant to pay, because in such a case the court would be violating the positive intention of the parties, that in no case should the defendant be liable. It would seem, however, to be a fair assumption, that the defendant, since she was equally in need of the necessaries of life, whether she were a wife or a widow, would have agreed personally, had it been necessary for her to do so in

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order to obtain these necessaries, to pay for them. The court therefore, if this assumption is warranted, would not have violated any positive intention of the parties, had it imposed an obligation upon her. It would have created a liability which the defendant would readily have assumed had the necessity therefor occurred to the plaintiff. The result of the actual decision in Smout *v.* Ilbery was that the plaintiff contributed to the support of the defendant during the time that her widowhood was an unknown, and therefore an undisclosed fact. Had the court allowed a recovery by the plaintiff on the principles of quasi-contract, the plaintiff would have lost nothing, and the defendant would have been simply put in the position of not being able to profit in consequence of her ignorance of her husband's death.

In Kneil *v.* Egleston[1] the plaintiff brought an action against the estate of a deceased husband, to recover money which had been lent by the plaintiff's testatrix to her husband on his promise to return it, or a like sum to her in a short time. It was held that the action would not lie. Said Devens, J., delivering the opinion of the court: —

"We do not perceive how, consistently with well-settled principles, the plaintiff in this case can recover. While, by statute, the wife may make contracts in the same manner as if she were sole, no authority has been given by which husband and wife may make contracts, each with the other. Their legal incapacity thus to contract remains as at common law. . . .

"In the case at bar, the fact that the wife survived the husband could not make that a good contract which was originally a nullity. . . .

"It has indeed been held that, where one renders service or conveys property as the stipulated consideration of a contract within the statute of frauds, if the other party refuses to perform, and sets up the statute, the value of such service or property may be recovered. The obligation which would arise from the receipt or retention of value, to return or pay for the same, is not overridden, because the words of a form of a contract which did not bind the party repudiat-

[1] 140 Mass. 202.

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ing it were uttered at the time. (Bacon *v.* Parker, 137 Mass. 309.) Between parties competent to contract, it is reasonable to infer that the party failing to perform that which he had agreed to do, and yet which he might lawfully do, promised that, if he availed himself of his right of rescission, he would return that which he received; and that the value received or retained by him was so received only on these terms. In Bacon *v.* Parker, the parties were competent to contract with each other; but the inference that, if one contract was repudiated, another must be inferred, could not arise where parties were not competent to make any contract."

Before considering the decision in Kneil *v.* Egleston it is necessary to consider the rights and liabilities of a husband and wife in a court of equity. Where the wife has lent money, as in Kneil *v.* Egleston, to the husband on the understanding that the money is to be repaid by him, it seems clear that in equity the wife has an enforceable claim against the husband. Thus in Woodward *v.* Woodward[1] it was held that a widow should be allowed to recover against the estate of the husband for money advanced to the husband, Lord Chancellor Westbury saying: —

"Wisely or unwisely this court has established the independent personality of a *feme covert* with respect to property settled to her separate use. It is a remarkable instance of legislation by judicial decision whereby the old common law has been entirely abrogated and the power of the wife to contract with her husband has been established. I do not go so far as to say that in the bare case of a sum of money, a part of the income of her separate estate, being handed over by her to her husband, this court would of necessity raise an assumpsit for the repayment of the money so handed over. But it is quite clear that if money, part of the income of her separate estate, be handed over by her to her husband upon a contract of loan, she may sue her husband upon that contract."

Such a claim being enforceable in equity, it is held that a payment thereof by the husband to the wife if not made with

[1] 3 DeG. J. & S. 672.

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a view of hindering, delaying, or defrauding creditors is valid as against creditors.[1]

It is true that at common law there could be no loan of money by a wife to a husband, and this was true for two reasons: 1, The merger of the wife's personality into that of the husband's; 2, The right of the husband to the wife's personal property. But in equity there could be a loan from the wife to the husband, equity recognizing the independent personality of the wife and her right to a separate estate.

It is also true at common law that the wife because of the merger of her personality could not sue the husband at law, and this rule has continued to exist in many jurisdictions where the wife's right to a separate legal estate has been declared by statute. This being the rule in Massachusetts at the time when the loan was made by the wife to the husband in Kneil *v.* Egleston, it is plain that the wife could not have sued the husband at law to recover the money so loaned; but on the death of the husband the objection in point of procedure to the wife becoming a plaintiff ceased to exist, there being no objection in law to a widow suing the personal representative of the estate of the deceased husband.[2]

Had the plaintiff in Kneil *v.* Egleston sued only in the count for money lent, it would seem that judgment should have been rendered for the defendant for the reason that the count for money lent would presuppose a contract, and that contract not with the defendant in the action, but with the intestate, with whom the plaintiff could not contract, because of the relation of husband and wife. But the count for money had and received having been used, it is submitted that the plaintiff should have been allowed to recover on

[1] Medsker *v.* Bonebrake, 108 U. S. 66; Atlantic National Bank *v.* Tavener, 130 Mass. 407; Jaycox *v.* Caldwell, 51 N. Y. 395.

[2] Dougherty *v.* Snyder, 15 S. & R. 84.

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that count. While the court was clearly right in saying that the evidence did not establish any intention on the part of the husband to make himself a trustee for the plaintiff, the evidence did establish an equitable obligation, in favor of the plaintiff against the husband, which had not been performed, and the estate was therefore under an obligation to refund to the plaintiff the money paid in expectation of performance of the obligation. It being clearly a case where a court of equity would have compelled the repayment of the money on equitable principles, and the count for money had and received being a count to recover at law money equitably due, it would seem useless to compel a plaintiff to file a bill in equity. That the equitable character of the obligation furnishes no objection to a recovery in the count for money had and received is evident, not only from the general use made of the count for money had and received, but it is strikingly shown by the fact that generally in this country the count can be used by a cestui que trust against a trustee, where the only duty resting upon the trustee is to pay to the cestui que trust a liquidated sum of money.

It was apparently urged in Kneil *v.* Egleston that the plaintiff should be allowed to recover on the authority of the cases holding that one who renders service or conveys property under a contract which the defendant has refused to perform, relying upon the statute of frauds, can recover the value of such service or property in an action of assumpsit.

It is submitted that the distinction which the court attempted to draw between the two cases is not well founded; that in point of principle the two cases are the same, each resting upon the equitable obligation imposed on the defendant to prevent an unjust enrichment at the expense of the plaintiff. The suggestion made in Kneil *v.* Egleston that where a recovery is allowed for services rendered under a contract within the statute of frauds, the theory thereof is

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that between parties competent to contract it is reasonable to infer that the defendant promised if he availed himself of the statute to return that which was received, it is submitted with all deference is purely fanciful, and not recognized as the basis of the obligation.[1]

[1] See *supra*, p. 277.

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CHAPTER VII.

RECOVERY FOR BENEFITS INTENTIONALLY CONFERRED WITHOUT REQUEST.

A PLAINTIFF seeking to recover for services rendered without the consent of the defendant has the burden of taking himself out of the well-established rule that no one has a right to force himself upon another as his creditor. The service for which the plaintiff seeks a recovery may have been rendered in a case where, though the defendant did not assent thereto, he expressed no dissent, or in a case where he not only did not assent, but actually dissented.

Again, the act done by the plaintiff may have been one which the defendant was under no obligation to perform, or one which he was under an obligation to perform because of an obligation imposed by law, or because of a personal obligation assumed by himself. The service rendered may have been one in the performance of which the public had an interest, or a matter of no public concern.

Recovery of money paid in discharge of an obligation imposed by law on the defendant in the interest of the public.

Where an obligation is imposed by law upon a person to do an act, because of the interest which the public has in its performance, it would seem that on the defendant's failure to perform, a person performing the same with the expectation of receiving compensation should be allowed to recover against the defendant.

In accordance with these principles it has been held, in a number of cases, that a plaintiff rendering services in such circumstances can recover from the defendant, upon whom the law imposed the obligation in question. Thus in Jenkins *v.* Tucker[1] it was held that the plaintiff could recover from the

[1] 1 H. Bl. 90.

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defendant, for money paid to the use of the defendant, in the following circumstances: The defendant, who was possessed of a large estate in Jamaica, left his wife in England, out of health and much in want of money. During his absence she died, and funeral expenses, suitable to the defendant's fortune and station, were paid by the plaintiff, her father. Lord Loughborough, in his opinion, said: —

"I think there was a sufficient consideration to support this action for the funeral expenses, though there was neither request or assent on the part of the defendant, for the plaintiff acted in discharge of a duty which the defendant was under a strict legal necessity of himself performing, and which common decency required at his hands; the money, therefore, which the plaintiff paid on this account was paid to the use of the defendant. A father also seems to be the proper person to interfere in giving directions for his daughter's funeral, in the absence of her husband."

In Ambrose *v.* Kerrison[1] the defendant and his wife had separated. On the death of the wife, the plaintiff, who was distantly connected with the deceased, defrayed the funeral expenses, not knowing where the husband resided. In an action brought to recover money paid to the defendant's use, it was objected that the plaintiff could not recover because he was a volunteer. It was held, however, that he was entitled to recover the money so paid, Jarvis, C. J., saying: —

"The point for our consideration is simply this, whether the husband, living apart from his wife, is liable to a third person for expenses incurred by him for the decent and suitable interment of his wife. There can be no question that an undertaker who performs a funeral may recover from the executor of the deceased (having assets) the reasonable and necessary expenses of such funeral without any specific contract. That liability in the executor is founded upon the duty which is imposed upon him by the character he fills, and a proper regard to decency and to the comfort of others. And I think that the same reasons which call upon the executor to perform that duty cast at least an equal responsibility on the husband

[1] 10 C. B. 776.

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of a deceased wife, and, without any express authority or request on his part, compel him to recoup one who has performed the funeral. I see no difference in principle between the case of an undertaker, and that of a third person who takes upon himself to employ and pay the undertaker."

In Bradshaw *v.* Beard [1] the defendant and his wife had separated, the wife leaving the defendant in consequence of a quarrel, and going to the house of the plaintiff, her brother, about a mile distant from her husband's home, which he still continued to occupy. She continued to reside with her brother until her death. On her death the plaintiff, her brother, without communicating with the defendant, employed an undertaker to bury her. Although the plaintiff did not communicate with the defendant, the defendant knew of his wife's death and did not in any way interfere. It was held that the plaintiff could recover the money so expended, as money paid to the use of the defendant. Willes, J., said:

"Where the deceased has a husband, the performance of that last act of piety and charity devolves upon him. The law makes that a legal duty, which the law of nature and society make a moral duty. And upon his default the law obliges him to recoup the reasonable expenses of the person who performs it for him. I am not, therefore, surprised to find that there are two authorities in this court (Jenkins *v.* Tucker, 1 H. Bl. 91; Ambrose *v.* Kerrison, 10 C. B. 776) which support this view; and I feel no alarm that this doctrine may induce a stranger to thrust himself in between husband and wife for the mere purpose of preventing the husband from performing that duty himself. Generally speaking, parties are not allowed to claim in respect of moneys expended for others without request. If the plaintiff here had been shown to have been guilty of any fraud in concealing from the husband the fact of his wife's death, and so preventing him from performing the last duty to her remains, the case would have presented a very different aspect. But I see no reason for imputing any such misconduct to the plaintiff. Therefore I think the plaintiff is entitled to recover

[1] 12 C. B. N. S. 344.

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the reasonable expenses incurred by him in the performance of that duty, which the defendant ought to have discharged, but has failed to discharge."

An executor or administrator being under an obligation to bury the deceased, any one performing that act in circumstances justifying the act on his part, can recover from the executor or administrator for the services so rendered.[1]

In Patterson *v.* Patterson,[2] Folger, J., delivering the opinion of the court, after speaking of the duty of the executor or administrator to bury the deceased testator or intestate, said:

"From this duty springs a legal obligation, and from the obligation the law implies a promise to him, who in the absence or neglect of the executor, not officiously, but in the necessity of the case, directs a burial and incurs and pays such expenses thereof as is reasonable."

In Force *v.* Haines[3] a plaintiff sued the defendant to recover for services rendered in the following circumstances: The defendant had let a slave to the plaintiff. At the expiration of the period of hiring, the plaintiff tendered the slave to the defendant, who refused either to receive the slave or to be accountable for her maintenance. The slave not being able to care for herself, because of her physical infirmities, the plaintiff received and maintained her for a number of years. It was held that, notwithstanding the law imposed upon the defendant an obligation to maintain his slave, the plaintiff could not recover for the services so rendered. The ground upon which this decision was placed seems to have been that there was no urgent necessity requiring the plaintiff to act in the premises, for the reason that the overseer of the poor would, upon application, have compelled the defendant to discharge this duty. Thus Ford, J., in his opinion said:

[1] Rogers *v.* Price, 3 Y. & J. 28; Patterson *v.* Patterson, 59 N. Y. 574.

[2] 59 N. Y. 574.

[3] 2 Harr. 385.

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"The situation of Elizabeth Haines cannot be relieved without upholding this action for maintenance of a slave against the owner's will, without his request or any promise to pay for it, and in a case of no emergency, which would legalize interference with the private business of others, in a manner subversive of law and mischievous to society. She ought not to have harbored the slave; but, if actuated by pity towards an old servant, should have notified the overseer of the poor, who would have found a ready mode of compelling the owner to do his duty."

Dayton, J., in his opinion said: —

"Minna being the slave of Force, he was morally and legally bound to support her, knowing, as he did, her destitute condition. Does this raise an implied assumpsit in favor of Mrs. Haines? And here let it be remembered, that there is nothing which gives to Mrs. Haines any peculiar rights in this case, other than would have been common to any other citizen, who, from motives of benevolence or otherwise, had supported the black woman as Mrs. Haines did. And if we sanction the recovery in this case, we must adopt the general principle, and extend a right of recovery under like circumstances, to all such as shall take upon themselves to give support to another's slave, when it may be needed.

"This will be to supersede all necessity of application to the overseers of the poor, and constitute every man the keeper, at his option, of this class of poor of his neighborhood, — nay, indeed, of all classes and cases where the statute creates a legal liability on one man or set of men, to maintain another, if they neglect their duty; for the implied assumpsit, it must be remembered, springs, if at all, not from the moral, but the legal obligation. The former, it is well settled, is a good consideration as a general rule, for an express promise; the latter alone will raise an implied one. Without referring to the numerous cases to be found in the books, I shall ground my opinion upon general principles extracted from them, referring to specific cases only for the purpose of better illustrating my meaning. This case stands entirely clear of those authorities which hold the master liable for necessaries found his servant or slave on an emergency, as on a sudden injury or hurt on the highway or elsewhere, or a distance from home, and where the master is not accessible. These cases constitute a class of themselves, and the rule of law which applies to them, and the

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reason of that rule, has no application to the present question. Here, there was no immediate necessity, but a long-continued support of the black woman by Mrs. Haines, for which she was no more liable, either legally or morally, directly or indirectly, than any other citizen. . . .

"There was still another ground assumed on the argument, which at the time appeared to me more plausible than either of the preceding, but I think equally unsound. The liability of the master to support his slave was likened to that of a husband to support his wife, or a parent his child; for whose necessary maintenance he is liable under certain circumstances, though rendered against his express orders. But these cases I apprehend have always stood upon their own foot, regulated not by general principles, but such rather as have their origin in the legal character and relationship subsisting between the parties. They constitute rather an exception to general principles than a rule."

Assuming that the plaintiff at the time she rendered the service, rendered the service with the expectation and intention of getting compensation from the defendant for the services so rendered, it is submitted that the case is not to be distinguished from the case of the liability of a husband for necessaries furnished to a wife or the liability of a father for necessaries furnished to a child, cases where it is conceded by the court that a plaintiff furnishing necessaries would have a right to recover against the husband or father refusing to supply the same. It will not do to say that one furnishing necessaries to a wife or child can recover because it would be humiliating to the wife or child to have to apply to the overseer of the poor for support. The ground upon which the decision allowing such a recovery must be placed is the broad principle that the defendant, having failed to discharge an obligation imposed upon him by law, and in the performance of which the public has an interest, a plaintiff supplying the aid which the defendant has refused to supply, is not acting officiously, and can, therefore, though a volunteer, recover.

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It is respectfully submitted that this view does not violate any principle of public policy. The only possible public policy which it might apparently violate would be that allowing such a claim might result in the vexation and annoyance of members of the community by persons claiming to have rendered such services. But when it is borne in mind that the burden is on the person making such a claim to establish a necessity therefor, and that the act done by him should have been performed by the defendant, and that while a failure to establish these facts means expense to the plaintiff, their successful establishment will involve him in expense which in the ordinary case will not be compensated by the recovery obtained, this objection would seem not to be well founded.

In Everts *v.* Adams [1] the plaintiff, a physician, sought to recover from the defendants, overseers of the poor, for medicine and attendance furnished a pauper. Under the statutes then in force the overseers of the poor were not allowed to make advances for the relief of a pauper, except on an order from a justice of the peace, authorizing such advances. An order had been made by two justices, authorizing the overseers to furnish the pauper with necessaries, and also with medical attendance, if needed, by a physician named in the order. There was no evidence that the physician named in the order had ever attended upon the pauper, and the plaintiff sought to recover for services rendered the pauper. It was held that the plaintiff could not recover.

This decision is clearly sound. Any other decision would have been in violation of the statute. The statute requiring the overseers to obtain an order authorizing them to make an expenditure, there was clearly no obligation resting upon the overseers in the absence of the order. As the order made did not authorize the employment of the plaintiff, it seems difficult to see how the plaintiff could avail himself of the fact had an order been made. Furthermore, there is no evidence in

[1] 12 Johns. 352.

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the case that the overseers had been derelict in discharging their duty, and no reason given why the plaintiff rendered the service in question without the sanction of the overseers. The case then can be supported on either of two grounds: 1, That there was no duty imposed upon the defendants by law corresponding to that which was performed by the plaintiff; 2, That the plaintiff failed to show any reason why the service in question should have been rendered by him in the absence of assent on the part of the defendant.

In Dunbar *v.* Williams[1] the plaintiff sought to recover for services rendered in attendance as a physician upon a slave belonging to the defendant. It appeared that the slave concealed from the defendant, his master, the fact that he was ill, and applied to the plaintiff, who cured him. As the defendant did not know of the illness of his slave, the services were of course rendered without the consent of the defendant. Furthermore, the sickness was not of a character requiring the slave to apply to the plaintiff without first consulting the wishes of his master. It was held, and properly, that the plaintiff could not recover. The court, denying the plaintiff's right to recover, said: —

"But the case of the slave in the present instance was not one that required instant and indispensable assistance. We are to presume that the master was accessible, and both able and willing to grant the request for aid. The service was voluntary on the part of the defendant below. It was not a case *in extremis;* and if the plaintiff did not choose to apply to the master, or to take care that his assent was obtained, the service must be deemed gratuitous. It would be dangerous to the rights of owners of slaves to allow them to charge their masters with legal assistance, when the case was not so urgent as to prevent a previous application to the master for his direction."

The only exception that can be taken to this statement of the law is, the statement that the services must be deemed to

[1] 10 Johns. 249.

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have been rendered gratuitously, because of the fact that there was no urgent necessity calling for the rendition of the services without first consulting the master. That the plaintiff rendered services for which there was no urgent necessity without first consulting the defendant, is indeed a sufficient reason in law for saying that he was an *officious volunteer*, and should not be allowed to recover, but hardly a reason for saying that he in fact did not intend to charge for the services so rendered.

The case in this particular differs from Cunningham *v.* Reardon,[1] where it was held that the plaintiff, who buried the wife of the defendant, who had been compelled to leave him because of his cruelty, and whom he had refused to support, could recover from the defendant the expenses incurred by him in the burial of the wife, though he gave no notice to the defendant of the wife's death, notwithstanding the fact that such notice could easily have been given. Hoar, J., delivering the opinion of the court, said: —

"Nor is any notice to him requisite in order to charge him for her funeral expenses, any more than for necessaries to sustain life. The burden is on the plaintiff in either case, to prove the existence of the necessity, and that the husband has failed to make provision for it. But when this is established, nothing more is needed to create the liability; and it would seem to be an idle ceremony to give notice of his wife's death to a man who had refused her the means of sustaining life. The responsibility for funeral expenses is not a new and distinct cause of action, differing in kind, or in the rules by which it is created, but an incident to the obligation to furnish bodily support."

No recovery unless act was necessary.

To charge a defendant for services rendered in the discharge of an obligation which he, the defendant, should have performed, the plaintiff must establish a necessity for his, the plaintiff's, action. In a case where the reason for the appeal to the plaintiff is the fact that the defendant has failed in his

[1] 98 Mass. 538.

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obligation, then no notice is necessary. If, however, the defendant has not refused to discharge his obligation, and his failure to act has been due to his want of opportunity, he must, if he is in a position to act, be given the opportunity before any one will be justified in acting in his stead.

Service must have been rendered with the expectation of charging the defendant therefor.

In the cases that have been heretofore considered in this connection, it has appeared that the plaintiff rendered the service with the expectation of compensation, and in addition thereto it has appeared that the service was not rendered upon the credit of any person other than the defendant. In this class of cases, if the service at the time it was rendered, though rendered with a view of obtaining compensation therefor, was rendered on the credit of a person other than the defendant, then, notwithstanding the act was one which the defendant was under an obligation in law to perform, still, since the plaintiff has acquired all the rights which he expected at the time when he rendered the services, namely, a right to sue a person other than the defendant, there is no reason why he should be given a claim against the defendant. The claim against the defendant, if any exists in such a case, exists not in favor of the plaintiff, but in favor of the person upon whose credit he in fact rendered the services. Thus it was held in Quin *v.* Hill[1] that the plaintiff could not recover against the defendant for burying the body of his deceased wife, it appearing that the deceased was buried at the request of her mother, and upon her mother's credit.

No recovery where service was rendered officiously.

Furthermore, in order that a party may recover for services so rendered, he must not have acted officiously. Thus in Quin *v.* Hill[1] where it appeared that the plaintiff, in the presence of the husband of the deceased, assumed entire control of the arrangements of the burial, entirely ignoring the husband, who was living under the same roof with her, it was held that she acted officiously, and thereby relieved the husband from any obligation in regard to the burial of his wife.

[1] 4 Dem. 69.

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Right of a plaintiff supporting one whom the defendant contracted to support.

There remains to be considered a class of cases where, in the absence of an obligation imposed by law, the defendant has taken upon himself by contract the duty of supporting another, whom the plaintiff supports on the refusal of the defendant to perform his contract. Shall the plaintiff be allowed in such circumstances to recover for service rendered? This class of cases differs from the case of a purely private nature, in which only the parties to the contract are interested, in that the public has an interest in the proper sustenance of all members of the community. The case also differs from the cases hereinbefore considered in this particular, that while the public is interested in the performance of the obligation by the defendant which he has taken upon himself, the defendant does not occupy a position in consequence of which the law would have imposed the obligation upon him, and therefore, in the absence of a contract obligation on his part, it would have been necessary for the public, and not the defendant, to render the service in question.

It seems difficult to say in this class of cases that a plaintiff, because of a defendant's default, shall have a right to render a service assumed by the defendant, and charge him in quasi-contract therefor. The defendant's contract, it is conceded, confers no rights upon the plaintiff, and in the absence of contract the defendant would have been under no obligation. How then can the plaintiff charge the defendant, because of a contract obligation, when that contract obligation confers no rights on the plaintiff?[1] It would seem proper for a court of equity to subrogate the plaintiff to the rights of the party to the contract, for the plaintiff, though a volunteer, has acted in discharge of a social duty, and in the interest of the public.

It was held, however, in Forsyth *v.* Ganson,[2] that the defendant, who had contracted with his father to support his

[1] See Savage *v.* McCorkle, 17 Ore. 42.

[2] 5 Wend. 558.

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stepmother, the father's second wife, was liable to the plaintiff, her son, for her support and maintenance. Sutherland, J., delivering the opinion of the court, said: —

"The remaining inquiry is (admitting the intestate to have been legally bound to support Mrs. Ganson) whether this action can be maintained in the name of the present plaintiff? I am of opinion that it can. It appears to me analogous to the case of necessaries furnished to a wife, or infant child, for whom the husband, or father, improperly neglects or refuses to provide. . . .

"The intestate in this case being legally bound to provide for Mrs. Ganson, the service and supplies afforded to her by the plaintiff were advantageous to the defendant, and may well be considered as having been rendered at his request."

So in Rundell *v.* Bentley[1] it was held that the defendant, who had promised, in consideration of the conveyance of her property to him, to support the promisee for life, and who had failed to provide for her in an emergency, was liable to the defendant for necessaries furnished. Ingalls, J., delivering the opinion of the court, said: —

"It seems very clear that the defendant omitted the performance of his agreement at a time when, considering the inclemency of the weather, and the destitute condition of Mrs. George, and the state of her health, he was called upon to exercise more than ordinary care and attention in administering to her necessities, and in performing the requirements of the contract on his part. We think the jury were justified by the facts and circumstances in concluding that the defendant was informed that the plaintiff was furnishing the provisions and caring for Mrs. George at the time, and did not object thereto. Under the circumstances, the neglect of the defendant was almost criminal."

Conceding the act of the defendant to have been almost criminal, the premise would seem to fail to support the conclusion that, therefore, the plaintiff could recover against the defendant. The defendant did not contract with the plain-

[1] 53 Hun, 272. Cf. Savage *v.* McCorkle, 17 Ore. 42.

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tiff nor for his benefit, and if he was guilty of a breach of contract, the cause of action arising from such breach vested not in the plaintiff, but in the promisee.

No recovery for the preservation of property against the protest of the owner.

There remains for consideration a class of cases where the plaintiff rendered services in the preservation of the defendant's property. If the service is rendered against the defendant's protest, where he is under no obligation to preserve the property, there can be no recovery. Thus, in Earle *v.* Coburn,[1] the plaintiff sued the defendant to recover for the board and stabling of the defendant's horse. The plaintiff had exchanged the horse for the defendant's wagon. In consequence of a controversy that arose between them, the defendant left the horse upon the plaintiff's premises, repudiating all title thereto, and brought an action to recover the wagon. In that action he was unsuccessful, the court holding that an indefeasible title to the wagon had passed to the defendant in that action, the plaintiff in the case at bar. At the time the defendant left the horse at the plaintiff's stable, the plaintiff informed him that if he left the horse it would be on his own responsibility and at his own expense. It was held that the plaintiff could not recover for the board and stabling. Lord, J., delivering the opinion of the court, said: —

"There may be cases where the law will imply a promise to pay, by a party who protests that he will not pay; but those are cases in which the law creates a duty to perform that for which it implies a promise to pay, notwithstanding the party owing the duty absolutely refuses to enter into an obligation to perform it. The law promises in his stead and in his behalf. If a man absolutely refuses to furnish food and clothing to his wife and minor children, there may be circumstances under which the law will compel him to perform his obligations, and will of its own force imply a promise against his protestation. But such promise will never be implied against his protest, except in cases where the law itself imposes a duty; and this duty must be a legal duty. The argument of the plaintiff rests upon the ground that a moral duty is sufficient to raise an implied

[1] 130 Mass. 596.

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promise, as well as a legal duty. He cites no authority for this proposition, and probably no authority can be found for it. The common law deals with and defines legal duties, not moral. Moral duties are defined and enforced in a different forum. Under the particular circumstances of this case, it would be futile to inquire what moral duties were involved, or upon whom they devolved. It is sufficient to say that no such legal duty devolved upon the defendant as to require him to pay for that for which he refused to become indebted."

Recovery for the preservation of property without the knowledge of the owner.

The service may be rendered, however, without the defendant's knowledge, and without any dissent therefore on his part. In this class of cases it is, in the first place, of great importance to distinguish between cases where the plaintiff expected remuneration at the time when the service was rendered, and cases in which he rendered the service simply as an act of benevolence and generosity. When the services are not rendered with the intention of receiving compensation therefor, as the plaintiff had a right to give his services, and intended to give them at the time they were rendered, there can of course be no recovery.

If, however, when the service was rendered, it was the intention of the plaintiff to receive compensation for the service rendered, it would seem that the plaintiff could, in no sense, be said to be an officious volunteer in charging the defendant for the preservation of property which would have been destroyed but for his intervention. It must be admitted, however, that the right of recovery is denied by the weight of authority. In Bartholomew *v.* Jackson [1] the plaintiff sought to recover for work and labor rendered in the following circumstances: It appeared that the plaintiff owned a field, in which the defendant had a stack of wheat, which he had promised to remove in season to allow the plaintiff to prepare the ground for the fall crop. The time for removal having arrived, the plaintiff sent a messenger to the defendant

[1] 20 Johns. 28.

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requesting him to remove the wheat, as he wished to burn the stubble on the next day. This message was delivered, in the absence of the defendant, to his son, who answered that they would remove the wheat by ten o'clock of the next day. Plaintiff waited until that hour, and then set fire to the stubble in a remote part of the field; the wheat not having been removed, the plaintiff, to save the same from destruction, the fire spreading more rapidly than he had expected, removed it himself. It was held that the plaintiff was not entitled to recovery. Platt, J., delivering the opinion of the court, said: —

"The plaintiff performed the service without the privity or consent of the defendant; and there was, in fact, no promise, express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily attempting to preserve his neighbor's house from destruction by fire, the law considers the service rendered as gratuitous, and it, therefore, forms no ground of action."

If this decision is to be taken as holding as a rule of law that no recovery can be had in this class of cases, regardless of the intention of the plaintiff at the time when he rendered the services, then it is submitted that the decision goes too far. It is true that our law gives each individual, as a general proposition, a right to select his own creditor, and declares that no one shall be allowed to thrust his services upon another; but the courts have held, and properly, that this rule has no application to a case where, because of the public interest involved, the law imposes upon a man an obligation to maintain life. It is because of the interest of the public in the preservation of life that the obligation is imposed at all, and because of the relation of the defendant to the life in question that the obligation is imposed upon the particular defendant. While it is true that at common law the defendant is under no obligation to preserve his property, and clearly, therefore, a party who insisted upon preserving the defendant's property against his consent, should not be

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allowed to recover for services so rendered, yet it is also true, that as a rule men are willing to preserve property because of the advantage derived from such preservation. Therefore, in a case like Bartholomew *v.* Jackson, the plaintiff certainly did no act which he had any right to suppose would not be acceptable to the defendant. He did an act which in fact benefited the defendant, an act beneficial in its nature to the public. Why then should the courts apply to a plaintiff in such circumstances, if it can be shown that he intended to receive compensation for the services rendered, the doctrine applicable to cases of officious volunteers?

If the court in Bartholomew *v.* Jackson is to be regarded as holding simply that the plaintiff in that and similar cases should be regarded, in the absence of other evidence, as doing simply a neighborly act, with no expectation of receiving compensation therefor, then the decision is not open to criticism.

In Chase *v.* Corcoran [1] the plaintiff, while engaged with his own boats, found the defendant's boat adrift, badly damaged, and in danger of being destroyed. The plaintiff secured the boat, and advertised the finding of it, but receiving no inquiries for it, housed it for a long period, and made repairs necessary for its preservation. The defendant afterwards claimed the boat, and the plaintiff refusing to surrender it without receiving compensation for the expenses which he had incurred, the defendant recovered the same in an action of replevin. The plaintiff then sued to recover his expenses. It was held that he could recover. Gray, J., delivering the opinion of the court, said: —

"His claim is for the reasonable expenses of keeping and repairing the boat after he had brought it ashore; and the single question is whether a promise is to be implied by law from the owner of a boat, upon taking it from a person who has found it adrift on tide water and brought it ashore, to pay him for the necessary expenses

[1] 106 Mass. 286.

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of preserving the boat while in his possession. We are of opinion that such a promise is to be implied. The plaintiff, as the finder of the boat, had the lawful possession of it, and the right to do what was necessary for its preservation. Whatever might have been the liability of the owner if he had chosen to let the finder retain the boat, by taking it from him he made himself liable to pay the reasonable expenses incurred in keeping and repairing it."

It will be noticed that the court does not undertake to decide what would have been the liability of the defendant, had the defendant not taken the boat from the possession of the plaintiff. That the plaintiff, in the case under consideration, never intended to give his labor to the defendant seems clear. But the plaintiff when he repaired the boat, after failing to find the owner, clearly proceeded upon the theory that he would either have the property, in which event the ownership thereof would compensate him for the expense incurred, or that he would have a charge against the owner upon his claiming his property. Suppose the property had been destroyed, without fault upon the part of the plaintiff; should he have had a claim upon the defendant for the services rendered by him up to the time of the destruction? It would seem not. It would seem that the plaintiff, in order to recover against a defendant in this class of cases, must prove that the defendant has, in fact, derived a benefit from the service rendered. For this reason, as well as for the additional reason, that the plaintiff thought at the time when he repaired the boat, that the boat itself would probably be the only compensation which he would receive for his labor, it would seem that the defendant in Chase *v.* Corcoran could have escaped liability by simply renouncing his interest in the property, and letting the plaintiff retain the same.

Recovery for benefits of a purely private nature conferred without request or consent.

There remains to be considered a class of cases where, though the plaintiff has done an act which has resulted in a benefit which the defendant desired, the defendant did not request the plaintiff to act, or may have even notified him

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not to act. In Boulton *v.* Jones[1] the plaintiff sued the defendant in a count for goods sold and delivered, to recover for goods delivered in the following circumstances: The defendant sent to one Brocklehurst an order in writing for certain goods, not knowing that Brocklehurst had transferred his business to the plaintiff. The goods were sent by the plaintiff to the defendant, who consumed the same, ignorant of the fact that the plaintiff, and not Brocklehurst, had furnished them. The defendant had a set-off against Brocklehurst. It was held that the plaintiff could not recover. Pollock, C. B., said: —

"Now the rule of law is clear, that if you propose to make a contract with A, then B cannot substitute himself for A without your consent and to your disadvantage, securing to himself all the benefit of the contract, the case being, that if B sued, the defendant would have the benefit of a set-off by which he is deprived by A's suing. If B sued, the defendant could plead his set-off; as B does not sue but another party, with whom the defendant did not contract, all that he can do is to deny that he ever was indebted to the plaintiff."

Bramwell, B., said: —

"It is an admitted fact, that the defendant supposed he was dealing with Brocklehurst, and the plaintiff misled him by executing the order unknown to him. It is clear also, that if the plaintiff were at liberty to sue, it would be a prejudice to the defendant, because it would deprive him of a set-off, which he would have had if the action had been brought by the party with whom he supposed he was dealing, and upon that my judgment proceeds. . . . The defendant has it is true had the goods; but it is also true that he has consumed them, and cannot return them. And that is no reason why he should pay the money to the plaintiff which he never contracted to pay, but upon some contract which he never made, and the substitution of that for which he did make would be to his prejudice, and involve a pecuniary loss by depriving him of a set-off."

[1] 27 L. J. R. 117; s. c. 2 H. & N. 564.

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Channell, B., said: —

"Without saying that the plaintiff might not have had a right of action on an implied contract if the goods had been in existence, here the defendant had no notice of the plaintiff's claim until the invoice was sent to him, which was not until after he had consumed the goods, and when he could not of course have returned them."

That there was no contract existing between the plaintiff and the defendant in Boulton *v.* Jones is clear. That a defendant who ordered goods with an understanding that he would pay for them in cash in part only, should not be compelled to pay their full value in cash, seems also clear. That the plaintiff could not get the full value for his goods in such a case would be due to the fact that the defendant has not contracted with him to pay for them, and the law should impose no obligation upon the defendant, which the defendant would not have been willing to assume in ordering the goods. But that a plaintiff should not be allowed, if he were willing, to take a judgment, not for the value of his goods, but for the amount which the defendant would have been compelled to pay in cash, had the order been filled by the one to whom it was sent, does not seem so clear. In Boulton *v.* Jones the plaintiff, it is submitted, did what would be ordinarily done in the same circumstances if the plaintiff was satisfied with the credit of the person sending the order. The plaintiff had been in the employ of Brocklehurst, knew the defendant as a customer of Brocklehurst, and had in stock exactly the goods which the defendant desired; and the case would hardly seem to call for the application of the rule applied to parties acting officiously. Since the act was not authorized by the defendant, the plaintiff should act at his peril to this extent, that the defendant should not be prejudiced thereby. But that a proper regard for the right of a man to select his creditor requires that he shall profit at the expense of the plaintiff in such a case seems hardly necessary. The suggestion has been made that the plaintiff in this case might have recovered

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against the defendant by bringing an action in the name of Brocklehurst and invoking the doctrine of undisclosed principal. But this does not seem tenable. Where the doctrine of undisclosed principal is invoked, the party who claimed to act as agent did, in fact, intend to act on behalf of the person who claims to have been the principal in the transaction. In Boulton *v.* Jones the plaintiff intended to act for himself, and not for Brocklehurst; and, therefore, the contract was not even on the doctrine of undisclosed principal made by Brocklehurst, nor could Brocklehurst, as Boulton did not intend to act for him, become a party to the contract by ratification.

In the Boston Ice Company *v.* Potter[1] the plaintiff sought to recover for ice furnished the defendant in the following circumstances: The defendant, becoming dissatisfied with the plaintiff, terminated his contract with the plaintiff and contracted with another company for the supply of ice. This latter company sold its business to the plaintiff with the privilege of supplying ice to its customers. The plaintiff then supplied ice to the defendant, which the defendant used, not knowing of any change in the business, and having, as the jury found, a right to suppose that he was furnished by the plaintiff's assignor. It was held that the plaintiff could not recover for the ice furnished.

This case differs from the case of Boulton *v.* Jones in that the plaintiff knew that the defendant did not desire to deal with him, and was, therefore, officious in supplying him with ice without notifying him of that fact; whereas in Boulton *v.* Jones, unless the fact that the order was addressed to Brocklehurst was a reason for the plaintiff's supposing that the defendant would not desire to deal with him, the plaintiff had no reason for supposing that the defendant would not be perfectly willing to have the order filled by him, the plaintiff. To have allowed a recovery by the plaintiff in the Boston Ice

[1] 123 Mass. 28.

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Company *v.* Potter would have been, to use the language of Lord Mansfield in Stokes *v.* Lewis,[1] to have allowed a recovery against the defendant "in spite of his teeth," and would have been entirely destructive of the doctrine that a man has a right to select his creditor.

No recovery for incidental benefits.

If a plaintiff has in fact received the equivalent which he expected in exchange for an act done by him, the fact that incidentally some one else has also derived a benefit should not give him a cause of action. In such a case it cannot properly be said that there is an unjust enrichment on the part of the defendant at his expense, since he has received an equivalent which he regarded as ample when he did the act.

On this short ground might have been rested the decision in United States *v.* Pacific Railroad Co.[2] In that case the government sought to recover from the Pacific Railroad, by way of counter-claim, compensation for bridges built by the government over the line of road of the railway company. The government built the bridges for the purpose of transporting troops — a delay having been caused in the transportation of troops by the destruction of the bridges owned by the company. It was held that the government had no claim for the bridges so constructed. Mr. Justice Field, delivering the opinion of the court, said: —

"While the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency, the converse of the doctrine is equally true, that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies. Military necessity will justify the destruction of property, but will not compel private parties to erect on their own lands work needed by the government, or to pay for such works when erected by the government. The cost of building and repairing roads and bridges to facilitate the movement of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the government.

[1] 1 T. R. 20. [2] 120 U. S. 227.

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"It is true that in some instances the works thus constructed may afterwards be used by the owner; a house built for a barrack, or for the storage of supplies, or for a temporary fortification, might be converted to some purposes afterwards by the owner of the land, but the circumstances would impose no liability upon him. Whenever a structure is permanently affixed to real property belonging to an individual without his consent or request, he cannot be held responsible because of its subsequent use. It becomes his by being annexed to the soil; and he is not obliged to remove it to escape liability. He is not deemed to have accepted it so as to incur an obligation to pay for it, merely because he has not chosen to tear it down, but has seen fit to use it. (Zottman *v.* San Francisco, 20 Cal. 96, 107.) Where structures are placed on the property of another, or repairs are made to them, he is supposed to have the right to determine the manner, form, and time in which the structures shall be built, or the repairs be made, and the materials to be used; but upon none of these matters was the company consulted in the case before us. The government regarded the interests only of the army; the needs or wishes of the company were not considered. No liability, therefore, could be fastened upon it for work thus done."

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CHAPTER VIII.

RECOVERY FOR IMPROVEMENTS MADE UPON THE LAND OF ANOTHER WITHOUT REQUEST.

It is proposed to consider in this chapter the rights and liabilities of parties, arising from benefits conferred without request, in the following circumstances:

1. Where a vendee in possession of land, under an oral contract for the purchase thereof, has improved the property in the expectation of the performance of the contract by the vendor, and the vendor has refused to perform the contract, relying on the statute of frauds;

2. Where the vendee, having taken possession of land under an oral contract for the purchase thereof and having improved the same, has refused to accept a conveyance thereof, relying on the statute of frauds;

3. Where benefits have been conferred under a mistake as to the ownership of property.

SECTION I.

RECOVERY FOR IMPROVEMENTS MADE WHILE IN POSSESSION OF LAND UNDER AN ORAL CONTRACT WHICH THE VENDOR HAS REFUSED TO PERFORM.

Right of recovery in equity.

A vendee is allowed to recover in equity for the value of improvements made by him while in possession of land under an oral contract for the purchase thereof which the vendor has refused to perform. The basis of the liability is that otherwise the vendor would unjustly enrich himself at the

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expense of the vendee. In Albea *v.* Griffin [1] it was held that while the plaintiff who had built a house upon land in which he was in possession as vendee under an oral contract of sale, could not get specific performance of the contract, he could recover for the improvements made by him while in possession of the premises. The ground of liability was thus stated by the court: —

"The plaintiff's labor and money have been expended on improving property which the ancestor of the defendants encouraged him to expect should become his own, and by the act of God, or by the caprice of the defendants, this expectation has been frustrated. *The consequence is a loss to him and a gain to them. It is against conscience that they should be enriched by gains thus acquired to his injury.*" [2]

Measure of recovery.

The liability resting on the doctrine of unjust enrichment, the increased value of the land to the owner, and not the expense of the improvement to the vendee, constitutes the measure of recovery.[3] In Mathews *v.* Davis,[4] where the plaintiff sought to recover for improvements made upon land of which he was in possession under an oral contract which the defendant refused to perform, the trial judge charged the jury that the criterion of damages would be, not the increased value of the land to the owner, but the value of the improvements put upon it, deducting from the value of the improvements the value of the use of the land and improvements during the time the plaintiff occupied the same. On appeal it was held that the value of the improvements to the owner should have constituted the measure of the recovery, and not the expense incurred by the plaintiff in making them. In delivering the opinion of the court, Green, J., said: —

"If the party agreeing to purchase perform labor and make improvements which will benefit the owner of the land, we have

[1] 2 Dev. & Bat. Eq. 9.
[2] The italics are the author's.
[3] Mathews *v.* Davis, 6 Humph. 324; Vaughan *v.* Cravens, 1 Head, 108.
[4] 6 Humph. 324.

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said he has an equitable right to compensation. But if his work and labor and materials are of a character that will not benefit the owner of the estate, upon what principle of equity can it be assumed that he ought to be paid? It matters not how much labor he has employed, nor what amount he may have expended for materials; if the estate is not benefited he has no claim to compensation from the owner of the land. To allow him to recover, in such a case, would be to reward him for volunteering his labor on another man's land, and to punish the owner of the soil for permitting him to do it. This cannot be done. His honor, the judge of the Circuit Court, erred, therefore, when he told the jury that the plaintiff was entitled to the value of his improvements, whether they enhanced the value of the estate or not."

A plaintiff in possession cannot recover for improvements made by him.

Furthermore, since the plaintiff's right to recover depends upon the fact that otherwise there would be an unjust enrichment of the defendant at the expense of the plaintiff, it must appear to entitle a plaintiff to recover, that the vendor's conduct has been such as to interfere with his enjoyment of the land and the improvements made thereon. If, therefore, notwithstanding the refusal of the vendor to perform the contract, the plaintiff still remains in possession, he will not be allowed to recover for the improvements made by him. In Yates *v.* Bachley [1] the plaintiff, who had purchased land of one Wolcott, who had orally agreed to give to the defendant a seven years' lease thereof, and had refused to do so, sued the defendant for rent. The defendant sought to counter-claim against the plaintiff for improvements made upon the premises. It appeared that after Wolcott's refusal to execute a lease of the premises to the defendant, the defendant vacated the premises, and sold the improvements made by him to a person who, at the defendant's request, was accepted by the plaintiff as a tenant of the land in his place. At the trial the jury were charged as follows: —

"If you find that there was an agreement for a lease for a term of years; that the defendant went into possession under

[1] 33 Wis. 185.

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it; that the plaintiff refused to carry it out; and that the defendant made improvements on the premises at the request of the plaintiff, or while so occupying the premises made improvements or did work by reason of such agreement, beyond what a tenant on such premises is bound to make or to do, then you must determine what, if anything, such improvements were reasonably worth, and give the defendant the benefit of it in making your verdict."

An exception to this charge was sustained on appeal. Lyon, J., said: —

"This instruction is erroneous in that it makes the plaintiff, Mrs. Yates, liable to pay for the improvements made by the defendant because she refused to execute a lease for seven years, regardless of the question whether the defendant was or was not evicted from the premises. The defendant was not so evicted. It is probable that had he surrendered possession on the intimation of Colonel Yates that he intended to occupy the premises the next year, this would have been equivalent to an eviction. But he did not do so. On the contrary he retained possession until he sold the house, and then procured the consent of the plaintiff to accept the purchaser thereof as tenant of the premises in his place. There was no interference with the possession of the defendant. No case is cited in which a landlord has been held liable to pay for improvements made by a tenant under an agreement for a lease, merely because the landlord has refused to execute the lease, where the possession of the tenant has not been disturbed."

On this principle it was held in Miller *v.* Tobie [1] that the plaintiff could not recover from the defendant the value of improvements made upon the land which the defendant had orally agreed to sell to the plaintiff, but had refused to convey, since it did not appear but that the plaintiff was still in possession of the land.

Right of recovery at law.

Although the plaintiff's right to recover in equity is recognized, a recovery at law in the action of assumpsit is

[1] 41 N. H. 84.

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denied.[1] In Shreve *v.* Grimes[2] the plaintiff sought to recover in an action of assumpsit for improvements made by him while in possession of land, which the defendant had orally contracted to sell to him, and which he had refused to convey, relying on the statutes of frauds. On the trial of the case the jury were instructed that, if they found that the plaintiff made the improvements while in possession of the property under an oral contract for the purchase thereof, which the defendant had refused to perform, they should give a verdict for the plaintiff for the value of the improvements, so far as the same were necessary and valuable to the owner of the land. A judgment entered upon the verdict in favor of the plaintiff was reversed on appeal, the court holding that there was no liability at law on the part of the defendant for the improvements so made. The opinion of the court on this point was as follows: —

"If we take this case on a still broader ground, we should be at a loss to perceive the principle on which an action of assumpsit could be maintained. In the case of money or property paid to the vendor, for the land itself, when he had only given his promise to convey, and should refuse to fulfil it, as such promise is of no avail in law, the price may be recovered back, on the principle that the consideration on which it was paid happens to fail. But, with regard to ameliorations made under such circumstances, they are not designed for the use of the seller. He is not instrumental in causing them to be made, as he is in case of payment of the price. They may or may not be made, at the election of the purchaser; and in searching the principles over for which an implied assumpsit will lie, we discover not one which would support the action. If *the seller can be at all made liable for them, it must be on the principle of equity that he ought not, when the improvements are delivered over to him, to be enriched by another's loss.*[3]

"It is true, an implied assumpsit will lie for work and labor done for the defendant upon his request and assent, without any fixed price or any express promise to pay; but the labor must be

[1] See, however, Clark *v.* Davidson, 53 Wis. 317.

[2] 4 Litt. 220.

[3] The italics are the author's.

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his, and the work be done for him, and not for another, and the work afterwards happen to become his, before the action can be sustained."

In Cook *v.* Doggett[1] the plaintiff sued to recover for the value of services rendered in cutting from the land, of which he was in possession under an oral contract for the purchase thereof, and storing in the defendant's barn, a crop of hay, of which it was admitted the defendant had had the benefit. It also appeared that the defendant had refused to perform the contract, relying upon the statutes of frauds. It was held that there could be no recovery for the services rendered. Said the court: —

"The judge also correctly instructed the jury that the plaintiff could not recover for the expenses of cutting the hay, as it was not cut at the defendant's request. There was no express or implied undertaking by the defendant to pay for cutting the hay. The work was done or caused to be done by the plaintiff for his own benefit, on the faith that the defendant would convey the land agreeable to his oral agreement, which the plaintiff must be supposed to have known he could not by law enforce."

In Welsh *v.* Welsh[2] the plaintiff sued to recover for improvements made upon land which the defendant had orally contracted to sell to him, using the counts for work and labor, money paid, and for money had and received. It appeared that the plaintiff and the defendant had agreed orally that the defendant should sell or lease as they might thereafter determine to the plaintiff certain land, which the plaintiff was desirous of using for certain business purposes. The plaintiff took possession of the land and made improvements thereon, with the knowledge and consent of the defendant. The defendant not only refused to execute a lease or conveyance thereof, but afterwards sold the property, including the buildings put thereon by the plaintiff, and appropriated the entire proceeds. It was held that

[1] 2 Allen, 439. [2] 5 Ohio, 425.

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there could be no recovery at law for the improvements so made. The court denied the right to recover in the count for work, labor, and materials in the following language:

"This action is founded upon the supposition that there was a contract which the plaintiff had a right to rescind in consequence of the conduct of the defendant. . . .

"In the present case, the object is not however to recover for anything which was paid under the contract, for nothing was paid. It is to recover for work and labor done by the plaintiff for his own use and benefit, while he was in possession of the property. A payment made to a vendor is for his benefit. But when this labor was performed, it was not for the benefit of the vendor, nor supposed to be for his benefit. It was done with his knowledge and approbation, but intended alone for the use of the plaintiff. Although done with the knowledge of the vendor, it was not done even at his request. I cannot see then upon what reason the principle which authorizes a vendee to recover back money paid upon a contract which is afterwards rescinded, can be applied to this case. It seems clear that it is an effort to extend this principle to a new class of cases."

It is respectfully submitted that none of these cases furnish a sufficient reason for denying the plaintiff's right to recover at law for the improvements made in the circumstances under consideration. While it is true that the plaintiff did not intend to benefit the defendant, the fact is that he did. That the defendant should not take the benefit without compensation to the extent that he has been benefited is admitted. Why then should not the plaintiff be allowed to sue in assumpsit instead of being compelled to file a bill in equity? It is said that the case differs from the case where the plaintiff is allowed to recover against the defendant, relying upon the statute of frauds, the value of that which he gave as a consideration for the defendant's promise or in the performance of his, the plaintiff's, side of the contract, in that in such a case there is a failure of consideration, that constitutes the basis of recovery; whereas in

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the case at bar there can be no failure of consideration, for the reason that the plaintiff did not expect compensation from the defendant, having made the improvements for his own and not for the defendant's benefit. That there is a technical failure of consideration in the one case and not in the other must be admitted; but it is submitted that this fact does not justify a different decision being reached in the two cases. The reason why a failure of consideration establishes a right in the plaintiff is because of the unjust enrichment which would result therefrom if the plaintiff were not allowed to recover. As a plaintiff proves failure of consideration simply to establish an unjust enrichment, it should follow that in any case where the plaintiff establishes an unjust enrichment on the part of the defendant, and a court of law has the machinery by which it can give the plaintiff the relief which he asks, he should not be compelled to resort to a court of equity.

The objection raised by the court in Welsh *v.* Welsh to allowing a recovery by the plaintiff in the count for money had and received was in substance this: that the defendant had not deprived the plaintiff of his equity, since the legal estate only was in the defendant, and as the purchaser took with notice of the plaintiff's rights, the plaintiff had not therefore lost anything, since the equity could be enforced against the purchaser. It is respectfully submitted that this is not a valid objection to maintaining the count for money had and received. In the same sense and with equal force could it be urged that one from whom property has been stolen cannot maintain a count for money had and received against a thief who has sold the stolen property, since the real owner can recover the property from the party to whom it was sold; but this as we have seen is not true, the owner of the property being allowed in such a case to waive the tort and sue in the count for money had and received.[1]

[1] See *supra*, p. 180.

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In Mathews *v.* Davis[1] it was suggested that a court of law should not take jurisdiction in this class of cases for two reasons:

1. The incompetency of the jury to determine the question of ameliorations;

2. The fact that the amount of the plaintiff's recovery should be, not the value of the services or property to him, but the enhanced value of the land to the defendant; whereas if a recovery were allowed in a court of law, the former and not the latter would necessarily be the measure of recovery.

The first objection raised by the court is intelligible, and furnishes a satisfactory ground for a court of law to refuse to take jurisdiction over this class of cases. While ordinarily the value of property or services to the plaintiff is the measure of recovery in an action against a defendant, there seems, however, to be no good reason why, if no other objection existed to a court of law giving relief in this class of cases, the court should not charge the jury that the benefit conferred upon the defendant and not the value to the plaintiff of what he parted with should govern them in determining the amount of the plaintiff's recovery.

Right of vendor to a credit for use and occupation.

Shall a defendant who has refused to perform an oral contract be allowed to reduce the amount of the vendee's recovery for improvements made, by making a claim for the use and occupation of the premises by the plaintiff?

The jury were charged in Mathews *v.* Davis[2] that the defendant should be allowed for the value of the use and occupation of the land by the plaintiff.

It is submitted that this claim should not be allowed if its allowance would cause the plaintiff to suffer a loss. Although the defendant cannot be sued for a breach of contract, yet if his breach of contract has in fact injured the

[1] 6 Humph. 324.

[2] 6 Humph. 324. See to the same effect Reynolds *v.* Johnston, 13 Tex. 214.

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plaintiff, he should not be allowed in equity a recovery so long as the plaintiff cannot be put in *statu quo*. To so hold is not to award damages, but to refuse to extend to a party in default the aid of a court of equity.

In Rucker *v.* Abell[1] the plaintiff, who had entered upon land relying upon a declaration of his father that he would convey the same to him, made improvements thereon. At the time when the son went into possession of the property the father was solvent. Subsequently the father became insolvent, and while insolvent conveyed the premises to the plaintiff. It was held that while the deed must be set aside in favor of creditors, the plaintiff was entitled to reimbursement to the extent that the improvements made by him had enhanced the value of the land, — subject, however, to a deduction for the use and occupation of the land.

This limitation upon the plaintiff's recovery does not seem justifiable. At the time when the father delivered possession to the plaintiff, he not only had a right to give him possession, but could also have given an indefeasible title to the premises. While he did not give a title thereto, he did give possession; and if a conveyance made at that time could not have been set aside by the creditors, it seems difficult to hold that the plaintiff must pay for the use and occupation of premises when it was not intended to charge him therefor. Possession can be as much the subject-matter of a gift as title; therefore it seems clear that until it could be said that the possession of the son was in fraud of the rights of creditors and at their expense, no charge should be made therefor.

Right of election between specific performance of contract and compensation for improvements.

In jurisdictions where the improvement of land is held to entitle a vendee to specific performance of the contract, the question arises as to the effect of this right upon his right to demand compensation for the improvements so made.

It was held in Reynolds *v.* Johnston[2] that one who was

[1] 8 B. Mon. 566. [2] 13 Tex. 214.

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entitled to specific performance could not elect to recover compensation from the defendant. The result of this decision is, of course, that one who has refused to convey property, relying upon the statute of frauds, can come into court after such refusal, and say to the plaintiff, "You must allow me to do what at one time you desired me to do and what I refused to do. If I must either pay you for the improved value of the land or convey to you the property, I prefer to convey the property, and it is I, and not you, who in these circumstances ought in good conscience to be allowed to make the election." The writer is unable to see the justice in, or the necessity for, such a decision.

In Smith *v.* Hatch[1] it was held that, assuming the plaintiff's performance of the contract which the defendant had refused to perform, relying upon the statute of frauds, to be such a performance as would entitle him to specific performance, still it was for him to elect whether he would have a decree for specific performance or sue to recover the consideration which had been paid by him.

The fact that in Smith *v.* Hatch the plaintiff was suing to recover the consideration given by him, while in Reynolds *v.* Johnston the plaintiff was seeking a recovery, not of the consideration, but of value received by the defendant, would not seem to be a fact distinguishing the cases in point of principle.

SECTION II.

RECOVERY BY A VENDEE FOR IMPROVEMENTS MADE UNDER AN ORAL CONTRACT WHICH HE HAS REFUSED TO PERFORM.

No recovery for improvements made after default and against the advice of the vendor.

It seems clear that a vendee who has made improvements against the consent and advice of the owner of the land, and after a default on his part in the payment of the purchase-

[1] 46 N. H. 146.

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money, should not be allowed to recover because of the enhanced value of the land.[1]

Right of recovery for improvements made before default.

Shall, however, a vendee who has refused to perform a contract relying upon the statute of frauds, but who in expectation of performance made improvements enhancing the value of the land, be allowed to recover for the improvements so made?

There should, of course, be no recovery for the value of improvements so made in jurisdictions where one who has refused to perform a contract, relying upon the statute of frauds, is not allowed to recover the money paid or the value of the services rendered thereunder. The right to recover for improvements made by the vendee for his own benefit, without the co-operation of the vendor, cannot possibly be stronger than the right of a plaintiff to recover money paid or the value of services rendered or property delivered under a contract where the defendant co-operated with the plaintiff and where the money was paid or the service rendered in the expectation of the defendant paying therefor.

In Guthrie *v.* Holt[2] the defendant when sued for the use and occupation of premises of which he had been in possession under an oral contract for the purchase thereof, which he refused to perform, attempted to reduce the amount of the plaintiff's recovery, to the extent that improvements made by him on the land had enhanced the value thereof. It was held that as the vendor was willing at all times to perform the contract, the defendant was not entitled to compensation for the improvements made by him.

In Farnam *v.* Davis[3] the plaintiff made an oral agreement with the defendants, as selectmen of a town, for the purchase of a house, of which he notified them he wanted immediate

[1] Rainer *v.* Huddleston, 4 Heisk. 223.

[2] 9 Bax. 527. See, however, *supra*, p. 232 n. 3, for the view prevailing at the present time in Tennessee as to the effect of the statute of frauds.

[3] 32 N. H. 302.

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possession, in order to repair the same. While in possession and making repairs, he was advised by one of the defendants "not to proceed any farther." He thereupon vacated the premises and moved into and fitted up another house. Subsequently he refused to accept a conveyance of the house. It was held that he was not entitled to recover compensation for the improvements made by him. Sawyer, J., said: —

"The question for consideration is, whether, upon the facts proved, the action can be maintained. The repairs which are the subject of the suit under one of the counts were not made for the defendants, not upon their account, nor for their benefit. There is no pretence of an express promise to pay for them, and we can perceive no ground upon which the law will imply such promise. They were made by the plaintiff, under the expectation founded on the agreement of the defendants, acting in behalf of the town, for the sale of the house, that they would enure to his benefit as the future owner of the house; and if he has not derived from them the benefit expected, it is not because of the want of authority in the defendants to make the agreement in behalf of the town, but because, having 'changed his plans,' he preferred to relinquish all the advantage which a fulfilment of the agreement would have secured, and therefore refused on his part to fulfil it."

The correctness of this decision would seem to depend upon whether the plaintiff was justified in acting upon the suggestion that he make no further repairs. If that suggestion was given to him in circumstances justifying his acting thereon, it would seem that the subsequent tender of a conveyance to him, after he had changed his position and purchased elsewhere, should not have defeated a recovery by him.

Even in jurisdictions where the plaintiff is allowed to recover the money or the value of the services rendered under a contract which he has repudiated because of the statute of frauds, it could be consistently held that there should be no recovery for improvements made by a vendee in possession who has refused to complete the contract, relying upon the

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statute of frauds. Where a plaintiff is allowed to recover for money paid or services rendered under a contract which he has refused to perform, relying upon the statute of frauds, the recovery is put on one of two grounds, — that to deny a recovery would be to charge the plaintiff with the performance of the contract; or that the statute of frauds enables either party to rescind, and that where a contract is rescinded, money which has been paid or services which have been rendered under the contract, without the receipt of an equivalent, should be returned to the plaintiff in value. But where improvements have been made, not at the request of the defendant or in pursuance of a contract, they cannot on the rescission of the contract be referred thereto as having been received by the defendant from the plaintiff without consideration. This distinction was recognized in Gillet *v.* Maynard,[1] where, while the plaintiff was allowed to recover money which he had paid under a contract, it was held that he could not recover for improvements made upon the property. Thompson, J., delivering the opinion of the court, said: —

"If the contract be considered as rescinded, no doubt can be entertained but that the plaintiff is entitled to recover back the money paid by the intestate. The case of Towers *v.* Barrett (1 T. R. 133) fully establishes the principle, that assumpsit for money had and received lies to recover back money paid on a contract which is put an end to, either where, by the terms of the contract, it is left in the plaintiff's power to rescind it, by any act, and he does it, or where the defendant afterwards assents to its being rescinded. I see no ground, therefore, upon which the defendant can resist a reimbursement of the sums he has received as a payment upon the contract which he has himself put an end to. The plaintiff, however, ought not to have recovered any compensation for the improvements. There was no express or implied undertaking by the defendant to pay for them. When the work was done by the intestate, it was for his own benefit; and if he volun-

[1] 5 Johns. 85.

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tarily abandoned his contract, without any stipulation as to the improvements, he must be deemed to have waived all claim to any compensation for them."

If the improvements made by the plaintiff are made after he has disabled himself from performing the contract, it seems clear that he should not be allowed to claim against the vendor for the improvements so made.[1]

SECTION III.

RECOVERY FOR IMPROVEMENTS MADE UNDER MISTAKE AS TO THE OWNERSHIP OF LAND.[2]

Relief in equity.

It is conceded that a court of equity will, if a plaintiff seek relief in equity against a defendant as to land which the defendant has in good faith improved under the impression that he was the owner thereof, grant relief only on condition that the defendant be reimbursed to the extent that his expenditures have enhanced the value of the land.[3]

The measure of recovery in such cases is the enhanced value of the land, not exceeding the cost to the defendant, at the time when the plaintiff took possession, less the rental value of the land without the improvements during the time that the defendant was in possession thereof.[4]

Not only will a court decree compensation for improve-

[1] French *v.* Seely, 7 Watts, 231.

[2] In many jurisdictions the questions considered in this section are regulated by statutes known as "Betterment Acts," but it is beyond the scope of this work to consider them.

[3] Williams *v.* Gibbes, 20 How. 535; Thomas *v.* Thomas' Executor, 16 B. Mon. 420; Hawkins *v.* Brown, 80 Ky. 186; The Union Hall Association *v.* Morrison, 39 Md. 281; Smith *v.* Drake, 8 C. E. Gr. 302; Haggerty *v.* McCanna, 10 C. E. Gr. 48; Freichnecht *v.* Meyer, 39 N. J. Eq. 551; Thomas *v.* Evans, 105 N. Y. 601; Preston *v.* Brown, 35 Oh. St. 18.

[4] Smith *v.* Drake, 8 C. E. Gr. 302; Preston *v.* Brown, 35 Oh. St. 18.

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ments made in good faith by the defendant, and which have enhanced the value of the land, but it will also compel the plaintiff, as a condition of obtaining relief, to reimburse the defendant for taxes paid,[1] and for expenses incurred in making necessary and useful repairs.[2]

That the mistake made by the defendant was one of law is material.[3]

Should, however, relief be given only by way of limitation upon the rights of the true owner in equity, and as a condition of giving him equitable relief, if this is to be regarded as the extent of the rights of one innocently improving land under mistake as to the ownership thereof, it follows, that if the owner of the land is not compelled to invoke the aid of a court of equity, he will be able to enjoy the benefits arising from such improvements or expenditures without making compensation therefor.

The fact that the taking of an account is usual in this class of cases, would seem to justify a court of law in refusing to give relief in an action of assumpsit. But since the reason why a plaintiff seeking to recover land which has been improved by a defendant in good faith under mistake is granted conditional relief only, is that to allow an unconditional recovery would enable the plaintiff to unjustly enrich himself, it seems that a court of equity should give affirmative relief on a bill filed by the party making the improvements or expenditures in question. While it is true that a court of equity will often refuse a complainant relief unless he will recognize certain rights asserted by the defendant, when in fact it would not grant relief to the defendant as a plaintiff, yet it is believed that in all such cases there will

[1] Hawkins *v.* Brown, 80 Ky. 186; Smith *v.* Drake, 8 C. E. Gr. 302; Haggerty *v.* McCanna, 10 C. E. Gr. 48; Freichnecht *v.* Meyer, 39 N. J Eq. 551.

[2] Smith *v.* Drake, 8 C. E. Gr. 302; Freichnecht *v.* Meyer, 39 N. J. Eq. 551.

[3] Freichnecht *v.* Meyer, 39 N. J. Eq. 551.

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be found some positive rule of law or equity which would be violated were the court to entertain a bill. But in the cases under consideration, unless the mistake is one of law, there seems to be no rule of equity which would be violated by the courts maintaining a bill filed by the party who incurred the expenses. In a few cases the right of a party so situated to file a bill has been recognized.[1]

In Bright *v.* Boyd[2] the plaintiff, who had improved land by building thereon, supposing that he had acquired title thereto, when he in fact had not, and against whom a judgment in ejectment had been obtained, was, on a bill filed by him as complainant, given a decree, making his claim, to the extent that his expenditures had enhanced the value of the property, a lien thereon, and directing a sale thereof in the event of the defendant's refusin to reimburse him for the expenditures so made.[3]

[1] Bright *v.* Boyd, 1 Story, 478, 2 Story, 608. The Union Hall Association *v.* Morrison, 39 Md. 281. In Haggerty *v.* McCanna, 10 C. E. Gr. 48, the right of the plaintiff to file such a bill was denied because the mistake made by him was due to his negligence.

[2] 1 Story, 478.

[3] Mr. Justice Story, who recognized that the decree made by him was without precedent, expressed himself in his opinion referring the case to a master, as follows: —

"The other question, as to the right of the purchaser, *bona fide* and for a valuable consideration, to compensation for permanent improvements made upon the estate which have greatly enhanced its value, under a title which turns out defective, he having no notice of the defect, is one upon which, looking to the authorities, I should be inclined to pause. Upon the general principles of courts of equity, acting *ex æquo et bono*, I own that there does not seem to me any just ground to doubt that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value, upon the maxim of the common law, *Nemo debet locupletari ex alterius incommodo;* or, as it is still more exactly expressed in the Digest, *Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiorem.* I am aware that the doctrine has not as yet been carried to such an extent in our courts of equity. In cases where the true owner of an estate, after a recovery thereof at law from a *bona fide* possessor for a valuable consideration without notice, seeks an account in equity as plaintiff, against such possessor, for the rents and profits, it is the constant habit of courts of

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In Goodnow *v.* Moulton[1] the plaintiff, who had paid taxes levied upon land of which he supposed he was the owner,

equity to allow such possessor (as defendant) to deduct therefrom the full amount of all the meliorations and improvements which he has beneficially made upon the estate; and thus to recoup them from the rents and profits. So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements of the estate, beneficial to the true owner. In each of these cases the court acts upon an old and established maxim in its jurisprudence, that he who seeks equity must do equity. But it has been supposed that courts of equity do not, and ought not, to go further, and to grant active relief in favor of such a *bona fide* possessor making permanent meliorations and improvements, by sustaining a bill brought by him therefor against the true owner after he has recovered the premises at law. I find that Mr. Chancellor Walworth, in Putnam *v.* Ritchie (6 Paige, 390), entertained this opinion, admitting at the same time that he could find no case in England or America where the point had been expressed or decided either way. Now, if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a *bona fide* purchaser in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a *bona fide* purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete; is it reasonable or just that in such a case the true owner should recover and possess the whole without any compensation whatever to the *bona fide* purchaser? To me it seems manifestly unjust and inequitable thus to appropriate to one man the property and money of another, who is in no default. The argument, I am aware, is that the moment the house is built it belongs to the owner of the land by mere operation of law; and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law by which the true owner seeks to hold what, in a just sense, he never had the slightest title to, that is, the house. It is not answering the objection, but merely and dryly stating that the law so holds. But then, admitting this to

[1] 51 Ia. 555. See, however, Homestead Co. *v.* Valley Co., 17 Wall. 153.

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when in fact it belonged to the defendant, was given a lien in equity for the taxes so paid.

be so, does it not furnish a strong ground why equity should interpose and grant relief ?

"I have ventured to suggest that the claim of the *bona fide* purchaser under such circumstances is founded in equity. I think it founded in the highest equity ; and in this view of the matter I am supported by the positive dictates of the Roman law. The passage already cited shows it to be founded in the clearest natural equity, *Jure naturæ æquum est.* And the Roman law treats the claim of the true owner, without making any compensation under such circumstances, as a case of fraud or ill faith. . . . It is a grave mistake, sometimes made, that the Roman law merely confined its equity or remedial justice on this subject to a mere reduction from the amount of the rents and profits of the land. The general doctrine is fully expounded and supported in the Digest, where it is applied, not to all expenditures upon the estate, but to such expenditures only as have enhanced the value of the estate (*quatenus pretiosior res facta est*), and beyond what he has been reimbursed by the rents and profits. The like principle has been adopted into the law of the modern nations which have derived their jurisprudence from the Roman law; and it is especially recognized in France and enforced by Pothier, with his accustomed strong sense of equity, and general justice, and urgent reasoning. Indeed, some jurists, and among them Cujacius, insist, contrary to the Roman law, that even a *mala fide* possessor ought to have an allowance of all expenses which have enhanced the value of the estate, so far as the increased value exists.

"The law of Scotland has allowed the like recompense to *bona fide* possessors making valuable and permanent improvements; and some of the jurists of that country have extended the benefit to *mala fide* possessors to a limited extent. The law of Spain affords the like protection and recompense to *bona fide* possessors, as founded in natural justice and equity. Grotius, Puffendorf, and Rutherforth all affirm the same doctrine, as founded in the truest principles *ex æquo et bono.*"

On the confirmation of the Master's (2 Story, 608), report Mr. Justice Story expressed himself as follows: —

"I have reflected a good deal upon the present subject; and the views, expressed by me at the former hearing of this case, reported in 1 Story, R. 478, *et seq.*, remain unchanged; or rather, to express myself more accurately, have been thereby strengthened and confirmed. My judgment is, that the plaintiff is entitled to the full value of all the improvements and meliorations which he has made upon the estate, to the extent of the additional value which they have conferred upon the land. It appears by the Master's report, that the present value of the

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In O'Conner *v.* Hurley[1] it appeared that the plaintiff had suggested to his sister, one of the defendants, she being obliged to move from the house which she had been occupying, that she build the house for herself and her family. On her statement that she had no money with which to build the house, he agreed to furnish the money if he could have the land and the house as security. The plaintiff thereupon built the house. Both the plaintiff and his sister at the time when he built the house supposed the land belonged in fee to her. The other defendants were daughters of the plaintiff's sister, and although they knew that the plaintiff was building the house for their mother, to be occupied by the mother and themselves, they also supposed that the mother owned the property in fee. The mother in fact had only a dower interest, the fee being in the daughters, subject to that interest. The plaintiff's sister having failed to pay the note which she had given for the building of the house, the plaintiff foreclosed the mortgage given as security for the note. The foreclosure sale not having real-

land with the improvements and meliorations is $1,000; and that the present value of the land without these improvements and meliorations is but $25; so that in fact the value of the land is increased thereby $975. This latter sum, in my judgment, the plaintiff is entitled to, as a lien and charge on the land in its present condition. I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge, before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and, I may add, common sense and common justice, for its foundation. The Betterment Acts (as they are commonly called) of the States of Massachusetts and Maine, and of some other States, are founded upon the like equity, and were manifestly intended to support it, even in suits at law for the recovery of the estate."

[1] 147 Mass. 145.

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ized the amount of expenses incurred by the plaintiff, he sued the mother and daughters, alleging that they requested him to build the house, and promised to pay therefor. Although it was admitted that the expenditures made by him had correspondingly increased the value of the property, it was held that he could not recover.

The decision in this case can be supported, it would seem, upon a point of pleading, namely, that the parties did not enter into a joint obligation to pay the plaintiff for the building of the house. The mother made an express and several contract, and there was, therefore, no joint liability on the part of the mother and daughters. Waiving this point, the case seems to involve the principle heretofore considered, where it was held that equity would give relief for improvements made under mistake. The fact that the plaintiff did not consider himself the owner of the property, if in fact he made the improvements thinking that the property belonged to another, who would therefore have a right to mortgage the same to him as security, does not distinguish the cases. It is the fact that a party has made improvements in good faith, that have enhanced the value of land, and not the fact that he supposed himself to be the owner of the property, it is submitted, that should constitute the basis of recovery.

That the work was done because of a contractual liability assumed by the mother, it is submitted, should not defeat the plaintiff. It is evident from the facts that what the plaintiff looked to for compensation, was not the credit of the mother, but the security of the land. Furthermore, under the decisions heretofore considered, had the mother paid the plaintiff for the improvements so made, she would clearly have had a right to reimbursement had it been necessary for the daughters to assert their claim in equity. And under the decision in Bright *v.* Boyd, unless the mistake was one of law, she would have had a right to file a

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bill in equity for relief. That the daughters had not occupied the building seems to be immaterial, since their interest was an interest by way of remainder, and the value of their remainder was increased because of the improvements made by the plaintiff. The fact that the daughters had only an interest by way of remainder, subject to a life interest in the mother, would, of course, be material in considering the value of the improvements to the daughters.

It is respectfully submitted that the suggestion made by the court in O'Conner *v.* Hurley, that it did not appear that they had objected to a removal of the house by the plaintiff, is not of itself conclusive as to the existence or non-existence of a liability on their part. If the plaintiff could not reimburse himself by a removal of the house, and yet the house distinctly enhanced the value of the property, it would hardly seem that in such a case a defendant should be allowed to escape liability by giving a plaintiff permission to remove or tear down the structure which had been erected by him.[1]

It is further submitted that the case of Wells *v.* Banister[2] while authorizing the statement of the court, that one cannot merely by erecting a house on land, compel another to pay therefor, cannot be said to support the decision in O'Conner *v.* Hurley.

In Wells *v.* Banister it appeared that the defendant's son had erected a house upon land belonging to the defendant, under a license given him by the defendant to do so; the defendant not obligating himself either to convey the land to the son or to pay him for the improvements so made. Since the son knew that the land belonged not to himself but to

[1] In McCracken *v.* McCracken, 88 N. C. 272, it was held that one who had erected buildings and made other improvements on land of which he was in possession under an oral contract for the purchase thereof, could not recover against the defendant, who had refused to convey the land, but who had offered to allow him to remove the improvements made by him.

[2] 4 Mass. 514.

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his father, and made the improvements on the land, not intending to charge the father therefor, and knowing that the father did not intend to assume any obligation in reference thereto, it was properly held that the father could not be charged for the improvements. To have held otherwise would have defeated the intention of the parties, in that it would have given the son rights which, with a full knowledge of all the facts, he did not expect. But in O'Conner *v.* Hurley, had the plaintiff known the facts, he would not have made the improvements in question without securing rights against the interest which the daughters had in the land.

In the Isle Royale Mining Company *v.* Hertin[1] it appeared that the plaintiff, owning a tract of land adjoining that of the defendant, in consequence of a mistake as to the boundaries, went upon the defendant's land and cut a quantity of wood, which he hauled some distance with a view to selling it. The defendant took possession of and disposed of it. It was held that the plaintiff was not entitled to recover for the benefit thereby conferred on the defendant.

If it be assumed that the trees were worth more to the defendant when standing than when cut, then, of course, the plaintiff should not have recovered.[2] It would be impossible in that event to predicate an unjust enrichment on the part of the defendant; but if it be assumed that the defendant would itself have cut the trees for the purpose of disposing thereof in the market, or for the purpose of using the same as fuel, it is submitted that a different result should have been reached. It seems difficult to distinguish in principle this case from the cases heretofore considered, where it has been held that compensation should be made to one enhancing in value, in good faith but under mistake, the property of another. In the case under consideration nearly two thirds of the value of the wood was due to the work of the plaintiff, and the facts were such, that a court of law was as

[1] 37 Mich. 332.

[2] Kemble *v.* Dresser, 1 Met. 271.

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competent to do full justice between the parties as a court of equity.

Had the defendant sued the plaintiff in trover for a conversion of the property, because of the refusal of the plaintiff to deliver the same to him upon demand, the limit of the defendant's recovery in many jurisdictions would have been the value of the wood, less the value added thereto by the plaintiff. In other words, in assessing the damages in an action for the conversion of goods, the fact that the defendant in the action is innocent of wrong-doing is taken into consideration, and he is in effect allowed a credit for his labor and services.

In the Isle Royale Mining Company *v.* Hertin, one of the grounds for denying a plaintiff a recovery was that it would encourage carelessness; yet the principle recognized in the assessment of damages against an innocent defendant would seem to be equally productive of carelessness.

In Walker *v.* Mathews[1] it was held that one who had purchased in good faith in market overt cows from a thief, could not recover from the owner, who had retaken them under a statute allowing a retaking after the prosecution of the thief, the expenses incurred by him for their keep, although he had accounted to the owner for the value of the milk yielded by the cows while in his possession. No opinion was given by the court in deciding against the plaintiff, but Lopes, J., suggested during the argument of counsel, "that he was keeping his own property, and could not in the absence of any contract with the plaintiff, claim from him the costs of keep."

It is submitted that the case of Walker *v.* Mathews is not to be distinguished in point of principle from Bright *v* Boyd; and that one should not be denied a right of reimbursement who has conferred a benefit because he was technically the owner of property at the time when the

[1] 8 Q. B. D. 109.



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expenditures were made, if in fact he would have been entitled to reimbursement had he not been technically the owner but supposed himself to be. The basis of the recovery in such cases is not, that the party intended to benefit not himself but some one else, but that he has in fact conferred a benefit on another in circumstances where, as between the two parties, it should not be at his expense.

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CHAPTER IX.

RECOVERY OF MONEY PAID TO THE USE OF THE DEFENDANT.

No one officiously paying the debt of another can maintain an action either at law or in equity to recover from the debtor the money so paid. To hold otherwise would be to hold that a person has a right to thrust himself officiously upon another as his creditor. If, however, the payment made, though made without request, is not regarded in law as having been officiously made, the party so paying is entitled to be reimbursed by the debtor to the extent that the debt as between the debtor and himself should in equity and good conscience have been paid by the debtor.

It is proposed to consider in this chapter the rights of a plaintiff who has paid the debt of a defendant to prevent a sale of his own property, or who has paid a claim which, as between the defendant and himself, should in equity and good conscience have been paid by the defendant.

SECTION I.

RECOVERY OF MONEY PAID TO PREVENT A SALE OF PROPERTY.

Recovery of payments made to release property from a distress for rent.

It is held that if without fault on the part of the plaintiff, it is necessary for him to pay the debt of another in order to prevent a sale of his own property, he can recover from the debtor the payments so made.

The leading case upon this point is the case of Exall *v.* Partridge *et al.*[1] In that case the three defendants were

[1] 8 T. R. 308.

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lessees of certain premises. The defendant, Partridge, had, to the knowledge of the plaintiff, secured from the other defendants an assignment of their interest. None of the lessees, however, were released by the landlord from the obligation originally assumed by them to pay the rent. After this assignment the plaintiff left his carriage upon the premises, under the care of the defendant, Partridge, a coachmaker. The carriage having been distrained by the landlord for rent due under the lease, the plaintiff, in order to recover his property, paid the rent, taking from the landlord a receipt stating that the rent was paid by the plaintiff for the benefit of the defendants. It was held that the plaintiff could recover from the three defendants the money so paid. The opinion of Grose, J., representing the grounds upon which the case was decided by the court, was as follows: —

"The question is, whether the payment made by the plaintiff under these circumstances were such an one from which the law will imply a promise by the three defendants to repay; I think it was. All the three defendants were originally liable to the landlord for the rent; there was an express covenant by all, from which neither of them was released; one of the defendants only being in the occupation of these premises, the plaintiff put his goods there, which the landlord distrained for rent, as he had a right to do; then for the purpose of getting back his goods he paid the rent to the landlord which all the three defendants were bound to pay. The plaintiff could not have relieved himself from the distress without paying the rent; it was not therefore a voluntary but a compulsory payment; under these circumstances the law implies a promise by the three defendants to repay the plaintiff. And on this short ground I am of opinion that the action may be maintained."

On this principle it was held in Wells *v.* Porter[1] that the plaintiff who had purchased his own property at a sale thereof under a distress for rent, which was charged upon property

[1] 7 Wend. 119.

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of the defendant, could recover the money so paid in a count for money paid to the use of the defendant.

So in Graham *v.* Dunigan [1] it was held that a life tenant, who had been compelled, in order to protect her interest, to pay taxes which should have been paid by the defendant, could recover from him the money so paid.

In England *v.* Marsden,[2] the plaintiff, a mortgagee of personal property, took possession of the property after default upon the part of the defendant, the debtor, but left the same on premises, of which the debtor's wife and family were occupants. The goods having been distrained for rent by the landlord, the plaintiff paid the rent to release the goods from the distraint. It was held that as it did not appear that the goods were left on the premises with the defendant's express authority, there could be no recovery. Erle, C. J., attempted to distinguish the case from Exall *v.* Partridge, saying:

"There is, however, one great distinction between that case and this. There, Partridge was a coachmaker, and Exall, at his request, bailed his carriage with him. The landlord distrained it for rent, and Exall cleared it from that burthen by paying the sum claimed; and it was held that the action lay because the carriage was left upon the defendant's premises at the defendant's request and for his benefit. Here, however, the plaintiff's goods were upon the defendant's premises for the benefit of the owner of the goods, and without any request of the defendant. The plaintiff having seized the goods under the bill of sale, they were his absolute property. He had a right to take them away. He probably left them on the premises for his own purposes, in order that he might sell them to more advantage. At all events they were not left there at the request or for the benefit of the defendant. It is to my mind precisely the same as if he had placed the goods upon the defendant's premises without the defendant's leave, and the landlord had come in and distrained them."

It is submitted that it is impossible to support the decision in this case. That the plaintiff's goods were lawfully on the

[1] 2 Bosw. 516. [2] L. R. 1 C. P. 529.

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defendant's premises was not questioned; that they were lawfully seized for the defendant's debt was not questioned; that the payment by the plaintiff of the rent resulted in the payment of the defendant's debt by the plaintiff was not questioned. If then the plaintiff was not acting as an officious volunteer, either in leaving the goods on the defendant's premises, or in paying the defendant's debt to avoid losing his goods, why should he not be allowed to recover? The fact that in Exall *v.* Partridge the property was left on the premises by the express consent of the defendant Partridge, it is submitted, does not warrant a different result in the two cases. Furthermore, the distinction suggested does not reconcile the two decisions, for the reason that while in Exall *v.* Partridge the three defendants were held liable, it did not appear that more than one of the three defendants charged knew of the carriage being left on the premises, and it certainly was a fact that only one of them requested the carriage to be left.

The decision in England *v.* Marsden has been severely criticised, and can hardly be regarded as law, since the decision in Edmunds *v.* Wallingford,[1] where Lord Justice Lindley, speaking of that decision, said, "This appears to us a very questionable decision. The evidence did not show that the plaintiff's goods were left in the defendant's house against his consent; and although it is true that the plaintiff only had himself to blame for exposing his goods to seizure, we fail to see how he thereby prejudiced the defendant, or why, having paid the defendant's debt, in order to redeem his own goods from unlawful seizure, the plaintiff was not entitled to be reimbursed by the defendant."

Right of recovery where plaintiff's property is sold to satisfy a judgment obtained against defendant.

In Edmunds *v.* Wallingford, the plaintiff sought to recover money paid in the following circumstances: The defendant purchased in his own name, but in fact for his son, a certain business, taking also in his own name a lease of the premises on which the business was conducted. The defendant assisted

[1] 14 Q. B. D. 811.

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from time to time in and about the management of the business, and his family occupied the premises on which the business was conducted. The goods having been seized and sold to satisfy a judgment debt of the defendant, and it having been held that the son was estopped from denying the defendant's title thereto, the plaintiff sued, as receiver in bankruptcy of the son, to recover as for money paid to the use of the defendant. It was held that he was entitled to recover. Lindley, L. J., delivering the opinion of the court, said: —

"The first question is the liability incurred by the defendant to his sons by reason of the seizure of what he has deliberately asserted to be their goods, for his debt. That, as between the father and the sons, the goods were theirs, we consider established by the father's own statements. Speaking generally, and excluding exceptional cases, where a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, and in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor. . . .

"In order to bring the present case within the general principle alluded to above, it is necessary that the goods seized shall have been lawfully seized; and it was contended before us that the sons' goods were in this case wrongfully seized, and that the defendant, therefore, was not bound to indemnify them. But when it is said that the goods must be lawfully seized, all that is meant is that as between the owner of the goods and the person seizing them, the latter shall have been entitled to take them. It is plain that the principle has no application, except where the owner of the goods is in a position to say to the debtor that the seizure ought not to have taken place; it is because as between them the wrong goods have been seized that any question arises. Now in this case it has been decided between the owners of the goods seized (*i. e.*, the sons) and the sheriff seizing them, that the goods were rightfully seized; and although the defendant is not estopped by this decision, and is at liberty, if he can, to show that the seizure was one which the sheriff was not justified in making, he has not done so. Indeed, the defendant's connection with his sons' business was such as to justify the inference that the sheriff had a right to seize the goods

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for the defendant's debt, and if, in truth, any mistake was made by the sheriff, the defendant had only himself to thank for it. His own conduct led to the seizure, and although he did not in fact request it to be made, he brought the seizure about, and has wholly failed to show that the seizure was wrongful on the part of the sheriff.

"The case, therefore, stands thus: goods which the defendant has admitted in writing to be his sons', have, owing to his conduct, been legally taken in execution for his debt, and the proceeds of sale have been impounded as a security for what is due from him to the execution creditors. The defendant, therefore, was liable to repay to his sons the amount realized by the sale of the goods."

Recovery of payments made to release property from an attachment.

In Johnson *v.* Royal Mail Steam Packet Co.,[1] the plaintiff sued to recover money paid in the following circumstances: Vessels, of which the plaintiffs were mortgagees, were with the plaintiffs' consent chartered to the defendants, the defendants undertaking the management thereof. In consequence of the failure of the defendants to pay the sailors their wages, the vessels were libeled, and to release the vessels from seizure, the plaintiffs were compelled to pay the claims. It was held that the plaintiff could recover from the defendant the money so paid. Willes, J., delivering the opinion of the court, said: —

"Now the mortgagees having had to pay sums of money for which the Royal Mail Company were liable in the first instance, which they ought, according to maritime usage, and by their contract with the European and Australian Company, to have forthwith paid; what answer is set up by the Royal Mail Company against reimbursing the mortgagees who have paid their debt? Of course there is, upon the surface, that by the law of this country, differing, it is said, in that respect from the civil law, nobody can make himself the creditor of another by paying the other's debt against his will or without his consent; that is expressed by the common formula of the count for money paid for the defendant's use, at his request. That is the general rule, undoubtedly; but it is subject to this modification, that money paid to discharge the

[1] L. R. 3 C. P. 38.

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debt of another cannot be recovered, unless it was paid at his request, or under compulsion, or in respect of a liability imposed upon that other. This is the modification of the rule relied upon by the plaintiff, and the question is, within which branch of the rule the present case falls?

"This is a case which we have been compelled to consider very much upon its own circumstances, which are very peculiar, and may be difficult to be made a precedent, perhaps, in any future case. Perhaps the nearest case that could be put by way of illustration would be this. A lends B his horse for a limited period, which would imply that he must pay the expense of the horse's keep during the time he retains it. B goes to an inn and runs up a bill, which he does not pay, and the innkeeper detains the horse. In the mean time A has sold the horse out-and-out for its full price to C, and C is informed that the horse is at the inn; he proceeds there, to take him away, but is told he cannot take him until he pays the bill, and he pays the bill accordingly and gets his horse; can C, who in order to get his horse is obliged to pay the debt of another, sue that other in an action for money paid? We are clearly of opinion that he could, and without heaping up authorities where it has been held, independent of contract, that a person occupying a property in respect of which there is a claim that ought to have been discharged by another, being compelled to pay, is entitled to reimbursement, we think that this is a case in which the mortgagees, by compulsion of law, have paid a debt for which the Royal Mail Company were liable, — a ready money debt which they ought to have provided for on the arrival of the vessel at Sydney, — and that, therefore, in respect to the claim for wages the plaintiffs are entitled to recover as on the count for money paid."

Right of recovery where seizure of property was unlawful.

The dictum found in many of the cases, that to enable a plaintiff to recover for money paid to the use of the defendant, the seizure of his property must have been lawful, was followed in Myers *v.* Smith,[1] where, though the plaintiff established a payment in consequence of the seizure of his property for the debt of the defendant, he failed to show the lawfulness of such seizure.

[1] 27 Md. 91.

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If it be assumed that the debt was in fact due, and that the plaintiff paid the debt in good faith to release his goods from a seizure which he regarded as lawful, the plaintiff certainly ought not to be regarded as an officious volunteer, and it is difficult to see how the ends of justice are furthered by denying a right of recovery against the debtor, because of the unlawfulness of the seizure. It is true that in such a case the plaintiff can recover the money so paid from the party to whom it was paid to release his goods from the seizure,[1] but the result of compelling him to pursue this remedy to the exclusion of a right against the debtor in a count for money paid to the debtor, is productive of circuity and multiplicity of action, since the creditor when compelled to refund the money received by him will again assert his claim against the debtor.

SECTION II.

RIGHT OF A PLAINTIFF WHO HAS PAID A CLAIM WHICH AS BETWEEN THE PLAINTIFF AND THE DEFENDANT SHOULD HAVE BEEN PAID EITHER IN WHOLE OR IN PART BY THE DEFENDANT.

The cases arising for consideration in this section are usually cases where the payment made by the plaintiff was made in extinguishment of a claim existing in fact against the plaintiff. The claim may have been one which could also have been asserted in whole or in part against the defendant by the party to whom the plaintiff made the payment, or it may be that the claim could not have been enforced either at law or in equity against the defendant by the party receiving payment from the plaintiff.

The principle involved in this section is not, however, confined to such cases, and may be invoked by a plaintiff who

[1] See *infra*, p. 426.

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Recovery by plaintiff purchasing property under an execution sale to which judgment debtor had no title.

has paid a debt without request, and under no compulsion. Thus the question arose in McGhee *v.* Ellis,[1] which was a suit in equity, as to the right of a plaintiff who had purchased property under an execution sale, to which the judgment debtor had no title, to recover the money so paid from the judgment debtor as paid in extinguishment of his debt. It was held that the plaintiff was entitled to such relief. The same result has been reached in other jurisdictions.[2] Though it has been doubted whether an action at law would lie against the judgment debtor,[3] there would seem to be no objection to allowing the action at law as readily as in equity. That the defendant did not request the payment to be made should be no objection, as the basis of the recovery, whether at law or in equity, is the unjust enrichment that would result if the defendant were not compelled to reimburse the plaintiff. That the element of compulsion generally found to exist in the cases considered in this section is wanting, is immaterial unless it can be said that a party acts officiously who purchases at a sheriff's sale.

Right of recovery where the claim existed against the plaintiff.

The question of allowing a plaintiff to recover from a defendant for the payment of a claim existing in fact against himself, may arise in a case where the plaintiff and the defendant sustained to each other the relationship of principal and surety, or that of co-sureties, or it may arise where the parties are strangers to each other with reference to the transaction in question.

It may be stated as a general proposition that a plaintiff can recover against a defendant as for money paid to his use to the extent that the claim paid by the plaintiff should have been paid by the defendant.[4] Thus it was held in Brown *v.* Hodgson[5] that the plaintiffs, common carriers, who by mis-

[1] 4 Litt. 244.

[2] Preston *v.* Harrison, 9 Ind. 1; Short *v.* Sears, 93 Ind. 505 (*semble*); Reed *v.* Crosthwait, 6 Ia. 406.

[3] McGhee *v.* Ellis, 4 Litt. 244; Hawkins *v.* Miller, 26 Ind. 175.

[4] See Aspinwall *v.* Sacchi, 57 N. Y. 331.

[5] 4 Taunt. 189.

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take delivered to the defendant goods consigned to another, could recover from the defendant the amount of money which they were compelled to pay the consignee of the goods in consequence of the defendant having appropriated the goods to his own use. Mansfield, C. J., said: —

"The plaintiffs pay Payne on account of these goods being wrongfully detained by Hodgson. They paid the value to the person to whom both they and Payne were bound to pay; and this, therefore, is not the case of a man officiously and without reason paying money for another; and therefore the action may be supported."

In Hales *v.* Freeman [1] it was held that the plaintiff, who as executor of an estate paid a legacy without retaining the legacy duty, and who was by statute made a debtor to the crown for the amount of such duty, could, on paying the duty, recover the amount thereof from the legatee. Park, J., said: —

"The executor here is only made liable for the benefit of the government, and not on his own account; he has not paid the money voluntarily, but upon compulsion. He pays not on his own account, but upon that of the legatee. The executor is no more than surety for the legatee, and this case falls within the principles applied to the case of sureties."

In Bleaden *v.* Charles [2] it was held that the plaintiff could recover the amount of a bill of exchange which he had been compelled to pay because of the defendant's wrongful endorsement thereof. The bill had been given by the plaintiff for the accommodation of the defendant's debtor, and the defendant refused to surrender the bill on the payment of his debt, and endorsed the same to an innocent purchaser.

In Spencer *v.* Parry [3] it was held that a plaintiff who had paid taxes charged upon land of which he was the owner, and for the payment of which he only was liable under the

[1] 1 B. & B. 391.
[2] 7 Bing. 246.
[3] 3 A. & E. 331.

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statute, could not, because of an agreement by the defendant, the lessee of the land, to pay the taxes, recover from the defendant the money so paid, as money paid to his use, since the payment did not discharge a debt or claim existing against the defendant, but only a claim existing against the plaintiff.

It is submitted that if in good conscience the defendant should have paid the money which was in fact paid by the plaintiff, the plaintiff should have been allowed to charge him with the money so paid.[1] Such is the principle of the decision in Brittain *v.* Lloyd,[2] and in The Great Northern Railway Co. *v.* Swaffield.[3] In Brittain *v.* Lloyd, the plaintiff, as auctioneer, paid the duty imposed upon him by a statute in respect of a sale which he conducted for the defendant at the defendant's request, and it was held that though the statute imposed a liability upon the plaintiff only, the plaintiff could recover from the defendant the money so paid. It is true that the court said that Spencer *v.* Parry was distinguishable for the reason that in Brittain *v.* Lloyd the defendant impliedly requested the plaintiff to pay the taxes, in that he had requested him to act in a capacity which resulted in the obligation imposed upon him by the statute. But this fact does not distinguish the cases, since it would only establish that the defendant had agreed with the plaintiff that, if he would become the plaintiff's agent, she, the defendant, would indemnify him against any liability as her agent; that is to say, in Britton *v.* Lloyd the court finds an implied contract of indemnity. But in Spencer *v.* Parry there was an express contract of indemnity on the part of the defendant, that if the plaintiff would enter into the relation of lessor with her, she, the plaintiff, would indemnify him against any liability as to taxes. It is true that in Spencer *v.* Parry the liability existed, regardless of any act of the defendant; whereas in

[1] See Sageman *v.* Kloppenburg, 2 E. D. S. 126.

[2] 14 M. & W. 762.

[3] L. R. 9 Ex. 132.

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Brittain *v.* Lloyd the liability was incurred because of defendant's act. But in each case there was a contract of indemnity, and in neither case was there any liability on the part of the defendant to the party to whom the money was paid.

In the Great Northern Railway Co. *v.* Swaffield [1] it was held that the plaintiff, a common carrier, who had sent the defendant's horse to a livery stable, after the defendant's wrongful refusal to receive him, could recover from the defendant the money paid by him for the keep of the horse, although there was no pretence that any obligation existed in favor of the stable-keeper against the defendant. The court put the case on the short ground that, as the plaintiff had acted reasonably and in discharge of a duty, the defendant should pay to the plaintiff the amount which the plaintiff had expended.

In Moule *v.* Garrett [2] it was held that the plaintiff, the original lessee of certain premises, was entitled to recover from the defendants, assignees of the term, a sum of money which he had been compelled to pay in consequence of dilapidations which had occurred during the tenancy of the defendants. Cockburn, C. J., said: —

"Whether the liability is put on the ground of an implied contract, or of an obligation imposed by law, is a matter of difference. It is such a duty as the law will enforce. The lessee has been compelled to make good an omission to repair, which has arisen entirely from the default of the defendants, and the defendants are therefore liable to reimburse him."

To the same principle may be referred the decision in Van Santen *v.* The Standard Oil Co.,[3] where it was held that the master of a vessel who had issued a bill of lading for a quantity of oil in excess of that received on board his vessel, on the representation of the defendant that the quantity named in the bill of lading had been in fact delivered, and who had

[1] L. R. 9 Ex. 132.
[2] L. R. 7 Ex. 101.
[3] 81 N. Y. 171.

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been compelled to make good the deficiency to the purchaser of the bill of lading, could recover from the defendant the money so paid.

Nature of surety's claim against debtor.

Although at the present time the right of a surety to indemnity from the debtor can be worked out on the theory of a contract implied in fact, where no express contract has been made, the right first obtained recognition in our law on the principles just stated.[1]

In Toussaint *v.* Martinnant, Buller, J., speaks of the doctrine having been first introduced into the law by Gould, J., upon equitable principles. While Mr. Justice Buller was probably mistaken as to the first case in which the surety's rights were recognized at law, Gould, J., not having gone on the bench until 1763, and the surety's right having been recognized by Lord Mansfield in 1757, in Decker *v.* Pope,[2] yet the decision was rested by Lord Mansfield not upon a genuine contract existing between the surety and the debtor, but upon an obligation imposed by law.

A surety, however, who enters into a special contract with the debtor at the time when he becomes a surety, cannot

[1] Toussaint *v.* Martinnant, 2 T. R. 100; Norton *v.* Coons, 6 N. Y. 33; Tobias *v.* Rogers, 13 N. Y. 59; Johnson *v.* Harvey, 84 N. Y. 363; Oldham *v.* Broon, 28 Oh. St. 41; Aldrich *v.* Aldrich, 56 Vt. 324.

"Again, it is an equitable principle of very general application that where one person is in the position of a mere surety for another, whether he became so by actual contract, or by operation of law, if he is compelled to pay the debt which the other in equity and justice ought to have paid, he is entitled to relief against the other, who was in fact the principal debtor. And, when courts of law, a long time since, fell in love with a part of the jurisdiction of chancery, and substituted the equitable remedy of an action of assumpsit upon the common money counts, for the more dilatory and expensive proceeding by a bill in equity in certain cases, they permitted the person thus standing in the situation of surety, who had been compelled to pay money for the principal debtor, to recover it back again from the person who ought to have paid it, in this equitable action of assumpsit as for money paid, laid out, and expended for his use and benefit." Per Walworth, Ch., in Hunt *v.* Amidon, 4 Hill, 345, 348.

[2] 1 Sel. N. P. 13 ed. 91.

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claim independently of the contract, in the count for money paid to the use of the defendant.[1]

Nature of surety's claim against co-surety.

The law not only imposes on a defendant who as between himself and the plaintiff should have paid a claim, an obligation to indemnify the plaintiff, but also requires a defendant, who, as between himself and the plaintiff, should have paid, not the whole, but a portion of a claim, to indemnify the plaintiff to that extent. Were the law otherwise, the defendant would be allowed to unjustly enrich himself at the expense of the plaintiff.

It is on this broad principle, and independently of any theory of contract, that the right of a surety against his co-surety should rest, and such was in fact the theory upon which the surety's right of contribution was put in Deering *v.* the Earl of Winchelsea.[2] In that case the plaintiff and the defendant were sureties on separate bonds for the faithful discharge of his duties by one Thomas Deering. A judgment having been obtained against the plaintiff for the balance due from Thomas Deering to the crown, because of a default by him, the plaintiff filed his bill on the equity side of the exchequer for contribution from the defendants as co-sureties. And it was held, that notwithstanding the plaintiff and defendant had become sureties on separate instruments, and for all that appeared were strangers to each other, still, since the right of contribution rested not upon contract, but upon the equitable principle that parties equally bound for a certain act should equally bear the burden, the plaintiff was entitled to contribution. Lord C. B. Eyre, delivering the opinion of the court, said: —

"It is admitted that if they had all joined in one bond for £12,000, there must have been contribution. But this is said to be on the foundation of contract implied from their being parties in the same engagement, and here the parties might be strangers to each

[1] Toussaint *v.* Martinnant, 2 T. R. 100.

[2] 2 B. & P. 270.

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other. And it was stated that no one could be called upon to contribute who is not a surety on the face of the bond to which he is called to contribute. The point remains to be proved that contribution is founded on contract. If a view is taken of the cases it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract. . . .

"In Sir William Harbet's [1] case, many cases are put of contribution at common law. The reason is, they are all in *æquali jure*, and as the law requires equality, they shall equally share the burden. This is considered as founded in equity; contract is not mentioned. The principle operates more clearly in a court of equity than at law. . . .

"In this case, Sir E. Deering, Lord Winchelsea, and Sir J. Rous were all bound that Thomas Deering should account. At law all the bonds are forfeited. The balance due might have been so large as to have taken in all the bonds; but here the balance happens to be less than the penalty of one. Which ought to pay? He on whom the crown calls must pay to the crown; but as between themselves they are in *æquali jure*, and shall contribute. . . .

"There is an instance in the Civil Law of average, where part of a cargo was thrown overboard to save the vessel. The maxim applied is *qui sentit commodum sentire debet et onus*. In the case of average there is no contract express or implied, nor any privity in an original sense. This shows that contribution is founded on equality, and established by the law of all nations."

That the right of a surety to contribution from a co-surety rests not upon contract, but upon the equitable principle herein before considered, was the ground of the decision in Tobias *v.* Rogers,[2] where it was held that a surety who had received his discharge in bankruptcy before the payment of the debt by a co-surety, was not liable for contribution. Gardiner, C. J., said: —

"Contribution is not founded upon, although it may be modified by, contract. The right to it is as complete in the case where the sureties are unknown to each other as in any other. The law following equity will imply a promise to contribute in order to afford a remedy. But as this is in most instances a fiction, in aid of an

[1] 3 Co. 11. [2] 13 N. Y. 59.

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equitable right, it will never be tolerated where the relation upon which the equity is founded is wanting. Such is this case. The liability of the defendant upon the replevin bond was discharged four years before the suit by the obligees against the plaintiff; subsequent to that time, the plaintiff and defendant have never stood in *æquali jure*, in reference to the obligation of their principal. The burden, which pressed with its whole weight upon the plaintiff, was removed from the defendant by aid of the bankrupt law. When the former paid the judgment recovered upon the replevin bond, it was as sole surety for Mahoney and Trull, and not as co-surety with the defendant."

While the theory of a contract implied in fact on the part of a surety to make contribution to a co-surety would justify the result reached in some cases, the right of contribution is recognized in cases where it is impossible to establish a contract between the parties; as, for example, where the plaintiff, who has paid a debt as surety, assumed the obligation before the defendant became or agreed to become a surety.[1]

In such a case a contract implied in fact between the plaintiff and the defendant is quite impossible, not only because of the absence of an intention on the part of the plaintiff to contract with the defendant at the time when he became surety, but also for the reason that no consideration exists for such contract, since the plaintiff has surrendered no right in exchange for the defendant's promise.

In Batard *v.* Hawes[2] it was held that the amount to be paid by the defendant, one of a number of sureties, was to be determined by ascertaining the number of sureties originally bound, the fact being that before the payment by the plaintiff, a surety, two of the sureties had died. If the defendant's liability was to be determined on the principle of parties equally liable in law bearing the burden equally, then the defendant was under an obligation to pay the plaintiff one-tenth of the amount paid by the plaintiff, there being ten sureties living at the time of such payment. If the defend-

[1] Norton *v.* Coons, 6 N. Y. 33. [2] 2 E. & B. 287.

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ant's obligation was to be regarded as resting on a contract made with the plaintiff at the time when he became a surety, to pay an aliquot part of the bond, then the defendant was under an obligation to pay only one-twelfth, since twelve persons signed as sureties. The court held that the defendant was only bound to pay one-twelfth. Lord Campbell, C. J., delivering the opinion of the court, said: —

"If the right to contribution is considered as arising merely from the fact of payment being made so as to relieve a party jointly liable from legal liability, we should have to look to the number of co-contractors actually liable at law at the time of making the payment which relieved them from liability. But we think that it is not merely the legal liability to the creditor at the time of the payment that we are to regard, but that we must look to the implied agreement of each to pay his share arising out of the joint contract when entered into. To support the action for money paid, it is necessary that there should be a request from the defendant to pay, either express or implied, in law. When one party enters into a legal liability for and at the request of another, a request to pay the money is implied in law from the fact of entering into the engagement; and if the debt or liability is incurred entirely for a principal, the surety being liable for him at his request, and being obliged to pay, is held at law to pay on an implied request from the principal that he will do so. In a joint contract for the benefit of all, each takes upon himself the liability to pay the whole debt, consisting of the shares, which each co-contractor ought to pay as between themselves; and each in effect takes upon himself a liability for each to the extent of the amount of his share. Each, therefore, may be considered as becoming liable for the share of each one of his co-contractors at the request of such co-contractor, and upon being obliged to pay such share, a request to pay it is implied as against the party who ought to have paid it, and who is relieved from paying what, as between himself and the party who pays, he ought himself to have paid according to the original arrangement."

This decision, it is submitted, is not to be supported. The result thereof is that each surety is, as between himself and the other sureties, liable only for an amount bearing the same



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proportion to the total amount as he bears to the number of sureties engaging for the payment of the debt. And it necessarily follows that notwithstanding one surety was compelled to pay the entire indebtedness, he could not require, either at law or in equity, any other surety to pay an amount exceeding this proportion. For example, if there were ten sureties, of whom eight were insolvent, and one of the solvent sureties was compelled by the creditor to pay the entire amount, he could only collect from the remaining solvent surety one-tenth of the amount so paid by him. And while this is in fact the result reached at law,[1] the reason therefor is the fact that the court of law can never have before it parties who are not jointly or jointly and severally liable, and the question of the insolvency of co-sureties who are not, and cannot be made, co-defendants, because the liability is not joint, can never properly be passed upon.[2] In such a case a court of equity, with all the parties before it, would decree that the solvent defendant should pay one-half the burden borne by the plaintiff, and yet if the principle of contract announced in Batard *v.* Hawes is sound, it is impossible to support such a result as is reached in equity, since a court of equity has no right to impose an obligation upon a defendant exceeding that agreed upon between himself and the plaintiff.

Furthermore, Batard *v.* Hawes is open to the objection that the court rested the decision upon a theory historically false, for the reason that the right of contribution was recognized and in force before the courts recognized the theory of a contract implied in fact. Moreover, if the theory of a contract implied in fact is to be accepted as the theory on which a co-surety is compelled to make contribution, it is impossible to support the case of Deering *v.* The Earl of Winchelsea,[3] where the court held that the plaintiff was entitled to con-

[1] Cowell *v.* Edwards, 2 B. & P. 268.

[2] Easterly *v.* Barber, 66 N. Y. 433.

[3] See *supra* p. 401.

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tribution even though he and the defendant were strangers to each other.

No contribution except between co-sureties.

Since, however, the liability of the defendant rests upon the principle that there would be an unjust enrichment on his part were he not compelled to share in a burden which should have been borne by him as well as by the plaintiff, the plaintiff, in order to recover against the defendant, must not only show that he and the defendant were sureties for the same act of the same principal, but that, as between themselves, they occupy the relation of co-sureties. Thus it was held in Turner *v.* Davies[1] that the defendant, who had become a surety for one Evans at the request of the plaintiff, also a surety, was not liable to the plaintiff, who had paid the amount of the claim owing by Evans, the court holding that while they were both sureties for Evans, they were not, as between themselves, co-sureties, since it was the understanding of the plaintiff and the defendant that the defendant should have the right to look to the plaintiff were he compelled to pay the debt owing by Evans. So in Craythorne *v.* Swinburne[2] it was held that the defendant, who obligated himself to pay a debt, if neither the plaintiff, a surety, nor the principal debtor paid it, was not liable to the plaintiff for contribution, since there was not between the plaintiff and the defendant the relation of co-sureties.

Plaintiff must have paid the debt at his own expense.

As an unjust enrichment on the part of the defendant at the expense of the plaintiff is the basis of the doctrine of contribution between co-sureties, the plaintiff who claims a right to contribution because of the extinguishment of a debt must have paid the debt at his own expense, and not at the expense of the debtor. For the reason that he had not done so, it was held in Goepel *v.* Swinden[3] that the plaintiff who, with the defendant, became a surety for a debtor to whom he in turn was indebted, with the understanding that he

[1] 2 Esp. 479.
[2] 14 Ves. 160.
[3] 1 Dow. & L. 888.

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was entitled to treat as payment *pro tanto* of his indebtedness to the debtor any sum which he might pay as surety, could not recover from the defendant contribution until the amount paid by him exceeded his indebtedness to the principal debtor.

Surety has no claim for contribution until he has paid more than his proportionate share.

Furthermore, as there can be no unjust enrichment on the part of the defendant until the plaintiff has paid more than his proportionate share of the debt, the plaintiff's cause of action against the defendant does not arise until it is established that he has paid more of the debt than, as between himself and his co-surety, he should have been called upon to pay.[1] In *Ex parte* Snowdon a surety who had paid just one half of the debt had his co-surety adjudged a bankrupt because of his failure to answer a debtor's summons for contribution. It was held by the Court of Appeal that such adjudication was erroneous, since his claim against his co-surety could not arise until it appeared that he had paid more than he should have paid as between himself and his co-surety, and *non constat* that the defendant might not be called upon to pay, and pay in fact, the remaining half of the claim.

Of course, if after a partial payment by a surety of an amount not exceeding, as between himself and the co-surety, the sum payable by him, the claim should become extinguished without any further payment by the sureties, he would have a right to call for contribution.

Form of obligation assumed by sureties immaterial.

Since the right of contribution rests not upon contract but upon equitable principles, it should not matter in what form the parties have assumed their obligations as sureties, — whether in the same or several distinct obligations.[2] Such also is the principle of the decision in Reynolds *v.* Wheeler,[3] where it was held that an accommodation acceptor could

[1] Davies *v.* Humphreys, 6 M. & W. 153; *Ex parte* Snowdon, 17 Ch. D. 44.

[2] Deering *v.* Winchelsea, 2 B. & P. 270.

[3] 10 C. B. N. S. 561. See also Easterly *v.* Barber, 66 N. Y. 433. See, *contra*, 2 Ames, Cas. on Bills & Notes, 682, note 4.

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recover from an accommodation endorser the amount which he had been compelled to pay to the holder of the bill.

Surety need only show his liability to pay debt.

It is not necessary, to entitle the surety to call for contribution, that he refuse payment until he is threatened with suit. It is sufficient for him to show that circumstances existed in which he and the defendant were liable to make the payment which was in fact made by him.[1]

Right of contribution between tort-feasors.

It is frequently said that as between tort-feasors there is no contribution. This statement is inaccurate and misleading. It is true that contribution will not be given in favor of a plaintiff knowingly engaging in a wrongful act.[2] But a plaintiff who has innocently done an act not tortious in itself, and who has been compelled to indemnify the injured party, is entitled to indemnity or contribution, — indemnity if, as between themselves, the defendant in good conscience, and not the plaintiff, should have satisfied the claim; contribution if the defendant, as between himself and the plaintiff, should in good conscience have shared the burden with the plaintiff.[3]

Thus, in Churchill *v.* Holt[4] it was held that the plaintiff who had been compelled to indemnify a person for injuries sustained in consequence of falling into an open hatchway in the sidewalk, leading to the basement of a building leased and occupied by the plaintiff, could recover indemnity from the defendant, whose servants had in the course of business, without the knowledge of plaintiff, removed the cover of the hatchway and failed to replace the same.

In Armstrong County *v.* Clarion County[5] it was held that, as the maxim that there can be no contribution between tort-feasors had no application to a case where the injury was the result of an error of judgment simply, the plaintiff could

[1] Pitt *v.* Purssord, 8 M. & W. 538.

[2] Merryweather *v.* Nixan, 8 T. R. 186; Boyer *v.* Bolender, 129 Pa. St. 324.

[3] Pearson *v.* Skelton, 1 M. & W. 504; Farwell *v.* Becker, 129 Ill. 161; Port Jervis *v.* First National Bank, 96 N. Y. 550.

[4] 127 Mass. 165.

[5] 66 Pa. St. 218.

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recover from the defendant contribution for an injury sustained by a defect in a bridge which the plaintiff and the defendant were jointly bound to keep in repair, the fact being that the bridge had been imperfectly repaired at the joint expense of the two counties.

A plaintiff who has incurred a liability, not because of his own personal wrong, but because of the doctrine of *respondeat superior*, whereby he is held responsible for the wrong of another, can call upon the guilty party to indemnify him for the loss which he has incurred, or can call for contribution from those who in good conscience should share his burden. Thus, it was held in Wooley *v.* Batte [1] that the plaintiff could recover from the defendant, who was a joint owner with him of a line of stage-coaches, one half the amount which the plaintiff had been compelled to pay to a party injured by the negligent driving of a servant.

So it was held in Bailey *v.* Bussing [2] that the plaintiff, one of three joint owners of a stage line, could recover from the executors of one of the joint owners contribution on account of damages which the plaintiff had been compelled to pay because of the negligent driving of one of the joint owners. Ellsworth, J., said : —

"The reason assigned in the books for denying contribution among trespassers is, that no right of action can be based on a violation of the law, — that is, where the act is known to be such, or is apparently of that character. A guilty trespasser, it is said, cannot be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it, and must ask in vain for its interposition in his behalf. If, however, he was innocent of an illegal purpose, ignorant of the nature of the act, which was apparently correct and proper, the rule will change with its reason, and he may then have an indemnity, or, as the case may be, a contribution, as a servant yielding obedience to the command of his master, or an agent to his principal, in what appears to be right, an assistant rendering aid to the sheriff in the

[1] 2 C. & P. 417. [2] 28 Conn. 455.

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execution of the process, or common carriers to whom is committed and who innocently carry away property which has been stolen from the owner. . . . The form of action, then, is not the criterion. We must look further. We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liability in the eye of the law, growing out of a mere relation to the perpetrator of the wrong, the maxim of law that there is no contribution among wrong-doers is not to be applied. Indeed, we think this maxim too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it, as in the cases of master and servant, principal and agent, partners, joint operators, carriers, and the like."

Money need not be paid to maintain action for money paid to use of defendant.

While to maintain the count for money paid to the use of the defendant it is not necessary for the plaintiff to show that he actually paid money, it being sufficient for him to show that he transferred property in extinguishment of the claim,[1] the mere giving of a bond or promissory note will not entitle one to recover in a count for money paid.[2]

[1] Ainslie *v.* Wilson, 7 Cow. 662. Ald. 51; Cumming *v.* Hackley, 8
[2] Maxwell *v.* Jameson, 2 B. & Johns. 202.

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CHAPTER X.

RECOVERY OF MONEY PAID UNDER COMPULSION OF LAW.

SECTION I.

RECOVERY OF MONEY PAID AFTER ACTION BROUGHT.

Money paid after action brought cannot, as a rule, be recovered.

As a rule, if one after action brought, whether before or after judgment, pays the claim made upon him by the plaintiff therein, he cannot afterwards make that payment the basis of an action against the party to whom the money was paid. This rule is founded both upon common sense and public policy. The payment would be an idle ceremony if the only effect thereof were to reverse the position of the parties as plaintiff and defendant.

Not only would the payment be an idle ceremony, but injustice would be done the party to whom the money was paid, since it would subject him to an action to be instituted at such time and place as might be deemed desirable by the party making the payment.

Furthermore, if payments made in such circumstances can be recovered, the litigation between parties could be made almost interminable. If the defendant paying in the first action can make that payment the basis of an action, the defendant in the second action has of course the same privilege.

One of the most striking illustrations of this rule is afforded by the case of Marriott *v.* Hampton.[1] In that case the plaintiff sued to recover money which he had paid to the defendant

[1] 7 T. R. 269.

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in an action wherein he was sued by the defendant to recover a sum of money which he contended he had paid. Being unable to find the receipt which he had received on paying the claim, he paid the amount thereof a second time. He afterwards found the receipt, and thereupon sued to recover from the defendant the money so paid. It was held that he could not recover. "If this action could be maintained," said Lord Kenyon, C. J., "I know not what cause of action could ever be at rest. After a recovery by process of law there must be an end of the litigation; otherwise there would be no security for any person." It does not appear at what stage of the action the payment was made; but that fact would seem to be immaterial, as the payment was made in an action in which the subject-matter of the litigation was the plaintiff's right to recover the money which the defendant in fact paid him in that action. Undoubtedly in Marriott *v.* Hampton there was a strong equity in favor of the plaintiff that would not ordinarily exist, — the fact that the plaintiff had, in the action in which he appeared as defendant, the burden of proving payment to the plaintiff therein, and had lost the evidence thereof, namely, the receipt, which would in all probability have been controlling. But while the case is exceptional in this particular, it seems clear that a court could not for this reason reach a result different from that reached in the ordinary case. A court can of course, because of a loss of evidence, postpone the trial of a case in order to give the party an opportunity of finding the same, or even grant a new trial, within the rules allowing such relief, upon the ground of newly discovered evidence; and in a case like Marriott *v.* Hampton a party must avail himself of these remedies.

Right of recovery where court had no jurisdiction over subject-matter of defence

This case has been thought to be in conflict with the decision in Moses *v.* Macferlan.[1] The two cases are, however, entirely dissimilar; and each case, it is submitted, was cor-

[1] 2 Burr. 1005.

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rectly decided. The decision in Marriott *v.* Hampton rested upon and involved the simple principle that all issuable allegations of which the court in which an action is brought has jurisdiction must be raised and decided, if at all, in that action.

In Moses *v.* Macferlan it was decided that a defendant who is unable to avail himself of certain matter because the court in which the action is brought cannot entertain the defence for want of jurisdiction, is not precluded by the payment of a judgment therein from making such matter the basis of an action for a recovery of the money so paid. The plaintiff in Moses *v.* Macferlan had endorsed to the defendant four promissory notes of which the plaintiff was payee, for the purpose of enabling the defendant to sue the maker thereon, the defendant agreeing to indemnify him against any liability because of such endorsement. The defendant nevertheless sued the plaintiff as endorser in the court of conscience, to recover the amount of the notes and recovered judgment, the court holding that it had no jurisdiction over the subject-matter of the defence; namely, the collateral agreement not to sue on the endorsements. The plaintiff thereupon paid the judgment, and brought an action in the King's Bench to recover the money so paid. It was held, Lord Mansfield delivering the opinion of the court, that he was entitled to recover. The decision was put by Lord Mansfield distinctly on the ground that the court of conscience had no jurisdiction to inquire into the subject-matter of the defence. On this point Lord Mansfield said: —

"Many other objections besides that which arose at the trial, have since been made to the propriety of this action in the present case. . . .

"Third objection. Where money has been recovered by the judgment of a court having competent jurisdiction, the matter can never be brought over again by a new action.

"Answer. It must be clear that the words of a judgment can never be overhauled by an ordinary suit, either at law or in equity.

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Till the judgment is set aside or reversed, it is conclusive as to the subject-matter of it, to all intents and purposes.

"But the ground of this action is consistent with the judgment of the court of conscience; it admits the commission did right. They decreed upon the endorsement of the notes by the plaintiff, which endorsement is not now disputed. The ground upon which this action proceeds was no defence against that sentence.

"It is enough for us that the commissioners adjudged that 'they had no cognizance of such collateral matter.' We cannot correct an error in their proceedings, and ought to suppose what is done by a final jurisdiction to be right. But we think the 'commissioners did right in refusing to go into such collateral matter.' . . .

"The ground of this action is not 'that the judgment was wrong,' but 'that (for a reason which the now plaintiff could not avail himself of against that judgment) the defendant ought not in justice to keep the money.' And at Guildhall I declared very particularly 'that the merits of a question determined by the commissioners, where they had jurisdiction, never could be brought over again in any shape whatever.'

"Money may be recovered by a right and legal judgment, and yet the iniquity of keeping that money may be manifest upon causes which could not be used by way of defence against the judgment."

Whatever views Lord Mansfield may have entertained as to the use of the count for money had and received to recover money, which a defendant cannot in conscience keep, it is evident that he did not regard his decision in Moses *v.* Macferlan as at all infringing upon, or limiting the rule that the subject-matter of an action over which a court has jurisdiction cannot, after a decision by that court, be litigated between the same parties in another action.

If one is to criticise the decision in Moses *v.* Macferlan, it should be not for the reason that it violates the doctrine of *res adjudicata*, or the rule against double vexation, but rather that the court should have refused to have allowed the action for the reason that the defendant, in the first action, might have obtained from a court of equity an injunction restrain-

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ing that action, and thereby have avoided multiplicity of litigation. The injunction, if granted, would have accomplished the result obtained by the two actions, in that the holder of the note would have been enjoined from collecting from the defendant what he did in fact collect, and what, under the decision in Moses *v.* Macferlan, he was required to repay. Even from this point of view, however, the decision in Moses *v.* Macferlan seems to be correct.[1] Macferlan was plainly guilty of a breach of contract in suing Moses on the endorsement, and that breach of contract gave Moses a right to bring an action in *special assumpsit* to recover whatever damage he had suffered in consequence of such breach of contract. Certainly no one would contend that a man who has a right to sue for a breach of contract must, if the opportunity offers, avail himself of that right as an equitable defence. Surely he cannot in this way be deprived of his right to sue for damages in an action which he will control as plaintiff. If then his right to sue in *special assumpsit* for damages is not barred by his failure to avail himself of his right to an injunction, why should he not be allowed, if he prefers, to sue in the count for money had and received?

Although the case of Moses *v.* Macferlan is constantly spoken of to-day as if it were overruled, the writer knows of no case in which any doctrine differing from the decision of Moses *v.* Macferlan has been laid down. Undoubtedly Lord Mansfield, in that case, used many expressions which would not represent the law of to-day, but they were mere *obiter dicta*, and should not be confused with the grounds upon which Lord Mansfield in fact rested the decision in favor of the plaintiff.

Money extorted under color of law can be recovered.

There are exceptions to the rule that money paid after an action brought cannot be recovered. If it can be shown in any given case that the money paid was in fact extorted under color of law, the party receiving it knowing that he

[1] See Woodward *v.* Hill, 6 Wis. 143.

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had no right thereto, then, notwithstanding the payment was made in a pending action, the party paying is allowed to sue in a count for money had and received to recover the same. Thus, in Duke de Cadaval *v.* Collins,[1] the plaintiff, a foreigner, was allowed to recover from the defendant money which he had paid the defendant to secure his release from arrest in an action brought by the defendant, who knew that he had no cause of action. Lord Denman, C. J., said: —

"It is asserted that the principle of the decision in Marriott *v.* Hampton has not been adhered to in this case. But that case does not warrant the argument drawn from it. It does not decide that money obtained under compulsion of legal process can never be recovered back; but only that after the defence in an action has failed, and money has been recovered in an action, it cannot be recovered in another action. The question there arose not upon an extortion by legal process, but upon the want of means of defence in a previous action, which means a party ought to have when such action is brought. But no case has decided that when a fraudulent use has been made of legal process, both parties knowing throughout that money claimed was not due, the party paying under such process is not to have the assistance of the law."

The same principle is illustrated by the case of Chandler *v.* Sanger.[2] In that case the plaintiff, who had received his discharge in insolvency, and had been thereby released from liability on a note given by him to the defendant, paid the note to release his property from an attachment issued in an action brought on the note. It was held that if the defendant attached the property of the plaintiff knowing that he needed the same for immediate use in his business, and knowing that he had no claim against the plaintiff, the plaintiff was entitled to recover, notwithstanding the fact that the action in which the attachment was issued was still pending. Gray, J., said: —

"This is not an action for tort to recover damage for malicious prosecution or abuse of legal process, but an action of contract, in

[1] 4 A. & E. 858. [2] 114 Mass. 364.

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the nature of assumpsit, for money had and received by the defendants, which they had no legal or equitable right to retain as against the plaintiff. Although the process sued out for the defendant was in this form, yet if, as was offered to be proved at the trial, he fraudulently, and knowing that he had no just claim against the plaintiff, arrested his body or seized his goods for the purpose of extorting money from him, then, according to all the authorities, the payment of money by the plaintiff, in order to release himself or his goods from such fraudulent or wrongful detention, was not voluntary but by compulsion; and the money so paid may be recovered back, without proof of such a termination of the former suit as would be necessary to maintain an action for malicious prosecution."

Money paid upon a judgment subsequently reversed can be recovered.

Another limitation upon the general rule is, that a party who has paid money upon a judgment which has been subsequently reversed, may sue in a count for money had and received to recover the money so paid.

In Clark *v.* Pinney,[1] the plaintiffs, against whom a judgment had been obtained, gave a note in satisfaction of the execution issued thereon. A judgment was subsequently obtained on this note, and the amount thereof collected. The first judgment having been reversed, it was held that the plaintiff could recover the money paid upon this second judgment in satisfaction of the first, in a count for money had and received. Savage, C. J., delivering the opinion of the court said: —

"The general proposition is, that this action lies in all cases where a defendant has in his hands money which, *ex æquo et bono*, belongs to the plaintiff. When money is collected upon an erroneous judgment which subsequent to the payment of the money is reversed, the legal conclusion is irresistible that the money belongs to the person from whom it was collected. Of course he is entitled to have it returned to him. The only question is whether this would be the proper remedy. . . .

"Upon the whole my view of the question is this: The general principle is undoubtedly in favor of sustaining the action. . . .

[1] 6 Cow. 297.

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I am inclined to sustain the action. The inclination of courts is to extend the action for money had and received. It is not denied that the plaintiff is entitled to some remedy for the money. It was taken from him by process erroneous merely. Then why turn him around from this simple action to the antiquated remedy by *scire facias?* I do not think the purposes of justice require it.

"It is also contended that the facts in this case do not amount to a payment of money to the defendant. A note was received by the sheriff as payment of the execution by the direction of the plaintiff and his attorney, and the execution was returned satisfied. Nay, more, a judgment has been obtained, and the money actually paid upon that note. To what would the plaintiffs be restricted on a *scire facias?* To the money paid by the note, as restitution could be for nothing else."

Judgment debtor need not defer payment until issuing of execution.

Nor is it necessary to entitle one to recover money paid on an erroneous judgment, that the judgment debtor refuse to pay until execution has been issued against him. As a decision must be regarded as law until reversed, the judgment may be immediately paid, even though the party paying intends at the time to appeal, and, upon obtaining a reversal, he can recover the money so paid.[1] In discussing this question in Lott *v.* Swezey, Emmott, J., says: —

"We ought not to say that a party must resist the judgment of a court to the last extremity, and with what is something like contumacy, if he wishes to preserve his right to restitution in case he succeeds in reversing the judgment. Where a man pays without coercion, and with knowledge of the facts of his case, he cannot be heard afterwards to say that upon these facts he ought not to have been called upon for payment. That is undoubtedly a settled rule of law. But that supposes that he claims restitution upon the same state of facts which existed when he paid the money. When, however, the payment is made in obedience to the judgment of a court which had determined that he must pay it, and that his adversary had the right to demand it of him, and subsequently a legal tribunal of competent authority adjudges that the first judgment was erroneous, and therefore vacates and reverses it, the

[1] Scholey *v.* Halsey, 72 N. Y. 578; Lott *v.* Swezey, 29 Barb. 87.

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conclusion is irresistible that the plaintiff in the first judgment, if he has received its amount, has received what he is equitably and justly bound to restore."

Right of party other than judgment debtor to recover money paid on a judgment subsequently reversed.

To entitle a party to recover money paid upon a judgment afterwards reversed, he need not appear as the defendant of record. It is sufficient for him to show that he was the real party in interest, and in fact paid the judgment in performance of an obligation which he was under to the judgment debtor. Thus, in Stevens *v.* Fitch,[1] the defendant had obtained a judgment against one Stevens for flowing his land by means of a mill-dam, and the plaintiff, who used the dam on the land of Stevens for the purpose of operating a mill on his own land, paid the amount of the defendant's judgment, under an agreement with Stevens to indemnify him against any damage occasioned thereby. The judgment being subsequently reversed, it was held that he was entitled to recover, in a count for money had and received, the amount so paid. Wilde, J., delivering the opinion of the court, said: —

"The only defence relied on is, that there was no privity of contract between the present parties, and that the action should have been brought in the name of Stephen Stevens, administrator. But there is no ground for this defence. The money now sued for was paid by the plaintiff not as the agent or attorney of Stephen Stevens, who is only a nominal party. The plaintiff was the sole party in interest, and he paid the money on his own account which he was obliged to pay on a consideration which had failed; and this shows a privity of contract implied by law. In the case cited in support of the defence it appeared that the money was paid by an agent. The contrary is proved in the present case; for the plaintiff paid his own money, and in no sense can he be considered as the agent of Stephen Stevens." [2]

As the basis of recovery by a plaintiff seeking to recover

[1] 11 Met. 248.

[2] In Garr *v.* Martin, 20 N. Y. 306, it was held that the only remedy of a surety on the reversal of a judgment obtained against the debtor, in an action to which he was not a party, but which he had paid, was against the judgment debtor.

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Defendant must have received the money in person or through an agent.

money paid under a judgment which had been reversed is the unjust enrichment of the defendant, it must appear that the party from whom he seeks to recover the money, either received the money in person or through an agent. Thus, it was held in Isom *v.* John,[1] that money paid to a sheriff could not be recovered from the judgment creditor on the reversal of the judgment under which it had been paid, unless the money had been received by the judgment creditor, or an agent on his behalf, the sheriff not being regarded as an agent, but simply as an official.

That money was paid to the defendant will not necessarily render him liable.

Since a judgment must be regarded as properly rendered until a reversal thereof, the right to restitution does not arise until that time. No liability to make restitution to the judgment debtor can arise therefore simply from the fact that the defendant collected the money for the judgment debtor. This is true even though the judgment debtor at the time of payment gives notice that he intends to appeal, and that he will hold the party receiving the money liable for the amount received in the event of a reversal. Thus, in The Bank of the United States *v.* The Bank of Washington,[2] the plaintiff in error, who collected, as agent for a judgment creditor, the amount of a judgment from the defendant in error, was notified at the time when he collected the money that an appeal was to be taken, and that in the event of a reversal he would be expected to return the money collected by him. It was held that as the plaintiff in error received the money simply as the agent of the judgment creditor, it was a complete defence to an action brought on the reversal of the judgment to recover the money so paid, that he had paid the money to his principal. In delivering the opinion of the court, Mr. Justice Thompson said: —

"It is a settled rule of law that upon an erroneous judgment, if there be a legal execution, the party may justify under it until the judgment is reversed; for an erroneous judgment is the act of the

[1] 2 Munf. 272. [2] 6 Pet. 8.

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court. If the marshal might have sold the property of the bank and given a good title, it is difficult to discover any good reason why a payment made by the bank should not be equally valid, as it respects the rights of third persons. In neither case does the party against whom the erroneous judgment has been enforced lose his remedy against the party to the judgment. On the reversal of the judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment to make restitution to the other party for what he has lost. . . . But as it respects third persons, whatever has been done under the judgment whilst it remained in full force is valid and binding.

"When the money was paid there was a legal obligation on the part of the Bank of Washington to pay it; and a legal right on the part of Triplett and Neale to receive it, or to enforce payment of it under the execution. Whatever was done under the execution, whilst the judgment was in full force, was valid and binding on the Bank of Washington so far as the rights of strangers and third persons are concerned. The reversal of the judgment cannot have a retrospective operation, and make void that which was lawful when done. The reversal of the judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost by reason of the erroneous judgment; and as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right; but as to strangers there is no such privity, and if no legal right existed when the money was paid to recover it back, no such right could be created by notice of an intention to do so."

SECTION II.

RECOVERY OF MONEY PAID TO PREVENT A THREATENED SALE OF PROPERTY UNDER LEGAL PROCESS.

Money so paid to prevent a sale of personal property can be recovered if defendant has no legal or equitable right thereto.

Although money voluntarily paid to the defendant cannot be recovered, for the reasons heretofore stated, money paid to prevent a sale of personal property under legal process, by a defendant in a position to make a seizure and sale thereof, and threatening to do so, can be recovered if the defendant had no right thereto, either in law or equity.

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While the cases uniformly support the above proposition, there is a conflict of authority as to what facts short of those first stated will entitle a plaintiff to recover money as paid under compulsion of legal process.

Plaintiff need not wait until property has been seized.

It has been held that one who was threatened with a seizure and sale of his personal property, unless he paid certain taxes, could recover the money so paid, although in fact a warrant of distress had not been issued; the officer making the threat being in a position, however, to issue the warrant and levy the same.[1] The ground of recovery was thus stated by Shaw, C. J:—

"But the warrant to a collector, under our statute for the assessment and collection of taxes, is in the nature of an execution, running against the person and property of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability. Where, therefore, a party not liable to taxation is called on peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and, by showing that he is not liable, recover it back as money had and received.

"It appears by the facts agreed, that upon the first notice of the tax, the plaintiff applied to the treasurer and collector, setting forth his specific ground of objection, namely, that he was not an inhabitant and not liable to the tax on personal property. The plaintiff was informed by the collector that he had no discretion on the subject, and unless he obtained an abatement a warrant of distress would issue against him. He then applied to the city government, stated the grounds of his objection, and remonstrated against the tax; but they decided that the tax must be paid, of which the collector was duly informed. The law under which the treasurer and collector acted obliged him to issue a warrant, under which the person and property of the plaintiff would have been liable to be taken, and that officer had notified him that such warrant would be issued. Under these circumstances the money was paid, and we think it cannot be considered as a voluntary

[1] Preston *v.* City of Boston, 12 Pick. 7.

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payment, but a payment made under such circumstances of constraint and compulsion, and with such notice on his part that it was so paid, that on showing that he was not liable he may recover it back in this action from the defendants, into whose treasury it has gone."

It is not necessary that the plaintiff establish that the goods would have been seized at the moment of payment had not the money been paid. He has established a right of recovery if he prove that an officer presented the warrant for collection, and "manifested an intention to enforce collection by seizure and sale of the property at any time.[1]

While it has been held[2] that it was sufficient that payment was made after the taxes were payable, and notice thereof given to the plaintiff, though before a summons or warrant was issued or was issuable; yet it was held in Railroad Co. *v.* Commissioners[3] that the plaintiff could not recover taxes paid in the following circumstances: Tax-lists with warrants attached had been delivered to the treasurer of the county. The warrants authorized the treasurer, should default be made in the payment of any of the taxes, to seize the personal property of the party in default. No demand of payment was necessary, but it was the duty of every person to attend at the treasurer's office and make payment. The plaintiff, whose name was on the tax-list, and against whom a warrant had been delivered to the treasurer of the county, called at the office of the treasurer and paid, under protest,[4] the taxes assessed against him, although no attempt

[1] Parcher *v.* Marathon County, 52 Wis. 388.

[2] Boston & Sandwich Glass Co. *v.* Boston, 4 Met. 181.

[3] 98 U. S. 541.

[4] If, independently of protest, the circumstances in which a payment is made, would not justify a recovery thereof, the fact of payment under protest will not render such payment involuntary. In such cases the importance of paying under protest is that the protest is evidence of the plaintiff's intention at the time when the payment was made. Lamborn *v.* County Commissioners, 97 U. S. 181; Detroit *v.* Martin, 34 Mich. 170; Flower *v.* Lance, 59 N. Y. 603; De La Cuesta *v.* Insurance Co, 136 Pa. St. 62.

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had been made to collect the same, and no threat had been made to seize his property.

If the rule is well founded that one who pays a judgment without waiting for execution to issue thereon, can recover the money so paid as paid under compulsion,[1] it would seem that the same rule might be applied to a case such as was presented for the consideration of the court in the Railroad Co. *v.* Commissioners. In each case a competent tribunal has declared a certain sum of money to be payable, and in each case the plaintiff's property is subject to seizure for such payment. In neither case was a seizure threatened. In the case of the Railroad Co. *v.* Commissioners, however, differing from the case where money is paid under a judgment upon which execution has not issued, an execution had been in fact issued directing the collection of the taxes.

Recovery of money paid to prevent a sale of real estate.

The question of the recovery of money as paid under compulsion of law may arise because of a threatened sale of real as well as personal property. A threatened sale of real estate differs from a threatened sale of personal property in one particular: an officer who sells personal property takes possession thereof. Where a sale of real estate is threatened, it is not the purpose of the officer to take possession of the property, but simply to sell the same, leaving the purchaser to assert his rights thereto under the sale. For this reason it has been held that money paid under a threatened sale of real property under legal process cannot be recovered, unless the sale thereof would have created a cloud upon title.[2]

Had the effect of the threatened sale upon the market-value of the property been adopted as the test of the existence of a cloud upon title, the rule would be unobjectionable.[3]

[1] See *supra*, p. 418.

[2] Lamborn *v.* Commissioners, 97 U. S. 181; The City of Detroit *v.* Martin, 34 Mich. 170; Bruecher *v.* The Village of Portchester, 101 N. Y. 240.

[3] See Whitney *v.* Port Huron, 88 Mich. 268.

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But the rule seems objectionable if the test of the existence of a cloud upon title is whether the absence of a right to sell the property, as for example, the unconstitutionality of a statute, appears by the record under which the right is claimed. It seems hardly justifiable to hold that while one whose enjoyment of personal property is interfered with by a threatened unlawful taking or detention thereof, can recover money paid to prevent such interference,[1] money paid to prevent a depreciation in value of real estate because of an unlawful interference therewith, cannot be recovered if the court is of the opinion that an inspection of a record will enable one sufficiently versed in law to say that the interference is unlawful.

[1] See *infra*, p. 426.

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CHAPTER XI.

RECOVERY OF MONEY PAID TO THE DEFENDANT UNDER DURESS, LEGAL OR EQUITABLE.

It is proposed to consider in this chapter the right of a plaintiff to recover money paid in the following circumstances:

1. To prevent the wrongful taking or detention of property;
2. To avoid injury to business;
3. In performance of a usurious contract;
4. To induce the defendant to discharge a duty;
5. To avoid arrest or to be released therefrom.

SECTION I.

RECOVERY OF MONEY PAID TO PREVENT THE UNLAWFUL TAKING OR DETENTION OF PROPERTY.

Money paid to prevent an unlawful taking or detention of property can be recovered.

While the unlawful taking or detention of another's property does not constitute legal duress, and would not, therefore, constitute a defence at law in the absence of equitable defences to an action on a contract,[1] yet money paid to prevent such taking or detention can be recovered in the count for money had and received, as paid under compulsion.[2]

[1] Skeate *v.* Beale, 11 A. & E. 983.

[2] This seeming anomaly in our law, where on the same facts money paid can be recovered, while one who has made a contract has no defonce thereto and must perform the same, is a striking illustration not only of the difference between legal and equitable principles, but also of the importance of keeping the distinction between law and equity clearly in mind. The decision that in a court of law a defendant who

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Thus it was held in Hills *v.* Street[1] that the plaintiff who paid to the defendant a sum of money to prevent a wrongful removal and sale of his goods under a distraint, could recover the money so paid.

Likewise in Hooper *v.* Mayor, etc,[2] it was held that the plaintiff who paid harbor duties to the defendant in excess of what was due, to prevent a wrongful taking of his goods for the duties so charged, could recover the money so paid.

It would seem, therefore, that the decision in Nibbs *v.* Hall,[3] holding that a plaintiff was not justified because of a threatened distress in paying a claim made upon him, for the reason that he might have defended himself by replevying the goods, can no longer be regarded as law.

The ground upon which a recovery of money so paid is allowed, seems to be that a plaintiff who has a right to the possession of his property, need not wait upon the delays of the law to obtain the same, but can, if necessary, comply in form with the terms imposed by the party attempting to deprive him thereof.

In Astley *v.* Reynolds,[4] which may perhaps be called the leading case on this subject, the plaintiff, who had pawned

contracted for a consideration to pay money to prevent the wrongful taking or detention of his goods had no defence to the contract, was perfectly sound, for the reason that such acts did not constitute duress at law, and a common law court had no jurisdiction over a mere equity existing in favor of the defendant. Nor was this decision inconsistent with the ruling that money paid in the same circumstances could be recovered in the count for money had and received. In the count for money had and received the court dealt confessedly with equitable principles, and the simple question was whether the circumstances were such that equitably the defendant should restore to the plaintiff that which he had received. When, however, a plaintiff sought to recover on a contract, the sole question before the court was whether the facts pleaded by the defendant constituted duress at law.

[1] 5 Bing. 37.

[2] 56 L. J. 457. See also Chase *v.* Dwinal, 7 Greenl. 134; Chamberlain *v.* Reed, 13 Me. 357.

[3] 1 Esp. 84.

[4] 2 Str. 915. See also Briggs *v.* Boyd, 56 N. Y. 289; Buford *v.* Lonegan, 6 Utah, 301.

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plate to the defendant, was allowed to recover money unlawfully demanded of the plaintiff as a condition of allowing him to redeem. Said the court: —

"We think also that this is a payment by compulsion; the plaintiff might have such an immediate want of his goods that the action of trover would not do his business; where the rule *volenti non fit injuria* is applied it must be where the party had the freedom of exercising his will, which this man had not; we must take it he paid the money, relying on his legal remedy to get it back again."

In Wakefield *v.* Newbon,[1] the defendant, a mortgagee, having refused to return to the plaintiff, the mortgagor, the title deeds of the mortgaged premises, unless he was paid an amount to which he was not entitled, was held compelled to return to the plaintiff the amount so paid.

In Close *v.* Phipps[2] it was held that the defendant, who demanded as a condition of allowing the plaintiff to redeem mortgaged premises a payment not due, and threatened to sell the property if his demand was not complied with, should refund to the plaintiff the money so paid.

On the same principle, it is held that money paid to a carrier who refuses to deliver goods, except on condition of receiving a payment, to which he is not entitled, can be recovered by the party making the payment.[3]

On the same principle, money paid to obtain from the defendant bonds or stock which the defendant refused to deliver except on the payment of a sum to which he was not entitled, can be recovered as paid under compulsion.[4]

[1] 6 Q. B. 276.

[2] 7 M. & G. 586.

[3] Ashmole *v.* Wainwright, 2 Q. B. 837; Lafayette & Indianapolis R. R. Co. *v.* Pattison, 41 Ind. 312; Harmony *v.* Bingham, 12 N. Y. 99; Baldwin *v.* The Liverpool Great Western Steamship Co., 74 N. Y. 125, 129.

[4] Scholey *v.* Mumford, 60 N. Y. 498; Bates *v.* The New York Insurance Co., 3 John. Cas. 238. See, however, De La Cuesta *v.* Insurance Co., 136 Pa. St. 62.

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Recovery of money paid to remove cloud on title.

On the same principle, if one's enjoyment of his real estate is interfered with by the assertion of a claim creating a cloud upon title, he can, though not deprived of his possession, pay the demand made upon him and recover the money so paid as paid under equitable duress. Thus, it was held in Joannin *v.* Ogilvie[1] that the plaintiff, who was compelled, in order to obtain a loan, to pay an unfounded claim of lien, could recover the money so paid.[2]

No recovery of money paid to protect property unless retention of money against conscience.

The plaintiff in the cases considered under this section cannot, however, recover the money so paid unless it is against conscience for the defendant to retain it,[3] and the burden is on the plaintiff to establish that fact.[4]

In Richmond *v.* The Union Steamboat Co.,[5] the defendant refused to deliver a cargo belonging to the plaintiff at the place where the plaintiff claimed the delivery should be made, and would not surrender to the plaintiff the cargo, except on payment of the freight. The plaintiff paid the freight, and then had the goods transported to the place where he claimed the defendant should have delivered them. In an action brought by the plaintiff to recover money alleged to have been paid under duress, the plaintiff on the trial recovered not only the sum paid by him to the defendant as freight, but also the expenses incurred by him in sending the goods to their destination. It was held that while the defendant had no right to refuse to deliver the goods to the plaintiff, still it was manifestly unjust that the plaintiff should recover both the money paid by him to the defendant and also the expense which he had incurred in transporting the goods to their destination, and that the most just and equitable rule was to allow the plaintiff to

[1] 49 Minn. 564.

[2] It is held, however, that title to real estate cannot be tried in the action for money had and received. Lindon *v.* Hooper, Cowp. 414; King *v.* Mason, 42 Ill. 223; Pickman *v.* Trinity Church, 123 Mass. 1 (*semble*).

[3] Richmond *v.* The Union Steamboat Co., 87 N. Y. 240.

[4] Briggs *v.* Boyd, 56 N. Y. 289.

[5] 87 N. Y. 240.

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recover from the defendant the amount of the expenses that had been incurred by him. The result reached can be sustained upon two theories, — that the plaintiff should have been allowed to recover as for money paid to the use of the defendant, since the defendant should have complied with the plaintiff's demand as to the delivery of the goods; or that the defendant was liable to the plaintiff in a count for money had and received, but that as the defendant had substantially performed the contract on his part, the amount of his unjust enrichment would be the sum that it cost the plaintiff to do what should have been done by him.

SECTION II.

RECOVERY OF MONEY PAID TO AVOID AN INJURY TO ONE'S BUSINESS.

Money so paid can be recovered if defendant's act unlawful.

Although neither the plaintiff's person or property is threatened with seizure or detention, he can recover as paid under compulsion, money wrongfully demanded of him, and paid by him to prevent a serious injury to his business. Thus it was held in Westlake *v.* St. Louis[1] that the plaintiff could recover money paid to the defendant, who threatened, unless his wrongful demand was complied with, to deprive the plaintiff of the use of water necessary to the conduct of his business.

In Carew *v.* Rutherford,[2] it appeared that in consequence of the plaintiff's refusal to pay a fine of $500, which had been imposed upon him by an association of workmen, of which the defendant was a member, for sending some of his work to New York, his workmen had left his employ and notified him that until the fine was paid neither they nor any members of the association would work for him. The

[1] 77 Mo. 47. See also Panton *v.* Duluth Co., 52 N. W. Rep. 527 (Minn. 1892); Lehigh Coal Co. *v.* Brown, 100 Pa. St. 338.

[2] 106 Mass. 1.

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plaintiff, who was a freestone cutter, and was under large contracts to furnish freestone, being unable to employ workmen to enable him to perform his contracts, paid the fine. It was held that the money so paid could be recovered. Said Chapman, C. J. : —

"Without undertaking to lay down a precise rule applicable to all cases, we think it clear that the principle which is established by all the authorities cited above, whether they are actions of tort for disturbing a man in the exercise of his rights and privileges, or to recover back money tortiously obtained, extends to a case like the present. We have no doubt that a conspiracy against a mechanic, who is under the necessity of employing workmen in order to carry on his business, to obtain a sum of money from him, which he is under no legal liability to pay, by inducing his workmen to leave him, and by deterring others from entering into his employment, or by threatening to do this, so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the illegal demand, is an illegal, if not a criminal conspiracy; that the acts done under it are illegal, and that the money thus obtained may be recovered back, and, if the parties succeed in injuring his business, they are liable to pay all the damage thus done to him. It is a species of annoyance and extortion which the common law has never tolerated."

In Swift Co. *v.* United States[1] it was held that a plaintiff whose business could not be conducted without the use of certain stamps, could recover from the defendant the money unlawfully exacted from him as a condition of delivering the stamps. In delivering the opinion of the court, Mr. Justice Matthews said: —

"From this statement, it clearly appears that the Internal Revenue Bureau had at the beginning deliberately adopted the construction of the law upon which it acted through its successive commissioners, requiring all persons purchasing such proprietary stamps to receive their statutory commissions in stamps at their face value,

[1] 111 U. S. 22.

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instead of in money; that it regulated all its forms, modes of business, receipts, accounts, and returns upon that interpretation of the law; that it refused on application, prior to 1866, and subsequently, to modify its decision; that all who dealt with it in purchasing these stamps were informed of its adherence to this ruling; and finally, that conformity to it on their part was made a condition without which they would not be permitted to purchase stamps at all. This was in effect to say to the appellant, that unless it complied with the exaction, it should not continue its business; for it could not continue business without stamps, and it could not purchase stamps except upon the terms prescribed by the commissioners of internal revenue. The question is whether the receipts, agreements, accounts, and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

"We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria*."

In Robertson *v.* Frank Brothers Co.[1] it was held that a plaintiff who added additional charges to the cost of goods, thereby involving a payment of increased duties, and paid the same to avoid a penalty which the custom officials threatened to enforce if he did not add such additional charges, could recover the amount of the increased duties. Mr. Justice Bradley, speaking for the court, said:—

"In that case (Maxwell *v.* Griswold, 10 How. 242), it is true, the fact that the importer was not able to get possession of the goods without making the payment complained of, was referred to by the court as an important circumstance; but it was not stated to be an indispensable circumstance. The ultimate fact, of which that was an ingredient in the particular case, was the

[1] 132 U. S. 17.

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moral duress not justified by law. When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. But the circumstances of the case are always to be taken into consideration. When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required, — as where an officer exacts illegal fees, or a common carrier excessive charges. But the principle is applicable in all cases according to the nature and exigency of each. In Swift Co. *v.* United States, 111 U. S. 22, the plaintiffs, who were manufacturers of matches, and furnished their own dies for the stamps used by them, and were thereby entitled to a commission of ten per cent on the price of such stamps, accepted for a long period their commissions in stamps (which, of course, were worth to them only ninety cents to the dollar), and they did this because the Treasury Department would pay in no other manner. We held that the apprehension of being stopped in their business by non-compliance with the Treasury regulation was a sufficient moral duress to make their payments involuntary. . . . The cases referred to by Justice Matthews abundantly support the position taken, and need not be repeated here. In our judgment, the payment of money to an official, as in the present case, to avoid an onerous penalty, though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one. It is true that the thing done under compulsion in this case was the insertion of the additional charges upon the entries and invoices; but that necessarily involved the payment of the increased duties caused thereby, and in effect amounts to the same thing as an involuntary payment."

It would seem that the test adopted by Mr. Justice Bradley in Robertson *v.* Frank Brothers Co., namely, "that when such duress is exerted in circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary," should have led to a different result in Oceanic Steam Navigation Co. *v.*

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Tappan,[1] where the plaintiff sought to recover money paid under protest as an immigration tax, claiming that the statute imposing it was unconstitutional. The statute imposed penalties upon the non-payment of the tax, which it was admitted would, if collected, have ordinarily bankrupted a ship-owner. It was held that the money so paid could not be recovered. Said Wallace, J.: —

"Palpably the statute was framed to coerce the payment of the commutation moneys. If they were not paid, the owner of the vessel was made liable to an accumulation of penalties which would aggregate an enormous sum, and which, if collected, would ordinarily bankrupt the ship-owner. Naturally, rather than incur the hazard of such disastrous consequences, the ship-owner would pay, in preference to abiding the contingencies of litigation. The hardship of the particular case, however, cannot change the rule of law. The penalties imposed in lieu of the commutation money could only be collected by suit in a court of law, where the corporation against which they were claimed could have its day and all the protection which the courts afford to suitors; and a payment made under such a state of facts is not made under legal coercion."

While it is and should be true that ordinarily money paid under a threat of suit cannot be recovered as money paid under compulsion,[2] the rule, it is submitted, should not control such a case as the one under consideration.

As a rule the recovery of money paid to avoid litigation would make a payment meaningless, and often do injury to a defendant by giving the plaintiff control of the litigation, but when payment is made to avoid consequences such as were involved in the Oceanic Steam Navigation Co. *v.* Tappan, it does not make the original payment an idle ceremony, since the payment was made to avoid possible bankruptcy growing out of a doubtful question of law. Surely the cir-

[1] 16 Blatch. 296.

[2] City of Muscatine *v.* The Keokuk Northern Line Packet Co., 45 Ia. 185; Emmons *v.* Scudder, 115 Mass. 367; Regan *v.* Baldwin, 126 Mass. 485.

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cumstances of that case were "sufficient to influence the apprehensions and conduct of a prudent business man."

To this principle must be referred the decision in Smith *v.* Cuff,[1] where it was held that a defendant who refused to sign a composition agreement, and who threatened to take bankruptcy proceedings against the plaintiff, his debtor, unless he was paid the difference between the amount of his debt and the amount stated in the composition agreement, must refund to the plaintiff the money received by him in excess of the sum named in the composition agreement. Said Lord Ellenborough, C. J.: —

"This is not a case of *par delictum;* it is oppression on one side and submission on the other; it never can be predicated as *par delictum* when one holds the rod and the other bows to it. There was an inequality of situation between these parties: one was creditor, the other debtor, who was driven to comply with the terms which the former chose to enforce. And is there any case where, money having been obtained extorsively, and by oppression, and in fraud of the party's own act as it regards the other creditors, it has been held that it may not be recovered back? On the contrary, I believe it has been uniformly decided that an action lies."

The writer is unable to agree with this decision, which, it must be admitted, is generally regarded as law. It is true, as was said by Lord Ellenborough, that the defendant held the rod and the plaintiff bowed to it, but the defendant only succeeded by the use thereof in collecting the amount of his debt. The defendant was under no obligation to the plaintiff to sign the composition agreement. It is true that the defendant practiced a fraud upon the creditors, — a fraud in which the plaintiff co-operated, and which, of course, gave the creditors a right to set aside the composition agreement as against the plaintiff, and perhaps a right also in equity to compel the defendant to hold what he received over and above the sum named in the composi-

[1] 6 M. & S. 160.

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tion agreement for their benefit. The result reached in Smith *v.* Cuff was not that the creditors received money which the defendant in fraud of their rights received from the plaintiff, but that the defendant was compelled to refund to his creditor a sum of money which it is admitted was owing by the plaintiff to the defendant.[1]

SECTION III.

RECOVERY OF MONEY PAID UNDER A USURIOUS CONTRACT.

Amount paid in excess of principal and legal rate of interest can be recovered.

The inception of a usurious contract rather than its performance suggests the existence of duress. While one attempting to borrow money may, because of his necessities, be somewhat restrained in the exercise of his volition, it seems difficult to say that a payment made by one who has the right to refuse to pay, is a payment made under compulsion. Nevertheless, it has been held that a party paying money under a contract void for usury, can recover as money paid under compulsion the amount paid in excess of the principal and legal rate of interest.[2] If a recovery is to be allowed, manifestly it would be unjust to allow a recovery of more than the excessive rate of interest, since to the extent of the principal and legal rate of interest, he is only returning to the defendant what he received from him, and therefore it is impossible to say that as to that amount the defendant has anything which in equity and good conscience he should return to the plaintiff.

In considering the right of a plaintiff to recover money paid, where an action could not be maintained to recover the

[1] See questioning the soundness of this decision, Solinger *v.* Earle, 82 N. Y. 393–397, 398.

[2] Bosanquett *v.* Dashwood, Cas. t. Tal. 37; Browning *v.* Morris, Cowp. 790 (*semble*); Fowler *v.* Equitable Trust Co., 141 U. S. 384; Kendall *v.* Davis, 55 Ark. 318 (*semble*); Willie *v.* Green, 2 N. H. 333.

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rate of interest agreed upon in the contract, it is important, however, to distinguish between a statute forbidding the exacting of more than a given rate of interest, and a statute which renders an agreement for more than a given rate of interest unenforceable unless the agreement is in writing. In the latter case the contract, while unenforceable, is perfectly lawful, and if performed, no part of the money paid thereunder can be recovered.[1]

No recovery where statute simply renders agreement unenforceable if not in writing.

As the law prohibits not the payment but the taking of usurious interest, payments so made will not be treated as payments *pro tanto* of the principal debt.[2] A debtor cannot therefore, after the statute of limitations has run against the recovery of such payments, claim the benefit thereof in an action brought to recover the principal debt, where such actions are allowed.[3]

Such payment are not treated as payments in part of principal debt.

SECTION IV.

RECOVERY OF MONEY PAID TO INDUCE THE PERFORMANCE OF A DUTY.

Money paid to one who, because of his position, is under an obligation to discharge certain duties to the public, but who refuses to discharge such duty without the payment of a sum of money, to which he is not entitled, can be recovered as money paid under compulsion. Thus, in Dew *v.* Parsons[4] it was held that a sheriff who exacted money to which he was not entitled, as a condition of issuing warrants, was liable to an action for the recovery of the money paid in excess of that to which he was entitled.

[1] Marvin *v.* Mandell, 125 Mass. 562. See also Carson *v.* Cochran, 53 N. W. Rep. 1130 (Minn. 1892).

[2] Peterborough Savings Bank *v.* Hodgdon, 62 N. H. 300. See also Pixley *v.* Ingram, 53 Hun, 93.

[3] Cummings *v.* Knight, 65 N. H. 202; Pixley *v.* Ingram, 53 Hun, 93.

[4] 2 B. & Ald. 562.

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In Steele *v.* Williams,[1] the plaintiff applied to the defendant for permission to search certain records in the office of the defendant, a parish clerk, and to take extracts therefrom. He was told by the clerk that whether he took extracts or received official certificates, he would have to pay a certain fee. The plaintiff, after completing his search, paid the fee demanded by the defendant. It was held in an action brought to recover the money so paid, that, notwithstanding the payment was not made until after the searches had been made and the extracts taken, the plaintiff, since he had agreed to pay the fee in question on the defendant's demanding it as a condition of allowing him to make the search, could recover the money so paid as paid under compulsion.

On the same principle, it is held that a carrier who refuses to receive goods tendered to him unless a sum of money is paid to which he is not entitled, must refund to the plaintiff the overpayment made in such circumstances.[2]

SECTION V.

RECOVERY OF MONEY PAID TO AVOID ARREST OR TO BE RELEASED THEREFROM.

Money paid to avoid or to obtain release from an unlawful arrest can be recovered.

If money paid to prevent the wrongful seizure or detention of property can be recovered as paid under compulsion, a recovery should certainly be allowed of money paid to avoid bodily harm, or to prevent the wrongful arrest or detention of the party making the payment. Accordingly, it was held in De Mesnil *v.* Dakin[3] that the plaintiff could recover money which he paid to obtain his release from an arrest not only

[1] 8 Ex. 625.

[2] Parker *v.* The Great Western Railway Co., 7 M. & G. 253; Cook *v.* Chicago R. R. Co., 81 Ia. 551. As to the recovery of money paid to obtain goods detained by a carrier, see *supra*, p. 428.

[3] L. R. 3 Q. B. 18.

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groundless but unlawful, because the warrant authorized the arrest not of the plaintiff but of his brother.

Even though the arrest is legal in form, having been made as required by law, if the defendant caused the arrest to be made not in the interest of justice but to enable him to extort money from the plaintiff, money paid to obtain release therefrom can be recovered.[1]

When money can be recovered though there was no immediate danger of arrest.

While, ordinarily, money paid under a mere threat of criminal prosecution in circumstances not authorizing the belief that there is immediate danger of arrest without an opportunity of being heard will be regarded as a voluntary payment,[2] still, if it can be shown that the plaintiff was imposed upon because of his age, infirmity, position, or ignorance, and money was procured by such threats, a recovery thereof will be allowed.[3]

No recovery of money paid after necessity for payment has passed.

It is not enough, however, for the plaintiff to show that prior to the time when he made the payment which he seeks to recover, he was acting under duress; it must appear that he was acting under compulsion at the time of making the payment which he seeks to recover. Thus in Schultz *v.* Culbertson[4] it was held that the plaintiff, who gave a note to avoid the arrest of his son on a false criminal charge, could not recover the money paid in extinguishment of the note, it not appearing that there was any necessity for the payment of the note.

Payment must unjustly enrich defendant.

Since, however, the plaintiff must establish an unjust enrichment on the part of the defendant, there can be no recovery if in fact the plaintiff has only done what he should have done voluntarily.[5]

[1] Richardson *v.* Duncan, 3 N. H. 508. See also Hackett *v.* King, 6 Allen, 58; Heckman *v.* Swartz, 64 Wis. 48.

[2] Bosley *v.* Shanner, 26 Ark. 280; Hines *v.* Hamilton County, 93 Ind. 266; Harmon *v.* Harmon, 61 Me. 227; Higgins *v.* Brown, 78 Me. 473; Betts *v.* Reading, 93 Mich. 77.

[3] Cribbs *v.* Sowle, 87 Mich. 340; Adams *v.* Irving National Bank, 116 N. Y. 606.

[4] 46 Wis. 313.

[5] See Diller *v.* Johnson, 27 Tex. 47.

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Plaintiff need not be the party threatened with arrest.

Not only can the party unlawfully arrested or threatened with arrest recover money which he has paid to avoid such a result, but one closely related to him will be allowed to recover money paid in such circumstances.[1]

In Adams *v.* Irving National Bank[2] it was held that the plaintiff, who had paid money under a threat by the defendant to arrest her husband if the money was not paid, could recover the money so paid, as paid under compulsion. Brown, J., delivering the opinion of the court, said: —

"It is not an accurate use of language to apply the term duress to the facts upon which the plaintiff seeks to recover. The case falls rather within the equitable principle which renders voidable contracts obtained by undue influence. However we may classify the case, the rule is firmly established that in relation to husband and wife, or parent and child, each may avoid a contract induced and obtained by threats of imprisonment of the other. And it is of no consequence whether the threat is of a lawful or unlawful imprisonment."

Recovery of money paid to compound a felony.

The statement of the learned judge that it is of no consequence whether the threat is of a lawful or unlawful imprisonment seems to need modification. It was held in Haynes *v.* Rudd[3] that a father who gave a note to the defendant to prevent the prosecution of his son for larceny, and who was compelled to pay the same at maturity, had no cause of action against the defendant for the money so paid, since the money was paid to compound a felony, and the parties were *in pari delicto*.[4]

On the same principle, it was held in Gotwalt *v.* Neal[5] that a deed executed for the purpose of compounding a threatened prosecution for embezzlement could not be set aside as obtained under duress.

[1] Adams *v.* Irving National Bank, 116 N. Y. 606; Schultz *v.* Culbertson, 49 Wis. 122.

[2] 116 N. Y. 606.

[3] 102 N. Y. 372.

[4] See *supra*, p. 273.

[5] 25 Md. 434.

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In Schoener *v.* Lissauer,[1] however, the court entertained a bill to procure the cancellation and discharge of a mortgage apparently given to compound a felony committed by the son of the mortgagor. It is submitted that Haynes *v.* Rudd and Schoener *v.* Lissauer are the same in principle. In each case equitable relief was sought by a party who had engaged in an illegal transaction. It is true that the one action was at law, while the other was in equity; but it must not be forgotten that while Haynes *v.* Rudd was an action at law, it was an action which is maintained on equitable principles.[2] It is true that the one transaction was executed, while the other was, in a sense, executory. But in each case the defendant had acquired legal as distinguished from equitable rights. In each case the plaintiff sought to deprive the defendant of his legal right. In the one case he was allowed to do it, in the other not. If relief was properly denied in the one case because the parties were *in pari delicto*, why should it have been granted in the other case, in spite of that fact?

[1] 107 N. Y. 111. See also Bryant *v.* Peck & Whipple Co., 154 Mass. 460.

[2] See Hunt *v.* Amidon, *supra*, p. 400, note 1.

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