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A

PRIMER OF LEGAL PRINCIPLES.

The Philosophy of Common Law.

A

PRIMER OF LEGAL PRINCIPLES

ILLUSTRATED BY

A VARIETY OF INTERESTING CASES.

BY THE LATE

HERBERT BROOM, LL.D.,

OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

THIRD EDITION,

REMODELLED AND ALMOST REWRITTEN

BY

JOHN C. H. FLOOD,

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TO THE MEMORY OF

HERBERT BROOM, LL.D.,

OF THE INNER TEMPLE, ESQUIRE, BARRISTER-AT-LAW,

LECTURER ON COMMON LAW TO THE FOUR INNS OF COURT,

FROM 1852 TO 1875;

AUTHOR OF

"A TREATISE ON LEGAL MAXIMS;" "COMMENTARIES ON THE COMMON LAW;" "A TREATISE ON CONSTITUTIONAL LAW;" "PRACTICE OF THE COUNTY COURTS;" "COMMENTARIES ON THE LAWS OF ENGLAND;" AND "THE PHILOSOPHY OF LAW;"

THIS EDITION OF THE LAST-NAMED WORK

IS

VERY RESPECTFULLY DEDICATED

BY

THE EDITOR.

PREFACE TO THE FIRST EDITION.

THIS little work, although primarily intended as a "First Text Book for Law Students," will, it is hoped, prove of utility to the Public generally. It exhibits the elements of our existing Law, vouched for by reference to recent cases and statutes, though resting on principles and doctrines, many of which were settled centuries ago. I submit it as the result of much thought devoted to the adapting of legal knowledge to the ordinary concerns of life.

H. B.

March, 1876.

PREFACE TO THE SECOND EDITION.

I HAVE much pleasure in again submitting this Book to Law Students and to the Public. The text has been carefully reconsidered, and some few alterations necessitated by recent decisions have been made in it. Many newly reported cases are also referred to, which have been selected as specially fitted to explain and illustrate the various propositions stated. The original design of

the Work, however, has been kept in view, and I trust that a perusal of it will suffice to give an insight into the principles of our Common Law, and show how it is administered by the Courts.

The book has been deemed worthy of publication in the United States of America—at New York and at San Francisco—and has thus been brought under the notice of a very large circle of Readers.

H. B.

April, 1878.

NOTE BY THE EDITOR.

ALTHOUGH this work passed into two editions during the lifetime of its author, was widely circulated in America and elsewhere, and received the highest commendations of the press (*a*), it is nevertheless believed that one word in the title which the book bears militated in some degree against its still greater success. That word is "Philosophy," a term which no doubt bears an ominous appearance, and is suggestive to many persons of anything but that "feast of nectar'd sweets" which the poet assures us is afforded by "Divine Philosophy."

To entirely alter the title of a deceased author's work, would be an unwarrantable act on the part of an editor: it is, however, competent to him to explain it if necessary, and in the present case to do this is easy. Without entering into any philological dissertation, we may observe that the significations of the word "Philosophy" have been so far multiplied in course of time, that the term is now made to do duty in a variety of modes in which its primary etymological

(*a*) See the reviews at the end of the Book, after the Index.

meaning is merged or quite lost sight of. By a treatise on the Philosophy of Law, or indeed of any other science, we simply mean an exhibition of its known principles, their consistency with each other, their general applicability to even dissimilar sets of phenomena or circumstances, and of the manner in which all the subordinate features of the subject dealt with are referable to those principles.

If, then, any person be inclined to take fright at the word "Philosophy," he may rest assured that he is not being invited to here peruse a series of dry abstract propositions—which Philosophy generally, and especially that of Law, is often thought to be. On the contrary he will find, if we mistake not, "The Philosophy of Common Law" a very entertaining introduction to the learning of that subject, and to a knowledge of every-day law generally.

As stated on the title-page, Dr. Broom's book has been remodelled and almost rewritten. This is literally true, and it is due alike to Dr. Broom and to the editor — perhaps more so to the former — that the changes which have been made in the book should be enumerated. These are as follows:—Cases cited at the end of the volume and referred to in the text by numerals, have been placed in footnotes (*b*); a

(*b*) This has been done in spite of the antipathy said to exist in some quarters against the foot-notes of "barristers' law books." But it seems clear that any person afraid of footnotes in a work dealing with

proper Table of these cases has been made; a Comparative Table of Current Reports, a key to the short method of citing Reports generally, and notes explanatory of the text have been added; Latin and French quotations, and legal maxims, have been translated and indexed; and certain typographical changes are made, which it is hoped will assist the reader's eye. Where Dr. Broom seems to have forgotten that he was writing for the uninitiated, his language has been altered, and many of those pedantic forms of expression common to the old school of legal writers—of which school Dr. Broom was perhaps the last—have been discarded, and the book has been brought as closely down to date as was practicable (*c*). Lastly, the Index has been enlarged from eleven pages of large to fifty pages of small type, and may perhaps serve as an *aide-mémoire* to the student. A glance at this Index will show the variety of subjects dealt with, and the amount of

any scientific subject should at once abandon the study of it, and direct his attention to some other pursuit. Especially is this so with respect to Law, and we can imagine the consternation with which a lawyer would regard a text-book without references.

(*c*) With regard to the **Criminal Code Procedure Bill**, occasionally referred to in the following pages, we must observe that the short note (*z*) on p. 250, was printed before the collapse of this measure on Thursday, June 21, 1883. That note and also note (*i*) at p. 199, must therefore be read with that at p. 254, where the main provisions of this intended measure are set out. It is said that the failure of this bill was fully anticipated; yet, only three days before its abandonment, the Attorney-General stated in the House of Commons that he hoped to pass the bill before the Prorogation of Parliament.

information which the book is capable of directly or indirectly furnishing.

In conclusion, the editor can only express the hope that in attempting to improve the work of an eminent writer, he has not marred it. He trusts, however, that such alterations and additions as he has with diffidence ventured to make therein are such as the learned author of the book would have sanctioned and approved of had he been living.

JOHN C. H. FLOOD.

MIDDLE TEMPLE,
July, 1883.

N.B.—Should the reader come upon any mention of the **Criminal Code Procedure Bill** previous to page 254, he will bear in mind that this measure was **abandoned** by Parliament on 21st of June last.

The **Criminal Law Amendment Bill**—of which the object is the better protection of young girls—passed through Committee in the House of Lords on 25th of June last.

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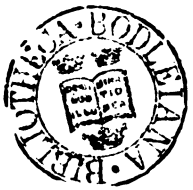

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A. & E.	Adolphus and Ellis	12	King's and Queen's Bench	1834—1840.
B. & Ald.	Barnwall and Alderson	5	King's Bench	1817—1822.
B. & C.	Barnwall and Creswell	10	,, ,,	1822—1830.
Bell Cr. Cas.	Bell's Crown Cases	1	Criminal Appeal	1858—1860.
B. & S.	Best & Smith	10	Queen's Bench	1861—1869.
Bing.	Bingham	10	Common Pleas	1822—1834.
C. B.	Common Bench	18	,, ,,	1845—1856.
C. B. (N. S.)	Common Bench, New Series	20	,, ,,	1856—1865.
Camp.	Campbell's Nisi Prius Reports	4	Nisi Prius	1808—1816.
Cl. & F.	Clark and Finnelly	12	House of Lords	1831—1846.
Co. Rep.	Coke	6	King's Bench	1572—1616.
Dears.	Dearsly's Crown Cases	1	Criminal Appeal	1852—1856.
Dears. & Bell	Dearsly & Bell's Crown Cases	1	,, ,,	1856—1858.
Den. Cr. Cas.	Denison's Crown Cases	2	,, ,,	1844—1852.
East	East's Reports	16	King's Bench	1801—1812.
E. & B.	Ellis and Blackburn	8	Queen's Bench	1852—1858.
E. B. & E.	Ellis, Blackburn, and Ellis	1	,, ,,	1858.
Ex. Rep. or Ex.	Exchequer Reports, by Welsby, Hurlstone, and Gordon.	11	Exchequer	1847—1856.
H. L. Cas.	House of Lords Cases, by C. Clark, Q.C.		House of Lords	1847—1866.
How. St. Tr.	Howell's State Trials	34		Early date, 1820.
How. Rep.	Howard's Reports (American)		United States	1845 (Vol. 3 referred to)
H. & N.	Hurlstone and Norman	7	Exchequer	1856—1861.
L. J. or Law Journal. H. L.	House of Lords	9 Vols. in Old Series, and 52 in New Series.		See "The Comparative Table of Current English Law Reports."
P. C.	Privy Council			
Ch	Chancery			
Ch. D.	Chancery Division			
K. B.	King's Bench			
Q. B.	Queen's Bench, *or*			
Q. B. D.	Queen's Bench Division			
C. P.	Common Pleas, *or* Common Pleas Division			
Ex.	Exchequer, *or* Exchequer Division			
M. C.	Magistrates Cases			

Abbreviated form of reference.	Titles.	Vols.	Court.	Period of time comprehended.
L. R. or Law Reports. H. L. *or* E. & I. App.	House of Lords, *or* English and Irish Appeal Cases	About 150 vols.		
The other references are the same as in the L. J. *except* C. C. R.	Crown Cases Reserved, which represent the "Magistrates Cases" of the L. J.			See "The Comparative Table of Current English Law Reports."
L. T. or Law Times	Law Times Reports	49 in New Series	Various	See "The Comparative Table of Current English Law Reports."
Leach Cr. Cas.	Leach's Crown Cases	2	Criminal Appeal	1730—1815.
L. & C.	Leigh and Cave's Crown Cases	1	,, ,,	1861—1865.
Macq. H. L.	Macqueen's Scotch Appeals	4	House of Lords	1851—1865.
Mass. Rep.	Massachusetts Reports		Massachusetts	1821 (Vol. 17 referred to)
M. & S.	Maule and Selwyn	6	King's Bench	1813—1817.
M. & W.	Meeson and Welsby	16	Exchequer	1836—1847.
Mod. Rep.	Modern Reports	12	King's Bench	1669—1732.
Phill.	Phillips	2	Chancery	1841—1849.
P. Wms.	Peere Williams	3	,,	1695—1736.
Q. B.	Queen's Bench Reports	18	Queen's Bench	1841—1852.
Sm. L. C.	Smith's Leading Cases	2	Various	A selection of leading Cases of various dates with notes.
Str.	Strange	2	King's Bench	1726—1742.
Wils.	Wilson	1	Chancery	1818—1819.
W. R.	Weekly Reporter—issued with the *Solicitors' Journal*	31	Various	See "The Comparative Table of Current English Law Reports."

COMPARATIVE TABLE OF CURRENT ENGLISH LAW REPORTS.

In this book, the Law Reports (L. R.) and those of *The Law Journal* (L. J.) are generally cited together. To enable the reader, however, readily to consult with them the valuable series of Reports issued weekly with *The Law Times* (L. T.) and *The Solicitors' Journal* (S. J.)—which latter are contained in the publication known as *The Weekly Reporter* (W. R.)—a Table is here given which will facilitate reference to these from any citation of the other two Reports above mentioned, since the year 1865.

FROM MICHAELMAS TERM IN ONE YEAR TO THE SAME TERM IN THE NEXT. FROM JAN. 1.—JAN. 1.

TITLES.	1865 to 1866	1866 to 1867	1867 to 1868	1868 to 1869	1869 to 1870	1870 to 1871	1871 to 1872	1872 to 1873	1873 to 1874	1874 to 1875	1875 to 1876	1876 to 1877	1877 to 1878	1878 to 1879	1879 to 1880	1880 to 1881	1881 to 1882	1882 to 1883	1883 to 1884
LAW REPORTS (*a*), cited prior to Mich. Term, 1875, as L. R. Q. B., C. P., Ex., or Eq., from then to Michaelmas 1881, as L. R. Q. B., &c., Division, or Div., and since that time L. R. Q. B. D., or Ch. D.	1	2	3	4	5	6	7	8	9	10	Q.B., C.P., and Ex. Divs. 1	2	3	4	5	6	Q. B. Div. (*c*) 7	8	9
LAW JOURNAL (*b*), cited before above date as L. J. Q. B., &c., and now as L. J. Q. B. Div., or Ch. Div.	35	36	37	38	39	40	41	42	43	44	Bench, Pleas, and Exchequer, or C. L. 45	46	47	48	49	50	Q. B. Div. 51	52	53
LAW TIMES (*c*), cited as L. T.	13, 14, 15	15, 16, 17	17, 18, 19	19, 20, 21	21, 22, 23	23, 24, 25	25, 26, 27	27, 28, 29	29, 30, 31	31, 32, 33	33, 34, 35	35, 36, 37	37, 38, 39	39, 40, 41	41, 42, 43	43, 44, 45	45, 46, 47	47, 48, 49	49, 50, 51
WEEKLY REPORTER (*d*), cited as W. R.	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32

(*a*) First issued in 1865. (*b*) First issued in 1823. From that year to 1831 cited as L. J. O.S. (Old Series), afterwards as L. J. N.S. (New Series). In this work the latter is always intended, unless otherwise is indicated. (*c*) Commenced in 1843, and from then until 1859 cited as L. T. (O.S.), since then as L. T. (N.S.), or L. T. (*d*) Commenced in 1852. (*e*) In 1880, after the decease of Sir A. J. E. Cockburn, Lord Chief Justice of England, and that of Sir Fitzroy Kelly, Chief Baron of the Exchequer, Lord Coleridge, then Chief Justice of the Common Pleas Division of the High Court of Justice, was appointed Lord Chief Justice of England. The Common Pleas and Exchequer Divisions became merged in the Queen's Bench Division; hence the alteration in the style of Reports indicated above.

THE

PHILOSOPHY OF LAW.

CHAPTER I.

PREFATORY OBSERVATIONS.

THE PROVINCE OF LAW.

Jurisprudence is "a rational science, founded upon the universal principles of moral rectitude, but modified by habit and authority."—LORD MANSFIELD.

"Let us consider wherein the law consists, and we shall find it to be, not in particular instances and precedents, but in the reason of the law."—LORD HOLT.

"We must have legal tribunals. . . . They pronounce their decisions, and these ought to be preserved; they ought also to be well studied, to the intent that we may adjudicate to-day as we did yesterday, and in order that the property and lives of our citizens may be as assured and as certain as the very constitution of the state is."—MONTESQUIEU.

1. LEGAL science concerns itself with 1st, **principles**, and 2ndly, **procedure** (*a*). The study of procedure, however, is not so attractive as that of principles, nor

(*a*) By "procedure" is meant the various steps in litigation which succeed what is called "process." The latter is the technical term for the means whereby a defendant is brought before a tribunal. When he is there the "procedure" commences. See *e.g. The Queen* v. *Hughes*, L. R. 4 Q. B. D. 615; 48 L. J. M. C. 151.

can the mode of acquiring a knowledge of procedure be made inviting. **Principles** of law, therefore, not procedure, will in the following pages, be expounded, reference being made, where necessary, to rules of evidence, and the mode of proving facts.

2. Our **Common Law** has come to us from very many sources, and having adopted portions of other legal systems, has modified and readjusted them: its province has thus been much extended, and our law has had from time to time not merely to acknowledge new rights, but to devise new remedies. From the *Corpus Juris Civilis* (*b*) of Justinian, from our Anglo-Saxon ancestors —fragments of whose codes are extant, from customs handed down to us by tradition, from mercantile usages, from the charters of our kings—including some antecedent to the Great Charter, from enactments of the Legislature, and from decided cases, has the Common Law of England been derived. This vast mass of materials has been drawn and blended together very gradually, and is constantly being added to and altered. Important doctrines of the Roman law especially have been interwoven with our own, and many local customs connected with landed property, of which the origin is lost in antiquity, are still recognised as binding.

3. The province of Law is being continually increased

(*b*) This "body of law" comprises the Code, The Digest or Pandects, The Institutes and The Novellæ or Novels. The *Corpus Juris Civilis* has also been styled the Imperial Law, the Roman Civil Law, or more generally the Roman Law, but the latter term is perhaps more applicable to the law of Rome which existed before the time of Justinian A. D. 482—565), which law he systematized.

by statutory provisions, which either create, alter, or declare, and much has been done by the Statute Law Revision Acts towards the improvement and simplification of our Statute Book by consolidating, and from time to time codifying, certain branches of the law, and by expunging from its pages obsolete and repealed enactments. Statutes also—besides creating positive law (*c*)—have greatly added to, or rendered more definite, the jurisdiction of our Courts. In this way, very many matters have been brought within such jurisdiction, and statutory provisions have sometimes defined the procedure in our Courts (*d*)—have sometimes amplified their powers.

4. Our Legislature usually abstains from interpreting in an authoritative manner a law which it has made; though sometimes it does so by a declaratory enactment.

Hence numberless questions as to the construction of statutes have arisen, and the solutions arrived at seem to show that where the language of the Legislature is plain and unambiguous, no considerations of convenience or public policy can influence the Court to affix to it a meaning different from its literal and ordinary sense. The Court will also strive to give to statutory language its full effect, and will construe one part of a statute by

(*c*) "The science of Jurisprudence," says John Austin in his lectures on that subject, "is concerned with *positive laws*." And by the term "positive," he means to "denote laws which flow from human sources," that is, laws *directly* set by men as political superiors to political inferiors.

(*d*) As to the importance of strictly adhering to the procedure prescribed by statute, see *The Queen* v. *Hughes*, cited on page 1.

another, so that the whole may, if possible, be operative. It was said, by the late Mr. Justice Willes in the case cited below (*e*)—that "The Acts are the law of the land, and we (the Judges) do not sit as a Court of Appeal from Parliament. We have no authority to act as regents over Parliament, or to refuse to obey a statute because of its rigour." Our Judges always endeavour to keep within the spirit, if not within the precise words and literal meaning of an Act of Parliament.

5. The doctrines of English Law are enunciated in decided cases—now published in an authentic form (*f*)—and in the treatises of learned writers, of whom Littleton, Coke, and Bacon may especially be named.

Cases which have been judicially recognised and thus have become precedents, must be conformed to, though sometimes, after the lapse of years, they are found to have been erroneously adjudged. When this is so, either the precedents will still be followed on the ground that it is inexpedient to disturb the established law, or they will be expressly dissented from and over-ruled (*g*).

In a case having reference to the poor-law, Mr. Justice (now Lord) Blackburn observes: — "The case is governed by a long series of decisions. . . . Looking at the reasons for those decisions I think that they are

(*e*) *Lee* v. *Bude & Torrington Junction Ry. Co.*, L. R. 6 C. P. 576; 40 L. J .C . P. 285.

(*f*) These are the reports issued by the Council of Law Reporting, but the reports of the *Law Journal*, *Law Times*, and *Solicitors' Journal*, —the first-named issued monthly and the two latter weekly, are extremely valuable and scarcely less authentic than the others.

(*g*) Or they may be rendered nugatory by an Act of Parliament directly or indirectly affecting them.

founded on a mistake. But we ought not lightly to override them. Where it is quite clear that there is a mistake, we are not bound to follow a previous case, but we may act here on the maxim, *communis error facit jus*" (*h*).

6. The above maxim, however, cannot fairly be used for casting opprobrium upon our law. A *dictum*, resolution or judgment which has long been accepted and recognised by the profession will be dissented from, if shown to have been erroneously founded; and although the hardship originally caused by it cannot thus be undone, the error at all events will be set right. Of this one notable example must suffice:—In a case decided in the time of Lord Ellenborough (A.D. 1807), it was held that a creditor who had insured the life of his debtor for the amount of his debt, and who after the debtor's death was paid in full by his executors, was precluded from recovering upon the policy. This case (*i*) was decided wrongly upon a false analogy, the Court holding that a policy of life insurance is a contract of indemnity, and that an action upon it is founded on a supposed damnification of the plaintiff occasioned by the death of the assured existing and continuing to exist at the time of action brought. Reasoning from this analogy the Court held that payment of the debt barred the right to recover

(*h*) *Stourbridge Union* v. *Droitwich Union*, L. R. 6 Q. B., 769; 40 L. J. M. C. 186. "To say that *common error makes law*, is merely to say that what is called universal opinion may be, and is frequently, universal error, though until the error is discovered it is law." Wharton's *Legal Maxims*, 35.

(*i*) *Godsall* v. *Boldero*, 9 East, 72; 2 Sm. L. C.

on the policy, but this decision, many years after it had been given was called in question, and the fallacy pervading it was exposed (*k*). A life policy really in no way resembles a contract of indemnity: it is a mere contract to pay a sum certain on the death of a person, the consideration being the due payment of a fixed annuity for his life, the amount of the annuity being calculated according to the probable duration of such life. Therefore the plaintiff in the older case ought to have recovered (*l*).

7. But although a slip in administering justice sometimes occurs, the authority of decided cases is very great. The reasoning on which a judgment rests is almost invariably given, and Lord Mansfield, we are told, endeavoured "to render the tribunal where he presided not only the instrument of immediate justice, but an instructive seminary to such as were engaged in professional studies" (*m*).

In the **Appellate tribunals** (*n*) judicial errors are for the most part set right, and uniformity in the exposition of law is thus to a great extent insured. Were no right of appeal allowed to an unsuccessful suitor, "it would be very easy for Judges by construction and interpretation to change even a written law, and it would be most easy

(*k*) In *Dalby* v. *India and London Life Assurance Co.*, 15 C. B. 365; 24 L. J. C. P. 2 (1854).

(*l*) A policy of **fire insurance** on the other hand, *is* a contract of indemnity. See *Darrell* v. *Tibbits*, L. R. 5 Q. B. D. 560 (Appeal); also *Castellain* v. *Preston*, in the Court of Appeal, March 6, 10, 12, 1883.

(*m*) *Lord Mansfield's Decisions*, by Evans, p. iv.

(*n*) The House of Lords; The Privy Council, The Court of Appeal, and at present, The Court for the Consideration of Crown Cases Reserved.

for the Judges of the common laws of England, which are not written, but depend upon usage, to make a change in them " (*o*).

The Judges of our Appellate Courts obtain their legal knowledge from the same sources as inferior judges, but their duty sometimes is to examine precedents *de novo*, and in doing so they may find that a long course of precedents has originated in mistake, or that the opinion of the profession upon a particular point has been erroneous. Admitting the difference between a decision or a precedent in a Court whence appeal lies and in a Court of the last resort, the highest Court is bound to view with respect the practice, decisions and precedents in the Court below as evidence of the law, and only to overrule a decision in which the law has been mistaken. The main difference between the supreme and the inferior Court is this : the latter might feel itself bound by its own precedents, though erroneous, whereas by the former such precedents would be overruled (*p*).

8. **Leading principles** regulate and govern every department of our law, though they are sometimes applied with modifications in order that justice may be done. Nor need any such modification of a legal principle, when it occurs, surprise us, because the relations of individuals to each other in this country, and the rights or liabilities which result from their dealings together, are exceedingly diversified. They are in fact founded partly on the

(*o*) *Barnardiston* v *Soame*, 6 Howell, State Trials, 1094, 1095, *per* North, C. J.

(*p*) *O'Connell* v. *The Queen*, 11 Cl. and F. 328, *per* Lord Brougham.

feudal law, partly on our Customary Unwritten law, and partly on our Law Merchant, which although of comparatively modern extraction, may yet challenge comparison with the other two on the score of importance.

9. An apparent **conflict between legal principles** may often be explained on close examination of the facts to which they are respectively applied. And throughout this volume every proposition laid down has either been illustrated by facts upon which judgment has actually been pronounced, or is vouched by reference to the point of a case, or the principle deducible from the reason for the decision of it. These matters have been carefully considered, so that the reader, if unwilling or unable to consult the report itself of a case, may feel reasonable confidence that the extract therefrom, or the purport of it, set before him is correct.

10. The province of our **Common Law**,—by which is meant that branch of our law which is administered in the Common Law Divisions of the High Court of Justice and on appeal from judgments there given, as well as in the County Courts and some other inferior tribunals—may be thus shortly stated.

The Common Law of England concerns itself, 1st, with contentious matters arising between **private persons**; 2ndly, with matters affecting the **community** generally. It supplies **remedies**, therefore, for infringement of **private rights**, and inflicts **punishment** for **offences** against the public. Many other and dissimilar matters, to which specific reference cannot be made in this work, also come under the cognisance of our Courts. For

instance, questions connected with the administration of the poor-law, with sanitary enactments, statutes regulating municipal corporations, railway companies and associations, incorporated or otherwise, are daily argued before our tribunals and resolved. Such matters, I repeat, how important soever they may be to the welfare of society or of individuals, cannot here be taken notice of. They stand somewhat apart from the ordinary routine and *curriculum* of law, and have been separately treated of by writers of established name and reputation.

11. Suffice it here to say that **civil procedure** is for the most part made ancillary to the asserting of private rights, whilst **criminal procedure** is principally directed towards insuring the maintenance of the public peace (*q*) and the observance of morality, at all events where any deflection from it might tend to prejudice the public. Criminal procedure is designed also for ensuring the stability of the property, and the security of the person of every member of the community.

The considerations necessary for determining whether a private right has been violated are different from those appropriate for deciding whether punishment should ensue upon an act.

(*q*) The case of *Rex* v. *Curl* (2 Strange, 788, Ad. 1727), which was a prosecution for publishing an obscene book, will illustrate this paragraph. The Attorney-General (Sir Philip Yorke, afterwards Earl of Hardwicke) said in the course of his argument: "This is an offence which tends to corrupt the morals of the king's subjects, and is against the *peace* of the king. 'Peace' includes good order and government, and that *peace* may be broken in many instances without actual force."

12. Thus an action for a **trespass to land** is founded on the idea that the right of the complainant to the exclusive occupancy and enjoyment of it has been wrongfully interfered with. He alleges, for instance, his ownership and occupancy of a certain farm, through a part of which runs a private road bounded by a hedge, and separated from plaintiff's fields on either side. Next that defendant had wrongfully claimed to use this road for his horses and carriages as being a public road, though warned that it was not such; that on a day specified defendant came with a cart and horse, servants and workmen, forcibly (*r*) used the road, and broke down and removed a gate placed across it by the plaintiff. Lastly, that defendant then with his servants and workmen damaged the plaintiff's hedge, and so forth.

The wrong here complained of is one of a private character, with which, assuming it to have involved no public disturbance, the public is not concerned. If, however, a public road or footway were to be obstructed by a gate placed across it, a **public nuisance** would be created, in respect of which an **indictment** might be maintained (*s*). For our criminal law can protect public rights by prohibiting undue interference with

(*r*) This is a technical word, for in every trespass the law assumes violence to have been used whether such was actually used or not, so that if the above-mentioned defendant had entered quite peaceably on the plaintiff's land it would nevertheless be conceived that he had done so *vi et armis*.

(*s*) A dangerous projection on a highway, renders the party who placed it there liable to an action for injury, resulting from such projection, whether to man or beast, *Kent* v. *Local Board, &c., of Worthing*, 10 Q. B. D. 123; 52 L. J. Q. B. 77.

them, and by annexing punishment to an infraction of them. The rights of property it scrupulously guards, discriminating, however, between rights the infringement of which may be alarming or dangerous to the public, and rights of which the invasion may, as between man and man, be reasonably compensated by pecuniary damages.

13. The **nature of a private duty**, *i.e.*, of a duty owing by one man to another, may be illustrated by the case of an excavation unjustifiably made so near to the confines of a neighbour's land, that his house, which has acquired a **prescriptive right** (*t*) to support, in consequence of such excavation, sinks and becomes ruinous. Here the duty violated is obviously not owing to the public at large, but to one individual in particular, namely the owner of the adjoining land and house. The breach of such a duty under the conditions stated is actionable (*u*), not indictable.

(*t*) A *prescriptive right* as distinguished from a *customary right*, is one annexed to a person ; the latter being a right associated more with the idea of locality. *Prescription* is the title by which anything is acquired and held by usage, lapse of time and by authority of law. Thus we speak of the Kentish *custom* of gavelkind, by which all the sons of an intestate owner of land share that land equally ; but we speak of a *prescriptive title* to a *right of way*, a pew in church and so on, which rights are annexed to the *person* who enjoys them, and are independent of local usage, which is equivalent to *custom*. See, as an illustrative case, one recently before the House of Lords, *Goodman* v. *The Mayor &c., of Saltash*, L.R. 7 App. Cas. 633 ; 52 L. J. Q. B. D. 193.

(*u*) See *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503 ; 34 L. J. Q. B. 181 ; *Angus* v. *Dalton*, L. R. 4 Q. B. D. 162 ; 48 L. J. Q. B. 225 ; affirmed as *The Commissioners of H. M.'s Works and Public Buildings* v. *Angus & Co.* ; *Dalton* v. *Angus & Co.* ; L. R. 6 App. Cas. 740 ; 50 L. J. Q. B. 689.

A question arose in the case cited below (*x*) as to whether a **duty** was imposed on a **dock company** to provide access to and egress from a ship in dock, and as to their liability for damage caused by their allowing a dangerous gangway to be used. It was held that a duty was imposed upon the dock company either to have made the gangway safe or to have given notice of its dangerous condition to the plaintiff, who had gone on board a ship on business.

Questions as to the existence, nature and obligatory force of **duties** alleged to be owing by one man to another are continually arising, and many such will be stated and discussed in Chapters VI. and VII. of this volume.

14. Fraud may be directed against an individual specifically or against the public. Let us suppose that the vendor of—say a jewel—is guilty of deceit in selling it; that he is shown to have been actually and fraudulently cognisant of the falsehood of some representation made by him with respect to it, and that he has sold it as and for that which it is not. Under such circumstances the vendor will be liable to a civil action for the fraud of which he has been guilty and the damage thence resulting to the purchaser of the article (*y*).

The essence of the misdemeanour of **cheating** at Common Law is a design to impose on the credulity of others, to induce them to believe a thing to be true which is not so, and to act upon such belief. This is

(*x*) *Smith* v. *London and St. Katherine's Docks Co.*, L. R., 3 C. P. 326; 37 L. J., C. P., 217.

(*y*) *Chandelor* v. *Lopus*, 1 Smith, L. C.

usually done to benefit the defendant, but, certainly, always "to the evil example" of the community, and these last words indicate the **distinction between a public and a private fraud.** They mark out that species of fraud which ought to be repressed and punished, and that kind of fraud aimed at an individual rather than at the public, against which a man should be upon his guard, but which, if committed to his detriment, is actionable only.

15. Cases involving fraud are often under the notice of our Courts, and the line is extremely fine which separates indictable from merely actionable fraud. Where **goods sent on approval** are, whilst unpaid for, wrongfully converted by their recipient to his own use —or again, where goods are sold or pledged, and money is thus obtained in respect of them by some false statement as to their quality, the nicest questions may arise. In the one case, Were the goods converted with an intention to steal them? In the other case, Was there fraud affecting the public? or was it so entirely mixed up with contract as to come within the definition of a private fraud? Do the proofs adduced point rather to undue exaggeration of the quality and goodness of a chattel than to misrepresentation? (*z*).

A **fraud mixed up with contract** lies indeed upon the very confines which separate the civil and the criminal law. A man may make himself liable to an action because he has stated something which went beyond the

(*z*) *Reg.* v. *Ardley*, L. R. 1 Cr. Ca. Res. 301; 40 L. J. M. C. 85.

exact line of truth, or has concealed some material fact which ought to have been made known to the other contracting party. A man may honestly misrepresent: he may state as true something which he believes to be true, but which turns out to be untrue. Whereas to support a criminal charge, not only proof of the *scienter*, that is, guilty knowledge—must be given, but also proof of an intention on the part of the defendant to deceive and defraud when committing the act charged against him. Hence arises the impossibility in some cases of affixing criminal liability to the promoters or the directors of a company, who, by means of false statements respecting its affairs, have induced other persons to become shareholders in it to their great detriment (*a*).

16. A conspiracy is an agreement to effect an unlawful purpose, or to effect a lawful purpose by unlawful means, and such an agreement is by the Common Law of England an indictable offence. It is, indeed, fit that if several persons deliberately plot mischief to an individual or to the State they should be liable to punishment, although they may have done no act in execution of their scheme. For, where several persons thus concert, confederate and combine together, our law apprehends danger to the community from the mere fact of such act. Accordingly, persons so confederating, are, therefore, indictable, even though the object aimed at by them may never be accomplished, or may, if accomplished, in itself be unobjectionable. If, however, there actually be not only the fact of combination or con-

(*a*) See Mr. Finlason's Report of *Reg.* v. *Gurney*, pp. 215, 216.

federacy but also evidence of intent, proof of such fact may not necessarily suffice for conviction upon a charge of conspiracy. For instance, an agreement amongst themselves by Members of Parliament to make defamatory speeches in the House of Commons respecting an individual not being a member of the House would not be indictable (*b*). And the reason of this is that more harm would accrue to the public from restricting the freedom of debate in Parliament than from the agreement and confederacy supposed.

17. What tests then should be applied to an act for determining whether it be criminal or not? They will be indicated in Chapter VIII. of this volume. The primary tests, however, have been already stated. Does the act in question prejudice or tend to prejudice the **public**? Was it directed against the community at large rather than against an individual? Is it punishable?

The character of criminality may be impressed on an act either by the Common or by the statute law. An act of violence to the person is *primâ facie* criminal as being of evil example, against the peace, causing alarm to the public and a sense of want of security. So a **nuisance** prejudicial to the public is indictable, whereas in order that an **action** may be maintainable by a private person for that which amounts to a public nuisance, three things must be established: 1st, plaintiff must

(*b*) *Ex parte* Wason, L. R. 4 Q. B. 573; 38 L. J. Q. B. 304. The statement in the text applies to Members of both Houses of Parliament, but to Members only *as such*, and only when engaged in the deliberations of either House.

show some particular damage to himself beyond that which is suffered by the rest of the public; 2ndly, the damage must be shown to have been direct; 3rdly, it must be shown to have been substantial, not fleeting or evanescent (*c*).

18. A customer gives to a carrier goods of a dangerous description to carry, requiring therefore more caution in their conveyance than ordinary merchandize. A duty becomes thus imposed by law upon the customer of this kind to give notice of the dangerous character of his goods to the carrier in order that they may be carried with that degree of care, the absence whereof might entail danger on the carrier or his servants. The breach of this duty, if productive of damage, will be actionable. Suppose that a person puts on board ship goods which are of a combustible and inflammable nature, the owner would clearly be liable to anyone injured in consequence of their combustion, by reason of his wrongful omission to give notice of the nature of the goods which he put on board (*d*). In such a case the duty violated is declared by the Common Law, and although in general the obligations owing from a customer to the carrier, or *vice versâ*, fall within the class of private rather than of

(*c*) *Benjamin* v. *Storr*, L. R. 9 C. P. 400; 43 L. J. C. P. 162. As to an **Injunction** against a defendant in the case of an actionable nuisance, see *Sturges* v. *Bridgman*, L. R. 11 Ch. D. 853; 48 L. J. Ch. 785 (App.).

(*d*) *Farrant* v. *Barnes*, 11 C. B. (N. S.) 553; 31 L. J. C. P. 137; *Brass* v. *Maitland*, 6 E. & B. 470; 26 L. J. Q. B. 49. As to the conveyance of **dangerous goods** by carriers, see 25 & 26 Vict. c. 66, and 29 & 30 Vict. c. 69.

public duties, it is conceivable that the breach of such a duty as stated might seriously concern the public, and so be criminally punishable. Indeed, the Court of King's Bench many years since considered the precise state of facts last put, and said that if a customer knowingly send on board ship goods of a dangerous kind without giving notice thereof—considering the peril so caused to the lives of those on board—the act amounts to a species of delinquency, for which the actor will be criminally liable and punishable (*e*).

19. Our law, as between party and party, endeavours to protect rights, usually by awarding **pecuniary damages** for wrongful interference with them; sometimes by compelling the restoration of property or the performance of this or that thing by the party in default, and sometimes in other ways (*f*). Occasionally an aggrieved person is allowed to redress his grievance for himself.

Thus, subject to the condition that no riot (*g*) be com-

(*e*) *Williams* v. *East India Co.*, 3 East, 192.

(*f*) As by a **Mandatory Injunction**, which enjoins a person to do something, or by **Prohibitory Injunction**, which enjoins him to refrain from committing some wrongful act contemplated. See Jud. Act, 1873, s. 25, sub-sect. 8. There is an action in certain cases for the **Specific Performance** of a contract, when damages would not compensate the complaining party. And the Chancery Division of the H. C. J. has jurisdiction to restrain the breach of a contract where specific performance cannot be enforced. On this last point, see the recent case of *Donnell* v. *Bennett*, 31 W. R. 316.

(*g*) Mr. Justice Stephen (Criminal Law, Art. 72) defines a **Riot** as "an unlawful assembly which has actually begun to execute the purpose for which it assembled, by a breach of the peace, and to the terror of the public." A Riot differs from an **Affray** in this, that to constitute the former offence *three* or more persons must be engaged,

mitted, a nuisance may sometimes be abated, *i.e.*, removed and put a stop to, by the person whom it injuriously affects (*h*). The treasurer of a County Court has been held justified in breaking open the offices of the Registrar of the Court, during the absence of that official, in order to get at the books kept by him, with a view to their being audited (*i*). Here no breach of the peace could have ensued from the act of violence in question (*k*). Again, if A. take goods out of the actual possession of B. against his will, B. may justify using force for retaking the goods, and so may set up a good ground of defence in an action of assault. And if goods are obtained under colour of a contract of sale, but really by trick and fraud, the semblance of a contract disappears; the property in the goods does not pass, and they may be recaptured (*l*).

The law allows the commission of an assault in such a case, because the remedy by action would be dilatory, tedious, and perhaps inadequate.

20. An individual then, it must be admitted, is sometimes allowed to take the law into his own hands, and "right himself." The general rule, however, proved or

whereas in the latter, two or more persons fighting in public to the terror of her Majesty's subjects will commit the misdemeanour.

(*h*) *Jones* v. *Williams*, 11 M. & W. 176; 12 L. J. Ex. 249.

(*i*) *Burridge* v. *Nicholetts*, 6 H. & N. 383; 30 L. J. Ex. 145.

(*k*) This is somewhat doubtful. The effect of 9 & 10 Vict. c. 95, s. 48, is to vest the books referred to in the treasurer. Accordingly, in breaking open the offices to get the Court books, the treasurer was really pursuing a legal right vested in him.

(*l*) *Blades* v. *Higgs*, 11 H. L. Cas. 621; 34 L. J. C. P. 286, with which compare *Chambers* v. *Miller*, 13 C. B. (N. S.) 125; 32 L. J. C. P. 30, a case of **payment by mistake**.

tested by the exceptions to it, has prescribed the procedure by **action** as applicable for the redress of a **private wrong**, without regard to its precise nature. For the vindication of **public** justice the procedure is by **Indictment**. Therefore throughout this book the references have almost exclusively been made to cases which, whether turning upon action or on indictment, raise legal questions, curious, interesting or important. In dealing with facts out of which any such questions are evolved, everything superfluous or irrelevant must be put aside, so that the very gist and essence of the matter may be discovered.

CHAPTER II.

A CONTRACT—WHAT IT IS.

"**A contract** is an agreement between two or more persons upon sufficient consideration that each will do or not do a particular thing."
—2 BLACKSTONE'S COMMENTARIES, 446.

21. LAW being a **science**, the use of technical words in discussing legal subjects can scarcely be avoided; accordingly the following explanatory definitions of certain terms used in this Chapter are at once put before the reader. The word "**contract**," conveys the idea of persons being drawn together in respect of some subject-matter and for effectuating some special purpose. A "simple contract," of which alone I here speak, is evidenced and authenticated by writing **not under seal**, (*a*) by words, conduct and so forth; "**privity**," indicates the tie between and connecting parties. The word "contract" includes the idea of "privity." It involves also the idea of "consent"—that the parties have agreed to do or not to do something, which ought to be defined. Consent, moreover, may assume the form of "**ratification**"—of **assent** subsequent (*b*).

(*a*) Afterwards referred to and explained in Chap. IV., Art. 106.

(*b*) **Assent** may be said to be the unqualified sanction of the understanding to a proposition, &c. I may **consent** to an assumption,

22. Although a "contract" is equivalent to an "**agreement**," it is in legal contemplation composite, involving three ingredients, viz., a **request**, a **consideration** or *quid pro quo*, and a **promise**. The request comes from the **contractor** to the **contractee** to do or to refrain from doing a specified thing; a doing of or refraining from the thing specified, or at all events an undertaking or engagement to such effect by the contractee; and a promise thereupon by the contractor to benefit, by payment of money or otherwise, the contractee (*c*). And in every simple contract, written, verbal, or evidenced partly by writing, partly by word of mouth or the conduct of parties, for breach of which an action will lie, there must have been either expressed or implied the ingredients mentioned, viz., the request, the consideration, and the promise.

23. Familiarity with the above-mentioned ingredients in a simple contract may be needed for testing its validity, inasmuch as one or other of them may disappear on applying to it the touchstone of a legal principle. For instance, a father could not be held liable even for necessary food and clothing supplied by a tradesman, for the use of his infant son, unless there were evidence to show either that the goods in question were ordered

say for the sake of an argument; but it does not follow that I **assent** to the truth of it, still less that I *assent* to the conclusion drawn from the premises founded on the assumption which I *consented* to allow.

(*c*) Each party to a contract is obviously both a contractor and a contractee, but he who makes the **request** for something to be done, and **promises** a consideration for the same, is regarded as the **contractor** (Arts. 56, 57). The party to whom the *request* is made, and who on the strength of the *promise* agrees to do what is involved in the

to be supplied by the father, or that their user and enjoyment by the son received the father's sanction (*d*). The father would otherwise have been an entire stranger to the transaction—there would have been no request nor consent by him, nor **privity** (*e*), as between him and the tradesman who supplied the goods.

24. Addressing myself for the moment to legal students, I would insist on the importance of testing one's aptitude in singling out and distinguishing between one and another of these main ingredients in a simple contract. The ingredients enumerated seem familiar enough and the order in which they have been mentioned seems natural and proper. Yet it may not always be found easy to indicate with certainty and precision where in a contract obviously enforceable at law—for

request is the **contractee**. Thus, if I *request* a tailor to make me a suit of clothes for £5 and he agrees to do so, this is an **executory contract**, that is, one *to be* fulfilled, and my promise to pay the tailor, if not *expressly* made to him would be *implied* by the law. I am the *contractor* or *promisor*, the tailor is the *contractee* or *promisee*. The transaction in short amounts to this :—I really say to the tailor :—"In consideration that you at my *request* will make me a suit of clothes, I *promise* to pay you £5." The *consideration* therefore proceeds from the tailor, and the consideration must in all cases proceed from the party *to whom* the promise is made. And if an action on a contract be brought, it must be shewn that the *consideration* moved from the *plaintiff*.

(*d*) *Mortimore* v. *Wright*, 6 M & W. 482 ; represented as *Mortimer* v. *Wright*, 9 L. J. Ex. 158 ; see also *Ruttinger v. Temple*, 4 B. & S. 481 ; 33 L. J. Q. B. I. A *mother* is not bound to maintain her son ; see *In Re Cottrell's Estate ; Joyce* v. *Cottrell*, L. R. 12 Eq. 566 ; 40 L. J. Ch. 70.

(*e*) By **privity** is meant a connection or bond of union existing between parties in relation to some particular transaction. Broom's Comm. on Com. Law.

breach of which an action would lie—each of these ingredients is to be detected, how it is to be evidenced and established. Nor must this sort of self-examination be declined as too elementary or as unnecessary; for sometimes, in relation to some essential ingredient in a simple contract, differences of opinion have existed on the Bench, and sometimes the ingredient is not easily to be discerned (*f*).

25. As in the next Chapter the consideration for a promise will have to be specially exemplified, I can here give but one or two instances of it. A. being indebted to B., dies, and then B. assigns the debt to C. and empowers him to receive it. Moreover, D., who is A.'s executor, promises to pay it him. Will an action lie at suit of C. against D. to compel payment of the debt? Assuming that the statutory requirements as to written evidence of the agreement have been complied with, and that a memorandum of the contract signed by D., the party sought to be charged on it, is forthcoming (*g*), there would still be an insurmountable obstacle to C.'s success in such an action. Our law insists that there shall be a **consideration for a promise** to pay money. It thus protects persons who are too free-handed, or reckless and improvident. The breach of a *nudum pactum*, that is a bare agreement, will not sustain an action (*h*).

(*f*) See *Shadwell* v. *Shadwell*, 9 C. B. (N. S.) 159; 30 L. J. C. P. 145; *Brogden* v. *Metropolitan Ry. Co.* L. R. 2 App. Cas. (H. L.) 666.

(*g*) See Chap. IV. as to the requirements of the Statute of Frauds (29 Car. II. c. 3.)

(*h*) *Forth* v. *Stanton*, 1 Saund. 210. Forbearance to enforce a legal

If in the case put D. had promised to pay in consideration of C.'s **forbearance** (*i*) to press and sue for the debt, an action might have lain at suit of the latter party against the former for the sum claimed. Moreover the compromise of a disputed claim made *bonâ fide* may be the consideration for a promise, even though it ultimately appears that the claim was wholly unfounded and unenforceable. "Every day a **compromise** is effected on the ground that the party making it has a fair chance of succeeding, and if he *bonâ fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration (*i*)."

26. An action may be maintainable upon the express ground that there was a **want of consideration** in some prior dealing between the parties to it, or that the consideration supposed to have existed has failed altogether or in part. Thus, an action may lie to recover money paid under a **mistake of fact.** No man should be deprived of money which he has thus parted with, and where it is against justice and conscience that the receiver should retain it. If A. pays money to B., supposing him to be the agent of C., to whom he owes the money

right is a consideration which will support a simple contract. If the promisor acquires *any* benefit, or the promisee *any* detriment, &c., in order to comply with the promisor's request, there is a sufficient consideration to support a simple contract, although the promisee may not benefit in any way. See E. G. *Wilby* v. *Elgee*, L. R. 10 C. P. 497; 44 L. J. C. P. 254.

(*i*) *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449; 39 L. J. Q. B. 181: Judgt. of Cockburn, C. J.

and B. is not such agent, it may be recovered back. If A. and B. are settling an account and make a mistake in summing up the items, and A. pays B. 100*l.* too much, A. may recover it back. In any such case, not only was the money paid under a mistake by the party paying it, but the retention of the money by its recipient would be against equity and good faith (*k*).

It not unfrequently happens also that where a transaction has taken place between parties, a state of things arises in reference to it which was not contemplated by them, but is such that one party ought in justice and fair dealing to pay a sum of money to the other. Under such circumstances, in order to support an action to recover it, the consideration being apparent in the money which has got into defendant's pocket, the request that it may, and promise that it shall, be repaid, if **not express**, will be **implied** in law (*l*).

27. Our Common Law, however, sometimes declines to imply a promise to pay money which might seem to have been fairly earned; as in the case of a client or

(*k*) *Kendal* v. *Wood*, L. R. 6 Ex. 243; 39 L. J. Ex. 167; *Newal* v. *Tomlinson*, L. R. 6. C. P. 405; *Freeman* v. *Jeffries*, L. R. 4 Ex. 189, 197, 38 L. J. Ex. 116. If money be paid voluntarily but unjustly to himself, by a person who has full knowledge of all the circumstances attending the demand made upon him, he will have no legal right to recover it back. See *Marriott* v. *Hampton*, 2 Sm. L. Cas. and *Barber* v. *Pott*, 4 H. & N. 759; 28 L. J. Ex. 381.

(*l*) As to contracts **executed** and **executory**, considerations **executed, executory, contemporaneous** and **continuing**, and as to the cases in which the request or promise is **implied**, see Broom's *Commentaries on Common Law*. A discussion of these matters here would be foreign to the object of this work.

the patient, with regard to remunerating his counsel or physician for work professionally done at his request. The general rule is that any man who bestows his labour for another has a right of action to recover from him compensation for that labour. But the law supposes a **physician** or a **barrister** to act without pecuniary remuneration, and declines to imply any promise which would be counter to such presumption. This rule or rather presumption of our Common Law is founded on public policy, and in the case of the barrister—though not in that of the physician (*m*)—is so stringent that it countervails even an express contract for remuneration. A special contract cannot have efficacy where there is thus an incapacity to contract (*n*).

28. The word "contract" properly understood involves the idea of "privity" (*o*) and of "consent" (Art. 21); if there be no privity between parties there can be no contract or agreement between them. Why should a man be bound by stipulations to which he is altogether a stranger—to which he has not expressly or impliedly assented?

(*m*) A *Member* of the College of Physicians may successfully sue a patient to recover his fee, the inability to sue extends only to the *Fellows* of the confraternity.

(*n*) *Kennedy* v. *Broun*, 13 C. B. (N. S.) 677; 32 L. J. C. P. 137. Of course this incapacity on the part of a barrister extends only to the enforcement of a contract entered into by him as *counsel*, and it is immaterial whether he has acted as an advocate or merely in chambers (*Mostyn* v. *Mostyn*; *Ex parte Barrey*, L. R. 5 Ch. 457; 39 L. J. Ch. 780). On the other hand a client cannot bring an action against a barrister who has ignorantly or injudiciously conducted his case.

(*o*) See note (*e*) at p. 22.

In a case which illustrates this doctrine, the facts were as follows:—The plaintiff, an officer in command of troops conveyed over the Great Indian Peninsular Railway, sued that Company for loss of luggage caused by defendants' alleged negligence. To this action a defence was successfully set up, that when the loss occurred the plaintiff with his luggage was being conveyed under a contract between the defendants and the Indian Government, and that there was no contract with the plaintiff (*p*). The ground of decision in this case is widely applicable.

Let us further suppose such a state of things as this. A. contracting with B. undertakes to lay down a gas-pipe for him fit and proper for supplying gas from the main. The construction of the piping is defective, and gas escapes, whereupon C., a third person, unconnected with A., by negligently using a light to ascertain the cause of the escape, explodes the gas, and so produces damage. Upon these facts A. will be liable to B. for breach of contract in not having laid down a proper pipe. And he will not be relieved from liability merely because the immediate cause of the explosion was the act of C. C. will be responsible to B. for his **negligent and wrongful conduct,** in accordance with principles hereafter stated (Chap. VI.). As between A. and B. there is privity in

(*p*) *Martin* v. *Gt. Indian Peninsular Ry. Co.*, L. R. 3 Ex. 9; 37 L. J. Ex. 27. See as to where a passenger's luggage is by his request or consent, placed in the same carriage with him. *Berghcim* v. *The Gt. Eastern Ry. Co.*, L. R. 3 C. P. D. 221; 47 L. J. C. P. 318 (Ct. of App.) In such a case the Company will be liable for loss or injury to the luggage caused by *their* negligence.

virtue of their contract. As between A. and C. there is no privity (*q*).

29. An apparent lack of privity between parties may sometimes be supplied by the **usage of a particular trade or profession**; for instance, where personal property is settled before marriage the practice is that the lady's solicitor shall draw the settlement, and that the intended husband shall have the privilege of paying for it (*r*).

30. With the rule requiring privity in a contract there long existed contemporaneously another well-known rule, which forbad the **assignment of a mere right** or *chose in action*. The assignee of such a right could not sue the original contractor, for as between these parties there was deemed to be no privity. Where a right to sue in contract became vested in A., enforceable against C., A could not assign or hand over to B. the same right to be enforced against the same person in the name of B., though A. might for due consideration or by deed bind himself to sue C. for the benefit of B. To this rule exceptions were always allowed in deference to mercantile usage, and some have been created by statute. Bills of exchange, promissory notes, cheques, policies of life and marine insurance (*s*), and certain other securities, are assignable. To some instruments, which are assignable

(*q*) *Burrows* v. *March Gas & Coke Co.*, L. R. 7 Ex. 96 ; 41 L. J. Ex. 46 ; *Goslin* v. *Agricultural Hall Co.*, L. R. 1 C. P. D. 482 ; 45 L. J. C. P. 348.

(*r*) *Helps* v. *Clayton*, 17 C. B. (N. S.) 553 ; 34 L. J. C. P. 1.

(*s*) See statutes 30 & 31 Vict. c. 144 ; 31 & 32 Vict. c. 86 ; 39 Vict. c. 6.

under the **law merchant**, brief reference will hereafter be made.

The doctrine which forbad the assignment of a chose in action, though now relaxed (*t*), was in ancient times very necessary. Its observance tended to repress litigation, to prevent the wealthy and litigious from buying up rights of action (*u*) to the detriment of their poorer neighbours; and the enforcement of this rule, subject to relaxations in favour of trade, was, doubtless, beneficial in repressing fraud and simplifying the mode of proof. Under the Judicature Acts the rule in question has been modified only, not entirely abrogated.

31. The reader having already inferred that "contract" involves the idea of "consent," as to this point little more need here be said. Upon a dispute between the overseers of two parishes respecting the election of a sexton, and the payment of his salary, one of the parishes paid the sexton without the consent of the other, and brought an action for the money as paid for their use; concerning these facts Lord Mansfield said—

(*t*) See Judicature Act, 1873, s. 25, sub-sect. 6; *Brice* v. *Bannister*, L. R. 3 Q. B. D. 569; 47 L. J. Q. B. 722.

(*u*) A bargain to share the result of litigation of which the consideration is entirely contingent on the verdict is called **Champerty**. Such a bargain cannot be enforced, see *Ball* v. *Warwick*, 50 L. J. Ch. 383. Any officious intermeddling with an action which does not concern one or assisting either party thereto is called **Maintenance**, and is offence punishable by a fine of £10 under 32 Hen. VIII. c. 9. Wharton's *Law Lexicon*, and see the case of *Ball* v. *Warwick*, cited above. According to the judgment of the present Lord Chief Justice, in the very recent case of *Bradlaugh* v. *Newdegate*, the doctrine of main-

"the dispute arises as to the election of a sexton, and the way of trying it is by refusing to pay the sexton elected: the whole is notoriously in litigation. Under these circumstances, therefore, one parish paid the quota of the other in spite of their teeth. Then can it be said that this action for money paid, laid out and expended, will lie? Certainly not. This action must be grounded either on an **express** or **an implied consent**: here is neither." (*x*)

From a proposition so simple as that "a contract implies consent," deductions useful in the daily routine of life may readily be drawn. Thus, where A. relies upon a contract in writing, consisting of an offer to and acceptance by B., he should consider whether there be, on the proofs adducible, evidence of a complete contract or agreement binding upon B. "If one man offers to let a house or to sell goods to another upon certain terms, and the other writes back, 'I agree to take the house or to purchase the goods upon those terms,' that amounts to a complete agreement." But if the reasonable construction of the alleged offer and acceptance shows that something material as between the contracting parties is left to be afterwards arranged, that the mind of the defendant never assented to all the terms proposed, never was at one with the mind of the plaintiff, there would be no sufficient acceptance of the offer made to bind the defendant. There would in short be no

tenance is not confined to civil actions. We presume that this means where there is an *unjustifiable* attempt to set the criminal law in motion.

(*x*) *Stokes* v. *Lewis*, 1 T. R. 20.

agreement between him and plaintiff for breach of which an action would be maintainable (*y*).

There must be a complete **mutual assent** to the terms of a simple contract, in order that it may be valid and reciprocally binding. This consent it is which justifies the law of every civilised country in holding a contractor to his contract.

32. Since a contract is founded in consent, it follows that where there is an incapacity to consent, there is an incapacity to contract. Wherefore a contract executed under **duress** may be avoided, and the contract of an **infant**, or a **lunatic**, is in general voidable, or void; and so, formerly, was that of a **married woman.**

A married woman was, for various reasons, favourably regarded by the Common, that is, the unwritten, law (*z*). In that legal system, she was deemed to be under the power and coercion of her husband (*a*), she had no

(*y*) *Stanley* v. *Dowdeswell*, L. R. 10 C. P. 102; *Hussey* v. *Payne*, L. R. 4 App. Cas. 311; 48 L. J. Ch. 846.

(*z*) And since Jan. 1, 1883, still more by the Statute Law. The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) completing the course of legislation commenced by 33 & 34 Vict. c. 93, and continued by 37 & 38 Vict. c. 50 (both of which Acts are repealed by the former), has the effect of causing the learned author's present tenses to be transformed into the past. So far as regards property, a married woman is now in the position of a single one. Marriage no longer confers any rights over her property on a husband: for a wife's property of every kind is her separate estate, of which she has the absolute control and disposition. Her existence is no longer merged in her husband's; in fact, so far as property is concerned, they may be said to be separate persons.

(*a*) A married woman who commits a *misdemeanour* or a *theft*, or receives stolen property in the presence of her husband, is still pre-

property save such as might have been settled to her separate use, and she was consequently incapacitated from making good any claims against her. And besides this, her separate existence was held to have become merged in that of her husband, so that, except in certain cases, she could at Common Law contract only as agent for him, not in her own right and as a principal (*b*). This doctrine of our unwritten law has been annihilated by the statute mentioned in note (*z*) on the previous page.

An **infant**, that is, a person under the age of twenty-one years, is specially protected in respect of contracts which might be prejudicial to him, as well by our customary as by our written law (*c*).

33. Ratification is the act of giving sanction and validity to something done by another person. It is an adoption of a contract previously made in the name of the ratifying party.

A contract when capable of being ratified must have been good in itself; if simple it must have been made upon consideration. If it were not so, the adoption or ratification of it would be of no avail. What a ratification is meant to cure is the want of authority in the party who made the contract in the name of another.

sumed to act under his coercion. Mr. Justice Stephen on Criminal Law, p. 17, Art. 30.

(*b*) As to the old law on this subject, see *Johnston* v. *Sumner*, 3 H. & N. 261; 27 L. J. Ex. 341.

(*c*) See the Infants' Relief Act, 37 & 38 Vict. c. 62; *Maccord* v. *Osborne*, L. R. 1 C. P. D. 568; 45 L. J. C. P. 727; as to a **contract of marriage** by an infant, see *Ditcham* v. *Worrall*, L. R. 5 C. P. D. 410; 49 L. J. C. P. 688.

A *primâ facie* contract, void when made, cannot be ratified.

34. Thus, the **promoters** of a joint stock company cannot sue the company, when formed, for their preliminary expenses, because it has been held that there is an entire want of privity as between the projectors and the company. Nor could the company, if so disposed, ratify any contract for payment of those expenses, such contract having been made when the company was non-existent (*d*). In such a case as this there is neither previous assent nor privity in law, nor, accordingly, is there efficient ratification.

Some time since the following facts appeared in evidence:—A proposal was made by the plaintiff to A., B., and C. (defendants), "on behalf of" a projected hotel company, to sell certain goods at a price specified; there was an acceptance of such proposal in writing by defendants, signing "on behalf of" the company, a subsequent incorporation of the company under the Joint Stock Companies Act, 1862, and an attempted ratification of the antecedent written contract. Upon these facts (i) Would A., B., C. be liable upon the contract? (ii) Would the company be liable in virtue of their so-called ratification of it? These queries must be thus answered. At the time when A., B., and C. contracted, there was no principal beside themselves in existence, and ratification can only be by an existing person, on

(*d*) *Melhado* v. *Porto Alegre &c. Railway Co.*, L. R. 9 C. P. 503; 43 L. J. C. P. 253. The *position* and *duties* of **promoters** of Companies were defined in *The New Sombrero Phosphate Co.* v. *Erlanger*, L. R. 3 App. Cas. 1218; 48 L. J. Ch. 73 (H. L.).

whose behalf the contract might have been made at the time (*e*). Under the circumstances put, if the plaintiff had consented to accept the company, when constituted, as purchasers of his goods, and as his debtors, in lieu of A., B., and C., a new contract might thus have been created, but such an arrangement would not have been tantamount to ratification (*f*).

If contracts have been entered into by the directors of a company, which are beyond the scope and limits of the objects of the company as set forth in their memorandum of association, such contracts were not merely voidable but absolutely void under the provisions of the Joint Stock Companies Act, 1862 (*g*). And now, all contracts *ultra vires* of a company—that is, not within the scope of their memorandum of association—are *void*, and having been stillborn originally, it would be beyond the power of the shareholders to give life to them by any subsequent attempted ratification (*h*).

Cases such as those cited in the three preceding paragraphs throw strong light on the doctrine of ratification, and have much practical importance.

35. An act illegal and void cannot be ratified. In a case not long since adjudged the facts were these:—The defendant's name was forged to a joint and several promissory note, and whilst the note was current the

(*e*) *Kelner* v. *Baxter*, L. R. 2 C. P. 174; 36 L. J. C. P. 94.

(*f*) See on the subject of the **Ratification** of a specific act, *Keay* v. *Fenwick*, L. R. 1 C. P. D. 745 (App.).

(*g*) 25 & 26 Vict. c. 89.

(*h*) *Ashbury Railway Carriage &c. Co.* v. *Riché*, L. R. 7 E. and I. App. 653; 44 L. J. Ex. 185 (H. L.).

defendant, protesting that the signature was not his—in order to prevent the prosecution of the forger—put his name to a memorandum setting forth that he held himself responsible for the note. It was held that this memorandum could not be construed as a ratification, inasmuch as the act which it professed to ratify was illegal and void, and incapable of being ratified. If the meaning of the memorandum was that the defendant agreed to be responsible on the note in consideration that plaintiff would forbear to prosecute the forger, such an agreement was altogether void as against the policy of the law (*i*).

36. Parties may doubtless so contract, whether by writing, by word of mouth, or otherwise, that nothing is left to **implication** or intendment of law, the parties having determined their respective rights and obligations for themselves. Often, however, they will be found not to have sufficiently provided for possible contingencies; if so, **legal principles** may need to be called into operation, to complete as it were by implication the provisions of the contract, and to adjust the rights and obligations of the parties to it. When such a state of things has occurred and this has been accomplished, the final result will be what it would have been if an express contract containing the terms implied, together with those of the original agreement, had been entered

(*i*) *Brook* v. *Hook*, L. R. 6 Ex. 89: 40 L. J. Ex. 50. A contract made when one of the parties is so drunk as to be incapable of transacting business is not void but only *voidable*, so that it *may* be ratified by him when he becomes sober, and if ratified may of course be enforced: *Matthews* v. *Baxter*, L. R. 8 Ex. 132; 42 L. J. Ex. 73.

into. For instance, an engineer agrees to do certain work to be paid for by quarterly instalments ranging over a certain time; he dies after so many instalments have become due, but before the completion of the work. Should the law hold that the personal representatives of the deceased are entitled to the instalments due at the time of death, the result would be the same as if the contingency of death had been foreseen and provided for in the contract, and had not been left to be provided for by the law (*k*).

A., we will suppose, engages B.'s wife to perform and sing at a concert, nothing being said as to any possible cause of absence through physical incapacity for doing so; such a cause of incapacity arises, whereby A., being unable to obtain a substitute, sustains pecuniary loss. What is the law applicable on view of these facts for determining A.'s right of action and B.'s liability? The Judge at the trial of the cause would direct the jury that there was in law an implied condition annexed to the contract, that the illness of the wife should discharge the husband (*l*) from performance of it, and the verdict, on proof of the facts supposed, would be returned accordingly (*m*).

(*k*) *Stubbs* v. *Holywell Ry. Co.* L. R. 2 Ex. 311; 36 L. J. Ex. 166.

(*l*) This and other similar cases, where *a married woman is concerned* must now be read by the light of the Married Women's Property Act, 1882. See sect. 1, and the note on p. 31.

(*m*) *Robinson* v. *Davison*, L. R. 6 Ex. 269; 40 L. J. Ex. 172. Suppose, however, that A. procures a substitute for B.'s wife, and that the latter recovers and offers to fulfil her contract, but that her offer is refused by A. In such case, B. and his wife could not successfully bring an action for rescission of the contract. For "the damage to the

37. Cases like those cited throw light on the meaning of the term "**implied**" contract, and shew that the liability of either party to a contract will be the same whether from given facts a contract be implied by law and inferred by a jury, or whether an express contract identical therewith be actually proved and put in evidence. The facts and data on the one supposition are deposed to at Nisi Prius; on the other supposition the **express** contract, if wholly written, is proved by producing it, and if partly written and partly verbal, it is proved by writing, by witnesses, and so forth.

Another instance of a condition being imported into a contract is offered by a **contract for purely personal service.** Where such a contract is entered into—say by a farm bailiff—should the servant die during his term of service, his representatives could not be compelled either to perform the service in his stead, or to pay damages, unless there had been an express stipulation on his part to the contrary. So also by the death of the master, the servant is discharged (*n*). Here, on the happening of a contingency, the law is called upon to supply a term in the particular contract, and to say what should be done as between the contracting parties.

38. By reference to the theory of implied contracts and undertakings a case may often be at once decided as between litigating parties. Thus, should a **solicitor**

defendant and the consequent failure of consideration, is just as great as if it had been occasioned by the plaintiff's fault instead of by her misfortune." *Poussard* v. *Spiers*, L. R. 1 Q. B. D. 410; 45 L. J. Q. B. 621.

(*n*) *Farrow* v. *Wilson*, L. R. 4 C. P. 744; 38 L. J. C. P. 326.

commit a breach of the duty imposed on him by his retainer, the moment such breach of duty is committed a cause of action accrues against him. But the cases shew that a solicitor may compromise a suit, provided that to do so is within his legitimate authority in the suit (*o*). A solicitor employed to sue for a debt in the County Court has no implied authority, after obtaining judgment, to enter into an agreement with the debtor not to enforce such judgment during a stipulated time. If, therefore, the judgment be enforced by execution before that time has expired, the principal so enforcing it will not be liable unless he has authorised or assented to the act of his solicitor (*p*). The non-liability of the principal is a logical deduction from the absence of implied authority in the agent.

39. To put a case quite dissimilar from the preceding. **If a horse is sold with a warranty** of soundness and it turns out to be unsound, the purchaser cannot return the horse, unless there is a stipulation in the agreement empowering him to do so should the horse not answer to the warranty. All that the purchaser can do in the absence of such a stipulation is to offer to return the horse to the seller, and if the seller refuses to receive back the horse, then the purchaser may sell the horse and recover the difference in price from the vendor. Here the contracting parties are to blame if they do not expressly provide beforehand for the happening of the

(*o*) *Prestwich* v. *Poley*, 18 C. B. (N. S.) 806; *rep.* as *Pristwick* v. *Poley*, 34 L. J. C. P. 189.

(*p*) *Lovegrove* v. *White*, L. R. 6 C. P. 440; 40 L. J. C. P. 253.

particular contingency (*q*). When, as very often befalls, parties are not thus circumspect, our law applies, to the state of facts before it, rules which, in the abstract, have long since been settled (*r*).

Where **goods** have been **sold by sample** and the purchaser "desires to rescind his purchase upon the ground that the quality of the goods does not correspond with the sample, it is his duty to make a distinct offer to return, or in fact to return the goods. He should also state to the vendor that the goods are at his risk, that they do not belong to the purchaser, that he in fact rejects them, that he throws them back upon the vendor's hands, and that the contract is rescinded" (*q*).

40. It will not, of course, be supposed from anything which has thus far been said, that the law disregards the declared or presumable intention of contracting parties; a contrary inference would be correct. Our law exercises much ingenuity in trying to ascertain what the parties meant, and in striving to carry out and make

(*q*) See *Couston* v. *Chapman*, L. R. 2 Scotch App. 250, 256. This was a case under the Scotch law respecting the sale of goods by sample. See, however, the judgment of Lord Chelmsford as to the matter in the text. See also on the remedy for breach of warranty of a horse, *Hinchcliffe* v. *Barwick*, L. R. 5 Ex. D. 177; 49 L. J. Ex. 495 (App.).

(*r*) A. invoiced goods to B., and put a note on the invoice running thus:—"No allowance for short weight, measure, or imperfections unless notice be given by the first post after receipt of goods." B. was aware of the note and finding some "imperfections," he brought an action against A., but the Court held that "imperfections" included both latent and patent defects, and that B. could not recover for defective quality six months after delivery. *Gorton* v. *Macintosh*, 31 W. R. 232.

operative their intentions. Of this ingenuity a very few instances must suffice.

At Common Law materials worked by one man into the property of another become part thereof, whether such property be fixed or movable. Bricks built into a wall become part of the house; thread stitched into a mended coat become part of the coat; while planks and nails worked into a ship under repair become part of the ship. Generally, therefore, and in the absence of something to show a contrary intention, the bricklayer, tailor, or shipwright is to be paid for labour done and materials provided, although the whole work be not complete. Such is, *primâ facie*, *i.e.* at Common Law, the nature of the contract for doing **work** and supplying **materials.** The essence of such a contract may, however, be altered and differently modelled by the expressed intentions of the parties to it. The workmen may agree to complete the entire work and to receive payment **when the whole is complete,** and not before. If such be the agreement, the plaintiff, having contracted to do an entire work for a specific sum, can recover nothing until the entire work is complete, or unless he can show that it was the defendant's fault that the work was not completed, or unless there is something to justify the conclusion that the parties entered into a fresh contract (*s*).

41. Let us suppose that a **cheque** bears on the back of it the name and signature of a former holder—what, it may be asked, is the precise significance thereto attaching? Does it fix him with any, and, if so, with

(*s*) *Appleby* v. *Myers*, L. R. 2 C. P. 651; 36 L. J. C. P. 331. (Ex. Ch.).

what sort of liability? Or is he unaffected thereby, *i.e.*, is he in the same position as any other holder for the time being of the instrument, and not liable to be sued upon it? The question proposed must be answered by reference to the **intention** with which the signature was placed upon the cheque. A cheque payable even to *bearer* may doubtless be "indorsed" in one sense of that word (*t*). It is in fact of common occurrence that a name is signed on the back of such an instrument, the signature being meant merely as an acknowledgment of or receipt for the amount for which it was drawn, or to indicate that the cheque is paid in to the credit of a particular account. The signature not being intended in any way to operate as an "indorsement," in the technical sense of the term, if a man's name is written on the back of such an instrument without the intention of "indorsing" and making himself liable upon it, the law holds that he is not so liable. Here, as in many other cases, it considers the **intent** accompanying the act under notice with a view to determining its character, and declines to saddle with responsibility as "indorser" one who had no intention of incurring it (*u*).

(*t*) A cheque payable to *bearer* is transferable by mere delivery. Of course a holder of such an instrument may write his name on the back of it; but, as Mr. Justice Byles said, in *Keene* v. *Beard* (se below), under such circumstances the writing must have been placed there with the intention of indorsing the instrument in a legal sense, that is, with a view of making himself as liable for payment as the drawer of it would be.

(*u*) *Keene* v. *Beard*, 8 C. B. (N. S.) 372; 29 L. J. C. P. 287. The views expressed by the learned judges in this case have recently been adopted by the Legislature. **The Bills of Exchange Act, 1882** (45 &

42. With a view to carrying out the intention of parties it has been held that there may be an actionable **breach of a contract before the time for complete performmance of it** has arrived (*x*). An action for **breach** of **promise** to **marry** the plaintiff after the death of defendant's father may be maintainable before the death has happened. For instance, if the defendant in the meantime absolutely declare his intention never to fulfil his promise, and so repudiate and rescind it, an action will lie against him forthwith (*y*).

43. Persons are generally free to contract as they please, conforming to the requirements of the customary or statute law. Accordingly, if a contract, in no respect infringing legal principles, be entered into and be suffered to remain unrescinded, a jury—proof being given of the breach of contract—will be directed that **nominal damages** at all events are recoverable. And whether actual or substantial damage may have accrued from the breach is immaterial; the law holds every man

46 Vict. cap. 61, Part III.) defines a **cheque** as "a bill of exchange drawn on a banker, payable on demand," sect. 73. By sect. 31 subsect. 2, "A bill [and therefore a cheque] payable to **bearer** is negotiated by **delivery**. By the next sub-sect, "A bill so payable **to order** is negotiated by the indorsement of the holder completed by delivery."

(*x*) *Roper* v. *Johnson*, L. R. 8 C. P. 167; 42 L. J. C. P. 65.

(*y*) *Frost* v. *Knight*, L. R. 7 Ex. 111; 41 L. J. Ex. 78. As to the *promise*, see 32 & 33 Vict. c. 68, s. 2, and *Bessela* v. *Stern*, L. R. 2 C. P. D. 265; 46 L. J. C. P. 467. App. The above action is generally spoken of as one for "breach of promise." As previously indicated, there cannot possibly be an action for breach of any mere promise. But this action really proceeds on a request and mutual promises, grounded on a *valuable consideration*, namely, marriage, which in the eye of the Common Law is nothing more than a civil contract.

to his contract. If then a man positively undertakes to do something connected with the happening of a particular event, should it not happen, he of course incurs liability for damages. Nor is there any hardship in this, because the possibility of the event not happening must be supposed to have been in his contemplation when he made the contract (*z*). To this rule, which is obviously founded in common sense [although the application of it may not always be directed by this faculty], reference will again be made, and some qualifications of it will hereafter be specified (Chaps. III. and IV.).

44. As regards the **assessment of damages for breach of contract** it may here be opportune to consider for a moment the position of the party who enters into a contract or undertaking, and thus assumes an obligation which he is bound at the risk of paying damages to perform. Such a person can at most be made liable for such damages only as would naturally flow from his breach of contract, or such as might reasonably have been brought within his contemplation by notice or otherwise when he entered into the contract or assumed the obligation. A notice might indeed be so given as to be incorporated with and form part of the contract.

(*z*) *Hall* v. *Wright*, E. B. & E. 746; 29 L. J. Q. B. 43. This was a case of breach of promise to marry and was decided in the Exchequer Chamber, the Common Law Appeal Court before 1873. The Court was nearly equally divided in opinion on this case, the majority having been four and the minority three. The common sense of the case seems to have been with the latter, inasmuch as the majority held that a man who makes a promise to marry must either perform it at all events —including even certain danger to his life—or pay damages for the breach of his engagement.

Primâ facie, **damage actually resulting** from a breach of contract is recoverable, provided it be such as may fairly be considered as arising **directly**, *i.e.*, in the ordinary course of things, from such breach. If a man contracts to carry a chattel and loses it he must pay its value, though he may discover that the chattel was more valuable than he had supposed (*a*). When, however, the loss is not such as would in the ordinary course of things naturally arise from the breach of contract, but is of an exceptional nature, in the absence of some notice to the defendant of special circumstances, damages cannot be given for the loss.

45. What has been stated in the preceding Article may be thus exemplified. A., being a **goods carrier**, takes for conveyance machinery to be put up in a mill, without which the mill cannot work. He has no notice of the purpose for which the machinery is intended; accordingly, if the machinery be lost *in transitu*, the carrier will not be responsible for pecuniary damages in respect of the stoppage of the mill (*b*).

(*a*) This means in the absence of any special contract or of any conditions limiting his liability. As to when the chattel is above the value of £10, see the Carriers Act, 1830, 1 Wm. IV. c. 68, and the case of *Millen* v. *Brasch*, L. R. 10 Q. B. D. 142; 52 L. J. Q. B. 127 (App.). As to the protection afforded to carriers by the Act of 1830, with regard to passengers' luggage, see *Morritt* v. *North Eastn. Ry. Co.*, L. R. 1 Q. B. D. 302; 45 L. J. Q. B. 289 (App.), also the Railway and Canal Traffic Act, 1854, 28 & 29 Vict. c. 94, and the case of *Brown* v. *Manchester & Sheffield &c. Ry. Co.*, L. R. 10 Q. B. D. 250; 52 L. J. Q. B. 132 (App.).

(*b*) *Hadley* v. *Baxendale*, 9 Ex. 341; 23 L. J. Ex. 179. With this read *Phillips* v. *London & South Western Ry. Co.*, L. R. 5 Q. B. D.78, 280; 49 L. J. Q. B. 233, as to the true mode of **assessing damages** when compensation is sought for personal injuries caused by a railway accident.

In the case cited below (*c*) the Court was called on to discriminate between two items of damages claimed (i) for inconvenience caused through breach of duty by a railway company in conveying H. and his wife to a wrong terminus, and (ii) for illness caused by their having to walk home from such terminus in inclement weather, and consequent medical expenses. The former of these heads of damage was allowed as the **immediate result of breach of duty** by defendants. The latter head of damage claimed was disallowed, as being merely connected with the breach of duty by "a series of causes" intervening between the immediate consequence of the breach of duty and the damage complained of.

In another case, the plaintiff, a commercial traveller, had sent his case of goods by luggage-train from Oxford to Liverpool without making any intimation respecting it of any kind. There was a delay of two days *in transitu*. The plaintiff, however, was held not entitled to recover the hotel expenses incurred by him whilst awaiting the arrival of the package. In any such case the question for the jury will be—has there been undue delay? (*d*) If so, nominal damages at all events should be given, but it is difficult to see how the hotel expenses could be considered as naturally resulting from non-delivery of the parcel, or how they could be said to have been

(*c*) *Hobbs* v. *London & South Western, Ry. Co.*, L. R. 10 Q. B. 111.

(*d*) Just as in cases of *unpunctuality*, the question is "Were the persons having the control, &c., of the train . . . . guilty of wilful delay or reckless loitering?" Judgment of James, L. J., in *Le Blanche* v. *London & North Western Ry. Co.*, L. R. 1 C. P. D. 286; 45 L. J. C. P. 521 (App.).

reasonably in the contemplation of the parties when they made the contract (*e*).

46. The assessment of damages for **breach of contract** may be affected and facilitated by stipulations of the parties having reference to the contingency of a breach occurring, specifying an amount to be paid in that event as and for **liquidated**, that is, ascertained, and predetermined damages by the one party to the other. If, indeed, from the terms used such sum is to be paid rather as a **penalty** for non-performance of the contract than as liquidated damages, a Court of Law, adopting an equitable principle, allows the jury to assess the damages at less than the named amount. Accordingly it is thus treated as the limit, not as the precise measure —of the damages. Upon this particular point nice distinctions are often taken in interpreting a contract (*f*).

47. Where A. is brought into contact with B. in a matter purely of contract, a duty is imposed upon A. to conduct himself honestly towards B. He is not bound to disclose everything in prejudice of the subject-matter of the contract, but he is bound to answer questions concerning it truthfully, and by no means to volunteer statements inducing to the contract, which are false or based on fraud. **Fraud**, we are told (*g*), is where one man

(*e*) *Woodger* v. *Great Western, Ry. Co.*, L. R. 2 C. P. 318 ; 36 L. J. C. P. 177.

(*f*) *Kemble* v. *Farren*, 6 Bing. 141 ; 7 L. J. (O. S.) C. P. 258 ; *Magee* v. *Lavell*, L. R. 9 C. P. 107, 115 ; 43 L. J. C. P. 131.; *In re Newman ; Ex parte Capper*, L. R. 4 Ch. D. 724 ; 46 L. J. Bank. 57.

(*g*) By Lord Romilly in *Spackman* v. *Evans*, L. R. 3 E. & I. App. 239 ; 37 L. J. Ch. 752 (H. L.).

endeavours to gain a personal advantage to himself, either by concealment of the truth or by inducing another to believe that to be true which is not so. If, moreover, persons take upon themselves to make false assertions as to which they are ignorant whether such assertions are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue (*h*).

48. The effect of fraud upon a contract is of this kind —it renders the contract **voidable** by or at the election of the person upon whom such fraud has been practised. It gives him an option to rescind the contract (*i*).

That which bears the semblance of a contract may thus be vitiated by fraud, and the apparent right founded upon the contract may thus be put aside. So long since as Lord Coke's time it was held that if an illiterate person have a **deed falsely read over** to him and he then seals and delivers the parchment, that parchment is nevertheless not his deed (*k*). A like principle may be applied to a contract not under seal. If a man write his name across the back of a **blank bill stamp** and part with it, and the paper is afterwards improperly filled up, he is nevertheless liable as indorser. For he must have intended, when signing his name, to indorse a bill of

(*h*) *Reece Silver Mining Co.* v. *Smith*, L. R. 4 E. & I. App. 64; 39 L. J. Ch. 849 (H. L.). Judgment of Lord (now Earl) Cairns.

(*i*) Judgment of Lord Hatherley in the same case. But see *Urquhart* v. *Macpherson*, L. R. 9. App. Cas. 831 (Privy Council), which establishes this very point.

(*k*) *Thoroughgood's Case*, 2 Coke's Rep. 96, with which read *Hirschfield* v. *Lond. Brigh. & S. C. Ry. Co.*, L. R. 2 Q. B. D. 1; 46 L. J. Q. B. 94.

exchange which was to be afterwards filled up, although he left the amount, date, maturity, and the principal parties to the bill undetermined. Here was no fraud inducing to the contract and so vitiating it. Now let us suppose that the same party had been unfairly led to indorse the bill upon the assurance that it was some other instrument, for instance **a guarantie** (Chap. IV.). Such a fraudulent representation might be set up as a defence to an action upon the bill even at suit of a holder of the bill for value, before maturity, and without notice of the fraud. The indorsement under these latter circumstances might be invalidated not merely on the ground of fraud, but on the ground that the mind of the alleged indorser did not accompany his signature. In other words, he may allege that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended (*l*). This mode of looking at a transaction involving fraud is often applicable ; a contract induced by fraud, if the objection to it be aptly taken, is regarded as never having had any legal entity.

49. A distinction must, however, at once be noticed between the case where a contract may be rescinded on account of fraud, and the case where it may be rescinded on the ground that there is a **difference in substance** between the thing bargained for and that obtained. As regards the former state of things it is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract

(*l*) *Foster* v. *Mackinnon*, L. R. 4 C. P. 704 ; 38 L. J. C. P. 310.

sought to be rescinded. But an **innocent misrepresentation** or misapprehension by the party making it as to the subject-matter of sale does not authorise a rescission unless there be a complete difference in substance between what was supposed to be, and what was got, so as to constitute a failure of consideration (*m*). For example, where a horse or other animal is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness the contract may be rescinded. If the purchaser was induced to buy the horse, &c., by an honest representation as to its soundness, the purchaser must pay the price unless there was a warranty; and even if there was a warranty he could not return the animal and claim back the whole price, unless there were a condition to that effect in the contract (*n*).

50. In general a contract framed in violation of the unwritten or of the statute law cannot be enforced. No action can be maintained upon it if the defence of illegality be put forward in a proper manner. And should a contract impugned as infringing the principles of our unwritten or customary law be really infected with such a vice, it cannot lay the foundation for an action. It cannot, in short, if challenged, be

(*m*) *Kennedy* v. *Panama &c. &c. Royal Mail Co.*, L. R. 2 Q. B. 580; 36 L. J. Q. B. 260.

(*n*) See *Ward* v. *Hobbs* (a case under the Contagious Diseases Act, 41 & 42 Vict c. 74) L. R. 4 App. Cas. 13; 48 L. J. Q. B. 281 (H. L.). As to returning horses sold with a warranty, but also with a condition as to their return if the terms of such warranty are not fulfilled, see *Hinchcliffe* v. *Barwick*, L. R. 5 Ex. D. 177; 49 L. J. 495 (App.).

recognised by a Court of Law, or give to either contracting party any legal right or impose upon him any legal obligation. A. agrees to let to B. a lecture room for hire, but before it has been used, A. ascertains that **lectures of a blasphemous nature** or of an immoral tendency are to be delivered there. A. will be justified in breaking off and rescinding his engagement and in refusing to allow the room to be used for the purpose named (*o*). A plaintiff, moreover, suing to recover money, who cannot present his case to the jury without disclosing the unlawful purpose in furtherance of which the money was paid would be precluded from recovering it in an action (*p*).

51. Let us suppose an agreement between A. and B. whereby A. agrees to serve at monthly wages as a seaman on board a ship of which B. is master, for a defined period, on a voyage from London to a foreign port and back to a final port of discharge. Suppose that on arriving at the foreign port B. purposes making another voyage within the terms of the agreement, but which would either be illegal (*q*), or would at all events expose the ship's crew to personal risk of capture or

(*o*) *Cowan* v. *Milburn*, L. R. 2 Ex. 230 ; 36 L. J. Ex. 124. The same would be the case where *any* contravention of **public policy** might be contemplated, that is to say, any infraction of a rule existing for the common good of the community. See as to this phrase, *Egerton* v. *Brownlow*, 1 H. L. Cas. 196, Judgment of Parke, B ; also *Besant* v. *Wood*, L. R. 12 Ch. D. 605 ; reported as *In re Besant*, 48 L. J. Ch. 497, Judgment of the late Sir G. Jessel, M.R. See also *post*, p. 52.

(*p*) *Begbie* v. *Phosphate Sewage Co.*, L. R. 1 Q. B. D. 679 (App.) ; *Taylor* v. *Bowers*, L. R. 1 Q. B. D. 291 ; 46 L. J. Q. B. D. 39 (App.).

(*q*) According to the Foreign Enlistment Act—59 Geo. 3, c. 69.

otherwise, for breach of neutrality, at the hands of a belligerent power in amity with our Crown. Would A., when cognisant of the facts and of the purpose of B., be justified in treating the agreement as having been broken and put an end to by him? Could A. quit the ship and sue B. for breach of contract? It seems that A. would be entitled to do so upon this intelligible ground, namely, that B.'s undertaking really was to employ the crew for a specified period on board his vessel upon an ordinary commercial voyage, not upon a voyage such as that afterwards projected, which would have exposed the crew to greater danger than they had anticipated and bargained for (*r*). Here the *onus* of proof would be on A., and, the illegal act proposed, or contemplated, by B. having been established, a question of law would arise for the Judge's decision—Was A. thus justified in treating as rescinded the original contract between himself and B.? If so, a further question, by no means free from difficulty, would be as to the amount of damages to be awarded, B., the defendant, being answerable as *causa causans*—or immediate cause of the rescission—only for such damage as naturally, or, "inevitably" resulted from his wrongful conduct.

52. The reason why evidence is admissible of fraud or illegality attending or inducing to the execution of a contract is this:—such evidence goes to show that the alleged contract never had any existence in legal contemplation. There is a semblance merely of a contract, the substance of which disappears by reason of the fraud

(*r*) *Burton* v. *Pinkerton*, L. R. 2 Ex. 340; 36 L. J. Ex. 137.

or illegality vitiating it. This idea should be quite familiar to the mind of one who concerns himself with the Law of Contracts. It enables him to appreciate the important difference between a defence grounded upon **matter posterior** to the creation of a contract, and a defence grounded upon **matter contemporaneous** therewith, or, perhaps antecedent and inducing to it.

53. Quite irrespective of cases involving fraud or illegality in the sense in which those words are ordinarily used, many contracts might be specified which are open to objection as opposed to **public policy** (*s*), to those considerations of theoretical expediency, hard to be defined, but by which our law is guided. The doctrine referred to is applicable to every class and subdivision of contracts, unwritten or written.

"The principle upon which Courts of Justice must go is to enforce the performance of contracts not injurious to society, and it would be absurd to say that a Court of Justice shall be bound to enforce contracts injurious to and against the public good" (*t*). Accordingly, when the validity of a contract is questioned upon the ground that it is in **restraint of trade**—trade being favoured and encouraged by the law—we find that our Courts will administer the law with a view to public expediency, and they will decline to sanction any such contract where the restraint which it aims at enforcing is unreasonable. As an element in the inquiry whether

(*s*) See note (*o*), at p. 50.

(*t*) *Collins* v. *Blantern*, 2 Wilson 341; 1 Sm. L. Cas.; *Brown* v. *Brine*, L. R. 1 Ex. D. 5; 45 L. J. Ex. 129.

such restraint is reasonable or not—even where the contract is under seal—(Chap. IV.). the Courts will look for some **consideration** (Art. 25) to support the undertaking to abstain from exercising the particular trade, and if no such consideration be found, the contract will be held invalid as unreasonable (*u*).

A case of some interest falling within this part of our subject recently occurred. It concerned what are known as **Voting Charities.** A. and B. being subscribers to any such charity, and entitled to an equal number of votes at the election of a candidate, thus agree :—If A. will give his votes in favour of B.'s candidate on this occasion, B. will vote for A.'s candidate at the next election. Such an agreement was held not to be illegal as opposed to public policy, and an action will lie for breach of it (*x*).

54. Matter set forth in the preceding pages will have enabled us now to answer the question—**What is a contract?** It is an agreement between parties containing certain ingredients, of which one or another may sometimes be with difficulty discerned. A contract involves privity and consent, though not necessarily **mutuality** or reciprocity of obligation. (*y*)

(*u*) *Mitchell* v. *Reynolds*, 1 P. Wms. 181 (A.D. 1711) ; *Coondoo* v. *Mookerjee*, L. R. 2 App. Cas. 186 ; *Rousillon* v. *Rousillon*, where all the leading authorities on the point are given ; L. R. 14 Ch. D. 351 ; 49 L. J. Ch. 338 (A.D. 1880). If there be a "hard bargain" but a *valuable* consideration has passed, the only question then is whether *undue advantage* has been taken by one party, of the other. *Middleton* v. *Brown*, 47 L. J. Ch. 411 (App.).

(*x*) *Bolton* v. *Madden*, L. R. 9 Q. B. 55 ; 43 L. J. Q. B. 35.

(*y*) Most contracts are necessarily **bilateral**, that is two-sided or binding on both sides, but there are contracts which are **unilateral** or

A contract may be **express**, evidenced by writing or by words, or implied either from the words used, or from the conduct of the principals. Legal principles, however, familiar in actions grounded upon express, will be just as available in actions grounded upon **implied** contracts. Effect will, if possible, be given to the intention of the parties. Fraud inducing to a contract, illegality at the very root of it, public policy violated by it, and many other grounds of objection less general and more technical in their nature, may be set up by way of defence to an action founded upon an implied, as well as upon an express contract. Indeed, it may be said to follow *à fortiori* that, since fraud or illegality—using this latter term in its broadest sense—will vitiate and nullify an express contract, the law will decline to imply a contract, promise, or undertaking as arising from a transaction based on and contaminated by fraud or illegality.

one-sided, that is, binding on one part only. Of this species of so-called contract a familiar instance is a guaranty or guarantie. For if I guarantee payment to A. for goods supplied by him to B., I cannot compel A. to supply goods. If, however, he acts on my guarantie, then my liability to him will attach. So, if I guarantee the performance of certain duties by A., if B. will employ him. I cannot compel B. to employ A., but if he does, my liability commences. Thus, it is seen that these contracts—if indeed such arrangements can be correctly so-styled—are, in a sense, one-sided. See *post*, p. 91 *et seq.*

CHAPTER III.

MERCANTILE CONTRACTS.

"**Commerce** as it may be regarded by **Jurisprudence**, consists in these diverse negotiations whereof the object is to effect or facilitate the exchanges of the products of nature or of industry so as to derive profit therefrom. Commercial or mercantile law is made up of all the rules relating to the validity and effect of those negotiations as well as to the manner of adjudicating upon the various disputes which may result from them."—PARDESSUS.

"The custom or law of merchants is part of the Common Law of this kingdom, of which the judges ought to take notice."—BEAWES.

"The mercantile law of this country is founded upon principles of equity."—Mr. JUSTICE BULLER.

LORD MANSFIELD held "the law to be best applied when made subservient to the honesty of a case."

55. IN the preceding Chapter a simple contract has been treated of quite generally; its nature, attributes and ingredients have been illustrated by reference indifferently to mercantile and non-mercantile contracts. **The law merchant**, however, although governed by principles identical with those already indicated, stands somewhat apart from our **municipal law** applicable to non-traders, and in the following pages will be so regarded.

56. A mercantile contract is, in truth, a contract between mercantile persons relating to mercantile matters, and like other contracts must be based upon the

request, consideration, and promise already spoken of (Arts. 22-27). The **request** perhaps may be **deducible** from the correspondence between the parties. A. negotiates with B. for the place of foreman or salesman in some department of B.'s business, and the negotiation is concluded. A. having taken the place and performed for a time its duties, is compelled to sue B. for non-payment of his salary. This matter may be looked at thus: the request would be by B. to A. to enter his service, the consideration would consist in the acceptance of the place and performance of its duties by A., the promise would be by B. to pay the salary.

57. The **consideration** in a mercantile contract, though always to be found there, is sometimes peculiar. If A., having no authority to act as **agent** for B., assumes to do so, he will be held impliedly to warrant that he has authority, and may incur liability for breach of this implied undertaking to C. The **confidence** induced by A.—that is inspired by A. in himself inducing C. to trust him—would be a sufficient **consideration** *moving or proceeding from plaintiff* (*a*) to support A.'s promise or undertaking that he had authority to contract. "By the Law of England, persons who induce others to act on the supposition that they have authority to enter into a binding contract on behalf of third persons, on it turning out that they have no such authority, may be sued for damages for the breach of an implied warranty of authority." (*b*) And so a person professing to prac-

(*a*) See note (*c*) at p. 21.

(*b*) *Richardson* v. *Williamson*, L. R. 6 Q. B. 276, 279; 40 L. J.

tise a particular **trade** or **profession**, thereby holds himself out as possessing a reasonable degree of **skill** in that trade or profession, and should he be found to be unreasonably ignorant of it he may incur liability for damage thence resulting to a customer, patient, or client (*c*). Here the confidence induced by the professing of skill is a sufficient consideration for the promise to exercise it. (See Arts. 27, 38.)

By analagous reasoning, **misconduct in a servant** (*d*) may justify the master in discharging him. Suppose a **clerk** to be hired for a year to keep a merchant's books, he impliedly undertakes and contracts that he is competent to do so. The clerk, however, is found to be ignorant not only of book-keeping but of arithmetic. Is the merchant bound to continue to employ him during the year? Common sense supplies the answer to this —he is not. A master has been held justified in dis-

Q. B. 145; but see *Thorn* v. *Mayor & Corporation of London*, L. R. 1 App. Cas. 120; 45 L. J. Ex. 62 (H. L.)

(*c*) *Turner* v. *Goulden*, L. R. 9 C. P. 58; 43 L. J. C. P. 60, Judgment of Keating, J.

(*d*) The law of **Master and Servant** is one of a very comprehensive character, and it is scarcely necessary to observe that the relation of master and servant may exist under innumerable sets of circumstances. An important criterion for determining the existence of such relation is the answer to the questions.—Is A. competent to *order* B. to do something for him within the scope of the employment entered upon, and is B. bound to obey the order given. Can A. *dismiss* B.? If so, A. is master and B. is servant, if not, the above relation does not exist. A child is regarded in law for certain purposes as its father's servant, and if **seduced** or **injured**, the father may sue as *for loss of the child's services*. As to the right of a master, generally, to bring an action for loss of service, see the somewhat singular case of *Berringer* v. *Great Eastn. Ry. Co.*, L. R. 4 C. P. D. 163; 48 L. J. C. P. 400.

missing a domestic servant without notice or the usual alternative payment of a month's wages, for disobedience to lawful orders (*e*); and a master would seem equally entitled to dismiss without notice a servant who was found grossly incompetent for the work which he had impliedly undertaken to do (*f*).

58. Sometimes, where there has been a **contract of sale** between parties, a question as to consideration arises. In general where there is a contract by one party to sell an article and by the other party to pay for it—no time being named—these two acts are meant to be concurrent. The one is the consideration for the other of them, and when the article is handed over, the price agreed on for it should be paid. It may, however, chance that the thing alleged to have been sold was at the time of the sale colourable merely—that is to say its existence was assumed—or non-existent. Or it may be found that the property in the thing had, by virtue of some antecedent contract, passed out of the vendor, so that under the alleged sale nothing in truth passed to the so-called purchaser, from whom, therefore, nothing can be recovered (*g*).

59. A **failure of consideration** may also occur where, on a sale of goods, there has been a complete difference in substance between what was supposed to be, and what actually was, taken by the buyer, without any

(*e*) *Turner* v. *Mason*, 14 M. & W. 112; 14 L. J. Ex. 311.

(*f*) *Harmer* v. *Cornelius*, 5 C. B. (N. S.) 236; 28 L. J. C. P. 85.

(*g*) See *Couturier* v. *Hastie*, 5 H. L. Cas. 673; 25 L. J. Ex. 253 (H.L.)

fraud in the transaction, but merely an innocent misrepresentation or a misapprehension. In such case a **rescission** of the contract may be justifiable (Art. 49); and if so, the price paid for the thing in question may be reclaimed. Much nicety may, however, be needed in discriminating between the case where the subject-matter of the contract is a **specific thing** which the buyer is to take subject to all faults and imperfections, and the case where the subject-matter of the contract is a chattel **not specific** but referable to a general class of chattels, and understood to possess the qualities attributable to chattels of such or such a designation (*h*). The test here applicable for determining the right of the purchaser to dispute the sale is indicated by the question—Has he obtained what he bargained for and meant to buy?

60. In a mercantile as in a non-mercantile contract (Arts. 31, 36), the promise, if express, should be definite. The terms of the contract must be complete, not inchoate merely, and must have been assented to by both the contracting parties. Their assent must have been *ad idem*—at one—on the essential matter of the agreement (*i*). A. says to B., "If you will give me an order for so much iron or other merchandize, I will supply it at a given price." When the order is given there is a complete contract, which the seller is bound to perform, the request being implied in the words used,

(*h*) *Lambert* v. *Heath*, 15 M. & W. 486; 15 L. J. Ex. 297.

(*i*) *Smidt* or *Schmidt* v. *Tiden*, L. R. 9 Q. B. 446; 44 L. J. Q. B. 199, a case of **mutual mistake**.

and there being an ample consideration for the promise (*k*).

61. On the facts just put, the existence of **privity** (Art. 28) is quite apparent, and from the rule requiring it as essential to a valid contract, results important to the trading portion of the community may sometimes be deduced. Thus, if a **factor** (*l*) or **agent** entrusted with goods for sale sells them as his own, and the buyer knows nothing of any principal, the buyer may **set off** a demand he has on the factor against the demand for the price of the goods made by the principal. In such a state of things the actual privity is between the buyer of the goods and the factor; and although the real principal may step in and claim the price of the goods, it would be very hard should the buyer be debarred from asserting his cross-claim as against that party with whom he was in actual privity, viz., the factor. The rule stated is practically applied in accordance with principles of natural equity (*m*), and in connection with it may be mentioned another rule. This is that where an **agent** is the **purchaser** of goods and the vendor has given credit to such agent, believing him to be the principal, the

(*k*) *Gt. Northern Ry. Co.* v. *Witham*, L. R. 9 C.P. 16; 43 L. J. C.P. 1, a case of unilateral contract where no real **mutuality** existed.

(*l*) A *Factor* is one who takes charge of goods for certain purposes, and in such respect he differs from a **Broker** who has no possession, but only negotiates the sale and purchase of goods. See E. g. *Irvine & Co.* v. *Watson & Sons*, L. R. 5 Q. B. D. 414; 49 L. J. Q. B. 531.

(*m*) *Borries* v. *Imperial Ottoman Bank*, L. R. 9 C. P. 38; 43 L. J. C. P. 3. A very important case on the **rights** of **undisclosed principals** is the *New Zealand &c. Land Co.* v. *Watson*, L. R. 7 Q. B. D. 374; 50 L. J. Q. B. 433 (App.)

vendor cannot recover against the undisclosed principal, if the principal has *bonâ fide* paid the agent at a time when the vendor still gave credit to the agent, and knew of no one else as principal (*n*). Here, the actual or ostensible privity is between the vendor and the agent, and it would manifestly be inequitable to hold the unknown principal liable to pay a second time for the goods, credit having been given by the vendor to the agent, with whom alone he had treated.

62. If a firm of **merchants resident abroad** instructs a home firm to purchase goods to be sent out on the joint account of the two firms, this will not *per se* empower the home firm to establish any privity between the vendor here and the house abroad. In such case, the presumption is that the foreign principal does not intend that the agent employed here should make him a party to the contract of purchase. Therefore, on the ground of **want of privity**, no action would lie at suit of the vendor of the goods in this country against the foreign firm (*o*). This presumption, when it exists, is deducible from a well-understood course of dealing amongst merchants which is founded on convenience and on something like necessity. For how could the foreign firm be sufficiently informed as to the solvency, respectability, and trustworthiness of those who sell goods to their home agents or correspondents? Consequently, the home agents would have no implied authority to create privity as between their principal abroad and the vendors of goods here.

(*n*) *Armstrong* v. *Stokes*, L. R. 7 Q. B. 598; 41 L. J. Q. B. 253.
(*o*) *Hutton* v. *Bullock*, L. R. 9 Q. B. 572 (Ex. Cham.)

63. The **doctrine of privity** (Art. 23) may thus properly be applied to test the completeness and efficiency of a contract made between traders and having reference to a matter purely mercantile. The test of mutuality or reciprocity of obligation (Art 92) cannot always be so applied. The **contract of suretyship** exemplifies this remark. A. guarantees payment of the price of goods to be supplied by B. to C. on the contingency of C.'s default in paying for them. A. thus accepts a possible liability, but B. does not bind himself to supply the goods (*p*). This is a very common state of things in practice, though B.'s position would of course be different should there be evidence of an undertaking by him, express or implied, to **forward goods** to C.

64. The **intention** of parties to a mercantile contract, when clearly discoverable, may affect their *primâ facie* contract, or may afford a clue for interpreting it. In most cases the intention of parties is sufficiently expressed. If so, and their contract in no way contravenes the law, effect must needs be given to it. In the Articles which immediately follow, various instances are given of what is here said.

65. A question such as just referred to may arise upon a **charter party**—a charter-party being "a contract by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places (*q*)." Such an instrument, we will suppose, contains an agreement that

(*p*) See note (*y*) at p. 53.
(*q*) Abbott on Shipping, 11th Ed. 195.

the ship shall take in a full cargo and proceed to some foreign port, and there, or so near thereto as she may safely get, deliver the cargo in the usual and customary manner, restraints of princes and so forth excepted. From such words may be implied a contract that the shipowner and charterer will each use reasonable diligence in performing that part of the duty to deliver which by the custom of the port falls upon him. If the charterers are prevented by the authorities abroad from sending lighters to the ship to land the cargo, the shipowner will not be able to successfully sue the charterers for any delay which may thus have arisen. For the whole process of landing will have been rendered impracticable by a cause over which neither party had control (*r*). In such a case the object is to deduce from words used the intention of the parties as to how they will act and conduct themselves under a state of facts which had not been contemplated by them when contracting.

66. If there be an agreement to deliver goods to a purchaser on a certain condition which, without default on the part of the vendor, never comes to pass, the latter will not be liable for non-delivery of the goods. But where the agreement is absolute or conditioned on an event which happens, the vendor will be liable for a breach of the agreement to deliver, although he could not help the non-performance. He must blame his own

(*r*) *Ford* v. *Cotesworth*, L. R. 5 Q. B. 544; 39 L. J. Q. B. 188 (Ex. Ch.); see also *Ashcroft* v. *Crow Orchard Colliery Co.*, L. R. 9 Q. B. 540; 43 L. J. Q. B. 194, where the defendants *placed themselves* in a position of incapacity to perform their contract and were accordingly held liable for a breach of it.

heedlessness if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his contract (*s*).

If a contract be entered into by A. to sell to B. 200 tons of potatoes about to be sown on specific land of A., there is in such contract an **implied condition** that both parties shall be excused if, before breach, performance becomes impossible by the perishing or non-appearance of the crop without default on the part of the contractor. Accordingly, if the crop does fail without default of the vendor he will be excused from delivering the entire number of tons contracted for (*t*). Here a state of things has occurred which perhaps neither of the contracting parties thought of or provided for, but the Court, called on to complete, as it were, their original agreement, assumes that they must have contemplated the contingency which has happened, and adapts their agreement specifically to the actual facts. The agreement thus completed is not, however, inconsistent with that first framed and *pro tanto* acted on. It is quite likely that if the parties had possessed or had exercised foresight they would have introduced into their contract a term such as was afterwards added to it.

67. If **goods** are sold to be **delivered by instalments** and paid for accordingly, and the buyer makes default in paying for one instalment, under circumstances such that the seller may reasonably believe that the buyer

(*s*) *Hale* v. *Rawson*, 4 C. B. (N. S.) 95; 27 L. J. C. P. 189—judgment.

(*t*) *Howell* v. *Coupland*, L. R. 1 Q. B. D. 258; 46 L. J. Q. B. 147 (App.).

cannot pay for the goods tendered, and does not mean to go on with the contract, the seller is justified in repudiating it (*u*). Cases of this kind seem to be increasing in number, and they involve considerations of much practical importance. The policy of the law clearly is to keep parties to their contracts and engagements; yet the hardship would be great in compelling a vendor to continue to supply goods which the purchaser has shown a disinclination to accept and an inability to pay for. Under such circumstances the intention of the parties will be taken to be that their contract is rescinded.

68. Where a **bill of lading** (*x*) or a receipt by the master of a ship for goods sent on board for conveyance, and a bill of exchange to cover the goods included in the bill of lading are sent in a letter to a vendee of the goods, it is well understood amongst merchants that the bill of exchange must be accepted, or the bill of lading cannot be retained. If the bill of exchange be not accepted, but the bill of lading is retained, the bill of

(*u*) *Bloomer* v. *Bernstein*, L. R. 9 C. P. 588; 43 L. J. C. P. 375.

(*x*) This is an instrument to the effect that certain goods have been placed on board a ship and are to be delivered to some consignee thereof or other person, in good order, unless the master be prevented from delivering them by the act of God, the king's enemies, and other specified causes. The charges for freight are given, and the document is stamped (6*d.*), executed and witnessed. There are three copies of the Bill of Lading, and if one be performed the other two stand void. Such an instrument is **negotiable** p. 128 n. (*g*), and will pass by indorsement and delivery. It will also pass the *property in the goods* it mentions to the indorsee or party receiving it; but if the seller be not paid he can stop the goods, as it is said, *in transitu*. The holder of the "receipt" mentioned in the text is the party to whom the Bill of Lading is first delivered, who thereupon returns the receipt to the master.

lading thus acquired gives no right of property to the person so acquiring it (*y*). The presumable intention of the party consigning to act in accordance with this usage may be modified, but the burthen of proof will be on the consignee.

69. A **presumption of law** may be inoperative, in view of the avowed intention of parties whom it might have affected. Thus, where items in respect of various transactions appear on the debit side of an account, we may, in the absence of any other appropriation, presume that the items on the credit side of the same account are to be appropriated to the items of debit in order of date. But this presumption may be rebutted by evidence showing that such could not have been the **intention** of the parties (*z*).

70. Sometimes an **implied term** may need to be added to, grafted on, or imported into a contract, with a view to effectuating the intention of the parties to it. And on the solution of the question whether or not it be so, may depend their respective rights and liabilities.

(*y*) *Shepherd* v. *Harrison*, L. R. 5 E. & I. App. 116 ; 40 L. J. Q. B. 148 (H. L.).

(*z*) *City Discount Co.* v. *McLean*, L. R. 9 C. P. 692 ; 43 L. J. C. P. 344 (Ex. Cham.). A presumption rebuttable by evidence is technically called *presumptio juris*, that is, one simply of *law*. If no evidence is adduced against it, the supposition involved will hold good. On the other hand against *presumptio juris et de jure*, a presumption *of law and by law*, no rebuttable evidence can be given. Thus it is a *presumption of law* that a *man* arraigned on a criminal charge is innocent, but the opinion is obviously rebuttable. On the other hand, if a child of six years of age is charged with an offence there is a *presumption of law and by law* that a person under the age of seven is incapable of committing crime, and such presumption cannot be even assailed.

Where, for instance, **tenders** are invited for the performance of work in accordance with certain plans and specifications, the question may arise—Is there any implied undertaking, warranty, or guarantee that the work can be done as described in the plans and specifications? Or must the parties tendering satisfy themselves independently in regard to this particular? (*a*)

71. As a **new term** or condition may sometimes be imported into a contract on considerations of convenience and necessity, in the same way **authority** to do this or that thing may, on the ground of necessity, occasionally be implied where otherwise there would be no sufficient authority. And such power, when duly exercised, may impose liability on that person who is presumed in law to have conferred it. Thus, the **captain of a ship** may, under certain circumstances, pledge her owner's credit for goods supplied to the ship at the port where she may be lying. A ship's captain, however, has authority to bind the owners to pay for supplies or to repay money advanced only where the **necessity** of the case is presumed to give him that authority. It must therefore in such cases appear that the money borrowed was needed, or that the goods supplied were necessary for the use of the ship, and that it was reasonably necessary that the captain should obtain or order them on the owner's credit. If the shipowner were himself at the port in question, or

(*a*) *Thorn* v. *Mayor &c. of London*, L. R. 1 App. Cas. 120; 45 L. J. Ex. 487 (H. L.); *Rhodes* v. *Forwood*, L. R. 1 App. Cas. 256; 47 L. J. Ex. 396 (H. L.).

had there an agent authorised and ready to supply the ship's requirements, the captain would have no implied authority to pledge the owner's credit for a purpose such as supposed (*b*). The **special power** thus vested in the captain of a ship, and exerciseable as aforesaid, is distinguishable from that **general discretionary power** with which an agent is often clothed to act for the interests of his principal as best he may in emergencies.

72. Great weight is allowed by our law to **mercantile usage**, and such a usage when once established is afterwards taken notice of by the Courts without formal proof of it (*c*). What a usage recognised among merchants is, what is its extent, what it means, must be ascertained by evidence. But when once ascertained the legal effect of the **usage** upon the contract is matter of law; so also is its **reasonableness**, **certainty**, or **legality**. "The universality of a usage voluntarily adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience" (*d*).

73. Mercantile usage may operate on a contract in various ways. 1st. by interpreting after a peculiar fashion some word or phrase occurring in it; 2ndly, by adding a term to the contract; 3rdly, as possessing inherent authority to which the contracting parties may appeal, and by which they may expressly agree that their words

(*b*) *Gunn* v. *Roberts*, L. R. 9 C. P. 331; 43 L. J. C. P. 233.

(*c*) *Stephens* v. *Australian Insurance Co.*, L. R. 8 C. P. 18; 42 L. J. C. P. 12.

(*d*) *Goodwin* v. *Robarts*, L. R. 10 Ex. 353; affirmed in Ex. Cham. L. R. 10 Ex. 337; 44 L. J. Ex. 157. See also *Rumball* v. *Metropolitan Bank*, L. R. 2 Q. B. D. 194; 46 L. J. Q. B. 346.

shall, if found ambiguous, be explained or their intention be determined.

74. 1st. Mercantile usage may operate on a contract by affixing a meaning to some phrase or word in it. Thus, on a **sale of goods** the invoice expressed that they should be paid for in "from six to eight weeks." The sale having taken place on the 1st of May, the action was commenced on the 18th of June following, barely seven weeks after the date of sale. Had the action been prematurely brought? that is to say, brought before a complete cause of action had arisen? The jury being called on at Nisi Prius to determine the mercantile meaning of the phrase (*e*), "from six to eight weeks," found that the action had not been brought too soon. Such a case—not altogether free from difficulty—may be thus explained. The words used are grammatically meaningless; therefore the jury, as men familiar with trading transactions, were to say whether the time of payment for the goods was to be fairly between the two extremes specified, viz., between six and eight weeks from May 1st; if so, was the 18th of June the fair mean? (*f*) It was not the province of the Judge at Nisi

(*e*) It is one function of a jury to affix a meaning to obscure words and phrases in a document offered in evidence, but the construction of the entire writing is for the Judge only. All questions of *law* must also be decided by him, while the Jury will decide all those of *fact*.

(*f*) *Ashforth* or *Ashworth* v. *Redford*, L. R. 9 C. P. 20; 43 L. J. C. P. 57. Of course **usage**, even if proved, will not be allowed to override express stipulations entered into by parties to a contract, and where the terms are express evidence of usage is worthless and therefore inadmissible. See *Abbott* v. *Bates*, L. R. 1 C. P. D. 654; 45 L. J. C. P. 117; also *Hayton* v. *Irwin*, L. R. 5 C. P. D. 130 (App.).

Prius to interpret the phrase here in question, for how could he do so unaided by the testimony of witnesses conversant with the usages of merchants? Such proofs being adduced, it was for the jury, looking at the expression used, to decide the question whether the action had been prematurely brought.

Where goods are consigned in a general ship by a **bill of lading** (*g*) to a particular port, "the shipowner's liability for the goods to cease on delivery,"—such delivery is to be made according to the **usage** which prevails at the said port. Thus, where goods are to be delivered "at the port of Cardiff," the shipowner's contract is fulfilled if he delivers them at that part of the port where goods of that class are required to be delivered. So, if delivery is by the usage of the port to be made in a certain manner, a delivery in that manner satisfies the shipowner's undertaking to deliver at the port, unless there be something in the terms of the contract inconsistent with the usage (*h*). In such case the true meaning of the contract to carry is ultimately arrived at by **local usage**, which, so far as it goes, will even supersede general law (*i*).

75. Secondly, by mercantile usage a term may be added to a contract. Mercantile usages or customs seem divisible into three classes:—1. Customs which *all* nations agree to and take notice of, and which are held to be part of the Law of England. 2. Customs

(*g*) See p. 65 n. (*x*).

(*h*) *Petrocochino* v. *Bott*, L. R. 9 C. P. 355; 43 L. J. C. P. 214.

(*i*) *Lord Falmouth* v. *George*, 5 Bing. 293, Judgment.

prevailing through the length and breadth of this country, which also have the force of law *here*, and are in general judicially noticed without proof. 3. Customs purely local (*k*) which are binding law within a particular district, or at a particular place, of the persons and things which it concerns. **Usages of trade**, however, cannot in strictness be considered as forming part and parcel of our customary law. In many respects, however, they possess the incidents of customs, properly so called. Thus, a usage of trade must be **reasonable**, otherwise it will not be supported (*l*); and although it may control the mode of performing a contract, yet it cannot change its intrinsic character. This is the true effect of the usage of trade on contracts, and as to market usages generally, see the case cited below (*m*).

In the second place, **mercantile** or other **usage** may **add a term** to a contract. The relation of **master** and **servant**, for instance, will aid in exemplifying this statement. The ordinary rule is that a master is responsible for the act of his servant done within the ordinary scope of his duty. This rule, however, does not apply to sustain a demand made by a servant upon his master, or by a workman upon his employer, in respect of damage resulting from the carelessness of a **fellow servant** or **fellow workman**, where the servants respectively causing and suffering the hurt are engaged in a common work or

(*k*) Broom's Commentaries on Com. Law (end of Chap. I.), citing 1 Black. Comm. 273 and a note in 8 C. B. 967.

(*l*) *Bradburn* v. *Foley*, L. R. 3 C. P. D. 129; 47 L. J. C. P. 331.

(*m*) *Robinson* v. *Mollett*, L. R. 7 E. & I. App. 802; 44 L. J. C. P. 362.

employment, in the discharge of a common duty, and under one common control or supervision (*n*). The reason of this is that the contract creating the relation of master and servant tacitly includes an agreement by the servant that he will, in consideration of his wages, incur the risks ordinarily incident to the course of employment upon which he is about to enter. The liability of the master so far as regards **menial servants** is thus limited by the terms and nature of the contract between himself and the injured person. With respect to an **employer** of **workmen**, however, the liability of such a person has been enlarged by a recent Statute, to which we shall shortly refer.

The principle on which the above rule rests has been applied to many cases where the labour of one servant was dissimilar from that of the other, and yet where the risk of injury from the negligence of the one is a natural and necessary consequence of the employment which the other accepts (*o*). For instance, whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of a line of railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and is therefore within the operation of the rule (*o*).

Formerly the general law of **master** and **workman** would have furnished an excellent exemplification of the mode in which usage will add a term to a contract. **The**

(*n*) See *Allen* v. *New Gas Co.*, L. R. 1 Ex. D. 251 ; 45 L. J. Ex. 668.
(*o*) *Morgan* v. *Neath Ry. Co.*, L. R. 1 Q. B. 149; 35 L. J. Q. B. 23 (App.).

Employer's Liability Act, 1880 (*p*), has however, lessened the value of an illustration taken from the incidents of such relation, in fact rendered it useless without an accompanying mass of circumlocution and explanation. The object and effect of this statute are concisely stated by Mr. Justice Field in the recent and important case of *Griffiths* v. *Earl of Dudley* (*q*). The learned Judge says:—"Now, the **Employer's Liability Act** was passed with a view to prevent what was thought to be an injustice to **workmen** (*r*)—that the employers should escape liability in cases where injury occurred to workmen through the negligence of a person **having superintendence.** When the **employer** was **himself** guilty of negligence he was clearly liable before the Act: while it is equally clear that since the Act the negligence of a person not coming within the specified class of persons mentioned does not impose liability upon the employer to make compensation." The Act has direct reference to persons who are employed by the master to act in a **superintending** or authoritative manner, and if such persons are guilty of negligence the employer is liable to any other servant injured thereby. Also if the injury is caused by reason of the act or omission of any person in the service of

(*p*) 43 & 44 Vict. c. 42, Sep. 7, 1880, which is to "continue in force till Dec. 31, 1887, and to the end of the next then session of Parliament."

(*q*) L. R. 9 Q. B. D. 357; 51 L. J. Q. B. 543: the case decides that a workman may contract for himself and his representatives in case of his death during his employment, that no compensation shall be claimed against his employer. In other words a workman may contract himself out of the Act.

(*r*) The Act does not apply to **menial servants.**

the employer done or made in obedience to the **rules** or **bye-laws** of the employer, *or* in obedience to particular instructions given by any person delegated with (*sic*) the authority of the employer in that behalf (sect. 1, sub-sect. 4). It would seem to follow from the first portion of this sub-section that even the negligent act of *an ordinary workman*, that is, one not in a position of authority, may, if performed under the sanction of the master's *rules*, etc., render the master liable to compensate another man in his employ if injured by the negligent act in question. Of course if a workman knows of any defect existing in the condition of his master's premises or machinery, of which the master himself is ignorant, and yet fails to give notice of the same as the Act enacts, such workman will be guilty of **contributory negligence** and will have no claim to compensation (sect. 2, sub-sect. 3).

While, then, a workman, in consideration of his wages, may undertake to incur and submit himself to the risks ordinarily incident to the course of employment upon which he is about to enter, the liability of the master exists to compensate him where, generally speaking, he receives personal injury either by the negligence of his employer himself or of such employer's *superintendent*, or other person to whom authority *to command* is delegated. If—without reference to rules or bye-laws—any *ordinary* workman employed by A. should happen to injure one of his fellow-workmen in the course of their employment, of course A. would not be liable for such injury unless it really resulted from A.'s negligence

to remedy some defect, etc., of which he had received notice. Notice of the injury must also be given (*s*).

The Employer's Liability Act, 1880, does not make a master liable for a personal hurt done to his servant by a fellow-servant engaged in one common employment where such fellow-servant has *no superintending power*, or authority to command, given to him. And this principle of non-liability under such negative circumstances (*t*) has been applied to many cases where the immediate object on which the one servant is employed is dissimilar from that on which the other is employed. Thus, we venture to repeat, whenever the employment is such as necessarily to place the person accepting it in situations of more than ordinary danger, risk of injury from the carelessness of those managing that employment is one of the risks necessarily incident to such an employment, and is therefore within the operation of this particular rule.

In all cases it will of course be necessary to show that the party sought to be charged really stood in the relation of master towards the complainant and the person

(*s*) See as to such **Notice** *Moyle* v. *Jenkins*, L. R. 8 Q. B. D. 116; 51 L. J. Q. B. 112: for *insufficient notice*, *Keen* v. *Millwall Dock Co.*, L. R. 8 Q. B. D. 482; 51 L. J. Q. B. 277 (App.). As to what is a **defect** in ways, works, &c. under the Act, see *Mc Giffin* v. *Palmer's Ship Building, &c., Co.* (*Limd.*), L. R. 10 Q. B. D. 5; 52 L. J. Q. B. 25; and as to the general effect of the Act, the able treatise of Mr. Roberts and Mr. G. H. Wallace thereon, 2nd edit.

(*t*) See as to the *principle*, *Lovell* v. *Howell*, L. R. 1 C. P. D. 161; 45 L. J. C. P. 387; *Rourke* v. *White Moss Colliery*, L. R. 2 C. P. D. 205; 46 L. J. C. P. 283; *Charles* v. *Taylor*, L. R. 3 C. P. D. 492; also *Shaffers* v. *Gen. Steam Navigation Co.*, 52 L. J. Q. B. 260.

who did the injury. Perhaps some other person was master at the time (*u*).

But without reference to the law of Master and Servant, it is a general proposition of law that usage may import into a contract some specific term to which nothing at all similar or akin is there found. Nor does it signify whether the term be thus imported directly by the usage or whether it be imported on analysing the relation subsisting between parties as explained and elucidated by long-continued custom. Looked at in either light a contract may be materially added to by usage, and such a contract as spoken of far more frequently than not falls within the list or catalogue of mercantile contracts.

76. Thirdly, a **mercantile usage** may have inherent **authority** to which the contracting parties may appeal, and by which they may agree that their words shall, if found ambiguous, be explained, or their intention be ascertained. Mercantile usage may essentially differ from the **customary law** of England, and it is competent to persons to exclude the operation of the latter by the **express wording** of their contract and to agree to be bound by the former. In any such case the usage appealed to, if existent and valid, will regulate the contract (*x*).

Where **goods are bought** and at once **paid for by cheque**, such payment is, *primâ facie*, conditional only, that is to

(*u*) As in *Rourke* v. *White Moss Colliery Co.*, just cited.

(*x*) *Stewart* v. *West India, &c., Co.* L. R. 8 Q. B. 362; 42 L. J. Q. B. 191 (Ex. Cham.).

say, it becomes absolute when the cheque is honored, or when the holder by his negligent conduct or *laches* makes the cheque his own. Hence the question—Does a cheque operate as payment? may depend on this further question—Was it duly presented? and this question may have to be answered by reference to mercantile usage. A cheque drawn in London on a Jersey banker is accounted a foreign cheque, and by the **custom of London bankers** any such banker, when a foreign cheque is paid to him by a customer, if he has an agent at the place where the cheque is payable, sends the cheque to his agent there to be presented for payment. If the London banker has no agent at such place he sends the cheque direct by post to the bank whereon it is drawn, and that bank immediately remits the money or returns the cheque. Should this usage be conformed to on behalf of the recipient of the cheque, he will not be deemed to have made it his own by *laches*, and, in the event of failure of the foreign bank, will be entitled to recover the price of the goods as against the purchaser (*y*).

77. It has been thought well in this Chapter to enter at some length into the nature and effects of mercantile usages, as giving a peculiar complexion to that branch of Law here treated of, viz., the **Law Merchant.** In reference to these usages, a mere glance at some of the cases cited will show how great the difficulty may be of interpreting and giving its proper effect to a usage, custom, word or phrase familiar to trades, or in reconciling a usage proved to exist, with the express wording

(*y*) *Heywood* v. *Pickering*, L. R. 9 Q. B. 428; 43 L. J. Q. B. 145.

of a mercantile contract. In attempting to give effect to the **intention of parties** by incorporating a usage with their contract, the words which they have adopted must first be looked at, and the intention, if thereby clearly expressed, will guide the Court.

78. A contract, being grounded on consent, will be vitiated by **fraud** practised on the contract (Art. 48), and the word "fraud" has in mercantile law a very wide significance. Our law merchant regards with jealousy anything at all savouring of bad faith, and where a contract has been made, it will sometimes absolve from his engagement that party to it whose position has been prejudiced by any act of the other contracting party, done without his consent or knowledge.

For instance, in an action substantially founded upon or arising out of an **alleged sale of goods**, such a question as this may arise:—Had the purchaser a right to treat the supposed contract of sale as null, or had he the right to rescind it? To such a question the answer will be this. If the contract has been induced by misrepresentation, the thing sold under it and delivered may, whilst it retains unaltered its original form and condition, be returned, and the price paid for it may be reclaimed by the vendee. And even where the condition of the chattel *has* become changed, perhaps even deteriorated, while in the vendee's possession, but without his default, as by the act of God or by unavoidable accident, a right to rescind the contract of sale may be insisted on (*z*).

(*z*) *Head* v. *Tattersall*, L. R. 7 Ex. 7; 41 L. J. Ex. 4. If there be

The phrase "**act of God**" just used is applicable under a variety of quite dissimilar circumstances. Thus, it is so where by an extraordinary rainfall, which could not reasonably have been anticipated, water dammed up in an artificial pool escapes and damages a neighbour, or where goods in charge of a carrier are injured by the irresistible act of nature (*a*).

79. From what has just been said it must not be inferred that a contract of sale can be avoided and treated as null merely because the **vendor** has **tacitly** suffered and **acquiesced** in the self-deception of the buyer. Such conduct, although reprehensible, would not be tantamount to active and express fraud (*b*).

80. Our law, however, endeavours to enforce good faith—not merely to repress gross fraud—in dealings between traders. Thus, in the case of a **marine policy** of insurance, as between the assured and the underwriters,

a condition at the time of an attempted sale of a horse that the purchaser shall try the animal for a specified time, and at the end of such time it shall be returned if not found suitable, and if in the meantime the horse dies without fault of either party, there has been *no absolute sale*, and the vendor cannot recover the price agreed to be paid by the purchaser, *Elphick* v. *Barnes*, L. R. 5 C. P. D. 321 ; 49 L. J. C. P. 698.

(*a*) See *River Wear Commissioners* v. *Adamson*, L. R. 2 App. Cas. 743 ; 47 L. J. Q. B. 193 (H. L.).

(*b*) *Smith* v. *Hughes*, L. R. 6 Q. B. 597 ; 40 L. J. Q. B. 221. This case exemplifies the maxim *Caveat emptor*, or that a purchaser must be on his guard. The doctrine given in the test must be added to by observing that the suppression of a material fact, if the party concealing it is legally bound to disclose it, and the other party has a right to be made acquainted with it, is fraudulent, and will invalidate a contract, 1 Story on Contracts, § 578, and this doctrine may be shortly stated by saying that *suppressio veri* or suppression of truth is equivalent to *suggestio falsi* or a suggestion of falsehood.

the utmost good faith is required; so that a concealment or withholding by the assured of material facts which ought to be known by and therefore disclosed to the underwriter, will vitiate the policy (*c*).

From the sensitiveness of our law in regard to the observance of good faith by contracting parties, difficulty has sometimes arisen. Thus, it is well established that a **principal**, although civilly liable for the misfeasance of his **agent** in the course of his employment as such, is not liable for the wrongful act of his agent in any matter beyond the scope of the agency. If, however, the principal has expressly authorised such act to be done, or has subsequently adopted it for his own use and benefit (*d*), he will be liable. Is, then, a principal who has had the benefit of a contract made by his agent responsible for a deliberate **fraud committed by such agent** in the making of the contract, by which fraud alone the contract was effected? Is a principal liable for a fraud committed by an agent employed in the ordinary course of his business? (See note on next page.) Can the consequences of fraud in an agent be fixed upon a man **morally innocent** as regards it? On the other hand, is a customer of the principal, dealing and negotiating with his accredited agent, necessitated to look to the agent personally and exclusively for damages caused by his fraud in the regular course of business, and so, perhaps, to be practically without redress?

(*c*) *Ionides* v. *Pender*, L. R. 6 Q. B. 531, 537; 43 L. J. Q. B. 227; *Stribley* v. *Imperial Marine Insurance Co.*, L. R. 1 Q. B. D. 507; 45 L. J. Q. B. 396.

(*d*) *McGowan* v. *Dyer*, L. R. 8 Q. B. 141.

The distinction between what is called **moral** and what is called **legal fraud** has caused much perplexity. Can there be in contemplation of law conduct which will entail the consequences of fraud without any ingredient of moral turpitude? In the language of pleading, a master is said to do an act by his servant: a principal is said to do an act by his agent. If a master or a principal make a false representation by his servant or agent who has no express authority to do what is wrongful, can either be said to commit a fraud, so as to be made civilly responsible for its consequences? (*e*) The answer to this is in the affirmative, and a case such as put is similar to that ordinarily occurring, in which a principal is held to be affected by the statement or **admission** of his **agent** made in the regular course of his employment. It may, however, be a question whether the fraudulent misstatement of an agent was within the scope of his duty and in his character of agent.

Again, we may consider whether the liability of the master or principal in any case such as above put can be regarded as analogous to that of a member of a **partnership**, who may, under certain circumstances, be answerable for the delinquency of his co-partner, causing loss of money to a third person. In the following case, the

(*e*) *Udell* v. *Atherton*, 7 H. & N. 172; 30 L. J. Ex. 337. In this case the Court were equally divided in their opinion and the judgment was on the facts of that particular case. *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; 36 L. J. Ex. 147 (Ex. Cham.):—Judgment of Willes J. But see *Swire* v. *Francis*, L. R. 3 App. Cas. 106; 47 L. J. P. C. 18, which is conclusive that a principal is responsible for th fraud of his agent, and an agent for the act of his sub-agent.

plaintiffs, who were executors and trustees under a will, employed A. and B., a firm of solicitors, to procure investments for the assets of their testator. Plaintiffs' dealings were with A., who, having received money from them to be advanced on mortgage, paid it nevertheless into a bank to the partnership account, representing to plaintiffs that it had been applied as they directed. A. having for many years paid interest regularly in respect of the pretended mortgage, dissolved partnership with B., and afterwards became bankrupt. The plaintiffs then, for the first time, became aware of A.'s default, and were held entitled to full relief as against B., for B., though morally innocent, was yet legally liable for the fraud of his co-partner. Although, in the case presented, the relief was sought in Equity, the ground of the decision, and the reasoning on which it was based, would be recognised in a Court of law (*f*). The case decides that the act of one partner, done in regard to the regular business of the firm, is binding on his co-partner, even if such act consist in a fraudulent misrepresentation made by the partner when transacting the partnership business (*g*).

The answer to any question indicated in the three

(*f*) This phraseology is used with reference to a time anterior to the Judicature Acts. We have no longer "Courts of Equity" and "Courts of Law" with different jurisdictions. Every Division of the High Court of Justice has jurisdiction over all matters in litigation and it is only for the sake of convenience that the Divisions exist. See the case of *Pinney* v. *Hunt*, L. R. 6 Ch. D. 98, in which it was said by the late Sir G. Jessel that a will *can* be proved as well in the Chancery Division as in the Probate Division.

(*g*) *Blair* v. *Bromley*, 2 Phillips, 354; 16 L. J. Ch. 495.

preceding paragraphs could only be given after careful consideration of the facts submitted. It may well be that a principal would be liable in respect of the misrepresentation of an agent contracting or assuming to contract on his behalf, yet not liable for fraud of the agent, entirely isolated from contract, causing damage. To this aspect of the inquiry we shall advert in the ensuing Chapter.

81. Illegality may afford ground of defence to an action on a mercantile as on a non-mercantile contract. For instance, it is generally true that a plaintiff suing for work and labour done in contravention of the Common or Statute Law cannot recover for it. Nor can one person successfully rely upon another's promise to reimburse him for money paid or damage incurred under a corrupt agreement; for our law declines to lend aid to one who has thus aimed at violating its provisions (*h*). So, an agreement executed with a view to the doing of an illegal act, especially if executed under compulsion by a person not a free agent, will not be enforceable in the High Court of Justice (*i*). Again, if a chattel has been pledged and the original deposit was made in respect of an illegal transaction, to which both pledgor and pledgee were privy, if the pledgor suing for the chattel cannot make out his right to it without showing the true character of the deposit, he will be unable by an action, to get back the chattel (*j*). The law will not

(*h*) *Fivaz* v. *Nicholls*, 2 C. B. 501; 15 L. J. C. P. 125.

(*i*) *Williams* v. *Bayley*, L. R. 1 E. & I. App. 200; 35 L. J. Ch. 717 (H. L.), a case of attempting to stifle a prosecution.

(*j*) *Taylor* v. *Chester*, L. R. 4 Q. B. 309; 38 L. J. Q. B. 225. In

at all lend its aid to enforce compensation for breach of an illegal compact.

82. Clearly, then, where a contract is to do a thing which cannot be done without violation of the law, such contract may be avoided (*k*). But if a contract can be legally performed, it can be avoided only on the ground that there was an intention to perform it in an illegal manner, that there was in fact a wicked intention to break the law (*l*).

In connection however with this part of our subject the question sometimes arises:—Where is the line to be drawn between an act done in **violation**, and an act done in **evasion**, of a statute? An agreement to contravene an Act of Parliament, or pointing and leading to a contravention of it, would be illegal, and yet an arrangement meant to evade an Act—perhaps to escape from revenue burdens, might not necessarily be so. The expression that something done was "a fraud upon a statute" is familiar; it applies, for instance, to an attempt made to deceive and defraud creditors in breach, not perhaps of the words, but at any rate of the spirit and policy of the **bankruptcy laws**. The expression cited should, however, be used with due discrimination. The

the **contract** of **pawn**, the party pawning or pledging is called the *pawnor* or *pledgor*, the other the *pawnee* or *pledgee*. The *absolute* property in the thing pawned remains in the pawnor, subject to the pawnee's special property therein.

(*k*) So that, for instance, if a brougham be let to an immoral woman by a person who is well aware of her object in hiring it, namely for purposes of ostentatious display, he cannot recover the price of hire. *Pearce* v. *Brookes*, L. R. 1 Ex. 213; 35 L. J. Ex. 213.

(*l*) *Waugh* v. *Morris*, L. R. 8 Q. B. 202; 42 L. J. Q. B. 57.

Legislature may designedly or by oversight omit to provide against every imaginable state of things, and under special circumstances it may be found that the mischief intended to be prevented by its enactment has not been provided against. Therefore, assuming that the terms of the particular Act have been complied with, a lawyer may well hesitate to characterise as illegal what has been done, or to say that the agreement out of which it originated was either voidable or void (*m*). It may also be very necessary to restrict within reasonable limits the operation of a statute affixing the character of illegality to an act or omission. Thus, where the object of an Act of Parliament is to prohibit a voyage, the illegality attaching to the voyage will attach also to the policy of insurance covering the voyage. But if passengers are taken by the master of a vessel without her owner's knowledge, no certificate having been obtained enabling the vessel to carry passengers, this illegal conduct of the master will not, it seems, vitiate a policy on the ship effected by her innocent owner (*n*).

83. From what has been set forth in this Chapter we infer that mercantile contracts are more liable to litigation than those made between non-traders, although both classes of contracts are governed generally by the same rules. It is seen also that, especially in regard to a

(*m*) *Ramsden* v. *Lupton*, L. R. 9 Q. B. 17 ; 43 L. J. Q. B. 17 (Ex. Cham.). A bill of sale case.

(*n*) *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. 581 ; 43 L. J. Q. B. 220 ; on Appeal L. R. 1 Q. B. D. 96. The case afterwards went to the H. L. but apparently only on the point of *warranty of seaworthiness*, L. R. 2 App. 284 ; 46 L. J. Q. B. 409 ; L. R. 1 Q. B. D. (App.) 96.

mercantile contract, the nicest **good faith** must be observed by each party thereto. The **language of traders,** moreover, is peculiar, and likely to cause embarrassment to persons not conversant with it. What traders have said and written, accordingly, may need to be explained by experts, or at all events by those familiar with their dealings. Our Courts, without undue indulgence, will decline to fetter merchants in their transactions with each other, and will abstain from interpreting any Act of Parliament, where it is possible and proper to do so, in such a way as to nullify or render illegal their arrangements.

CHAPTER IV.

WRITTEN INSTRUMENTS.

"Words may escape from our memory, or matter of conversation may be misunderstood or be forgotten, but that which is reduced to writing remains as evidence of the intentions of the contracting parties."—HUGH MOORE.

84. THE object of the present Chapter is to put before the reader some practical remarks as to **contracts** or agreements **evidenced by writing.** These are divisible into three classes, viz., simple contracts which are in writing, though not required to be so; simple contracts which **must be in writing** whether by virtue of the statute or by force of the customary law, and, 3rdly, deeds.

85. As regards the class of contracts first mentioned something has been from time to time incidentally said. The fact that an agreement between parties has been committed to writing affects the **mode of proving** it rather than its significance or efficacy. Our law indeed requires that a fact shall be proved at the trial of a cause by the best or highest kind of evidence which the nature of the case admits of. Evidence such as implies that better proof is attainable, being **secondary** only, cannot

be received. This rule is necessarily subject to exceptions; as where the best evidence has been destroyed or lost, or is in the possession of the adverse party, who, after due notice, refuses to produce it.

Let us suppose an **action** to be brought upon a **contract** assumed to be *verbal*. At the trial we gather, however, from parol evidence that the contract has been put into writing by the parties to it. That writing, therefore, being the best evidence of the contract must, if possible, be produced. And it will be for the Judge to say whether the existence of a written contract between the litigating parties embodying the oral contract sued upon be sufficiently proved to entitle the defendant's counsel to call for its production. He will also determine whether sufficient proof has been adduced by the plaintiff that the writing is not in his possession or within his control to let in **secondary evidence** of its contents. The rule adverted to is founded on a sort of presumption that there is something in the evidence withheld which makes against the party who ought or might be expected to produce to it. Should such evidence, however, be shown to be unattainable, this presumption ceases, and the inferior kind of proof is admissible. If, therefore, the **original** of a writing is required in a cause, and if it be shown to be in the possession of the adverse party, who, **after notice**, will not produce it, secondary evidence of its contents may be given. In the same way secondary evidence may be given of the contents of a **document** proved to have been **lost** or **destroyed**. Again, if a writing be in the possession of a third person not by law compellable

to produce it, and he refuses to do so, the result is the same, for the original is then unattainable by the party offering the secondary evidence.

86. From what precedes, it logically follows that **verbal statements** made contemporaneously with the signing of a written agreement by either party to it cannot be received in evidence to **vary** the terms of the agreement. On the other hand, **parol evidence** to show that there had in fact been no agreement at all would be admissible. In an action brought for breach of a written contract, the defence may be that it was never meant to have any effect, or that it was to take effect not absolutely and immediately, as contended for, but conditionally on the happening of an event which has not happened. Either of such matters of defence may be proved by **extrinsic parol evidence.** Evidence would not, however, be admissible to show that the alleged contract was to have **a partial effect.** In the former case the agreement would really be denied altogether; in the latter case the evidence proffered would go to vary the written contract (*o*).

87. It is for the **Judge to construe a written contract.** Of course there may be great difficulty in doing so, and parties who use involved or doubtful language have themselves to blame should their words be misconstrued and their actual intentions misconceived. "If," for example,

(*o*) *Fenwick* v. *Brinkworth*, 2 F. & F. 86. *Pym* v. *Campbell*, 6 E. & B. 370, 374; 25 L. J. Q. B. 277. This case shews that evidence may be admitted to prove that a writing purporting to be an agreement was really never intended to have any effect. If a **deed** is delivered to a third person on condition that it shall not operate until some other condition be fulfilled, such a document is technically termed an **Escrow.**

"a **principal** gives an order to an **agent** in such uncertain terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorised because he meant the order to be read in the other sense of which it is equally capable." The principal ought to have given his order in clear and unambiguous terms (*p*), and language, if ambiguous, is to be construed in the sense least favourable to the person using it.

88. Contracts required to be in writing but not under seal are constituted by force either of the Law Merchant or of statutory law. We should look in vain for contracts, unauthenticated by sealing and delivery, which were yet required to be in writing by virtue of our ordinary Common Law. The customary law of England in remote ages recognised the efficacy of a **charter** or a **deed**, but regarded all other contracts falling within the scope of this Chapter as of equal force and equal rank. "All contracts are by the laws of England distinguished into agreements by **specialty**, that is, by deed, and agreements by parol; nor is there any such third class as contracts merely in writing." (*q*) However, as trade was gradually established such contracts became necessary, and from time to time the Legislature made writing indispensable to the validity of certain agreements.

(*p*) *Ireland* v. *Livingston*, L. R. 5 E. & I. App. 395, 416; 41 L. J. Q. B. 201.

(*q*) *Rann* v. *Hughes*, 7 T. R. 350 (*a*); Judgment of Skynner, C. B.

89. Accordingly it may be stated that, up to the passing of the Statute of Frauds (29 Car. II. c. 3) every contract was referable either to the class of special or to that of simple contracts, also that the latter of these two classes was not subdivisible, except where, as in the case of bills of exchange, mercantile convenience had necessitated a recourse to writing by contracting parties. Since the Statute of Frauds other statutes have augmented the list of contracts which must be in writing, those enactments having been passed principally for the benefit and advancement of trade and commerce (*r*). Abstaining from a detailed examination of statutory provisions such as those adverted to, a few instances will be given with a view to illustrating remarks previously made respecting simple contracts, their component ingredients and attributes, in the two preceding Chapters. Such instances will also illustrate the practical operation of the statutes just alluded to.

90. A **guarantie** or **guaranty**—a security common amongst merchants—being "a special promise to answer for the debt, default, or miscarriage of another person," must, under sect. 4 of the Statute of Frauds, be evidenced by some memorandum in writing, signed by the party to be charged on the guarantie, or by his agent thereunto lawfully authorised. As already stated, a **guarantie is unilateral**, and to satisfy the Statute of Frauds and fix the guarantor with liability upon it, there

(*r*) As for instance, the important statute known as Lord Tenterden's Act (9 Geo. IV. c. 14), and the series of enactments having reference to Corporate Bodies, Joint Stock, and Public Companies generally.

should in strictness be a written contract complete in itself, leaving nothing to be supplied by oral evidence, except the identity of the documents (*s*). If this *complete* contract does not exist, it must be gathered from the terms of different papers referring to each other in such a manner as to shew that they are parts of the same contract.

91. The nature of a guarantie, its practical use, the relation between the parties to it, the remedies available on it, and proofs adducible in aid of them, may be thus indicated. A. asks B. to advance him a sum of money; B. declines to do so unless C. will answer for its repayment, whereupon C. does become guarantor for A., and B. makes the advance asked for. As between A. and B. this transaction is a loan, in which are comprised the request, consideration, and promise, constituting a complete simple contract (Art. 22). A loan of course, can arise only at the *request* of its recipient; *the consideration* is the sum advanced; and the *promise implied by law* is to repay it on demand. Should A. make default in doing so, an action for the debt might be brought against him at suit of B. The liability of A. to B. under the above circumstances is direct.

92. Towards B. the lender, C. the guarantor, stands in a position different from that occupied by A., for if the latter make default in repayment of the loan, C. becomes liable to B. in an action upon the guarantie. To support such action in the absence of any admission, the

(*s*) *Peirce* v. *Corf*, L. R. 9 Q. B. 210; 43 L. J. Q. B. 52.

guarantie must be produced at the trial, and, if signed by C., his handwriting must be proved, and the consideration for his promise must be shown. Then a material question *may* arise upon the guarantie itself—Is it **continuing** (*t*), or is it so worded as to be in force for a limited time or amount only, and then to become null?

The consideration for the undertaking to guarantie may be, as above supposed, an immediate advance of money, the future giving of credit, the forbearing to sue in respect of an accrued debt, or it may be the employment of A. by B. in his service, and so forth. The consideration must not, however, be wholly past and executed when the promise is made, though it may be in part executed and in part executory. It is not requisite that a consideration be either actually or constructively indicated in the guaranty (*u*).

The position of C. the guarantor in reference to B. the lender, is thus peculiar: there is an absence of **mutuality** in the contract (Art. 63). B. says to C.:—I may possibly supply goods to A., but shall not do so unless you will guarantie payment for them. This arrangement, when sufficiently evidenced by writing, is at once binding upon C., yet B. may decline to supply the goods, and no action would lie against him for such refusal (*x*). The contract does not impose obligations

(*t*) Art. 95. Shortly explained a **continuing guaranty** means one not limited as to a single transaction, but may be renewed as to the amount for, or the time during which the guarantor is originally liable.

(*u*) See Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 3.

(*x*) See *ante*, pp. 53, 54.

which are reciprocally enforceable. This feature in the instrument known as a guarantie is worthy of special notice. Thus, where negotiations are carried on with a view to the employment of A. by B. as his cashier, they may at length result in, or be apparently terminated by, the giving of a guaranty by C. that A. shall, if so employed, faithfully make out his accounts and pay over balances to B. Nevertheless, B. may, without incurring liability, capriciously abstain from completing this arrangement (*y*).

93. As between A. the person employed, and C. the guarantor, the state of things is this:—C., if compelled to pay on A.'s default, has a remedy against A. by action for the money so paid. For the law implies a promise by the principal to make good to the surety the money which he has been compelled to pay in virtue of his undertaking. And where judgment has been recovered and execution had at suit of the party *to* whom the guaranty has been given against one of several co-sureties of the party guarantied, a promise is likewise implied that each of the other sureties will contribute rateably to make good the damage suffered. And our law defines precisely the nature of this promise, namely, that each of the other sureties will repay his just share of the entire judgment debt recovered, to the party who has under compulsion paid it (*z*).

By The Mercantile Law Amendment Act, 19 & 20

(*y*) *Kennaway* v. *Treleavan*, 5 M. & W. 201; 9 L. J. Ex. 20, judgment of Parke, B.

(*z*) *Batard* v. *Hawes*, 2 E. & B. 289; 22 L. J. Q. B. 443.

Vict. c. 97, s. 5, a **surety** who discharges the liability of his principal will be entitled to an assignment of all securities held by the creditor in respect of the debt discharged or duty performed by the surety.

94. Such being in brief the position relatively to each other of the parties to a guarantie, these questions may be considered :—Does a given instrument really evidence "a special promise" to answer for the "debt, default, or miscarriage" of a third person? Is it or is it not within the operation of the 4th section of the Statute of Frauds? The mode of responding to these questions is indicated by others :—Is the **liability** assumed by the so-called guarantor under the instrument, **collateral** or **direct**? Does the party guilty of the default or miscarriage, remain liable in respect thereof? If the liability incurred is *collateral*, the contract is within the Statute. Much difficulty may be felt in distinguishing between a direct and a collateral liability, in determining whether the true character of a person is that of principal or of surety, and such difficulty may have to be determined at Nisi Prius and elsewhere (*a*).

95. A further important question arising upon a guaranty may be this :—Is it **continuing**, or is it in force for a limited time only? (*b*) The language of a guarantie, if **ambiguous** on this point, may however be explained by **evidence of extrinsic circumstances** and by proof of the relative position of the parties to one another at the

(*a*) *Mountstephen* v. *Lakeman*, L. R. 7 E. & I. App. 17; 43 L. J. Q. B. 188 (H. L.).

(*b*) See p. 93 n. (*t*).

time when the instrument was written, for the object is to find out their *intention*, and if possible give effect to it without doing violence to the words which have been used (*c*). By reason of the difficulty sometimes felt in construing a guarantie, it was enacted by 19 & 20 Vict. c. 97, s. 4, that a guarantie to or for a firm shall—except in special cases—cease to be in force upon a change in the constitution of the firm.

96. In the contract now spoken of, the nicest **good faith** is to be looked for, so that not merely fraud but **non-disclosure** of a material fact may avoid it. (*d*) If the creditor, without the consent of the surety, by his own act destroy the debt or derogate from the power which the law confers upon the surety to recover it, as against the principal debtor, in case he should have paid it to the creditor, the **surety is discharged.** Where a surety has agreed to become bound to a master on certain terms for the due performance of duty by his servant, and those **terms** are afterwards so **altered** as between the master and servant as to increase the risk of the surety, he would be discharged. Even if the change be in some *purely collateral* and *immaterial point*, that would afford no defence to the surety if sued for breach of his con-

(*c*) *Nottingham Hide &c. Co.* v. *Bottrill*, L. R. 8 C. P. 694 ; 42 L. J. C. P. 256. See also *Ellis* v. *Emanuel*, L. R. 1 Ex. D. 157 ; 46 L. J. Ex. 25 (App.), a case of **limited guaranty**, and *Lloyds* v. *Harper*, 50 L. J. Ch. 140, a case of **continuing guaranty.**

(*d*) *Railton* v. *Matthews*, 10 Cl. & Fin. (H.L.) 934 ; but see *London & Provincial Marine Insurance Co.* v. *Davies* (and *vice versâ*), L. R. 8 Ch. D. 469 ; 47 L. J. Ch. 511, where all the best authorities are set forth.

tract and undertaking (*e*). Should, however, a *continuing* guarantie (p. 93) be given for the honesty of a servant, and if the master detecting him in dishonesty, instead of dismissing him, chooses to retain in his employ a dishonest servant, the surety kept in ignorance of this will cease to be liable on his guarantie (*f*).

To an **action on a guarantie** the defence set up was, that after it had been made and delivered to the plaintiff, and whilst in his hands, the instrument had by some person unknown, been altered by such person affixing a seal to it, so as to make it purport to have been sealed by the defendant. The alteration here alleged to have been effected in the instrument was obviously material, inasmuch as the properties of a deed are widely different from those of a simple contract, and the Court held that the **alteration** made **avoided the guarantie** (*g*).

97. It may perhaps have been supposed that the state of facts rendering necessary the instrument treated of had been sufficiently defined by the Legislature and by legal tribunals, and that it had been in all respects well cared for by our written and customary law. We have, however, already seen that it is sometimes possible to evade the provisions of a statute (Art. 82), and contrary

(*e*) *Cragoe* or *Gragoe* v. *Jones*, L. R. 8 Ex. 78, 82 ; 42 L. J. Ex. 68 ; and see *Holme* v. *Brunskill*, L. R. 3 Q. B. D. 495 ; 47 L. J. Q. B. 610 ; a case of **alteration of agreement** between principals ; *Polak* v. *Everett*, L. R. 1 Q. B. D. 669 ; 46 L. J. Q. B. 218 (App.), a case where **the principal debtor was released** ; also see *Croydon Commercial Gas, &c.*, v. *Dickenson*, L. R. 2 C. P. 46 ; 46 L. J. C. P. 157 (App.), where **time was given to the principal debtor.**

(*f*) *Phillips* v. *Foxhall*, L. R. 7 Q. B. 166 ; 41 L. J. Q. B. 293.

(*g*) *Davidson* v. *Cooper*, 13 M. & W. 343 ; 13 L. J. Ex. 276.

to the spirit of the Statute of Frauds (29 Car. II. c. 3), a practice was initiated and gradually prevailed of this kind. The cause of action upon a guarantie, when merely verbal and therefore insufficient to support an action, was set forth as upon a fraudulent misrepresentation concerning the **solvency and trustworthiness** of another. Thus, the gist and substance of complaint were presented as a wrongful act rather than as a breach of contract or undertaking. This being so, the Legislature deemed it advisable to interpose, and now by the 6th section of Lord Tenterden's Act (9 Geo. 4, c. 14), a "representation or assurance," such as supposed, is required to "be made in writing, signed by the party to be charged therewith."

Under this later statute, points not free from difficulty may arise. A letter is written and signed by J., the manager of a banking company, in answer to an inquiry put to him by a third party, S., concerning the credit and solvency of R. J.'s letter contains misstatements and misrepresentations knowingly made in reference to such matter, which afterwards cause pecuniary loss to S. Upon these facts, apparently so simple, important legal questions may arise:—Can the bank manager be regarded in any sense as the bank, so that his false statement is that of the bank? This can hardly be, though the bank might, by adopting his false statement, as that of their agent—for their own advantage—**estop** (*h*) themselves from afterwards repudiating

(*h*) "An **estoppel** is an *admission*, or something which the law treats as equivalent to an admission, of an extremely high and con-

the agency. If the manager cannot be looked on as identical with the bank, can he be regarded as their **agent** in the case put, so as in any way to make them liable for his false representation? The answer is that the manager cannot—even if regarded as agent for the bank in answering the question as to R.'s trustworthiness—thus cast on them responsibility. By Lord Tenterden's Act, s. 6, the signature of the agent will not charge the principal. The personal liability of the manager in the case put, looking at the finding of the jury, could not be doubted. He had made a false representation as to the solvency and trustworthiness of another person, with intent that such person should obtain credit by it. He had also made it in writing, and had signed the document (*i*). Damage had thus been sustained by the plaintiff S., and the cause of action was complete (Chap. VII.).

98. The 4th section of the Statute of Frauds applies to some other contracts besides guaranties, and amongst them to **contracts for the sale of land** or any interest therein. Section 17 applies to such contracts as concern the **sale of goods** where the price agreed upon for them

clusive nature; so much so, that the party whom it affects is not permitted to aver against or offer evidence to controvert it. He may, however, shew that the party relying upon it is himself *estopped* from setting it up, since that is not to deny its conclusive effect as to himself, but to incapacitate the other from taking advantage of it." In short, to use the concise language of Lord Coke, "An estoppel is where a man is concluded by his own acts or acceptance to say [even] the truth"! See the notes to *The Duchess of Kingston's Case*, 2 Sm. L. C.

(*i*) *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; 43 L. J. Q. B. 56 (App.), with which read *Swire* v. *Francis*, L. R. 3 App. Cas. 107; 47 L. J. P. C. 18, also *Cargill* v. *Bowers*, L. R. 4 Ch. D. 78; 47 L. J. Ch. 649.

is £10 or upwards. To the former class of contracts no further reference can here be made, a contract falling within it usually necessitating, by reason of its importance, forethought and professional advice.

99. The *contract for a sale of goods* already more than once adverted to (Arts. 39, 49, 58) has been regulated as well by our unwritten as by our written law. Thus, in very early times it was established, that a sale or barter of goods was complete when the price had been agreed upon, provided there had been a **delivery** of the subject-matter of the sale, or **the price** had been paid in part, or **earnest** had been given and received. In general, moreover, by our customary law, where specific goods are the subject of a contract of immediate sale, the property in them passes to the purchaser upon completion of the bargain. Accordingly, the vendor has then a right to recover the price, though this will not be so where there are circumstances whence an intention may be inferred that the property should not at once vest in the purchaser (*k*). Here the intention when ascertained is a key for interpreting the contract. The question whether the property in a chattel has or has not passed under a contract of sale is necessarily important. It may need solution for the one purpose of ascertaining on which of the two parties, buyer or seller, the loss should fall, where the subject-matter contracted about happens to be destroyed, or perishes in some way, before it has been dealt with or before dominion has been exercised over it by the buyer. The property in the goods or

(*k*) *Heilbutt* v. *Hickson*, L. R. 8 C. P. 131; 42 L. J. C. P. 59.

chattel perishes to the *dominus*; but who is he? In whom is the property vested?—for the risk is his (*l*).

100. The **17th** section of the Statute of Frauds applies to contracts for the sale of goods where the **price** agreed upon is **£10 or upwards**, and, having regard to the requirements of the Common Law, enacts as follows. If there be no acceptance and actual receipt of the goods sold, or part thereof, if nothing be given as **earnest** to bind the bargain, or in part of payment, there must be some note or **memorandum in writing** of such bargain made and signed by the **party to be charged thereby** or his agent. As to the true significance of the words set forth, very many questions have arisen, of which, however, regard being had to the aim of this volume, two only will be considered. What are we to understand by 'acceptance and actual receipt' of goods? The answer to this question may, under ordinary circumstances, be given on reference to the facts in evidence, as shown by the following cases. The defendant, who was a butcher, **verbally** agreed with the plaintiff to purchase of him certain cattle which were then in the plaintiff's field. After the bargain was concluded, the defendant, finding that he had not his cheque book with him, told the plaintiff to call at his house in the evening for payment. It was then arranged that the cattle should remain in the plaintiff's field for a few days, and should be fed with the plaintiff's hay by the defendant. This having been done, the defendant afterwards repudiated the bargain, and the question

(*l*) *Martineau* v. *Kitching*, L. R. 7 Q. B. 436; 41 L. J. Q. B. 227.

arose—whether there was evidence of an acceptance and a receipt of the cattle within the statute? It was held that no sufficient evidence to this effect appeared. Clearly there had been no actual receipt of the cattle by the defendant, and the act of feeding the cattle with the plaintiff's assent could not be deemed an exercise of such an act of ownership as to amount to an acceptance by, and constructive delivery to, the defendant (*m*). On the other hand, a receipt and an acceptance were held to have been properly inferred from the following facts:—A. (the defendant) agreed to purchase of B. (the plaintiff) a carriage, then standing in B.'s shop. After some alterations had been made in the carriage by the defendant's order, he requested that it might remain, as in fact it did, on the plaintiff's premises, but the defendant himself made use of it on one occasion. It was argued, in this case, that there had been no delivery to the defendant, nor any acceptance and actual receipt by him of the carriage. The Court, however, held, that there had been both a sufficient delivery and acceptance of the carriage; that the defendant had dealt with it as his own; and that the plaintiff, in retaining the actual ostensible possession of the carriage, was, under the circumstances, to be regarded as filling the character of a mere agent or warehouseman for the defendant (*n*).

Cases akin to the above are often before the courts,

(*m*) *Holmes* v. *Hoskins*, 9 Ex. 753.

(*n*) *Beaumont* v. *Brengeri*, 5 C. B. 301; see also as to **sufficiency of acceptance** and **receipt of goods**, *Marshall* v. *Green*, L. R. 1 C. P. D. 35; 45 L. J. C. P. 153.

but where the facts of a case are not extremely similar to those just given by way of illustration, all inferences from such cases with a view of applying the law to the new one, must cautiously be drawn.

101. A sale of goods, then, of the value of £10 or upwards, bearing in mind the requirements of the Statute of Frauds, is usually proved where contested, either by writing or by acceptance and actual receipt of the goods, or by part payment for them. And the difficulty in establishing any one of these heads of proof will be more or less according to the opinion which the jury may entertain as to its sufficiency. On the other hand a difficulty may arise as to the construction of the statute.

As **matter of law** it has been decided that the written contract or memorandum relied on as satisfying the statute, will not suffice, if signed by one of the principal parties as agent for the other: the signature as agent must be by some third person (*o*). Very often it is by a **broker** (*p*) or an **auctioneer.** An auctioneer, for example, acting under due authority, may sign in compliance with the Statute of Frauds as agent for purchaser of the goods sold. At a **public sale of goods** it is usual for him to write down in his sale book containing a copy of the conditions of sale, the name of the highest bidder as purchaser of any particular lot, and also the amount of the purchase money, opposite to the lot sold. When the

(*o*) *Sharman* v. *Brandt*, L. R. 6 Q. B. 720; 40 L. J. Q. B. 312 (Ex. Cham.). See also as to **signature of memorandum by agent,** *Smith* v. *Webster*, L. R. 3 Ch. D. 49; 45 L. J. Ch. 528 (App.).

(*p*) See p. 60 note (*l*).

auctioneer thus signs for the purchaser, the Statute of Frauds is satisfied, because there has thus been made a "note or memorandum in writing" of the "bargain," signed by the agent of the vendee. But when the public sale is over, the implied agency of the auctioneer, arising from his character and function, ceases (*q*). In such a case extrinsic evidence will be admitted as to facts necessary for deciding whether the statute has been complied with, and so deciding whether the contract sued upon is, using the statutory word, "good."

102. It may, perhaps, have occurred to the reader that transactions daily take place involving the sale and purchase of goods above £10 in price with reference to which the statutory requirements above noticed are disregarded. This is so, and of course both parties to any such transaction incur the risk, in event of default on the other side, of being wholly without remedy. Thus, where a person goes into a shop and orders goods without either receiving them at the time or paying for them—the price of such goods exceeding £10—no action can be brought against him for subsequently refusing to accept the goods so ordered although they may be *bonâ fide* deemed to have been sold. Nevertheless, such a transaction as this is constantly taking place without apprehension by either party to it of unpleasant consequences. And even amongst persons engaged in trade a like disregard of the statutory provisions is

(*q*) *Mews* v. *Carr*, 1 H. & N. 484; 26 L. J. Ex. 39, with which read *Shardlow* v. *Cotterill*, L. R. 20 Ch. D. 90; 51 L. J. Ch. 353 (App.), as to evidence, connection of documents by reference, &c. &c.

habitually shown, no memorandum being made on the sale of goods which could successfully be relied on as sufficient.

103. Sometimes, however, as our Law Reports testify, an objection is taken to the enforcement of an alleged contract, or rather to the demand of damages for its infraction, upon the ground that no sufficient proof of such contract is forthcoming. For instance, where a variance occurs between the bought and sold notes issued to his client by a broker, and objection is taken thereto, much apparent hardship may result (*r*).

Hence we infer the expediency—at any rate as regards transactions of magnitude—of waiving a strict and literal compliance with the statute law which requires certain contracts to be evidenced by writing. True it is that doubts respecting the policy which dictated the 17th section of the Statute of Frauds have sometimes been expressed, but so long as this section remains in force, its provisions must be complied with. If not, the risk indicated in them must be incurred, that of being defeated in an action brought to recover a just claim arising out of a sale of goods. And such a contract falling within the scope of the said section and committed to writing **cannot be varied by verbal proofs** on any pretext that its terms may seem to be susceptible

(*r*) See *Sievewright* or *Sevewright* v. *Archibald*, 17 Q. B. 103; 20 L. J. Q. B. 529; *Thompson* v. *Gardiner*, L. R. 1 C. P. D. 777. Where a defendant was held to be bound by a broker's signature to a "sold note," he having by his conduct admitted the broker's authority to contract for him.

of much latitude of construction and interpretation. In general it will be found that the language used amongst mercantile men indicates their meaning sufficiently well when read by the light of mercantile usage and custom, and the evidence of those conversant with commercial language. And where a purely mercantile word or phrase occurs in a written contract, and its meaning is fixed and ascertained by apt proofs, the contracting parties will not be permitted to vary that meaning by subsequent verbal stipulations.

Connected with this part of our subject a somewhat curious point was decided in the case cited below (*s*). The signature of the promisor or party to be charged under sect. 17 of the Statute of Frauds had been affixed to the memorandum of agreement, which document at the time of signature contained interlineations. These were afterwards struck out, and although the contract itself was thus in some respects altered, the signature of the purchaser of the goods, who had verbally assented to the final terms of the contract, was held sufficient. Parol evidence of assent was here admitted, the effect of which was not to vary the written contract, but to show what was the condition of the document when it became a contract between the parties.

104. The 7th section of Lord Tenterden's Act (9 Geo. 4, c. 14) extends the provisions of the 17th section of the Statute of Frauds. The latter apply specifically to "contracts for the sale of goods, wares, and merchandizes

(*s*) *Stewart* v. *Eddowes*; *Hudson* v. *Stewart*, L. R. 9 C. P. 311; 43 L. J. C. P. 204.

for the price of £10 sterling or upwards." Lord Tenterden's Act extends their operation to contracts for the sale of **goods of that value intended for delivery at some future time**, but which may not at the date of the contract be made or be ready for delivery. The effect of this clause of Lord Tenterden's Act, taken in conjunction with the 17th section of the Statute of Frauds, is this. Contracts for the sale of goods, as well executory as executed, must, except in certain cases—as when earnest is given or part of the purchase money is paid down—be in writing.

Where an irregular and informal contract is entered into for the **purchase of goods to be made according to specification**, between parties, a remedy by action afterwards contemplated for breach of such contract may perhaps be found unavailable by reason of a provision contained in sect. 4 of the Statute of Frauds, thus far unnoticed (*t*). By that section of the Act, some written memorandum is necessary to validate a contract which is "not to be performed *within* the space of one year from the making thereof." The meaning of these statutory words, however, is confined to contracts which are not to be *carried into execution* within the year, and does not extend to such as *may be* by force of circumstances postponed beyond that period. Were any other effect to be given to the foregoing words, "there is no

(*t*) As to **part performance** of a contract under this section, see the singular case of *Alderson* v. *Maddison*, where a man was alleged to have verbally agreed to leave property to a servant by his will, L. R. 7 Q. B. D. 174; 50 L. J. 466 (App.); affirmed in H. L. June 4, 1883.

contract which might not fall within the statute" (*u*). Nor is an agreement within the scope of the statutory words which *might have been performed* within the year, although both parties expected that its performance would last longer than the year (*v*).

105. In preceding Articles it has been shown that a plaintiff may fail at Nisi Prius because he has not come thither provided with the requisite statutory proof of his contract. He may also fail by reason of not having obtained from the defendant some statutory acknowledgment of liability.

Let us suppose an action to be brought for the price of goods, and that the defence meant to be put forward is that the period of six years prescribed by the statute 21 Jac. 1, c. 16 (*x*), as a bar to such an action, has run since the accrual of the debt. Let us further suppose that in answer to this ground of defence an acknowledgment of the debt is set up. Such an answer to the defence might by our customary law have been substantiated by proof of a verbal admission or recognition of liability. But by the statute 9 Geo. 4, c. 14, already several times referred to, such an acknowledgment is required to be in writing signed by the debtor. The

(*u*) *Wells* v. *Horton*, 4 Bing. 43, judgment of Best, C. J., reported also in 5 L. J. C. P. (O.S.) 41.

(*v*) *Knowlman* v. *Blewitt* or *Bluett*, L. R. 9 Ex. 307 ; 43 L. J. Ex. 151.

(*x*) "An Act for Limitation of Actions, and for avoiding Suits in Law," 3 & 4 Will. IV. c. 27, is generally called The Statute of Limitations, but see 36 & 37 Vict. c. 66 ; 37 & 38 Vict. c. 57, the latter being the Real Property Limitation Act, 1874.

operation, however, of this particular provision was extended by section 13 of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97) to the case of such an acknowledgment signed by an agent duly authorised to make it. Moreover, it is important to remember that if the promise be to pay conditionally, proof must be given of the performance or fulfilment of the condition in order that the promise may suffice to bar the statute of James I. From a general acknowledgment of a debt, a general promise to pay it may properly be implied; but where the promisor guards his acknowledgment and accompanies it with an express declaration to prevent any such implication, why should he not be understood to mean that he will only pay conditionally? If B. promises to pay his debt to A. when able to do so, some proof of B.'s ability to pay must, in order to fix him with liability, be laid before the jury. In such a case the construction of the document relied upon by plaintiff may be doubtful (*y*).

106. The class of written instruments thirdly mentioned in Art. 84, comprises deeds. A definition accordingly may here be proper. "A **deed** is a writing containing a contract, and signed, sealed, and delivered by the party" (*z*). "Know that there are three things necessarily appertaining to a deed, *viz.*, writing, sealing,

(*y*) *Chasemore* v. *Turner*, L. R. 10 Q. B. 500; reversed in Ex. Cham. 45 L. J. Q. B. 66. But see *Meyerhof* v. *Froelich*, L. R. 4 C. P. D. 63; 48 L. J. C. P. 48, where the distinction between an *unconditional acknowledgment* of a debt, and an *acknowledgment coupled with a promise conditional to pay* was observed.

(*z*) Coke upon Littleton, 35 b.

and delivery" (*a*). And, strange as it may seem, "To constitute a sealing, neither wax nor wafer nor even an impression is necessary." Neither is any particular form of words or act needed to constitute delivery (*b*) The mere affixing the seal does not, indeed, render the instrument a deed, but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed, presently binding on him, that is sufficient.

A deed being characterised by the solemnities attending its completion, has peculiar efficacy, and some peculiar qualities. It is "the most solemn and authentic act that a man can possibly perform with relation to the disposal of his property" (*c*). To this instrument applies the maxim that "things of a higher nature determine things of a lower nature" (*d*). An agreement under seal or specialty will merge, that is, swallow up and annul the remedy in respect of the simple contract so authenticated. Generally, too, a **deed requires no consideration** (Arts. 22, 58) to support it, but the evidence of consent in such a contract is forthcoming in the receipt and acceptance of the instrument by either of the contracting parties, but a deed must be delivered **actually** or **constructively**, and if so

(*a*) Perkins' "Profitable Book," Ch. II. s. 117.

(*b*) The usual practice is for the party executing it to place the forefinger of his right hand on what purports to be the seal and to say—"I *deliver* this as my act and deed."

(*c*) See 2 Black. Comm. Ch. 20; *Xenos* v. *Wickham*, L. R. 2 E. & I. ap. 312; 36 L. J. C. P. 313 (H.L.).

Noy's Maxims, 9th ed. p. 24.

delivered it must be actually or constructively received. It may, however, be delivered as an **Escrow** (p. 89, *n*).

Further, a deed **estops** (*e*) or concludes the parties to it from gainsaying what they have thereby asserted, and the force of this **estoppel** (*e*) may be such as to preclude a party to it from insisting on the illegality of a transaction between himself and the other party to the instrument (*f*). An estoppel, moreover, binds not only the parties but their **privies** (*g*). "If a man make a **lease** by indenture of an estate in which he hath nothing, but afterwards purchases the same in fee, and then bargains and sells it to A. and his heirs, A. shall be bound by this estoppel" (*h*), and so also would be persons claiming under him.

In another important particular does a deed differ from a simple contract. In case of the death of the contractor or promisor, the remedy, if any, on a **simple contract**, which has been entered into by him, must be against his *personal representatives*; for a man cannot by simple contract render his *heir* liable to an action upon it. Such action, if maintainable at all, will be so against his executors or administrators, but it is otherwise in regard to a contract under seal, for that is binding on the *heir*, to the extent of the real assets which come to him by descent.

107. A deed being authenticated by certain solemni-

(*e*) See p. 98 n. (*h*).

(*f*) *Webb* v. *Commissioners, &c., of Herne Bay*, L. R. 5 Q. B. 642; 39 L. J. Q. B. 221.

(*g*) See p. 22 n. (*e*).

(*h*) *Trevivan* v. *Lawrence*, 1 Salkeld's Rep. 276.

ties, and containing within it engagements very obligatory and stringent, we may well suppose that apt proof is needed of it at Nisi Prius. In an ordinary **action upon a deed**, not merely must the instrument be produced, but evidence must be given of its due execution if that be put in issue. It is to be observed, however, that (1) a **deed thirty years old**, and coming from proper custody, proves itself; (2) the attesting witnesses to a deed which does not need to be attested, can be dispensed with at the trial, provided the execution of the deed, if not admitted, can be proved in some other way; (3) the execution of a deed, even where attestation is necessary, may be admitted either expressly or on the pleadings.

108. For rendering a transaction operative a **deed** may by virtue of the statute or of the customary law, be **indispensable.** The Statute of Frauds makes it so in certain cases, and so do provisions of the Joint Stock Companies' Acts. According to our unwritten law, the gift of a chattel can only be perfected by *delivery* or by *deed*, for a mere *verbal gift* is insufficient to effect a transfer of the property in the thing to the donee (*i*). And, subject to various exceptions, a **corporation** can only contract efficiently under seal (*k*). Let us suppose, for instance, that an annuity or pension has to be granted by such a body to an officer retiring from its service. The annuity, if granted by resolution merely, would be revocable by the corporation; accordingly, if

(*i*) *Shower* v. *Pilck*, or *Sharr* v. *Pilch*, 4 Ex. 478; 19 L. J. Ex. 113.

(*k*) *Austin* v. *Guardians of St. Matthew, Bethnal Green*, L. R. 9 C. P. 91; 43 L. J. C. P. 100.

meant for the life of the annuitant, or for a term certain, the grant should be by deed (*l*).

109. Of deeds, the simplest is a **bond** whereby one person binds himself to another to pay a sum of money or to do some specified thing. The parties to the instrument are termed respectively obligor—who is the *debtor*—and obligee who is the *creditor*. A bond may be entered into for various purposes, as for instance, by a principal and sureties, for the due performance by the former of the duties of an office. A bond may also be made available as a collateral security, while railway and other companies employ bonds and debentures as ready means of raising capital for carrying on their works.

110. A **bond is unilateral** (*m*). It may be single, that is, may simply acknowledge a liability to pay money. In practice, however, there is attached to the bond a condition framed according to the intentions of the parties, and setting forth terms, compliance with which will render the obligatory part of the instrument void and of no effect. Such, indeed, was the strictness of the Common Law, that an absolute forfeiture of the bond ensued on non-performance of the condition annexed to it. And although Courts of Law, assimilating their doctrine to that of Equity, ultimately relaxed in rigour towards a defaulting obligor, it was not until the time of Queen Anne that adequate relief was extended by the Legislature to the obligor of a money

(*l*) *Marchant* v. *Lee Conservancy Board*, L. R. 9 Ex. 60; 43 L. J. Ex. 44 (Ex. Cham.).

(*m*) See p. 52 n. (*y*), also p. 91 *et seq.*

bond, who, through inability or remissness, had failed to pay the sum secured by it on the day appointed. The 4 & 5 Anne, c. 16, ss. 12, 13, enacts that payment of the principal sum secured by bond, together with interest upon it, and costs, though made after the day specified, shall satisfy the bond. Also, by the statute 8 & 9 Will. 3, c. 11, s. 8, damages and costs of suit only are recoverable in an action upon a bond executed by way of security for the performance of covenants (Art. 114) contained in an indenture. The penalty of the bond in this case is not wholly and irretrievably forfeited.

111. The obligation of a bond may be **discharged** by cancellation, if the intent of the cancelling be to nullify the instrument. It may also be discharged by a **release under seal**, that is, by a deed giving up the right of action or claim which has arisen or may arise upon the bond. A distinction is, however, to be observed between the giving of **one bond in satisfaction of another not yet due**, and the giving a **formal release** of an instrument under seal, and then substituting for it another similar security. The former transaction could not at Common Law be successfully insisted on by way of answer to an action upon the original instrument, whereas the latter transaction might be so. For one deed may be discharged by another deed, and a fresh liability may at the same moment be created (*n*). This strict rule of our Common Law might not be favoured in Equity, but a person who has bound himself by deed ought to be

(*n*) *Mayor of Berwick* v. *Oswald*, 5 H. L. Cas. 856; reported as *Oswald* v. *Mayor, &c.*, 25 L. J. Q. B. 383.

very wary in perfecting any arrangement for the dissolution of his contract. He should insist on having the bond delivered up to him when the release is executed, and should by no means satisfy himself with a verbal or even a written agreement in lieu of its relinquishment by the obligee.

112. A release may occur by operation of law, as where the obligee appoints the obligor his executor, in which case the obligation is extinguished (*o*). So the obligation of a bond may be excused by the act of God (Art. 78) rendering performance of the condition annexed to it impossible (*p*), or by an Act of Parliament prohibiting or preventing it (*q*). Again, performance of the condition of a bond may be excused by the default of the obligee or creditor himself. Thus, if he is absent in those cases where his presence is necessary for the performance of the condition; if he obstructs or prevents its per-

(*o*) *Needham's Case*, 8 Coke's Rep. 135, a. Dr. Broom in his text gives also as an instance of release by operation of law, the case of a female bond creditor marrying the debtor. But the mere act of marriage no longer confers upon a husband any right to his wife's property. So far as regards that she is to all intents and purposes a single woman, that is, in the absence of any agreement between herself and her husband. If therefore, between a man and woman the relation of debtor and creditor exists, the mere fact of their intermarrying with each other, will not, since the 1st of Jan., 1883, destroy such relationship. For, by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married woman may *lend* to her husband, and if he become a bankrupt she may claim a dividend out of his assets, when other creditors for valuable money consideration have been satisfied. Sect. 9.

(*p*) *Laughter's Case*, 5 Coke's Rep. 22.

(*q*) *Brown* v. *Corporation of London*, 13 C. B. (N. S.), 828; 31 L. J. C. P. 280, Ex. Cham.

formance; and if by neglecting to do the first act towards performance which it is incumbent on him to do, the obligor or debtor will be discharged from his duty (*r*). An **obligor**, however, will not by his own wilful act rendering performance of the condition of the bond impracticable, be absolved or exonerated from the penalty (*s*).

113. Besides the rules, more or less technical, which have been enumerated, we must not forget that those broad principles applicable to contracts generally apply to a bond. An instrument so stringent even as this, may on the ground of fraud or illegality be successfully impugned, and extrinsic facts may be averred against it. If the condition of the bond be for payment of money, evidence will be admissible in an action upon the bond to show that the consideration for such payment was vicious. Such evidence is clearly not inconsistent with the **condition**, but strikes at the very **contract** itself. Nothing is due under such a contract, for the alleged debt never having existed, the law gives no right of action for it. These remarks hold good where there is fraud inducing to the execution of a bond, or where it was executed for a purpose opposed to the Common or the statute law. In any such case it would be strange indeed if the law upheld the contract or refused to allow the defence suggested to appear on the record (*t*).

So, a **bond opposed to public policy** (*u*) will be held void,

(*r*) Coke upon Littleton, sect. 335, note by Hargrave and Butler.
(*s*) *Vynior's Case*, 8 Coke's Rep. 81.
(*t*) *Collins* v. *Blantern*, 2 Wilson's Rep. 341 : 1 Smith, L. C.
(*u*) See p. 50 note (*o*).

and certain conditions annexed to bonds have been judicially declared to be against law. For instance, a condition (1) To do something *malum prohibitum* or *malum in se*, expressions which, though now discarded, are sufficiently intelligible; or (2) To omit the doing of that which is a legal duty; or (3) Tending to encourage crime or the non-performance of just obligations. Such conditions as these the law, without any regard to circumstances, will always lend its aid to defeat, its object being to remove temptations and inducements either to the commission of a crime or to the omission of a duty. But in construing a condition the rule is that, if there be a possibility of performing it without a breach of the law, the condition will be held good (*v*).

114. In any kind of **indenture, or agreement under seal,** covenants may be inserted irrespective of the matters to which such agreement relates. No particular *form* of words is necessary to make a covenant, for "Wherever the Court can collect from the particular instrument an engagement on the one side to do or not to do something, that amounts to a **covenant**" (*x*). Nor is a covenant necessarily directed to the doing of something at or during some *future time;* it may amount to an undertaking that something has been already done. **A covenant is distinguishable from a condition,** which is a kind of proviso creating, enlarging, or defeating an interest upon the happening of a specified event. A

(*v*) *Mitchel* v. *Reynolds*, 1 P. Wms. 181.

(*x*) *Great Northern Ry. Co.* v. *Harrison*, 12 C. B. 576, 609; 22 L. J. C. P. 49, 51, Judgment of Parke, B. (afterwards Lord Wensleydale).

condition may indicate a cause of forfeiture or something which must be done before an interest given can fully vest (*y*).

115. As in the case of any other instrument, so in that of an indenture, the Court may be called on to construe and interpret its language. If obscure, the intention of the parties to an express covenant will first be sought for, and if that be not clear, a **covenant by implication** will perhaps be raised from the words used, whereupon rights will perhaps be conferred, and liabilities will be imposed on the parties, which do not literally originate out of the deed. Or perhaps the Court may be called on to **infer** or **imply** a covenant from the use of certain words having a known legal operation. The main object however to be kept in view is to amend defects of expression and to prevent the evasion of his covenant by the covenantor in consequence of the equivocal wording of the deed. Accordingly, the Courts have adopted this general rule of construction, namely, that ambiguous words, those equally balanced in signification, are to be taken most strongly **against the covenantor.** This rule was on one occasion applied by Lord Kenyon, to fix a tenant with liability for the expense of building a party wall. For those covenants in his lease usually called **tenants' covenants** seemed to point to this liability as intended by both parties to the agreement. As a general rule, then,

(*y*) See, by way of illustration, *London Guarantee Co.* v. *Fearnley*, L. R. 5 App. Cas. 911 (H. L. Ir.), a case in which a **condition precedent** was involved. A *proviso* wholly repugnant to a *covenant* creating a personal liability is necessarily void, but if it only *limit* such liability it is good, *Williams* v. *Hathaway*, L. R. 6 Ch. D. 544.

the words in a deed are to be construed most strongly against the covenantor and words in a charter against the grantor thereof.

116. If inconsistent with the tenor and import of the instrument, a covenant must be read according to its natural **grammatical meaning**, for by so doing, effect will more readily be given to the **intent** of the parties as set forth and indicated by their words. Thus, in a **separation deed** between husband and wife the husband covenanted with trustees to pay them an annuity for his wife's support during the joint lives of himself and his wife, and so long as they should live *separate and apart*. The marriage was subsequently dissolved by reason of the *wife's* misconduct, and the question arose whether this circumstance caused the obligation of the husband as to the payment of the annuity to cease. It was argued that it did so, because the deed must have contemplated a continuance of the relation which gave rise to it. This argument, however, did not avail, because no express words thus limiting the husband's liability could be found in the deed, nor was there a clear implication arising from it to the effect contended for (*z*).

An important question may arise as to whether covenants in a deed are **dependent** or **independent**. In other words, whether, say one of such covenants, is dependent on another of them, or whether they are to be viewed as independent. The question suggested is not merely technical in its nature. A. covenants with B. that he will go to York. B. covenants with A. that he will pay

(*z*) *Charlesworth* v. *Holt*, L. R. 9 Ex. 38 ; 43 L. J. Ex. 25.

him a sum of money. It may be, upon construction of the deed, that the going to York is a **condition precedent** to the payment of the money, or it may be that these two acts are altogether independent of each other. According then, as one or the other interpretation is adopted, so—in the event of litigation ensuing—will the cause of complaint shape itself, and so will the proofs be adduced, arranged, and marshalled for the trial (*a*).

117. It appears then, that the framing of covenants may be fraught with difficulty even when undertaken by the skilled conveyancer or the experienced solicitor. There is, however, one primary rule on this subject, attention to which may avert mischief. Beware of narrowing and limiting the operation of an express general covenant, and of excluding altogether an implied one. Because the insertion of words having this effect, although intended to benefit a client, may eventually operate entirely to his prejudice. The practitioner should also beware of binding a covenantor by **express** words or by necessary implication to do that, performance of which may afterwards become impossible (*b*).

In the following case a lessee of coals under an estate covenanted to raise a certain quantity of coal in each

(*a*) *Pordage* v. *Cole*, 1 Saund. 319 ; see also *e.g. Cutler* v. *Bower*, 11 Q. B. 973 ; 17 L. J. Q. B. 217.

(*b*) It may be shortly and in general terms observed that, the foregoing remarks must be taken as having exclusive reference to covenants inserted in **commercial contracts**. By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41, sect. 7), a variety of **covenants for title** are to be henceforth implied, that is, if not actually mentioned, to be regarded as though appearing on the face of a document purporting to be a conveyance of property.

year during the term, to pay royalty for the same at so much per ton, and also to pay an equal amount of money as fixed rent whether the coals should or should not be raised. The mine having become exhausted during the term, the lessee thereupon contended that the covenant for payment of rent was conditional on the existence of coal to be worked and paid for. It was held, however, that the covenant in question did not carry with it by implication any such condition as suggested. No such condition had in fact been expressed, and accordingly, it was further held that the lessee was liable for rent according to the scale or standard stipulated by the parties during the continuance of the term (*c*). No Court would willingly act in disregard of the maxim, that 'the law does not compel a man to do what is impossible.' Before doing so they must be well assured that the covenant under notice really has the meaning assigned to it by the covenantee.

A covenantor, moreover, will under certain circumstances be favourably regarded, and will be absolved from his positive engagement where justice requires that he should be so. If, for instance, a man covenants to do

(*c*) *Bute* (*Marquess of*) v. *Thompson*, 13 M. & W. 487; 14 L. J. Ex. 95, with which compare *Clifford* (*Lord*) v. *Watts*, L. R. 5 C. P. 577. In the latter case, a man covenanted to raise 1000 tons of clay from certain land every year. There was in fact no clay under the land demised. This was an "**Impossible Contract**," and the rule of law that where there is a positive contract to do a lawful thing it must be fulfilled or damages paid for the default, was held not to apply. This case, as hinted in the text, illustrates the maxim *Lex non cogit ad impossibilia*. The law does not require the performance of what is absolutely impossible.

that which at the time of covenanting might lawfully be done, and an Act of Parliament is subsequently passed which renders the doing of the particular thing unlawful, the covenant is repealed or nullified by the Act. Cases within the operation of this rule sometimes occur in consequence of war breaking out between two countries having mercantile dealings with each other. Thus, a vessel is chartered to go to a distant port, ship a cargo of goods, and return to this country. Whilst on her voyage war breaks out with the country in which the foreign port is situate. The vessel in consequence cannot ship her cargo, and in this case the charterer is discharged (*d*). Again, if a man covenants *not to do* that which at the time of covenanting might lawfully be done, and a statute afterwards enacted compels him to do it, here also the statute repeals the covenant. But if a man covenants not to do that which at the time of covenanting was unlawful, and an Act comes and makes the doing of it lawful, by the passing of such an Act the covenant is not repealed.

118. It is now seen that a contract under seal, whether it be a bond or an indenture, will have to be strictly proved, and that every word and phrase contained therein—should it become the subject of litigation—will be construed by reasonable but strict rules. A person may therefore, in a transaction of moment be well advised to resort to such a method of assurance for the due effectuation of an agreement into which he enters.

(*d*) *Reid* v. *Hoskins*, 6 E. & B. 953 ; 26 L. J. Q. B. 5 ; *Avery* v. *Bowden*, Id. 962 ; Id. 3 (Ex. Chamb.).

CHAPTER V.

LEGAL PRINCIPLES APPLIED TO CONTRACTS.

"The law of England . . . exclusive of positive law enacted by statute, depends upon principles; and these principles run through all the cases, according as the particular circumstances of each have been found to fall within the one or other of them."—LORD MANSFIELD.

119. IN this Chapter an attempt will be made to apply legal principles to given facts involving contract, and to show how questions arising upon such facts should be answered. The words of Lord Mansfield, quoted above, will in the following pages be exemplified, and another remark of the same eminent Judge will be fully verified —"the law does not consist in particular cases, but in general principles."

That some familiarity with legal principles, and even with law as applicable to this or that state of facts, is desirable, may perhaps have already become apparent to the reader. In the daily routine of life, and, especially, in the course of trading transactions, points continually arise upon which immediate decision must be made; indeed, any-one of us may thus be called on to exercise his judgment and discrimination. If a general or popular knowledge of law be, as I humbly conceive it is, desirable for the community, much more is it fitting that particular sec-

tions of the public should acquire, as they may do, such branches of our law and such legal principles as specially concern themselves. And this remark seems applicable also to circumstances in which no necessity may arise for coming to an immediate decision as to what should be done. For although a person may avail himself of professional aid, he ought nevertheless to be able to form some tolerably definite idea of his actual position, and should be able readily to appreciate, when explained to him, the difficulties &c., surrounding it.

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120. In preceding pages the **contract of suretyship** has been noticed. Such contract is sometimes constituted by deed, sometimes by writing not under seal (Art. 90), and in regard to it an additional remark, apposite for carrying out the idea giving rise to this Chapter, may be offered.

Where a man executes a bond as surety for the principal obligor, he will be freed from liability on the bond by any conduct on the part of the obligee which is not consistent with good faith or fair and proper dealing, even if it scarcely amounts to what would popularly be termed fraud. Should, therefore, the arrangement which induced the undertaking of the surety be secretly altered in any material particular by the immediate parties to it, he will be discharged. If, on the other hand, they give him due notice of such alteration and he expressly or tacitly assents thereto, he will not be discharged. A bond was given by the obligor as surety, that a servant would, from time to time, and at all times

during the service, satisfactorily account for and pay over to his master all moneys received by such servant for the master's use. The servant made default in paying over moneys thus received, yet the master, knowing—but not informing the surety—thereof, retained the servant in his service. It was held that in respect of any default subsequent to the retention the surety was discharged (*a*).

The rule thus stated and applied is subject to some qualification. Being meant for the benefit of the surety or contractor, it applies only to cases where, if not applied, he would be prejudiced. Thus, take an instance of a man who enters into a bond as surety for the performance by another of two things which are separate and distinct. A subsequent alteration of the principal's contract as to one of such things without the knowledge and consent of the surety would not release the surety from his contract as to the other of such things (*b*). In such circumstances the surety is released as to that undertaking in regard to which he would be prejudiced by the alteration made; in respect of the other undertaking he remains liable.

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121. Where **a cheque bearing a forged signature** is inadvertently paid by the cashier at a bank, this question may arise:—On whom is the loss to fall? The query must be answered on a consideration of the nature of a

(*a*) *Sanderson* v. *Ashton*, L. R. 8 Ex. 73; 42 L. J. Ex. 64.
(*b*) *Harrison* v. *Seymour*, L. R. 1 C. P. 518; 35 L. J. C. P. 264.

cheque and the relation of a banker to his customer (*c*). Looking at a cheque when first drawn and held by the payee, the parties to it are drawer, payee, and banker. The nature of the contract between the first and second, and first and third, of these parties is as follows:—The **drawer** undertakes to the payee that the draft shall be paid on any date, at the bank if presented there during banking hours, but subject to the operation of the Statute of Limitations, if not presented within six years from the time of its receipt (Art. 105). The undertaking of the banker towards his customer in relation to the cheque, is to pay it, if presented within banking hours, provided there be sufficient funds of the customer standing to his credit, and applicable for the purpose of payment. Money deposited on **current account** with a banker is money lent to be repaid by the honouring of cheques drawn by the customer upon the banker (*d*). So that, as between banker and customer, a cheque paid by the banker *primâ facie* shows a return of so much of the money previously deposited by the customer with him as the cheque represents.

As the **implied undertaking** of the banker is to pay to the order of his customer, it is the banker's duty to become acquainted with his customer's handwriting, and

(*c*) The relation existing between banker and customer is that of debtor and creditor, and that only. *Ex Parte Warin ; In re Agra and Masterman's Bank*, 36 L. J. Ch. 151. See also cases cited on next page. With this Article of the text read Part III. of **The Bills of Exchange Act 1882.** (45 & 46 Vict. c. 61).

(*d*) *Hill* v. *Foley* or *Foley* v. *Hill*, 2 H. L. Cas. 28 ; *Pott* v. *Clegg*, 16 M. & W. 321 ; 16 L. J. Ex. 210.

therefore the banker who pays a **forged cheque** is in general liable to pay the amount again. At any rate he cannot debit his customer's account with the sum which has been thus paid. The banker, as the depositary of the customer's money, is bound to pay from time to time such sums as the customer may order. If unfortunately he pays money belonging to the customer upon an order which is not genuine, he—not the customer—must suffer. If, however, through the customer's own fault the banker pays more than he ought, as where the amount specified in the cheque has been altered through the customer's gross negligence, the banker cannot be called on to pay again.

The rule, even thus qualified, which exposes to loss the banker who cashes a forged cheque would be harsh but for the rule which he undertakes to be governed by, namely, that a banker is bound to make himself acquainted with his customer's handwriting. So that, where suspicion attaches to a cheque presented at his counter for payment, the banker may take a reasonable time for making inquiry before cashing it (*e*). A banker, moreover, has been protected against forgery by certain statutory provisions (*f*).

Although the forgery of a cheque is of comparatively

(*e*) See *Hall* v. *Fuller*, 5 B. & C. 750 ; 4 L. J. (O.S.) K. B. 297 ; Judgment of Bayley, J. ; *Young* v. *Grote*, 4. Bing. 253 ; 5 L. J. (O. S.) C. P. 165 ; *Robarts* v. *Tucker*, 16 Q. B. 577 ; 20 L. J. Q. B. 270 (Ex. Cham.). This last-cited case *intimates*—does not decide—that bankers may take a reasonable time to inquire into the genuineness of indorsements by strangers where it appears necessary to do so.

(*f*) 24 & 25 Vict. c. 98, ss. 23—25, 28.

rare occurrence, the subjoined additional instance, showing who must bear the loss ensuing from it, is given.

A **cheque is essentially a negotiable and transferable instrument** (*g*). For instance, a cheque may be paid by a customer resident and banking in London to the tradesman with whom he deals. By that tradesman it is perhaps passed as cash to a country tradesman, who pays it in to his account at a country bank, by whom it is transmitted to their town agent. Then, by that establishment it is passed through the clearing-house to the bank upon which it was drawn; and thus the cheque, having operated in payment of a debt, comes back again to the party who drew it. The contract by him with the payee, and the undertaking of the banker towards himself, have accordingly been punctually performed. A **cheque**, we know, if **drawn to bearer**, passes by delivery; if **drawn to order by indorsement.** Let us then suppose this state of facts: On payment of a sum of money by A. to B. & Co., bankers, a **letter of credit is** handed over by the bank in favour of C. This letter of credit, bearing a forged indorsement, is afterwards presented to and paid by a country agent of the bank. Who is to suffer the loss? Upon these facts we may reply, "This is the ordinary case of bankers paying money upon a forged cheque. The bank has paid upon

(*g*) An instrument is **negotiable**, only where its transfer from A. to B. passes all the right to and property in that which is secured by it to B., at the same time giving B. the right to sue upon the instrument in his own name.

the forged signature of C., and that is no payment at all; therefore things are in the same situation as if the money were yet in the till of the bankers (*h*)."

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122. A person about to insure his life may be cautioned as to one particular. In such a transaction the certainty of its due performance at the prescribed time is all-important; accordingly, the contract under notice should, as regards the interests of the party proposing to insure his life and his family, be in its inception wholly unimpeachable. Now although a contract, as already shown (Arts. 48, 113), is liable to be vitiated by fraud, yet to establish proof of that, of *mala fides* generally, together with the *scienter* (*i*), is often difficult. Such being the case, it may be expedient, and has been found so, for an insurance company to introduce into a life policy, some sort of warranty or undertaking, a non-compliance with which shall invalidate the policy. Where this practice is adopted, the person wishing to insure must be on his guard, otherwise the position of those who may afterwards seek to enforce the policy may be one of extreme difficulty.

Let us suppose that A. enters into negociations with an **insurance company** with a view to effecting an insurance on his life, the practice of the Office selected being as just stated. A document is submitted to him

(*h*) ***British Linen Co.*** v. *Caledonian Insurance Co.*, 4. Macq. Scotch App. Cas. 107.

(*i*) The term generally used by lawyers to express *guilty* knowledge.

containing the usual questions as to his age, habits and so forth. Accompanying this is a declaration to be subscribed by A., that the answers to such questions are correct and true throughout, and that if any fraudulent concealment or designedly untrue statement be contained therein, the premiums paid for the insurance shall be forfeited and the policy shall be null and void. Such declaration is to be the basis of the contract between the **insurers** and insured. Suppose, further, that incorrect answers are given to sundry of the questions thus proposed to the insured, and that the insurance is effected. The insured dies, and a question thereupon arises between his representatives and the insurance company whether the sum secured by the policy can be recovered. In such a case as this the policy might probably be admitted by the defendants. If so the jury would have to decide as to the presence or absence of a **fraudulent intent** at the time when the answers were given by the deceased to the preliminary questions. The jury, we will assume, find that the answers were **not designedly untrue**; but still, a question of law might arise from that finding. Thus it might be a question whether a statement, not designedly false but simply incorrect, made by the insuring party prior to the execution of the policy would have the effect of vitiating the contract. For resolving this question, the Court would, in the first place, regard the whole tenor of the policy and the before-mentioned declaration upon which it was based, and endeavour to extract and gather therefrom the intention and meaning of the

parties. Here, certain rules of construction might fairly be applied; the language of a policy of insurance is prepared by the company which grants it, therefore the language used in it must be construed in that sense which a prudent person about to insure would assign to it. Should an ambiguous phrase occur in such a document—a phrase so worded perhaps that it might be understood in one sense whilst it was really framed and intended to be taken in another—the applicable rule of construction requires that such phrase shall be taken in a sense adverse to the party using it (Art. 115, *ad fin.*). The result of such reasoning might well be that a policy so worded as supposed would be held good and binding as against the company, although some merely incorrect answers had been given to the questions proposed by the company prior to its execution (*k*).

A policy of life insurance contained a proviso that, "if the declaration which serves as the basis of the insurance is not in every respect true, the insurance shall be void." The answers to the questions put by the company to the party proposing to insure were declared to be truly set forth. One material particular, however, thus deposed to was untrue, though not so to the knowledge of deponent, but this error was held to avoid the policy (*l*).

There is no necessary discrepancy between the deci-

(*k*) *Fowkes* v. *Manchester & London Life Assurance &c. Association*, 3 B. & S. 917; 32 L. J. Q. B. 153.

(*l*) *Macdonald* v. *Law Union Fire & Life Insurance Co.*, L. R. 9 Q. B. 328; 43 L. J. Q. B. 131.

sions cited. In any such case the language of the policy must be looked at to show what was in the mind of those who made it. The object of the proviso was to protect the company against **incorrect representations** irrespective of the question, to them immaterial, whether the mis-statements were made wilfully and fraudulently or not. If, moreover, A., relying on B.'s statement or representation, chooses to **guarantee** as a fact that which B. has affirmed to him to be such, A. does this at his own risk and peril, and must abide the consequences if what B. has stated proves to be untrue. Responsibilities for the acts and defaults of others are constantly undertaken in commercial transactions. A merchant sells a cargo of goods which he **warrants** to be of a given quality, not because he has seen or personally knows anything about the goods, but merely because he bought them with a warranty. Another merchant contracts to **deliver goods** on a given day, trusting to the engagement of the person from whom he bought them that the vendor will deliver on that day. It is obviously one of the necessities of commerce and indeed life generally, that men should act upon the faith of each other's engagements.

122a. A state of things has already been adverted to (Art. 65) such as this:—A. and B. contract together, and afterwards, without default by either party, performance of the contract becomes impossible. The question at once arises—Does this affect, and if so how, the

reciprocal rights and remedies of A. and B. ? Of course **express provision** may be made in the contract for such a contingency. The charterer of a ship for instance might agree to load with all possible dispatch a cargo of coals at a port named, " strike of pitmen excepted." In such a case if a strike of probably long duration began, the charterer would be excused from putting the coals on board, and would have no right to call on the shipowner to wait till the strike was over. The shipowner would be excused from keeping his ship waiting, and would have no right to call on the charterer to load at a future time. The express exception in the case put would operate as an excuse for him who was to do the particular act, and would save him from liability for breach of contract. It further enables the contractee, as it were, to retire from the contract.

Where an **implied exception** is insisted on more difficulty may arise. A. enters the service of B., becomes ill and cannot perform his work. No action would lie against A. for this non-feasance, and B., without waiting for A.'s recovery, might hire a fresh servant, provided that A.'s illness be such as would frustrate the object of the engagement of hiring in a business sense. Again, if C. engages D. to make a sketch of some passing event for an illustrated journal, and D. is attacked with blindness which will probably disable him for six months from following his vocation, C. cannot maintain an action for breach of contract against D., but he will be justified in procuring some one else in lieu of D. to make the drawing. In such a

case the exception is implied, and is deducible from the very nature of the contract.

Whether express or implied, an exception such as spoken of operates to release the contractee from his engagement, as well as to relieve the contractor. Here is a case in point:—A., a shipowner, entered into a charter-party by which the ship chartered was to proceed with all possible dispatch, "dangers and accidents of navigation excepted," from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. The day after leaving Liverpool the ship got aground, and sustained injuries which could not be repaired till about eight months had elapsed. In the meantime the charterers threw up the charter-party, chartered another vessel for San Francisco, and they were held justified in doing so. The vessel, having been prevented from reaching Newport within a reasonable time, or in time for the adventure contemplated, the charterers were accordingly discharged. The shipowner also was free from liability, inasmuch as the delay arose from an excepted peril (*m*). By the decision thus given equal justice seems to have been done, and the principle on which it rests might readily be applied in other cases.

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123. The legal rights of a person aggrieved by an actual or a supposed breach of contract may be ascertained by considering the proofs *pro* and *con.* which would be

(*m*) *Jackson* v. *Union Marine Insurance Co.*, L. R. 10 C. P. 125; 44 L. J. C. P. 27, (Ex. Cham.).

needed at a trial at Nisi Prius, and these proofs may sometimes be briefly enumerated without much resort to technicalities. For example, there are various proofs required to support an action against a railway company for delay caused through the unpunctuality and so forth of a train by which a complainant may have intended to take or continue his journey. There would have to be proved the issue of the ticket to the passenger, the time-table or table of trains published by authority of the company, and perhaps many extrinsic facts which might show a contract or undertaking by the defendants.

The **language of the ticket** indicates simply that the defendants will convey the plaintiff from A. to B. by the specified line of railway, and the only relevant duty which the law raises out of the contract thus evidenced is that the passenger shall be carried in a **reasonable time** (*n*). Even this duty may be qualified by conditions inserted in the **time-table**, to which the ticket usually refers (*o*), though such conditions would not avail the company if the delay complained of were **unreasonable, negligent** or **wilful.** The fact, indeed, of an inevitable accident having happened, or of some natural impediment having presented itself to the continuance of the

(*n*) As to the effect of a **ticket** see *Thomas* v. *Rhymney Ry. Co.*, L. R. 6 Q. B. 266 ; 40 L. J. Q. B. 89 (Ex. Cham.), and *Le Blanche* v. *London & N. W. Ry. Co.*, L. R. 1 C. P. D. 286 ; 45 L. J. C. P. 521, (App.). See *ante*, p. 45.

(*o*) See as to this *Denton* v. *Great Northern Ry. Co.*, 5 E. & B. 860 ; 25 L. J. Q. B. 129. Sometimes conditions &c. on tickets &c. issued by railway companies are not read by the party who will nevertheless be bound by them. On this subject see *Watkins* v. *Rymill*, L. R. 10 Q. B. D. 218 ; 52 L. J. Q. B. 121.

traffic along a line of railway, might relieve the company from responsibility in respect of damage resulting from complainant's detention or injury, which otherwise would have attached to them (*p*).

The **train bill** of a company such as spoken of might afford cogent evidence in support of the contract contended for by plaintiff. It usually, however, if not always, contains an express stipulation that the company do not guarantee the arrival and departure of trains at the times specified, so that the plaintiff might be put out of Court on production of the time-table.

If the plaintiff offers evidence of some statement by an authorized official of the company to the effect that the train in question would start, or would arrive, at a particular time, such evidence would require to be carefully weighed. So, of **admissions** made on behalf of the company in a correspondence with their manager or other accredited agent. Clearly, the mere talk of, or expression of opinion by, a porter or other like servant of the company would not suffice to raise a specific contract such as adverted to (*q*).

So, a plaintiff claiming **compensation** from a railway

(*p*) See *Readhead* v. *Midland Ry. Co.*, L. R. 4 Q. B. 379 ; 38 L. J. Q. B. 169. This was a case of injury arising from a **latent** defect in the tire of a wheel, not attributable to any fault on the part of the manufacturer, a defect which could not have been detected by the usual methods of discovering flaws &c. But see *Richardson* v. *Great Eastern Ry. Co.*, L. R. 1 C. P. D. 343 ; and *Le Blanche* v. *London & N. W. Ry. Co.*, cited on previous page.

(*q*) See *Hurst* v. *Great Western Ry. Co.*, 19 C. B. (N.S.) 310 ; 34 L. J. C. P. 264. A case in which the company were held not liable, by reason of a notice in their authorized train-bills.

company **for a personal hurt** sustained by him whilst being conveyed on their line, must give such evidence at Nisi Prius as will establish "**negligence**" on the part of defendant, and no "**contributory negligence**" on the part of plaintiff. By negligence is meant the want of that degree of care which a person of common sense might reasonably be expected to take under the circumstances. Contributory negligence by a complainant will nullify his claim to redress, and it exists where by the exercise of ordinary care he himself might have avoided the consequences of the other party's negligence. Proof of negligence in this class of cases may include what was said by the company's servants, their conduct, or that of the complainant, when, or before, the accident happened. What a railway porter says in such a case, acting in the regular course of his employment, may well bind the company, though the true meaning of what he says may need to be carefully considered. Thus, is the announcement of the name of a station, simultaneously with the stoppage of the train thereat, to be taken as an **invitation to passengers to alight?** In one case this question was directly decided in the negative, but in that cited below (*r*), the House of Lords, held that such a combination of occurrences would afford evidence which ought to go before a jury. Because if the company under similar circumstances cannot explain why the name of the station was called out, and why the train was at that moment stopped, the inference must

(*r*) *Bridges* v. *North London Ry. Co.*, L. R. 7 E. & I. App. 213; 43 L. J. Q. B. 151 (H.L.).

be that there was an invitation to alight, and a plaintiff could recover damages for injury by reason of getting out. The interval between the time of stopping and going on again would also be an element in the inquiry. Again, where a train goes beyond the platform, so that to alight from it would be dangerous, the questions will be, 1st. Was sufficient notice of the danger given? 2nd. Did the servants of the company properly give notice that the train would "back?" 3rd. Was the plaintiff in fault in attempting to get out when the train had passed the platform (*s*)?

Where also plaintiff sues a railway company for bodily hurt done to him or his cattle through their negligence, (Chap. VI.) say whilst passing along a highway crossed by the line of railway, the question for the Judge at Nisi Prius will probably be this. Is there any evidence for the jury of negligence by the defendants? If not, the verdict must be for them, or there must be a **nonsuit**, that is to say, a declaration by the Judge that the plaintiff either has no legal cause of action, or that his evidence does not support his claim. Much will here depend on the credibility of the company's servants, who may be called to show that, when the accident occurred, the usual precautions for warning and protecting the public had been taken (*t*).

(*s*) See *Rose* v. *North Eastern Ry. Co.*, L. R. 2 Ex. D. 248; 46 L. J. Ex. 374 (App.). If a passenger, knowing that the train is not at the platform, alights and injures himself, there will be **contributory negligence** on his part, and the company will be discharged. See *Owen* v. *Great Western Ry. Co.*, 46 L. J. Q. B. 486.

(*t*) *Ellis* v. *Great Western Ry. Co.* L. R. 9 C. P. 551; 43 L. J. C.P. 304

In order to measure or estimate the liability of a Railway Company towards a passenger, we must look at the contract entered into between these parties. We must also consider the duty of a carrier towards his passenger at Common Law, which was quite irrespective of express contract or of statutory provisions. At Common Law the obligation imposed on the carrier towards a passenger is to take all due care—the utmost care—to prevent any accident happening to him whilst being carried. If, however, as previously indicated, it be shewn that the passenger has himself been guilty of improper or illegal conduct with reference to the carrier, as, by entering a railway carriage without a ticket and with intent to defraud the Company, or by misconducting himself when there, such acts might disentitle the passenger to redress (*u*). The liability of a railway company even for **gross negligence** causing bodily hurt may be put aside by the effect of a sufficient **notice,** if incorporated with the contract between the traveller and the company. For instance, a railway company undertakes to carry gratuitously a drover in charge of cattle in a truck, but by notice, they decline liability for negligence. It is competent to the company to do so, and they will not in such a case incur responsibility even if the negligence be gross, because the contract is subject

(Ex. Cham.). As to injury done to an animal through a Company's negligence, see *Corry* v. *Great Western Ry. Co.*, L. R. Q. B. D. ; 50 L. J. Q. B. 386 (App.).

(*u*) See *Great Northern Ry. Co.* v. *Harrison*, 10 Ex. 376 ; 23 L. J. Ex. 308, Judgment.

to a condition exempting them from liability for their acts (*x*).

Besides the care which a railway company is bound to take of a passenger whilst actually *in transitu*, the company ought by proper precautions to prevent, so far as may be, the happening of any accident at a station, either by the undue crowding of the public to the trains, or by persons crossing the line at a dangerous moment, or otherwise. They should, therefore, have directions for the general guidance of passengers, legibly posted up, and the stations should be sufficiently lighted to insure the safety and protection of strangers. Such an obligation is laid on a railway company by that general principle of law, which requires that a person who invites another to come on his premises undertakes with regard to that person that the premises on which he invites him to come, as well as the approaches and exits connected therewith, are in such a state as not to expose the person using them in consequence of the invitation to undue or unreasonable danger. Such is the implied engagement of a railway company to any ordinary passenger who comes on their premises. It is part of their contract with him. We have, however, seen that where a person—as for instance a drover carried *gratis* —travels at his own risk, the company may be

(*x*) *Mc Cawley* or *Macauley*, v. *Furness Ry. Co.*, L. R. 8 Q. B. 57; 42 L. J. Q. B. 4. See also *Gallin* v. *London & N. W. Ry. Co.*, L. R. 10 Q. B. 212; 44 L. J. Q. B. 89; *Hall* v. *North Eastern Ry. Co.*, L. R. 10 Q. B. 437; 44 L. J. Q. B. 164, and as to **Conditions of a carrier limiting his liability to ordinary Passengers**, see *Burke* v. *South Eastern Ry. Co.* L. R. 5 C. P. D. 1; 49 L. J. C. P. 107.

exempted from liability for that which would have been negligence as against an ordinary passenger. Towards such passengers, they expressly claim to be free from liability for the default of their servants and from the consequences of incidental risks—both before and after the actual journey—arising from the state of their premises, or from other circumstances (*y*).

As between a railway company and a traveller taking goods with him by train, the obligations of each are set forth or indicated in the **bye-laws** of the company. These have been officially approved and sanctioned and are binding on customers of the company, and any act done in fraud or breach of such bye-laws may either be summarily punishable, or may avail to relieve the company from responsibility for the loss of the goods. For instance, a railway company, publicly announces that they will not take merchandise as passengers' luggage, and that if a passenger does take merchandise with him he will have to pay for its carriage at a certain rate. Suppose that this rule of the company was known to a person who nevertheless takes with him into the carriage a case containing merchandise, without stating that fact to the company. Under such circumstances the company would not be liable for its loss, because, in breach of the bye-laws, the person had intended to have the goods conveyed in the carriage with him, and thus to escape the obligation of paying for their conveyance as merchandise. Obviously there was no contract between the

(*y*) See the cases in the previous note, particularly the strong one of *Gallin* v. *London & N. W. Ry. Co.*

plaintiff and the company as to the goods thus surreptitiously carried by the traveller, and therefore he could have no right respecting them enforceable against the Company (*z*).

Fair and honest dealing should, of course, be observed by every man towards another with whom he may have business transactions, or, as a lawyer might say, is brought into privity. Fraud, such as exemplified, will nullify a contract although good on its face, and reduce to nothing the duty performance of which would otherwise be incumbent on the parties thereto.

(*z*) *Belfast & Ballymena Ry. Co. &c. &c.* v. *Keys*, 9 H. L. Cas. 556.

CHAPTER VI.

A TORT—WHAT IT IS.

"We must not be surprised if we find in the law, a vast variety of rules, exceptions and extensions, which multiply individual cases, and seem to make an art of even reason herself."—MONTESQUIEU.

"If men will multiply injuries, actions must be multiplied too."—LORD HOLT.

124. A "**tort**" is a wrong done by one person to another, the term being used in civil, not in criminal procedure (*a*). The law on this subject set forth in the following pages is of great and increasing importance, because injuries new in kind frequently present themselves, while wrongs long recognised as such are becoming more frequent.

The mere **infringement** or **invasion** of a right constitutes in general an injury for which an action will lie. Such an injury may be constituted by an **assault**, by **false imprisonment**, by bodily **hurt** done through carelessness, and so forth. If A. unlawfully place a part of his foot on B.'s land, this is in law a **trespass**. If a man fails to keep his cattle on his own land, so that they stray into his

(*a*) A **tort** is in fact an injury not, as a rule, *punishable* by the law, but *remediable* by civil process. There is one tort, however, namely, libel or *written defamation*, which under certain circumstances may, form the subject-matter either of a prosecution or an action at law.

neighbour's field, it is a trespass (*b*). The act of the animals in voluntarily going on to another person's land would be as much a trespass as if they had been driven thither by their owner. Our law does not usually concern itself with very trifling matters, but a trespass to land infringing the right to its exclusive occupancy is actionable.

125. A tort to land or, as it is called in law, **realty**, may in its nature be indirect; it may be constituted by a wrongful act producing damage. For instance, A. so unskilfully manages his vessel that by the force of the wind or tide it is driven against and damages the pier or jetty of B.; A. is liable for the consequence of his negligence (*c*). But A. would not be answerable for

(*b*) In a recent case, an ox, while being lawfully driven through a street in Stamford, rushed into an ironmonger's shop and did some amount of damage. The shopkeeper having brought an action in the County Court against the owner of the ox, the Judge decided against the latter and awarded damages for the injury done. On appeal to the Q. B. Division, this decision was overruled, the learned Judges declaring the law in such a case to be that, assuming the act of driving an animal through a street to be a lawful act, which it is, if the animal commits a trespass the injured party cannot recover damages for it without proving *negligence on the part of the drover*. The law thus laid down will of course, until the decision is upset, apply to all cases of **cattle straying** from the high road when in charge of a keeper. Inasmuch, however, as the decision imports into our law a singular and strong exception to the general rule correctly stated in the text, it can hardly be regarded as an indubitable authority for straying cases generally. *Tillett* v. *Ward*, L. R. 10 Q. B. D. 17; 52 L. J. Q. B. 61.

(*c*) *Romney Marsh* (*Lords Bailiffs &c. of,*) v. *The Corporation of the Trinity House*, L. R. 7 Ex. 247; 41 L. J. Ex. 106 (Ex. Cham.). If the jury find **no negligence**, but that an occurrence was *purely accidental*, there is no trespass, *Holmes* v. *Mather*, L. R. 10 Ex. 261; 44 L. J. Ex. 176, a case of a **runaway horse** injuring a person.

damage resulting from overwhelming circumstances which he could not possibly control, although some general words of a statute which might seem to cast on him such a liability, without excluding the applicability of the Common Law principle. Thus, he would not have to make good the damage done to the works of a certain harbour board if such damage were caused by inevitable accident as from stress of weather or other like influences, comprehended under the phrase "the Act of God" (*d*).

126. The nature of torts or wrongs done to personal or chattel property may be exemplified by the common occurrence of **finding some lost article.** The law on this subject is that, the finder of a chattel has a better title to it than any other person, save its absolute and rightful owner. And by reason of such special property in it, the finder may sue any third person who gets hold of the chattel and detains it from him (*e*).

The following case throws light upon the nature of the qualified title of the finder of a lost chattel, to retain it for his own use and benefit.

The plaintiff was a traveller for a firm with which the defendant, a shopkeeper, had dealings. He called one day at the defendant's on business, and when leaving the shop, picked up a parcel lying there on the floor. He showed the parcel to the shopkeeper's assistant, and they ascertained that it contained banknotes. The plain-

(*d*) See *Wear River Commissioners* v. *Adamson*, L. R. 2 App. Cas. 743; 47 L. J. Q. B. 193, H. L. See also, pp. 78, 79.

(*e*) *Armory* v. *Delamirie*, 1 Strange, 504; 1 Sm. L. C.

tiff then told defendant, who had come into the shop, what he had found, and requested him to keep the notes for delivery to their owner. The defendant accordingly advertised in the newspapers, the finding of the articles, stating that they would be restored to their owner on payment of expenses. Three years having elapsed, and no one appearing to claim the notes, plaintiff applied to defendant for them, offering to pay the expense of the advertisements, and to indemnify defendant against any claim which might be made upon him in respect of the notes. Compliance with this request having been refused, the question was raised in the County Court, Had the finder, or had the bailee (*f*) of the notes the better right to them? The decision was in favour of the plaintiff, for these reasons: — The property had manifestly been lost by some one, and could not, when found, be considered to have been in the defendant's custody, or within the protection of his house. The plaintiff, moreover, by depositing the things with defendant for a special purpose, did not intend to waive his title to them. Accordingly, although no authority other than principle, was to be found in our law directly in point, the plaintiff, as against the defendant, was held to have a good title to the notes (*g*).

Chattel property may also pass into a man's possession without his knowledge, and then also a question as to

(*f*) The terms **Bailor** and **Bailee** are respectively applied to the party who delivers goods and to another party who receives them for some purpose: the former is the *bailor*, and the latter the *bailee*.

(*g*) *Bridges* v. *Hawkesworth*, 21 L. J. Q. B. 75.

the property, absolute or qualified, in it may arise—as where a man **buys** a chattel which, unknown to himself and to the vendor, contains valuable property. In a modern case on this subject, a person purchased, at a public auction, a bureau, in a secret drawer of which he afterwards discovered a purse containing money, which he appropriated to his own use. It appeared that, at the time of the sale, no person knew that the bureau contained anything whatever. It was adjudged that, although there was a delivery of the bureau, and a lawful property in it thereby vested in the purchaser, yet there was no delivery so as to give him a lawful possession of the purse and money as against the vendor. The ground of this decision was that, the vendor had no intention to deliver these things, nor had the vendee any to receive them. Both parties were ignorant of their existence; so that when the purchaser discovered the secret drawer containing the purse and money, it was a simple case of finding. And this being so, the law applicable to all **cases of finding** would apply to this, viz., that the absolute owner of the found chattel is entitled to it as against the finder (*h*).

A **pledgee**, or he who receives an article as a pledge, is not permitted to deal with it in a manner inconsistent with his contract. Accordingly, if he disposes in a manner inconsistent with his contract, of the reversionary interest of the pledgor in it, and thus causes the pledgor difficulty in reobtaining possession of the pledge, or if payment of the sum due upon it be made or tendered,

(*h*) *Merry* v. *Green*, 7 M. & W. 623.

and refused, so does him damage, the pledgee commits an actionable wrong against the pledgor (*i*). **If a horse be let on hire** to A., and be killed by the violent driving of B., a stranger, an action of trespass will lie at suit of A., the party hiring and in actual possession of the horse, against B. C., its owner, on the other hand, might sue B. for the damage done to his (C.'s) reversionary interest or property in the horse (*k*).

Again, suppose that A. **gratuitously** allows B. to ride his horse, which, whilst used by B., sustains hurt through C.'s negligence; an action might be brought by the owner of the horse against C. The reason is that, in contemplation of law, the mere **gratuitous permission** to use the horse would not take it out of the possession of the owner; under the circumstances supposed, such possession would be constructive (*l*).

To support an action for **wrongfully detaining goods** the plaintiff will have to show his right to the immediate or present possession of them. For instance, the purchaser of goods retained by the vendor, as subject to his lien (*m*) for unpaid purchase-money, could not sue a wrongdoer for the goods, he himself having obviously

(*i*) See the judgment in *Halliday* v. *Holgate*, L. R. 3 Ex. 299; 37 L. J. Ex. 174 (Ex. Chamb.). In this case no **tender of payment** of the debt had been made to the pledgee, consequently no action of trover lay against him.

(*k*) *Hall* v. *Pickard*, 3 Camp. Nisi Prius Rep. 187.

(*l*) *Lotan* v. *Cross*, 2 Camp. N. P. Rep. 464 (1810).

(*m*) **Lien** means "a right in one man to retain that which is *in his possession*, belonging to another, until certain demands of the person in possession are satisfied . . . . It is not a right of *property in* the thing itself, or a right of action *to* the thing itself" (Wharton's Law Lexicon).

no right to the immediate possession of them (*n*). He would clearly not be the proper person to complain of the wrongful withholding of the goods and to seek compensation for the wrong.

127. There may exist a right differing altogether from that to tangible property. For instance, the **interest of an author** in a literary work, of an **inventor** in a patent, of a manufacturer in a **trade-mark**, of an upholsterer in a **registered design**. Where such right does exist, any infringement of the same would clearly be actionable, for it might constitute a grievous wrong. So the **malicious rejection of a vote**, or the committing of a breach of duty without malice, by the official appointed to receive it, might be the ground of an action by the party aggrieved (*o*). In an action for an **assault**, a defence was set up justifying it, founded on the statute 35 & 36 Vict. c. 33, s. 9 (*p*). The question involved was, whether a candidate at a parliamentary or municipal election has a *general right* to be present in a polling station during the election, or whether he has merely a *qualified right* to be present for a specific purpose. The question thus raised was decided in favour of the plaintiff, and his right to be present *generally*, not merely for a *specific* purpose, was thus established (*q*). Accordingly, the presiding officer at an election cannot

(*n*) *Lord* v. *Price*, L. R. 9 Ex. 54; 43 L. J. Ex. 49.
(*o*) *Pickering* v. *James*, L. R. 8 C. P. 489.
(*p*) The Ballot Act, 1872.
(*q*) *Clementson* v. *Mason*, L. R. 10 C. P. 209; 44 L. J. C. P. 171.

exclude a candidate from the polling station—unless he misconducts himself in any way.

From such a case we may infer that all damage is not necessarily pecuniary, but that "an injury imports a damage when a man is thereby hindered of his right" (*r*).

128. These words of Lord Holt are justly celebrated, and on the occasion of uttering them the same illustrious man enunciated another proposition. He said that where a new Act of Parliament is made for the benefit of "the subject, if a man be hindered from the enjoyment of it, he shall have an action against the person who obstructed him." In applying a rule thus generally worded, we must not hastily infer that in every case where an alleged breach of a public statutory duty has caused damage a right of action accrues to the injured person as against the other. For whether the breach creates a right to sue must depend upon the object and language of the particular Act of Parliament. For example, a person sought to recover against a **water company** for not keeping their pipes charged with water as required by their Act. He alleged that, by reason of such neglect on the part of the company, his premises, situate within the specified limits of its operation, were burnt down; but regard being had to the words of the Act, the action was held not to be maintainable (*s*). If,

(*r*) *Ashby* v. *White*, 2 Ld. Raymond's Rep. 955; 1 Sm. L. C.; Judgment of Lord Holt.

(*s*) *Atkinson* v. *Newcastle &c. Waterworks Co.*, L. R. 2 Ex. D. 441; 46 L. J. Ex. 775 (App.).

however, the duty of keeping **towing-paths** and **river-banks** in repair be imposed upon a body incorporated and regulated by statute, and they neglect to perform that duty, a person who has sustained a particular damage from such neglect, may bring his action to recover pecuniary compensation for the injury thus done to him. Here, the remedy specified becomes available when a breach of duty having been committed, damage has resulted from it. If such a body corporate keep open a towing-path and take toll for its use, they are under certain legal obligations to those whom they invite to use it. The company are bound to take reasonable care that persons using their path are not when doing so exposed to danger, or, in the event of such danger arising, to duly warn them against it (*t*).

129. A tort or wrong such as has been thus far glanced at is apparently simple in its nature, although doubtless in discussions concerning it points of difficulty may occur. Facts, however, present themselves to the observer, out of which a right of action more complex in its character or surroundings may originate. Such an action may be founded, perhaps, on **breach of duty** on **negligence, malice,** or **fraud producing damage,** or perhaps on some express statute. The statements in the following Articles will help to elucidate this subject. They refer to facts, taken almost indifferently, which are likely to arise, facts on which are offered suggestions of the law applicable to them.

(*t*) *Winch* v. *Conservators of the Thames,* L. R. 9 C. P. 378; 43 L. J. C. P. 167 (Ex. Cham.).

The phrase **breach of duty** just used, is of very wide significance, and may include the several ingredients of "negligence," "malice," (*u*) and "fraud." It may be exemplified by reference to reciprocal duties and obligations, a breach of which does not necessarily involve any one of the ingredients mentioned. A breach of duty may consist in **misfeasance**, or non-performance of a duty, **malfeasance**, or an improper and injurious mode of performing it, or **nonfeasance**, which implies no performance of the duty at all.

130. A duty may exist,—may be imposed—on a person, in virtue of **vicinage** or juxtaposition of property belonging to two or more persons.

In mineral districts the **surface** of land often belongs to one proprietor, whilst the **strata** underlying it belong to another. When this is so, the owner of the coal or minerals must so work his strata as to leave sufficient support for the soil above, and so as not to prejudice the enjoyment of it. The right in regard to the working of the mine or colliery may, however, be regulated or amplified by **express contract**, or by **implication** arising out of it, or by **local custom** (*x*).

If the owner of a **coal-mine** on a level higher than that of his neighbour work out his coal, leaving, however, no barrier between the two mines, so that water flows into

(*u*) The word **Malice** as generally used by lawyers, does not mean *spite* or *ill-will*: it simply means *wickedness*; and a "malicious intent" means a wicked intent to do what is illegal. This lawyers call **Malice in Law**, whereas spite or ill-will would be termed **Malice in Fact.**

(*x*) *Smith* v. *Derby*, L. R. 7 Q. B. 716, 722; 42 L. J. Q. B. 140; *Eadon* v. *Jeffcock*, L. R. 7 Ex. 379; 42 L. J. Ex. 36.

the lower mine and obstructs its owner in getting his coal, the latter person has no ground of complaint as against the owner of the upper mine. Because the damage sustained by the plaintiff was caused by the *natural* flow or percolation of water from the upper strata, not caused by the defendant's negligence, but by the plaintiff's own omission to take proper precautions for the safety, &c., of his property. Moreover, there was no obligation on the defendant to protect the plaintiff against the water. It would be the plaintiff's business to erect a sufficient barrier to keep out the water, or else to adopt means for so conducting it away that his workings might not be impeded. The water is merely left by the defendant to flow in its *natural course;* no legal duty was, therefore, violated by him, and the loss sustained was not caused by his default (*y*).

Let us suppose, again, that there are owners of two adjacent mines, of which one is on a higher level than the other. The owner of the upper mine, has not merely suffered water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially, he has pumped up water which has afterwards passed into the plaintiff's mine and so caused him damage. This was held actionable though done by defendant without negligence, and with a view

(*y*) This is the principle of *Dunn* v. *Birmingham Canal Co.*, 42 L. J. Q. B. 34; but see *Smith* v. *Musgrave*, L. R. 2 App. Cas. 781; 47 L. J. Ex. 4 (H. L.). This is the case known in the Courts below as *Fletcher v. Smith*, and there decided on the authority of the leading case of *Fletcher* v. *Rylands*, or *Rylands* v. *Fletcher*, L. R. 3 E. & I. App. 330; 37 L. J. Ex. 171. (H. L.).

merely to the working of his own mine. The reason was that in the performance of the defendant's act the plaintiff was damaged; and whether that act were skilfully or unskilfully performed was held immaterial as regards the right of action (*z*). There is disclosed upon the facts put a **breach of duty** owing by defendant to his neighbour. The ingredients in the tort are breach of duty and damage thence resulting.

131. A landowner who collects anything on his land in unusual quantities, as for instance, water, likely to do mischief if it overflows, is *primâ facie* bound to prevent it from escaping, and is answerable for damage consequent on its doing so. Where this proposition applies, a remedy by action will be available for him whose land has been invaded or whose movable property has been destroyed by the escaping element, &c. Here a duty has been disregarded by defendant, whose liability results from his **breach of such duty**, and is not grounded simply on the idea that he has been guilty of negligence (*a*). Should there be no duty owing by defendant to his neighbour, and no negligence be apparent in his conduct, the proposition stated would not apply, but great care may be needed in distinguishing between such states of facts (*b*). And if he can show that the damage

(*z*) *Baird* v. *Williamson*, 15 C. B. (N. S.) 376; 33 L. J. C. P. 101. But this case must be read with *Wilson* v. *Waddell*, L. R. 2 App. Cas. (Sc.) 95, and *Smith* v. *Musgrave*, below.

(*a*) See *Smith* v. *Musgrave*, cited on previous page.

(*b*) See *Box* v. *Jubb*, L. R. 4 Ex. D. 76; 48 L. J. Ex. 417, where *Fletcher* v. *Rylands* was distinguished, and defendants whose reservoir had overflowed and damaged the plaintiffs, were held *not* liable.

resulted from the "Act of God," &c., (pp. 78, 79), he will be held excused (*c*).

132. The owner of land or realty may sometimes be justified in protecting it, though in so doing he cause damage to his neighbour. Here again, the test applicable is this:—Was any **duty** imposed on the alleged wrong-doer towards the complainant to abstain from doing what he did? If there were no such duty imposed no breach of duty could have been committed, and the foundation of a right of action to recover compensation for damage caused would wholly fail (*d*). A flood, for instance, is a common enemy against which every man has a right to defend himself, and a man is not bound to stand by and see his property destroyed because by protecting it he may cause injury to his neighbour. The law allows a kind of reasonable selfishness on such an occasion [or rather permits the very "first law of nature," to assert its supremacy]. There may be a conflict between duties, between the duty which a man owes to himself and his dependents and that which he owes to his neighbour, and the greater or more imperative of these duties must prevail (*e*). True it is that a man should in general so use his own property as not to damage his

(*c*) *Nichols* v. *Marsland*, L. R. 2 Ex. D. 1; 46 L. J. Ex. 174 (App.). See *Thomas* v. *Birmingham Canal Co.*, 49 L. J. Q. B. 851.

(*d*) The rule is that the commission of even a wrongful act is not actionable, unless *loss* results therefrom to the party considering himself aggrieved by it. Nor is an act which does cause a loss actionable unless that act be wrongful; that is, in violation of law.

(*e*) *Nicld* v. *London & North Western Ry. Co.*, L. R. 10 Ex. 4; 44 L. J. Ex. 15.

neighbour or his neighbour's property, but this rule, must be qualified in the manner stated.

In general, moreover, a person having the exclusive use of water running on to his land may reasonably enjoy it in such manner as he likes. He may apply it to some novel purpose more beneficial to himself than under previous circumstances. And a riparian owner (*f*) higher up the stream, having himself perhaps wrongfully diverted it, will have no legal ground of complaint that his rights have thus been abridged, inasmuch as for the wrongful act of diversion heavier damages might have to be paid by him than before. And where running water is justly appropriated to a new and more beneficial use, it is the necessary effect of every wrongful diversion or obstruction of it to entail a larger measure of liability on the person wrongly diverting or obstructing it (*g*).

133. It may be well to observe here that Parliament, when called on to legislate respecting public works, necessarily allows certain things to be done which may for a time prejudice the public or individuals. Usually, however, it prescribes the mode of proceeding and makes provision for the mitigation of, and compensation for, the annoyance caused. And even when this is other-

(*f*) Riparian owners are those on each side of a river, each owning the land of the river's bed to the middle of the stream. If a person owns land on both sides of it, he of course owns the whole of that part of the river which his property adjoins. See the important case of *Bickett* v. *Morris*, L. R. 1 Scotch App. 47.

(*g*) See *Holker* v. *Porritt*, L. R. 10 Ex. 59 ; 44 L. J. Ex. 52. (Ex. Cham.) ;—but particularly as to *reasonableness* of user of flowing water, *Swindon Waterworks Co.*, v. *Wilts, &c., Canal, &c. Co.*, L. R. 7 E. & I. App. 697 ; 45 L. J. 638 (H. L.).

wise, our Common Law may raise out of the words of an enactment a duty pertinent to the occasion, although not expressly provided for. Thus, where persons are authorised by statute to create what would *primâ facie* amount to an **indictable nuisance**, as impeding the traffic along a highway, they are bound, without any express clause being inserted in the Act, to put and keep up for the public a proper substitute for the old way, as for instance—where necessary—a bridge. If a railway company is empowered to lay rails at a level crossing, and accordingly lays such rails as may be necessary for the traffic, the rails must be laid down and kept so as to prevent injury or danger to the public (*h*). In such a case the particular duty is imposed by statute, and an action for breach or nonobservance of it causing damage will lie at suit of person injured through such breach, &c.

134. It may probably have been inferred from several of the preceding Articles (*i*) that **a distinction is to be noticed between absolute and qualified rights.** There does in fact exist a distinction of this kind between that which is mine exclusive of any right, present or future, in another person, and that of which I have but a qualified possession, a possession subservient to the contemporary or future use of the property by third persons.

If I place a log of wood across a path on my own property, but the public or individuals have a **right of way** over that path, an action will lie against me by a

(*h*) See *Oliver* v. *North Eastern Ry. Co.*, L. R. 9 Q. B. D. 409.
(*i*) See particularly, 12, 126, 130.

person injured by my act, because there is a privilege vested in others of going along the path without interruption (*k*). If, however, there is no right of way over my land, I am at liberty to place any obstruction on it, and should a stranger—having under such circumstances no right to be there—sustain damage consequent on his own trespass, he cannot sue me successfully for the damage so sustained. Here is another supposed case. A., the owner of waste land adjoining a highway, digs a pit in the waste, distant a dozen yards or so from the highway, and B.'s horse, escaping into the waste, falls into the pit. B. cannot sue A. for damage thence accruing, for A. sunk the pit on his own land, and B. was to blame for allowing his horse to escape into the waste. Here of course we must suppose that no duty to maintain or repair fences was imposed on A. Where such a duty is imposed by law, it must be observed, and if a man intrusts his horse to another even by way of loan, if that horse strays through a gap in the fence on the bailee's land, and is killed, the bailor can recover against him (*l*). Facts analogous to those put are frequently brought before a jury in actions against railway companies. Sometimes the claim for damages resulting from a breach of duty such

(*k*) *Clark* v. *Chambers*, L. R. 3 Q. B. D. 327 ; 47 L. J. Q. B. 427.

(*l*) See *Rooth* v. *Wilson*, 1 B. & Ald. 59 (1817). The actual facts here were, shortly put, these. A. sent his horse to B. for the night, and the horse was turned into a field of which the fences were defective, and ought to have been repaired by C. In consequence of the state of the fences, the horse fell from the field into which it had been turned, into another. Held, that B. might maintain an action against C.

as indicated is founded on the unwritten or customary, sometimes on the statute law.

135. A duty akin to such as last treated of may be owing to the **public generally**, or to some individual who has been brought into relation with the person on whom the duty is actually placed, or who has in some way assumed and undertaken it.

The owner or person in possession of premises adjoining a highway will be liable for a nuisance to such highway if he allow on his premises an **unprotected excavation** so near the road that a person lawfully using it, and exercising ordinary caution, might yet fall into the hole. And, generally speaking, the responsibility for such a nuisance rests on him who is in **occupation** of the premises whereon the nuisance complained of exists. It may be that other persons are also liable, but the **occupier** who probably knows most about it, is bound to see that there is no dangerous nuisance upon the premises. Should he allow one to exist then he is guilty of a breach of duty; whence, if damage result to an individual, either of the offending parties may incur civil liability (*m*). If, say, an excavation is within the

(*m*) *Hadley* v. *Taylor*, L. R. 1 C. P. 53; where the **occupier** of unfinished premises was held liable for leaving open the cellar "hoist hole" into which a person fell. See also as to duty of **occupier**, *Tarry* v. *Ashton*, L. R. 1 Q. B. D. 314; 45 L. J. Q. B. 260; *Humphreys* v. *Cousins*, L. R. 2 C. P. D. 239; 46 L. J. C. P. 438 (App.). Where an **occupier** was held liable for damage caused by escaped sewage although no negligence was attributable to him; also *Hardman* v. *North Western Ry. Co*, L. R. 3 C. P. D. 168; 47 L. J. C. P. 368 (App.). Where the defendants were held liable for the injurious percolation of water into plaintiff's house.

boundary of the owner's or occupier's premises, a person injured by falling into it may be technically a trespasser in the eye of the law in transgressing the line of demarcation between the highway and the private premises. He may, however, recover damages in respect of the hurt sustained by him, if it appear that the nuisance was of a public character and likely to cause injury. So also will a carrier be liable if he fails to take due precautions for the safety of his passengers (*n*).

We may now infer that where a person resorts to premises in the course of business, on the express or implied invitation of their occupier, such person is entitled to expect the occupier to use care to *prevent* damage from any unusual cause of danger, which he knows or ought to know of, existing on the premises. Where there is evidence of neglect, that is for the jury, and the evidence required in such cases is this. It must be shown that the plaintiff was on the defendant's premises by the defendant's express or implied invitation; that there was an unusual source of danger existing there actually known to, or presumably within the knowledge of, the defendant, and that damage occurred to the plaintiff by reason of the defendant or his servants not using sufficient means to avert that damage, or warn the plaintiff of his danger. If evidence of such facts be given, the defendant will be liable as for breach of duty causing damage (*o*).

Cases such as the above, have interest for the legal

(*n*) See *John v. Bacon*, L. R. 5 C. P. D. 437.

(*o*) *White* v. *France*, L. R. 2 C. P. D. 308; 46 L. J. C. P. 823.

analyst as showing and rendering quite appreciable **the distinction between breach of duty and negligence.**

136. Bodily hurt is sometimes caused by the **attack of an animal**—domesticated or not. A mishap of this kind is not uncommon, and is peculiar as regards the law applicable to, and the proofs requisite to sustain an action originating from, it. The owner of a domesticated or other animal is not liable for bodily hurt done by it, unless it can be shown that such owner was previously aware of the animal's mischievous propensity, or unless the damage done was attributable to neglect on his part (*pp*). In other words it is generally necessary in an action for injury done by such an animal to allege and prove the *scienter*, or knowledge of the animal's propensity. This may be done by showing that actual damage had been done by the animal on a previous occasion, and that the defendant was aware of it. And his knowledge of the fact may be evidenced by his presence at the time when the mischief was done, or by notice to him that it had been done.

Notice may be given either directly or indirectly to the owner of the animal, for instance through his wife or servant. And though notice to a servant or to a wife might not necessarily suffice to fix the defendant in such a case with liability, yet should some additional fact be established showing that notice had been given, these proofs taken together would fortify the plaintiff's case. Thus, notice to a wife who assists her husband in his business, where the notice is in the form of a

(*pp*) See *Lee* v. *Riley*, 18 C. B. (N. S.) 722; 34 L. J. C. P. 212.

complaint intended to be repeated to the husband, would be an additional fact of importance, although of course the jury would look to the main one involved (*q*). And if the owner of a savage dog, known to have bitten a person, puts it under the care of a **servant** the servant's knowledge of the dog's ferocity is deemed to be the knowledge of the master (*r*).

The owner of an animal **undomesticated** is bound to keep it in sure custody, and he will be liable if it escape and injure any one, or another animal, to pay compensatory damages (*s*). Here specific proof of negligence would not be needed and the *scienter* would be presumed.

137. Negligence is fruitful in producing damage, and an act done negligently is one done otherwise than it would have been by a reasonable man guided by considerations such as ordinarily regulate the conduct of human affairs. Negligence may also consist in the **omitting** to do something which a reasonable man would do.

When **negligence causing damage** lays the foundation of an action, something more than a mere *scintilla* of proof of negligence would be needed in support thereof. But although this is the case, yet the bare facts established in evidence may perhaps be such as to show (or rather raise a strong presumption) that the defendant

(*q*) See as to the *scienter*, *Applebee* v. *Percy*, L. R. 9 C. P. 647 ; 43 L. J. C. P. 365 (**Dog**) ; *Smith* v. *Cook*, L. R. 1 Q. B. D. 79 ; 45 L. J. Q. B. 122. (The case of a **bull** killing another animal.)

(*r*) *Baldwin* v. *Casella*, L. R. 7 Ex. 325 ; 41 L. J. Ex. 167.

(*s*) *Lee* v. *Riley*, previous page ; also *May* v. *Burdett*, 9 Q. B. 101 ; 16 L. J. Q. B. 64. But if the plaintiff used contributory negligence (Art. 139) it is doubtful whether he could recover. See also *Jackson* v. *Smithson*, 15 M. & W. 563 ; 15 L. J. Ex. 311.

was negligent. For instance, suppose that A. walking in a public street is injured by a bale of goods falling upon him from an upper floor of a warehouse belonging to B. Upon proof of these two simple facts there would be at least *primâ facie* evidence of negligence on the part of B. By "*primâ facie*," we mean that B. may, if he can, rebut the evidence. If he is able to do so, he will be held not liable: if he cannot, A. will be entitled to a verdict against him.

138. Difficulty as to the proof of negligence and its sufficiency often arises, for even well-trained, experienced lawyers will often differ in regard to it. And the mere fact of protracted litigation thus ensuing, guided and directed by eminent practitioners, suffices to show, not so much the uncertainty of our law, as the perplexities which may have to be encountered where fact and law are blended together. Legal principles applicable to the *facts* may be perfectly well understood, but the two elements have to be separated, and it may happen that the Judges are eventually called on to perform to some extent the functions of jurymen (*t*).

(*t*) See, by way of illustration, *Metropolitan Ry. Co.* v. *Jackson*, L. R. 3 App. Cas. 193; 47 L. J. C. P. 303 (H. L.). In this case the Lord Chancellor (the Earl of Selborne) thus expresses himself as to the **respective functions of the Judge** and **the Jury** in trials for **negligence**. "The judge has a certain duty to discharge, and the jury have another and a different duty. The *judge* has to say whether any facts have been established by evidence from which negligence *may be reasonably inferred*. The *jury* have to say whether from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that those separate functions should be kept distinct."

Notwithstanding the difficulty adverted to, the Judge at Nisi Prius will, in a case similar to that supposed, have to determine whether there is such a sufficiency of evidence as to justify him in submitting it to the jury. The due performance of this part of his duty will often involve perplexing considerations, especially where the evidence is of a very conflicting character. Proofs are also sometimes so nicely balanced that in the very same case different verdicts will be given, and Judges of the most consummate ability are not unfrequently at a loss to declare positively on which side the evidence preponderates.

139. Having now seen that where the damage complained of has been caused entirely by a defendant's negligence, the plaintiff would be entitled to recover, we must next consider what results when it appears that the plaintiff himself contributed to the mishap by his own negligence. For, if by his own want of ordinary care and caution, he himself was virtually the cause of his misfortune, the plaintiff will be precluded from redress. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover if the defendant, by the exercise of care on *his* part, might have avoided or prevented the consequences of the neglect or carelessness of plaintiff (*u*). In the application of the above rule to alleged facts, mistakes are often made. This being so, the Reports abound with cases which have

(*u*) *Tuff* v. *Warman*, 5 C. B. (N. S.) 585; 27 L. J. C. P. 322, judgment; *Radley* v. *London & North Western Ry. Co.*, L. R. 1 App. Cas. 754; 46 L. J. Ex. 573 (H. L.).

been discussed in court, involving this doctrine—as it is termed—of **contributory negligence.**

The doctrine has been held applicable under circumstances to which, at first sight, it might not have been thought so. Thus, the parent of a child of very tender years may, by contributory negligence, disentitle the child if hurt through another's default from obtaining redress in damages. The reason is that such a child in legal contemplation is so far identified with the parent, that an action brought in the child's name would not under the supposed circumstances, be maintainable (*x*). The foregoing remark brings us to the subject of **identification** of persons, that is, where for certain purposes two persons will be regarded by the law as one.

A **servant whilst doing his master's work** becomes for some purposes identified with him. For instance, a servant could not recover damages in a case where the master himself, by reason of his own contributory negligence, would have been unable to recover (*y*). A **passenger by an omnibus** is so far identified with the **driver** that the negligence of the latter contributing to a collision with another omnibus may disentitle the pas-

(*x*) *Waite* v. *North Eastern Ry. Co.*, E. B. & E. 719 ; 27 L. J. Q. B. 417. In this case the injury resulted from the **contributory** negligence of a child's *grandmother*, who was herself killed, and the Court identified these two persons, the child having been under the grandmother's charge.

(*y*) *Child* v. *Hearn*, L. R. 9 Ex. 176 ; 43 L. J. Ex. 100. The general rule in such cases is shortly this. The servant cannot be deemed to be in a better position than his master is.

senger to redress as against its owner (*z*). This same principle has been applied so as to **identify**, under analogous circumstances, a **passenger by railway train** with the **engine-driver.** At all events the following question has been judicially suggested as worthy of consideration. In a case of railway collision with evidence of contributory negligence, could an injured passenger maintain one action for breach of contract against the company which carried him, and another for negligence against the company whose servants caused the accident? (*a*).

140. Discussions respecting negligence have frequently arisen in actions brought under the statute known as Lord Campbell's Act (9 & 10 Vict. c. 93, amended by 27 & 28 Vict. c. 95). This statute materially affects the following two rules of our customary law—(1) that an action for bodily hurt cannot be maintained after the death of the injured person for the benefit of his estate; and (2) that where an act is in its nature **felonious** the civil remedy, if any, in respect of it is merged, or rather suspended, until public justice shall have been satisfied by the prosecution of the offender. Lord Campbell's Act provides that an action shall be maintainable by an executor or administrator for the benefit of certain of the surviving relatives of one whose death has been caused by a wrongful negligent

(*z*) *Thorogood* or *Thoroughgood* v. *Bryan*, 8 C. B. (O. S.) 115; 18 L. J. C. P. 336.

(*a*) *Armstrong* v. *Lancashire & Yorkshire Ry. Co.*, L. R. 10 Ex. 47; 44 L. J. Ex. 89, affirming *Thorogood* v. *Bryan*.

act which, if death had not ensued, would have been actionable. And the statute further enacts, that for the negligent or wrongful act ending in death, compensation in damages may be enforced, although the death were caused under such circumstances as amount in law to **felony** (*b*).

141. It may naturally be asked how, where an action is successfully brought under the Act referred to, the measure of damages ought to be determined? What considerations may influence the jury in assessing them? What description of evidence is to be deemed relevant for assessing them? These queries, especially the first, often involve difficulty, and, accordingly, in a work like this only general answers need be given to them. Where death is caused by **negligence** the jury will give **compensatory damages** only—not **vindictive** or **exemplary damages.** The jury will have to exclude from their consideration such matters as the loss or suffering of the deceased himself and the mental anguish caused to his family by his death (*c*). They will in fact have to restrict themselves solely to estimating the damage

(*b*) For instance, if A. drives over B. and kills him, and A. is convicted of **manslaughter**—which is **felony**—but for Lord Campbell's Act, the personal representatives of B. (p. 170 n. (*h*)) would have no claim on A. For at Common Law the tort would have wholly and for ever merged in the felony. Now, however, the tort will merge only temporarily; that is to say, as soon as what we call "public justice" is satisfied by the *punishment* of A., B.'s representatives may proceed against him for compensation. But see p. 199 and the note there as to the proposed modification of the rule as to merger or suspension of the civil remedy where a criminal act has been committed against a person.

(*c*) *Blake* v. *Midland Ry. Co.*, 18 Q. B. Rep. 93; 21 L. J. Q. B. 233.

resulting to the family from the death; to estimating the legitimate expenses (*d*) caused to them by that event. And they may also assess damages for a probable pecuniary loss sustained by the death, as the loss of any salary enjoyed by the deceased by which he benefited his family. Lastly, they may consider the loss of the profits of his business (*e*).

Such are the ordinary elements and considerations available for an assessment of damages under the statute mentioned. In an action brought under its provisions the evidence of experts, such as accountants and actuaries, is admissible, and will sometimes remove difficulties which might be insurmountable by a jury thus unaided. Doubtless extraordinary facts may appear in cases of this kind which may render the proper assessment of damages a task of much difficulty. It seems, however, that mere **remote contingencies** could not be taken into account at all in the assessment of damages. Care will, therefore, have to be used to control—by means of the above generally stated rules—the not unnatural tendency of juries to compensate individuals *inordinately* for damage sustained by the eath of a relative through negligence.

142. In an action against a railway company under Lord Campbell's Act, **fraud by the complainant** is not

(*d*) For **funeral expenses** or **mourning** it has been held that no damages can be given. See *Dalton* v. *South Eastern Ry. Co.*, 4 C. B. (N. S.) 296; 27 L. J. C. P. 227.

(*e*) See *Franklin* v. *South Eastern Ry. Co.*, 3 H. & N. 211; also *Pym* v. *Great Northern Ry. Co.*, 4 B. & S. 396; 32 L. J. Q. B. 377.

uncommon, though proof of malpractice by him in connection with the claim advanced would materially jeopardise his case. Indeed, the conduct of the party to any action may be of the highest importance in determining whether the *cause* of his action, or the *ground of defence* is an honest and just one. If, for example, it be proved that a plaintiff has been **suborning false testimony**, and has tried to have recourse to **perjury**, such facts will obviously indicate a knowledge or belief on his part that his cause of action was unrighteous. Such acts will therefore be evidence for the jury, not necessarily conclusive, but to be weighed by them in conjunction with other facts.

In an action by **husband and wife** (*f*) for a personal hurt caused to the latter by the defendants' negligence, witnesses were called for the defence who stated that although they were not present at the accident when it happened, yet the husband and a clerk of his solicitor, aware of the above fact, had solicited them to give evidence on behalf of the plaintiffs' claim. Such evidence was held to be receivable, as amounting to an **admission by conduct** that the plaintiffs' case was not good and genuine (*g*).

The principle just set forth is of course applicable to the conduct of all plaintiffs, seeking by false and fraudulent testimony to increase the damages.

143. An unsuccessful attempt was made some time

(*f*) See the notes at pp. 31, 36.

(*g*) *Moriarty* v. *London, Chatham & Dover Ry. Co.*, L. R. 5 Q. B. 314, 319; 39 L. J. Q. B. 109.

since to extend the operation of Lord Campbell's Act, by putting upon its provisions a construction of this kind. It was said that the statute gives to the **personal representatives** (*h*) of the deceased, whose death has been caused by negligence, a right of action, beyond that which the deceased himself would have had if he had survived. It was contended that if bodily hurt were sustained by a person, for which damages were recovered by him, and he afterwards died from that hurt, another action by his personal representatives would lie to recover damages for the injury and the death. Further, that if the deceased had been compensated during his lifetime, the amount of money received by him ought not to operate in bar of a second action founded upon the above-mentioned Act. The words of the statute, however, are not to be so strained, and all such contentions as referred to have, we may suppose, been set at rest (*i*).

144. Where an action is brought against a railway company to recover **compensation for damage done to cattle** which, through alleged nonfeasance of the company, have got on to the line, questions difficult of solution may present themselves. For, assuming the company liable at all for the act or nonfeasance of its

(*h*) A deceased person's *executor* or *administrator* is his **legal personal representative.**

(*i*) *Read* v. *Great Eastern Ry. Co.*, L. R. 3 Q. B. 555; 37 L. J. Q. B. 278, the effect of which is simply that an injured person who accepts compensation during his lifetime, bars his representatives from claiming further compensation after his death, even though that may result from the injury he had sustained.

servants, it may have to be determined, first to whom they are liable, and secondly, whether the duty for breach of which the action is brought was owing to all persons alike, or only to some section of the community. In other words, it may be a question whether the individual who seeks redress is legally entitled to any. A railway company is bound by the statute 8 & 9 Vict. c. 20, s. 68 (*k*) to maintain sufficient fences for the protection of the cattle of "the owners or occupiers" of land adjoining their line. The import of this provision is obvious. If, therefore, a horse being by the license of the owner on land adjoining a railway, thence escape on to the line through a defective fence, which the company ought to have repaired, and the horse is killed by a passing train, the owner of it will be entitled to recover compensation for his loss from the company (*l*).

145. Questions involving appeals to the general law concerning **Negligence** sometimes arise as to the **liability of an innkeeper** in respect of merchandise or luggage brought to his inn, and thence stolen or abstracted. Under such circumstances there exists a liability on the part of the innkeeper to compensate for the loss so sustained. In order to estimate its nature and extent reference must be made, as in other cases, to our cus-

(*k*) The Railways Clauses Consolidation Act, 1845.

(*l*) *Dawson* v. *Midland Ry. Co.*, L. R. 8 Ex. 8; 42 L. J. Ex. 49; *Wiseman* v. *Booker*, L R. 3 C. P. D. 184. But the proprietors of a **private railway** existing on their private property and used exclusively for their own purposes, are *not* subject to the statute referred to in the text. *Matson* v. *Baird*, L. R. 3 App. Cas. 1082.

tomary law, and such express enactments as may affect its provisions on this subject.

The liability of an innkeeper, as *custodian or bailee of property* belonging to his guest, rested till the passing of a recent statute (*m*) entirely on the Common Law, being set forth in a case decided in the time of Lord Coke, (1550-1634) (*n*). Here it was determined that, an innkeeper "is bound by day and night to keep safely the guests' goods and chattels," but that the innkeeper "shall not be charged unless there be a default in him or his servants in the well and safe keeping and custody of their guests' goods and chattels within his inn."

To a claim against an innkeeper for damage resulting from his alleged negligence or breach of duty, several grounds of defence may be available, a brief examination of which will further illustrate that part of the law concerning torts which is now under our notice.

(1) The innkeeper may show that the guest has himself been guilty of negligence, conducing to the loss of his goods. Thus, A. whilst staying as a traveller at B.'s inn had stolen from him valuable property by a person who was afterwards tried for, and convicted of, the theft. A. having brought an action against the innkeeper, evidence was given of negligence on the part of the plaintiff, and the rule of law applicable to the facts

(*m*) The Innkeeper's Act, 1863, 26 & 27 Vict. c. 41. The word "inn" by this Act means "any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guest," sect. 4.

(*n*) *Calye's Case*, 8 Coke's Rep. 32; 1 Sm. L. C.

proved was thus stated. The goods of a guest remain under the charge and protection of the innkeeper so as to make him liable for breach of duty unless the negligence of the guest occasions the loss. And this **contributory negligence** (Art. 139) must be of such a character that the loss would not have happened if the guest had used the ordinary care that a prudent man would be reasonably expected to exercise under the circumstances which may be in question (*o*). Such an amount of negligence in the guest, as thus indicated, will accordingly excuse the innkeeper.

(2) Another sufficient **ground of defence** may be that the goods were retained by the guest in his own **special care** and custody. The plaintiff, a commercial traveller, went to the defendant's inn and was allowed the use of a private room in which to exhibit his goods for sale. Told that he might lock the door of this room, he omitted to do so, and some of his goods were stolen: upon these facts the innkeeper was held to be exonerated from liability. "If," it was judicially said, "there be evidence that the guest accepted the key and took on himself the care of his goods, surely it is for the jury to determine whether the evidence of his receiving the key proves that he took it with the intention of himself guarding his property, and with a purpose of exempting the innkeeper, or whether he took it merely because the landlord forced it on him, or for the sake of securing greater privacy" (*p*).

(*o*) *Cashill* v. *Wright*, 6 E. & B. 891, 900; and see *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L. J. Ex. 131, with which, however, read the provisions of the Innkeeper's Act, 1863.

(*p*) *Burgess* v. *Clements*, 4 Maule & Selwyn's Rep. 306.

This accords with a view expressed in *Calye's Case* (*q*) upon a hypothetical state of things there put. "The innkeeper," it was stated, "requires his guest that he will put his goods in such a chamber, under lock and key, and then he will warrant them, otherwise not. The guest lets them lie in an outer court whence they are taken away—the innkeeper shall not be charged, for the fault is in the guest."

(3) The same old case affords a voucher for a third matter upon which the innkeeper may rely to relieve himself from liability when charged with negligence touching his guest's property. For in it we read that, if the guest's servant, or he who comes or is lodged with him, steals or carries away his goods, the innkeeper shall not be charged, because there "the fault is in the guest to have such" a companion or servant.

(4) It would also avail the innkeeper to show that the goods in question were lost or had perished through some **inevitable casualty**. And to sum up the matter, it may be stated that an innkeeper cannot be held liable for negligence, where a loss arises from the complainant's own default or from the act of God (Art. 78) or of the Queen's enemies (*r*). Nor will an innkeeper be liable for the loss of property which is out of his inn. So that, if a man comes to a common inn, and delivers his horse to the ostler, and requires him to put the horse to pasture, which is done, and the horse is stolen,

(*q*) Cited at p. 172.

(*r*) See the judgment of the Court in *Morgan* v. *Ravey*, cited on the preceding page.

the innkeeper shall not answer for it. On the other hand, an innkeeper is *primâ facie* answerable for the safe keeping of a guest's horse which is put in the *stable* of the inn. If, however, injury be done to it whilst in his custody, the innkeeper may rebut his liability for the injury by showing that he exercised due care in the matter, and properly attended to the horse (*s*).

The liability of an innkeeper in respect of his guest's goods is now, by the statute already alluded to (*t*) generally limited to 30*l*. There are, however, **two exceptions** to the rule created by the Act. These are as follows :—1st. Where the goods have been stolen, lost, or injured through the **wilful** act, default, or neglect of the innkeeper or his servant; and, 2ndly, where the goods have been deposited for safe custody with the innkeeper. And he cannot avail himself of this latter exception, if the deposit was not made, by reason of his refusal to receive it, or by his default in any way.

146. We thus see that the phrase "breach of duty" may be identical with the term "negligence." It is so under circumstances quite dissimilar from those just exhibited and where, moreover, the relation existing between the parties is altogether different.

Goods may be entrusted, or in legal parlance **bailed** (Art. 126) by their owner to another **by contract**, the stipulations whereof will, if sufficiently expressed, regulate the rights and liabilities of either party to it. If not sufficiently

(*s*) *Dawson* v. *Chamney* or *Cholmeley*, 5 Q. B. Rep. 164 ; 13 L. J. Q. B. 33.

(*t*) 26 & 27 Vict. c. 41. See p. 172.

expressed, something—as before seen—may have to be implied by our customary law. For instance, there may be implied an undertaking on the part of the bailee to use a certain degree of care and diligence in regard to the subject-matter of the bailment. A **bailment** as regarded by the Common Law involves important consequences without any express agreement between bailor and bailee directly pointing thereto. Thus, a **bailee for hire**, although he may not occupy the position of a common carrier, is bound to use ordinary diligence and to exercise reasonable skill, in regard to, and in dealing with, the subject-matter of the bailment. Such a person will be responsible only for loss or damage occasioned by the ordinary negligence of himself or his servants. If such a bailee undertake "safely and securely" to carry, he will be bound to carry safely and securely with reference to the degree of care which, under the circumstances, the law requires of him. And the law requires the use of such reasonable care that the customer shall incur no damage or loss through the carrier's default. In a case like this our customary law is called on to adjust the obligations arising out of a **bailment**, and it does so by reference to degrees of care and negligence, which it is difficult adequately to characterise.

Where a bailee undertakes to perform a duty, etc., **gratuitously**, it would be obviously unreasonable to expect from him that degree of care and diligence which might fairly be required from one who is to be **remunerated** for his trouble. Accordingly, when a gratuitous

bailee has an action brought against him, proof that he has exercised even a slight degree of care and diligence may exonerate him from responsibility. On the other hand, **gross negligence**—which is sometimes deemed to be tantamount to **fraud** itself—existing as it does where slight diligence is absent, renders him liable.

Reasonable care and **slight diligence** would seem to be nearly equivalent expressions. At all events, where reasonable care has been taken of a chattel bailed, one could hardly say that slight diligence was wanting. The question as to *reasonable care* will depend upon the nature, value, and quality of the thing bailed, and the degree of skill, etc., which the bailee possessed, or has professed himself able to exert, with regard to it. In the following Chapter states of facts illustrating the *nature of negligence* and the *consequence* of it in respect of liability for damages will be set forth.

Our customary law, then, making use of one or other of the expressions noticed, assumes to determine the liability of a bailee, when that cannot be gathered from the terms of any express contract. And as regards bailments generally, the law on the subject was long since expounded by Lord Holt in the celebrated case of *Coggs* v. *Bernard* (*u*); it has also been confirmed by authentic precedents, and handed down to us in a form which can readily be applied. As regards peculiar and exceptional species of bailments, the law has to be

(*u*) 1 Sm. L. C., where will be found all the other important cases on **bailments**. The case of *Coggs* v. *Bernard* was decided in the 2nd year of Queen Anne's reign (1702—1714).

judicially declared by reference to the facts which have occurred. So that a jury, from the evidence adduced, may rightly determine not merely the existence or non-existence of negligence; but, where existing, its degree.

In performing this rather delicate duty the jury will of course be aided by the Judge, who may, for instance, have to explain to them that a person may convey goods either as a mere bailee, that is, *gratis*, or as a bailee for reward. Or again that he may do so under an **express contract**; or as a **common carrier** subject only to the provisions of the Common Law; or lastly, as a carrier within the scope of some statutory enactment. Where in any case such as supposed there has been negligence, default, or misconduct on the part of the plaintiff, the task imposed on the jury may be onerous.

147. As social relations and mercantile transactions become more complex and involved, so are novel injuries likely to be committed, and of course in respect of these new remedies must be devised to meet them. Under such circumstances resort to **first principles** will become necessary for the devising of appropriate remedies. For, although on the one hand the law is strongly against the invention or creation of rights of action, yet on the other hand, where a wrong has actually been suffered by one person in consequence of the conduct of another, the maxim, *ubi jus ibi remedium* will, as far as possible, be upheld (*x*). Within the reach of the maxim

(*x*) See *Western Counties Manure Co.* v. *Lawes' Chemical Manure Co.*, L. R. 9 Ex. 218 ; 43 L. J. Ex. 171. The maxim quoted signifies that where there exists a *legal* right, there exists also a remedy for its

cited is the case where an **untrue statement disparaging complainant's goods** has been published without lawful occasion, and has caused him special damage. In an action brought by one **patentee of machinery** against another the following facts appeared in evidence :—The plaintiff had been negotiating for the sale of his machines to different manufacturers, some of whom were already using the defendant's machines under licences from him. The defendant wrote to these manufacturers stating that the plaintiff's machines infringed his patent, and that if used he would claim and enforce payment of royalties for their use. The consequence of this communication was that the plaintiff lost profits which would otherwise have accrued from the sale of his machines. It was adjudged on these facts that, malice (*y*) being proved, the defendant would be liable, although such an action had never before been brought. An unfounded assertion that the owner of property has not title to it, if made with malice express or implied, and if productive of **special damage** to its owner, is clearly actionable as **slander of his title**, which may obviously be injurious to him (*z*).

infringement or for its successful assertion. The interesting case of *Day* v. *Brownrigg* (L. R. 10 Ch. D. 294 ; 48 L. J. Ch. 173), admirably illustrates the maxim under notice. It was a case of what is termed **Slander of Title**, as to which see Flood on Libel and Slander, Ch. IX. And as to the maxim, See Broom's Legal Maxims, 5th ed., 191, and Wharton's Legal Maxims, 185.

(*y*) See *ante*, p. 152, n. (*u*).

(*z*) *Wren* v. *Wield*, L. R. 4 Q. B. 74 ; 38 L. J. Q. B. 327. This case was virtually affirmed by *Halsey* v. *Brotherhood*, 51 L. J. Ch. 233, App. (1882). From this case we learn that before a plaintiff can

An unusual kind of tort directed against chattel property some time since formed the ground of an action. The complaint was that defendant maliciously and without reasonable or probable cause **procured the plaintiff's ship to be arrested** under a warrant from the County Court, in which was pending an action against plaintiff for the price of necessaries supplied to his ship. The damage alleged was that plaintiff lost the use of his ship, was deprived of the benefits which would thence have resulted, and was "much injured and damnified" in his credit and otherwise by the defendant's act (*a*).

148. A **malicious act** directed against a person's **reputation** may lead to more serious results than when levelled at his property, and will be more severely dealt with by a jury.

It is permissible for any man to prefer an **indictment** against another for an alleged crime, but when the indictment is disposed of *in favour of the accused*, an action may lie at his suit for damages against the prosecutor. It will be necessary, however, in an action for **malicious prosecution**, to show that the charge was false and malicious, and made **without reasonable or**

recover damages for **slander of title**, the Court must be in a position to infer that there was an intention on the part of the defendant to injure the plaintiff. Also that a plaintiff may obtain an **injunction** against a defendant for the tort indicated, but that if, in the first instance, he frames his action for damages, he will not be able to turn it into one for an injunction.

(*a*) *Redway* v. *McAndrew*, L. R. 9 Q. B. 74. Under such circumstances an action would lie, and the decision cited turned on a point of pleading.

probable cause (*b*). Malice without anything else is not actionable, but malice causing damage often is so.

149. Malice is an essential ingredient in an action for defamation. As regards defamatory words, however, our law distinguishes between those which are *written* and published and those which are *spoken*, for the writing and publishing of such words indicates an intent to injure which may be absent when words are spoken. In either case the occasion may justify and privilege the act (*c*).

In an action for **slander** three primary questions may present themselves :—1st. Were the words actionable by themselves. 2ndly. If they were not, did damage to the complainant result from them, as a natural and reasonable consequence of speaking them? (*d*). 3rdly. Did the occasion privilege the defendant? (*e*). All disparaging words causing actual, or as it is called, **special damage** to flow naturally and immediately from them are actionable, and some communications are deemed to be of so hurtful a nature that our law **presumes damage** to result from them without actual proof of it.

(*b*) See *Lows* v. *Telford*, L. R. 1 App. Cas. 414 ; 45 L. J. Ex. 613 (H. L.)

(*c*) The main distinction between **Libel** and **Slander** is simply this : the former is *written* and the latter is *oral* defamation. Another distinction is that *Libel* may be *indictable* as well as actionable ; *Slander* is never indictable.

(*d*) See as to **Slander**, *Davies* v. *Solomon*, L. R. 7 Q. B. 112 ; 41 L. J. Q. B. 10 ; *Miller* v. *David*, L. R. 9 C. P. 118 ; 43 L. J. C. P. 84 ; *Riding* v. *Smith*, L. R. 1 Ex. D. 91 ; 45 L. J. Ex. 281.

(*e*) As to privilege in **Slander**, see *Davies* v. *Snead*, L. R. 5 Q. B. 608 ; 39 L. J. Q. B. 202.

Thus, **slander is actionable without proof of special damage,** if spoken of plaintiff with reference to his trade, profession, or calling, and calculated to injure him therein.

In that class of cases where the act complained of is not in itself necessarily injurious to complainant, but becomes so by reason of special damage caused by it, the special damage has to be set forth and proved as the gist of the action. In this way, the fact of injury is established.

In an action for **defamation** it is for the Judge to determine upon the evidence whether the words complained of are reasonably capable of the defamatory meaning ascribed to them. If they are not so, he will withdraw the case from the jury, and a nonsuit or a verdict for the defendant will ensue (*f*).

At the trial of an action for defamation, written or oral, it is for the Judge to determine whether the **occasion of writing** or speaking criminatory language which would otherwise be actionable repels the inference of malice. If the inference be repelled, the statement complained of is thus turned into what is termed **a privileged communication.** And if at the close of the plaintiff's case there is no proof of malice, intrinsic or extrinsic, it is for the Judge to direct a nonsuit or a verdict for the defendant, without leaving the question of malice to the jury. A different course would, indeed, be contrary to principle, and would deprive the honest

(*f*) See *Hunt* v. *Goodlake*, 43 L. J. C. P. 54.

transactions of business and social intercourse of the protection due to them (*g*).

In an action for slander the fact that an **apology for the slanderous imputation** was offered before action brought is admissible in evidence with a view to a reduction of the damages. And in an action against the **proprietor of a newspaper** or other periodical for libel, the defendant may set up, by way of defence, that the libellous matter was inserted without actual malice and without gross neglect. Also that *before action brought* he inserted or offered to insert an apology for the libel in such paper or periodical, paying at the same time a sum of money into Court as amends for the injury done to plaintiff (*h*). If, instead of thus pleading in an action for libel, a bad **defence of justification** be set up, it may be taken into account by the jury in their assessment of damages, as showing express malice. The *animus* of the defendant will then be deemed to be almost conclusively established, and heavy damages may be given.

In an action for defamation ample compensation, so far as money can compensate for the injury inflicted, will usually be awarded to the aggrieved person, and the Court will seldom interfere with the discretion of the

(*g*) The cases on the subject of **privileged communications** are too numerous to be here cited. They will be found in the text books on Libel, to which the reader is referred. It may, however, be stated as a general proposition for his guidance that when a person is alleged to be guilty of **defamation**, if he can show that he acted in good faith, without malice, and in the belief that his statement complained of was true, he will in all probability be held not guilty. See *Hamon* v. *Falle*, L. R. 4 App. Cas. 247 ; 48 L. J. P. C. 45.

(*h*) Under 6 & 7 Vict. c. 96—Lord Campbell's Libel Act, 1843.

jury thus exercised. But where the damages are **excessive**, that is, wholly beyond what the case demands, the Court may set aside the verdict. On the other hand, for mere inadequacy of damages a new trial is seldom granted. In an action for slander, however, which was tried sometime since, the jury by a compromise among themselves awarded the plaintiff so small a sum that the Court subsequently ordered a new trial of the case (*i*). In the case cited the slanderous words imputed to plaintiff the **commission of an indictable offence**; such words are actionable in themselves, and were therefore calculated to be extremely injurious to his character. Hence, it could not be considered that any verdict had really been given; in fact the very meaning of the word "verdict" had been falsified.

150. A wrongful act, more prevalent now than formerly, is that of committing a **fraud productive of direct damage.** Such an act may lay the foundation of an action at law.

Instances of fraudulent misrepresentation have been already given (Arts. 14, 49, 80, 97), and they frequently present themselves. Redress for damage thus caused is, however, more often sought for in the Equity than in the Common Law Divisions of the High Court of Justice, although both Divisions have now jurisdiction in such matters, but which, for the sake of convenience is not ordinarily exercised in both (p. 82,

(*i*) *Falvey* v. *Stanford*, L. R. 10 Q. B. 54; 44 L. J. Q. B. 7. And see as to **new trial**, generally, *for inadequacy of damages*, *Phillips* v. *London & South Western Ry. Co.*, L. R. 5 Q. B. D. 78; 48 L. J. Q. B. 693.

n. (*f*)). One case, typical of a large class of actions such as those referred to, which came before a Court of Law, may here be noticed. The complainant sued as for a tort, and, after stating the formation of a company, and that a certain number of shares therein were to be offered to the public at so much per share, set forth a variety of acts on the part of the defendant. The plaintiff alleged that the defendant, intending to defraud, deceive, and injure the public, openly represented and advertised that the said company was likely to be a safe and profitable undertaking. Also, that he caused to be publicly made known, by prospectus, certain **false statements**, by means of which the plaintiff was wrongfully and fraudulently induced to become the purchaser of a large number of shares in the said undertaking. Lastly, that in consequence of such acts he incurred loss. Objection having been taken to the sufficiency of this complaint, **the action was held maintainable** as founded upon a false representation, fraudulently made by the defendant to the plaintiff, for the purpose of inducing him to act upon it. The plaintiff showed that by so acting upon it he had suffered damage; accordingly, although the parties were not known to each other before the transaction indicated, yet the action was held to lie. A man who thus suffers damage from the wrongful act of another is, therefore, not without remedy (*k*).

(*k*) *Gerhard* v. *Bates*, 2 E. & B. 476; 22 L. J. Q. B. 364. See also *Twycross* v. *Grant*, L. R. 4 C. P. D. 40; 48 L. J. C. P. 1 (App.)—an action to recover money paid for worthless shares.

Fraud is sometimes established at Nisi Prius by putting before the jury an assemblage of facts from which, as reasonable men, the essential ingredient in the right of action may be inferred by them. And although such facts, perhaps, rather raise a presumption than amount to direct and express proof of *mala fides*, yet they may have the force of direct proof. Thus, evidence of this sort has especial force when it puts the conduct of defendant in such a light as to appear inconsistent with straightforwardness, with rectitude and honesty, or with the real wish to perform a duty. The success, say of a litigant vendor of property treating with defendants, would be seriously jeopardised if it appeared that he had "stood by" and allowed them for his own benefit to draw inferences as to the value of the property entirely erroneous, and which, when acted on, proved highly detrimental to them (*l*).

151. From what has been said in the present Chapter may be deduced the principal tests for determining whether upon given facts an action of tort is maintainable. We must see whether a *legal* right vested in plaintiff has been infringed by defendant; whether some duty owing by defendant to plaintiff has been violated or neglected to his damage. In the next place, we search for proof of anything to justify the act complained of, then see whether this will neutralize the apparently tortious character of that act.

(*l*) As an illustration of this, see the celebrated case of *Small* v. *Attwood*, 6 Cl. & Fin. 232, with which read *Lee* v. *Jones*, 17 C. B. (N. S.) 482 ; 34 L. J. C. P. 131.

Torts, not directly affecting the person, reputation, or property of an individual, may nevertheless seriously affect him in some other way. For example, a misrepresentation as to the credit of a stranger may cause ruin to another person who relies on it. A **breach of duty** owing by A. to B. in virtue of some relation subsisting between them may entail consequences, not too remotely connected with the breach, leading to pecuniary loss and even bankruptcy. **Negligence causing death,** and so prejudicing relatives who had looked to the deceased person for maintenance and support, negligence causing loss of service to a master by reason of **bodily hurt done to his servant,** may be actionable. The mean and objectionable act of enticing away a man's servant or apprentice may be actionable. For any one of such acts our law furnishes a remedy by awarding, generally through the medium of a jury, pecuniary compensation for the damage caused.

I will merely add that the **doctrine of ratification** may thus be applied in a case of tort. A., professing to act by my authority, does that which *primâ facie* is a trespass, and I afterwards assent to and adopt his act. I become a trespasser, as it were, by **estoppel** (*m*), unless I can justify the act. Further, suppose an act—which if unauthorised would have amounted to a trespass—has been done in the name and on behalf of another, but without his previous authority. A subsequent ratification thereof might enable the party to take advantage of it where to do so might be beneficial to him,

(*m*) See p. 98, n. (*h*).

and to treat it as having been done by his direction. Here a rather subtle qualification has to be noticed, namely, that the act of ratification must take place at a time and under circumstances when the ratifying party might himself lawfully have done the act which he ratifies (*n*).

As regards litigation concerning tort such as treated of and exemplified in the preceding pages, finality has been enforced in part by the statute 21 Jac. I. c. 16, already cited (*o*), in part by a strict recognition of the doctrines of **merger** and **estoppel** (*p*). Thus, the original cause of action is merged in the judgment of a Court of Record, and altogether gone, either party to such judgment or his privies (p. 22, n. (*e*)) will be estopped from questioning it in another suit. Accordingly, **judgment recovered as against one of several joint wrongdoers,** though unsatisfied, will operate in bar of proceeding against another of them (*q*).

(*n*) *Ainsworth* v. *Creeke*, L. R. 4 C. P. 475, 486; 38 L. J. C. P. 58, judgment of Bovill, C. J., citing *Bird* v. *Brown*, 4 Ex. Rep. 786; 19 L. J. Ex. 154. It must be observed that these cases do not *decide* the point stated in the text. It is deducible rather as an inference from them.

(*o*) Art. 105.

(*p*) Arts. 97, 106.

(*q*) *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547; 41 L. J. C. P. 190 (Ex. Cham.). Similarly, judgment recovered against one or more of several **joint contractors** is a bar to an action upon the same contract against the others;—*Kendall* v. *Hamilton*, L. R. 4 App. Cas. 504; 48 L. J. C. P. 705.

CHAPTER VII.

LEGAL PRINCIPLES APPLIED TO TORTS.

"It is a vain thing to imagine a right without a remedy."
LORD HOLT.

152. LORD HOLT'S observation has been many times re-echoed, and we may also learn from the judgment delivered in the case below (*a*), that "where there is a legal right—even against the Crown—there must be a legal remedy, and one which can be made effectual." And in order that a complainant may not be without redress for the infringement of a legal right vested in him, the law will create a suitable remedy where no precedent is to be found which presents one. This proposition has been strikingly exemplified in Art. 148, and a few additional instances will in this Chapter be given to a like effect. These will show that our law can apply its old principles to new facts, although it will not readily swerve from an observance of its *established* rules and doctrines.

It need scarcely be said, that the catalogue of cases submitted to the reader may easily be amplified to almost an unlimited extent.

(*a*) *Thomas* v. *The Queen*, L. R. 10 Q. B. 31; 44 L. J. Q. B. 9 (1874).

153. A question of much interest amongst farmers and residents in country districts arose some time since. The owner of a horse sent it to A. to be agisted, that is to say, to be turned out to pasture. A. having negligently put the horse into a field accessible to a bull, it was gored and killed by that animal.

An action having been brought against A., it appeared that he had turned out the plaintiff's horse in company with some heifers, upon land which was divided from the field where the bull was by a ditch. This the bull could pass, and he was accustomed to do so. One day the horse was found dead, having evidently been gored by a horned animal, and the action was brought against the defendant, who agisted the horse, for not taking due care of it, and so allowing it to be injured. It is perceived that the action was not brought against the owner of the bull, and there was no evidence that the bull had a propensity to gore man or beast (Art. 136). On the contrary, witnesses testified that he was really very quiet, but the circumstances attending his attack on plaintiff's horse could not be deposed to. Evidence was given to show that, generally, it was not safe to put bulls and cows in the same field with horses, though some witnesses said that this practice was usual, and that, ordinarily, no harm resulted from it. It appeared also that bulls are accustomed to stray, so that the defendant ought to have anticipated the probability of the bull coming across the ditch into the same field with the horse, especially as he was aware that the animal often did so. On this evidence the jury found that there had been a want of due and

reasonable care on the part of the defendant in keeping the plaintiff's horse, and they awarded substantial damages for its loss.

The case standing thus, the action was held by the Court to be maintainable upon the ground that the defendant had been negligent (Art. 136) in not taking due care of the horse. He had put it in a field into which he knew the bull was accustomed to go, and this clearly was negligence on his part. The evidence showed that a bull is a treacherous animal and of uncertain temper, and although in point of law domestic animals are not to be regarded by their owners as necessarily dangerous, yet this rule probably had its origin in times when there were no fences, and cattle were left to wander about on commons and wastes. Accordingly, the *owner* of dangerous animals was never liable for damage done by them unless he knew them to be vicious. But it cannot be assumed that these animals are always to be trusted with other animals, and the rule above stated does not extend to **parties bound by contract** to take proper care of animals. The defendant in the case put was intrusted with the horse, was bound to take proper care of it, and had failed to do so.

In the case just cited, the argument *was* urged on the defendant's behalf, that the action should have been brought against the owner of the bull. But assuming this to be true, it is tolerably clear that the agister of the horse could have also brought an action against the owner of the bull, because the bull had wrongfully entered his field. "But then, in such an action against

the owner, it would be necessary to show that he knew it to be vicious, so that it would have been more difficult to maintain that action than this. For, the cause of action for **negligence** in keeping the horse is quite different from that against the owner of the animal doing the injury" (*b*).

Thus we see an ancient head of law, regarding negligence generally, and liability by reason of want of care in the custody of animals domesticated or otherwise in particular, appealed to at the present day for determining the rights and liabilities of parties.

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154. The following case illustrates what has been said in the preceding Chapter, and further shows how legal principles may be applied to facts.

The plaintiff deposited with a bank for safe custody a cask containing gold doubloons. It was placed with other deposits in a vault in the bank, and the agent of plaintiff was in the habit of coming to the bank to see that his deposit was secure. The deposit was made solely for the plaintiff's accommodation, and without any payment, &c., to the bank. No evidence was given to show how the vault in which the money had been placed was secured; but it appeared that whenever the plaintiff gave orders to the bank, to deliver any of the coins deposited as above mentioned, the cask was opened by the cashier or chief clerk, who delivered the coins pursuant to such orders. These officers, however, both of

(*b*) *Smith* v. *Cook*, L. R. 1 Q. B. D. 79; 45 L. J. Q. B. 122.

whom had previously borne a fair reputation, fraudulently took a great number of these doubloons, with which they absconded.

On action brought by the depositor, it was held that "the bank was no more answerable for this act of its officers than it would have been had they stolen the pocket-book of a person who might have laid it upon the counter while he was transacting business at the bank." The bank had not been guilty of either gross negligence or actual fraud, and was therefore not liable for the theft of their officers (*c*).

155. The case just cited exemplifies the rule that **a gratuitous bailee is liable only for gross negligence** in regard to the thing bailed. Of course, degrees of care are not well definable; still, with some approach to certainty, they are distinguishable. Accordingly, it will be the duty of a jury, under the direction of the judge, to endeavour to discriminate as far as possible between degrees of negligence or care when their verdict depends upon their doing so.

(*c*) The above case, *Foster* v. *Essex Bank*, 17 Massachusetts Rep. 479, is cited by Dr. Broom, but it has been doubted in another American case, that of *The United States* v. *Prescott*, 3 Howard's Rep. (American), 578, 588. See, however, the English case of *Giblin* v. *MacMullen*, L. R. 2 Pri. Coun. 317; 38 L. J. P. C. 25. In a case where bankers, **bailees for reward**, had been guilty of **gross negligence as** to the custody of certain documents the loss of which caused the depositor to incur heavy costs, they were held not liable, because the costs incurred had not been the direct consequence of their neglect. See *In re The United Service Co. Lim.* (*Johnson's Case*), L. R. 6 Ch. 212; 40 L. J. Ch. 286.

156. The plaintiff, suing in a County Court, claimed £40 as damages for cattle killed through eating the leaves of a yew tree. The tree had been recently felled in a wood belonging to the defendant, and this wood adjoined a portion of the plaintiff's land. From this the cattle had escaped into the wood, in consequence of neglect by the defendant to repair a fence belonging to him, which, therefore, he ought to have maintained in repair. Such being the substance of plaintiff's claim, proofs in support of it were needed to establish these points: 1st, the possession and occupation of the respective lands of plaintiff and defendant; 2ndly, the duty of defendant to repair the boundary fence; 3rdly, his neglect to do so; 4thly, that the alleged damage accrued to plaintiff, and how it happened.

It appeared in evidence that the defendant had sold to a third person, C., the right to cut down timber in the wood; that C.'s servants cut down a tree there in such a manner that it fell upon and broke the fence separating defendant's land from plaintiff's, after which they cut down the yew tree. Further, that the cattle escaped from plaintiff's field through the gap in the fence, caused as above mentioned, into defendant's wood, where they ate the leaves of the yew tree which caused their death.

Several interesting questions of law arose upon the above facts. Was the defendant bound, without notice, and before the lapse of reasonable time, to repair the fence? Was he liable for damage resulting from the negligence of C.'s servants? Was the damage too remote? The Court at Westminster, reversing the

decision of a learned County Court Judge, held that the defendant was bound at his peril to maintain at all times, and without notice, a sufficient fence. Next, that as the damage had not been caused by the act of God (Art. 78), or by *vis major*,—that is, by some circumstances absolutely beyond his control—he was liable to make it good (*d*).

A case founded upon tort more suggestive than this is not perhaps to be found in the Reports. And it may well be asked whether C., whose servants caused the damage, would have been liable to plaintiff, or again, whether C. would have been held liable to recoup the actual defendant the amount recovered from him at suit of plaintiff. The Court having decided that the defendant was bound *at all times*, to keep in repair the fence, through which the cattle escaped, the defendant's neglect to do so was the original cause of the damage. It would appear then that under the precise circumstances, the defendant could have no remedy over either against C. or his servants.

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157. Suppose that the owner of a chattel well *known by him* to be defective or dangerous, gratuitously permits another person to use it, and that such person is injured by using it, the owner will be liable for the injury done.

(*d*) *Lawrence* v. *Jenkins*, L. R. 8 Q. B. 274; 42 L. J. Q. B. 147, with which compare *Wilson* v. *Newberry*, L. R. 7 Q. B. 31; 41 L. J. Q. B. 31, another case of animals being poisoned by leaves of a yew tree.

If the lender is ignorant of the defect or has no notice of its existence, he will not be liable, even though he may have made the chattel himself and done his work negligently (*e*). Such liability, in truth, flows from a breach of duty owing by the owner of the chattel towards him who is to use it, this breach of duty causing damage to the latter. In a case of this kind, difficulty, however, arises in determining whether the substantial question involved is one of law or one of fact, of law for the ruling of the judge, of fact for the finding of the jury (p. 163 n.). Such a difficulty was experienced where a cab driver sued the cab proprietor for bodily hurt caused by an unruly horse, which had never before been harnessed to a cab. The claim for damages was founded upon **breach of duty causing damage.** The jury at the first trial of the case found that the horse was not reasonably fit to be driven in a cab, and the plaintiff had a verdict. Whereupon arose a question as to whether the relation subsisting between plaintiff and defendant was that of bailor and bailee, or of master and servant, or that of co-adventurers. The question was important, because the liability of the defendant towards plaintiff would of course vary according to the relation between them. After much difference of opinion amongst the Judges upon these points, a new trial of the cause was ordered. At this second trial five questions were submitted to the jury, and amongst them these: Did the plaintiff take the horse and cab

(*e*) See, for the principle, *Macarthy* or *MacArthy* v. *Young*, 6 H. & N. 329; 30 L. J. Ex. 227. *Randall* v. *Newson*, L. R. 2 Q. B. D. 102; 46 L. J. Q. B. 259, App.

wrongfully, or were they entrusted to him by defendant? If so, were they entrusted to him as bailee or as servant? The jury found that they were entrusted to plaintiff as bailee, and the plaintiff again had a verdict. This, after another argument in Banc, was allowed to stand, the Court considering that the second verdict put a stop to the case. The decision was really founded on the defendant's negligence, and whether the plaintiff was a servant or bailee was therefore immaterial (*f*).

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158. A., the owner of certain jewels, puts them in a bag, which is duly sealed and placed by him in the hands of B., a jeweller, for safe custody. B. afterwards breaks the seal, takes the jewels out of the bag, and pledges them to C. for an advance of money. A., being apprised of what has happened, demands the jewels of C., who refuses to give them up except upon payment to him of the sum advanced on them.

From the facts stated several questions may arise. Is there any, and if so what, civil remedy at suit of A. against C.? To answer this question we must consider: 1st, in what relation B., the jeweller, stood to A.; 2ndly, whether or not, or how far, A. was bound by B.'s act in pawning the jewels? As to the former question, we may conclude that the delivery of the jewels to B. was a bailment of them for the use of the bailor. The jeweller was merely a depositary, having no right to sell or dispose of them, but having only the custody of them. Next,

(*f*) *Fowler* v. *Lock*, L. R. 10 C. P. 90.

we may conclude that the pledge of the jewels by B. was wrongful, and that the refusal by C. to deliver them up except on payment of the advance, would give A. a right of action against him for their recovery. In such a case the jury might assess the value of the jewels with a condition that if they were returned to the plaintiff nominal damages only should be paid (*g*). Here, moreover, a presumption might arise, derivable from the maxim—all things will be presumed against a wrongdoer. For, if C., having the jewels in his possession, refuses to produce them at the trial, the jury will be at liberty to presume them to be of the finest quality.

A. would have a right of action against B. for the jewels or their value, although in exercising this right difficulty might be encountered by reason of the doctrine of our law already adverted to in Art. 140. That doctrine is that, where a felony has been committed causing to an individual pecuniary damage, the interest of the public demands that *public justice* should be satisfied before redress by action is sought. This rule, however, as to the suspension of a right of action for a felony, in former times practically operated to extinguish the right altogether. This arose in consequence of the law which made the goods of a *felon* to be forfeited to the Crown. Such will not indeed henceforward be its operation, because the statute 33 & 34 Vict. c. 23, abolishes forfeiture on conviction for felony. The property of a con-

(*g*) See *Hartop* v. *Hoare*, 3 Atk. 44 (1729), and Lord Loughborough's judgment in *Mason* v. *Lickbarrow*, 1 Sm. L. C., where it will be found under the case of *Lickbarrow* v. *Mason*.

vict, therefore, though for a time dealt with and administered under the provisions of that Act, or the residue thereof, if any, is ultimately restored to him.

Let us observe how the rule as to merger or suspension of the civil remedy came into operation, and what course was taken when it did so. It has sometimes happened that a transaction under investigation at Nisi Prius, and apparently grounded upon tort, has been found to involve all the ingredients of an indictable offence. When such offence turned out to be a **felony**, the doctrine of our customary law which has been mentioned might have become operative. Thus, in an action for **trespass**, as for assault and battery, and the wrong proved to be really a *felonious assault*, or where the action was for *goods wrongfully taken*, and the case resolved itself into one of larceny, the presiding Judge would have had to decide which course should be taken under such circumstances. It seems that he could not properly have refused to proceed with the trial, because a Nisi Prius Judge is a Commissioner appointed by the Crown to try such issues as may be brought before him. His duty would therefore be to try the issues on the record (*h*). In such cases the Crown, it seems, might have called upon the Court to intervene to prevent the plaintiff, if successful, from obtaining the fruits of judgment (*i*).

(*h*) *Wells* v. *Abraham*, L. R. 7 Q. B. 554; 41 L. J. Q. B. 306.

(*i*) See the judgment of Cockburn, C. J., in the above case. N.B. If, however, a proposed clause in the **Criminal Procedure Bill**—now before Parliament—becomes law, all this will be matter of the past. It is proposed to abolish the rule as to the suspension of the civil right where both that and the criminal remedy are *alike open* to an aggrieved

But whatever might have been the right course to be taken under the circumstances supposed, the doctrine alluded to of our Common Law could not have failed to operate adversely to A.—the plaintiff in the case last put—in an action for damages brought by him against B. Of course, if C. had sued B. for the money advanced upon the jewels, C. having had to surrender them to A., their absolute and rightful owner, the doctrine as to merger would not have applied. It held only as between the parties to the **principal transaction.**

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159. A tort of not uncommon occurrence is constituted by the **infliction of bodily hurt upon a servant causing damage to his master,** by reason of loss of service resulting from the wrongful act and the expense of medical attendance. Such an action rests upon the doctrine that the master has a right to, and a property in, the services of the third person, which right and property have been interfered with by the tortious act of the defendant. **Proof of damage** is essential to the maintenance of this action. If the hurt were so slight that no loss of service resulted from it, the plaintiff could not recover. The damages are assessed in accordance with what is alleged and proved. The proofs must follow, and be adapted to the averments made in pleading.

person, as in cases like those mentioned in the text. It being highly probable that so reasonable a suggestion will be effectuated, we have accordingly ventured to speak of the actually existing rule in the past tense. Of course if the two remedies are *not* both alike open to a person, the rule of merger or suspension will still hold good.

160. A curious discussion arose some time since out of an attempt to extend the operation of the above method of redress. The question was whether a master could maintain an action for bodily hurt done to his servant directly causing his death? It may seem strange that for damage and loss of service an action at suit of the master would not in this case lie. When, indeed, the service is simply interrupted by mishap resulting from negligence, the master may recover damages from defendant. But if the service is wholly determined by the same cause, no such action can be sustained (*k*). This distinction rests on long continued usage and the general understanding amongst lawyers, recognised in the preamble to Lord Campbell's Act (9 & 10 Vict. c. 93).

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161. A careful perusal of cases like those collected in the foregoing pages, and a comparison of them with those cited in Chapter V., will show that legal principles applicable for resolving questions arising out of tort essentially differ from rules of law which govern cases involving contract. Tort is more akin to crime than to contract, and is so regarded in our legal literature, although in some instances the two subjects of legal consideration are closely interwoven with each other.

(*k*) See *Osborne* v. *Gillett*, L. R. 8 Ex. 88; 42 L. J. Ex. 53. But as the Court indicated, apart from Lord Campbell's Act, no civil action is maintainable against a person who has by negligence caused the death of another person, even though the latter were the servant of the laintiff.

CHAPTER VIII.

A CRIME—WHAT IT IS.

Criminal Law "merits, for reasons too obvious to be enlarged on, the attention of every man living. For no rank, no elevation in life, and no conduct, how circumspect soever, ought to tempt a reasonable man to conclude that these inquiries do not, nor possibly can, concern him. A moment's cool reflection on the utter instability of human affairs, and the numberless unforeseen effects which a day may bring forth, will be sufficient to guard any man, conscious of his own infirmities, against a delusion of this kind."—SIR M. FOSTER.

"The law inflicts **punishment** only for **overt acts**."

MONTESQUIEU.

162. EACH member of society should know the duties owing by him to the public generally, and to individuals in particular, and should be able to recognise his responsibilities as a member of the community. This is especially true as regards the Law of Crimes. If civil procedure, and matters regulated by it, are worthy of attention, so, much more, should be studied and understood the principles of what is technically termed Crown Law, which controls and governs each class of society, and recognises no distinction in regard to rank or social position.

Assuming then that each of us should understand, at least something of, the doctrines of the coercive, restraining and **punishing** law under which he lives, I

purpose to inquire concerning them, first smoothing away preliminary difficulties, and then briefly noticing in order the principal ingredients in **crime.**

163. To the question,—What is **a criminal act?** the answer most generally applicable seems to be that it is one which in some way or other subjects the actor to **punishment.** If the doer of a specified act is visited with a penalty in the shape of a pecuniary fine, and in default of payment thereof, with **imprisonment,** we shall be justified in saying that the act specified is criminal. Because imprisonment is in contemplation of law a most severe punishment, and as the law regards with jealousy any infringement of the liberty of the subject, so, from the very fact of punishment being inflicted for an act, we may, independently of its own badness, infer its character and quality as viewed by the **Law.**

In considering whether an act is of a criminal character, it will matter little whether the doer of it is only summarily punishable, or whether the act amounts to felony or misdemeanour. For although very many cases are summarily disposed of by a single magistrate, or at petty sessions, with a view to economising time and money, yet they are dealt with in accordance with the same principles of law which are applied at Quarter Sessions and Assizes. An act may in its nature be criminal though not indictable, and as to the distinction between felonies and misdemeanours this can afford no clue for determining whether an act is an indictable offence or even criminal.

164. In order to determine with certainty, irrespective

of the general test above indicated, the nature of a crime, we must search for the ingredients in it, and we shall find that **a crime is constituted by an overt act done with a guilty intent.** It must include a guilty mind, knowledge, or possession, affecting or prejudicing the public, features which will be commented on in due order.

165. The nature of an overt act, criminal and punishable, will be exemplified in almost every page of this Chapter. Thus to begin with; **it is a misdemeanour to incite an apprentice to embezzle his master's goods,** and any such act must generally be proved in the Crown Court in the same way as at Nisi Prius (*a*).

But although a fact must be established by the same proofs in criminal as in civil procedure, the legal inference deducible from a fact proved at Nisi Prius may be quite different from the inference deducible from the same fact evidenced in a criminal prosecution.

Thus, the fact that A. was agent for B. must be proved by like evidence at a criminal as at a civil trial, but it will not follow that B. will incur criminal responsibility for the act of A. because he might be civilly answerable for it. The **mode of proof** is one thing, the **effect of the evidence** is another.

If a man employs an **agent** for a perfectly legal purpose, and such agent does an illegal act, that act does not

(*a*) *Rex* v. *Higgins*, 2 East, Rep. 5; *Rex* v. *Collingwood*, 6 Mod. Rep. 289. "Every one who incites *any* person to commit *any* crime commits a misdemeanour, whether the crime is or is not committed." Mr. Justice Stephen's Criminal Law, Art. 47.

necessarily affect the principal. If, however, it is shown that the principal directed the agent to act illegally, or really meant that he should so act, or afterwards ratified the illegal act, or again, if it be shown that the principal appointed a general agent to do both legal and illegal acts, the principal will be alike guilty with the agent (*b*). If, however, a person, though resident abroad, commit, through the medium of an agent, an act which takes effect in this country and here punishable, the principal so offending might be made answerable to our laws should he come afterwards within their reach.

A master, as we have seen, is civilly answerable for a negligent act of his servant which causes bodily hurt to complainant, if the servant, when guilty of the breach of duty imputed, was acting in the service of the master, and in the course of his regular and accustomed duty (Art. 75). In such a case, if the death of the injured person ensued, the servant might be indictable for **manslaughter**. The master, on the other hand, could not be made criminally answerable, because there would obviously be no felonious or criminal intent provable as against him. Of course if the master ordered his servant to do some particular act, or to do something which would naturally cause death, or if he could be brought within the definition of what the law calls an **accessory before the fact**, he would be guilty. And **an accessory before the fact** is one who, being absent at the time of

(*b*) See *Cooper* v. *Slade*, 6 H. L. Cas. 793 ; 27 L. J. Q. B. 449 (H.L.), judgment of Lord Wensleydale.

the particular felony committed, did procure, counsel, command, or aid another to commit it.

If the **driver of a coach maliciously upsets it**, and so causes hurt to a passenger, the coach proprietor being at the time absent, the latter may nevertheless be civilly liable for the damage caused, and though the servant may have exposed himself to an indictment, the master would not be criminally responsible. Here an express statutory provision (24 & 25 Vict. c. 100, s. 35) would apply, so as to render that person criminally amenable, and that person only, whose act had done the harm. The section of this Act referred to declares that "whosoever having the charge of any carriage" shall, "by wanton or furious driving" . . . "or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm" to another shall be guilty of a **misdemeanour.**

Consistently with what has been just said, we may observe that penal consequences are not in general incurred for non-observance of statutory requirements where there has been no personal neglect or default by the party charged. For instance, the **owner of a colliery** is required to observe certain precautions and regulations in regard to the use by the miners of safety lamps. It is therefore his duty to appoint a competent person to examine and deliver these lamps to the miners, and if this is done the owner will not be liable to a penalty in respect of the act or default of the person so employed by him, though it be in contravention of the statute law (*c*).

(*c*) *Dickenson* v. *Fletcher*, L. R. 9 C. P. 1; 43 L. J. M. C. 25.

166. Generally speaking, then, a fact may be proved in the Crown Court in like manner as it is provable at Nisi Prius. As regards, however, the sufficiency and stringency of the proofs adduced in Crown procedure, they must be brought very closely home to the accused in order that a conviction may be had.

Let us suppose that in an **action against a carrier for the loss of plaintiff's goods** an issue is raised whether the loss arose from the **felonious act of the carrier's servants.** This issue, if found for the plaintiff, would entitle him to a verdict (*d*), and it would suffice for plaintiff to show facts rendering it more probable that the felony was committed by some one or other of the carrier's servants than by a person not in his employ. But evidence would have to be given sufficient to convict some one or more of the servants of the felony. And where a charge of larceny is preferred against a particular servant of a defendant, it will be necessary that the weight of legally admissible evidence adduced against such servant—as in the case of any other accused person—should be such that, to justify conviction, twelve men of average intelligence should believe him to be guilty. It is not, however, necessary to charge any one individual servant with the theft, &c. (*e*), and indeed to do so might be impossible.

Compare with this *Wynne* v. *Forrester*, L. R. 5 C. P. D. 361; 48 L. J. M. C. 361; where a manager and an agent were held liable to conviction for non-compliance with the terms of The Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76, s. 61).

(*d*) *Metcalfe* v. *London & Brighton Ry. Co.*, 4. C. B. (N. S.) 307; 27 L. J. C. P. 333.

(*e*) See *Vaughton* v. *London & N. W. Ry. Co.*, L. R. 9 Ex. 93; 43

167. In tracing by analogy the mode of proof in civil procedure, from that of the Crown Court, a practitioner must be somewhat wary; though in some cases such a course of reasoning may often be relied on.

Where the question is as to the effect of a written instrument, the instrument itself is primary evidence of its contents, and until it is produced, or its non-production is excused, no secondary evidence of them can be received (Art. 85). And this rule holds both in criminal prosecutions and in civil actions. Some time since, this principle was relied on as excluding a presumption of guilty knowledge, drawn from the fact that defendant had attempted (*f*) to commit a fraud similar to that for which he was indicted. The offence charged was that of attempting to obtain money by passing as genuine a ring set with false diamonds, but *the ring was not produced in Court.* The Judges, however, in repudiating this

L. J. Ex. 75. A defendant carrier is not estopped from denying that the person alleged to be guilty of a theft, &c., is or was his servant, and there will be no *inference* or *presumption* that he was the carrier's servant. See *Way* v. *Great Eastern Ry. Co.*, L. R. 1 Q. B. D. 692; 45 L. J. Q. B. 874.

(*f*) "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted." Every such attempt is a misdemeanour. See Mr. Justice Stephen's Criminal Law, Arts. 49, 50. From the above definition of an attempt to commit an offence, it will appear that if A., a pickpocket, puts his hand into B.'s pocket with the intention of stealing, but the pocket is empty, A. is not guilty of an attempt to steal. But, as Mr. Justice Stephen submits, he ought to be guilty of an assault with intent to commit a felony. Note 8 to Art. 49. See also as to attempt, the recent case of *Reg.* v. *Brown*, decided Mar. 3, 1883; 52 L. J. M. C. 49.

objection, argued by analogy from civil procedure. There is no case, they said, deciding that, when the issue is as to the state of a chattel, the soundness of a horse, or the equality of the bulk of goods to the sample, the chattel produced in Court constitutes primary evidence so as to exclude other evidence until the chattel has been inspected by the jury. Accordingly, it would not be incumbent on counsel for the prosecution, under the circumstances put, to produce the ring, if other proof of the attempted fraud is given (*g*).

168. The ingredient, then, in crime first to be specified is an **overt** act, such act being criminal and punishable at Common Law, or made so expressly or impliedly by statute. Difficulty, however, may occur not only in regard to affixing to such an act its precise technical quality, character, and designation, but also in determining whether, upon facts deposed to, an **offence** has been committed. The Legislature, moreover, has sometimes deemed it necessary to declare indictable an act which might or might not have been within the reach and cognisance of our customary law. When this is done the Legislature more or less minutely and circumstantially defines the offence constituted, leaving other states of facts not precisely falling within the letter of its enactment to be dealt with by the Common Law. Under such circumstances, where the statute applies,

(*g*) *Reg.* v. *Francis*, L. R. 2 C. C. R. 128 ; 43 L. J. M. C. 97 ; see also, as to act indicating **intent**, *Reg.* v. *Cooper*, L. R. 1 Q. B. D. (C. C. R.) 19 ; 46 L. J. M. C. 219. The former case may also be examined as to the same matter, as well as for the particular point mentioned in the text.

the indictment is framed upon the statute, and should the proofs fail to bring the case within it, a conviction may still possibly be had at Common Law.

A statute may prohibit an act either directly or indirectly as by making the doer thereof liable to a penalty. It may also order a thing to be done. In construing all penal statutes, the fundamental rule must be kept in mind that such an Act is to be construed strictly (*h*).

169. From what has now been stated we see what the **characteristics of a crime** are ; and an act to be such must concern or affect the public; and it must be prejudicial, or threaten to be so, to the community.

The **enticing away of** a servant might constitute a grievous wrong, and so be *actionable.* It was, however, long since held, namely in the time of Queen Anne (1702-1714), *not indictable,* because such wrong is in its nature private, rather than one affecting the community. Every violation of the law, it was argued, is of course an evil, but not therefore necessarily indictable (*i*).

It is the object of this Chapter to show that an act criminal and punishable concerns the public at large, as well as the particular individual aggrieved.

The **quality of an act** may have to be determined by marking its effect on the community generally. When we say that such and such an offence is **indictable,** we ought to be sure as to the signification of that term;

(*h*) See *Nicholls* v. *Hall,* L. R. 8 C. P. 322; 42 L. J. M. C. 105; judgment of Keating, J.

(*i*) *Reg.* v. *Daniell,* 6 Mod. 99 ; *Cox* v. *Muncey,* 6 C. B. (N. S.) 375.

for, as previously intimated, all breaches of even public law are not indictable. Further that, where an offence is one which may be the subject of an indictment, the statute law will in certain cases prevent any abuse of the right to prefer one against a person (*k*). An indictment is a brief narrative of an offence which the public good requires should be punished. A bill of indictment will lie "against all persons who actually commit, or who procure or assist in the commission of **crimes**" (*l*). Considerations of convenience, expediency, and public policy may weigh with our Judges in deciding whether a transaction brought before them in purely criminal procedure does really afford ground for an indictment. Take the case of **uttering a forged testimonial** to character by one knowing it to be forged. This is a **misdemeanour at common law**, the intent of defendant being to deceive and so to obtain a situation of emolument; and if the uttering is an offence, so of course is the actual forging of such a document (*m*).

And it is possible for a person to commit an indictable misdemeanour at Common Law by doing an act with even a correct motive. Thus, where a man entered an unconsecrated burial ground and disinterred a corpse deposited there, he was convicted, and the Court for Crown Cases Reserved affirmed the conviction, although the defendant

(*k*) See the Vexatious Indictments Act, 22 & 23 Vict. c. 17, and its Amendment Act, 30 & 31 Vict. c. 35.

(*l*) Archbold, Criminal Pleading, 7.

(*m*) *Reg.* v. *Sharman*, Dearsly, Crown Cas. 285; 23 L. J. M. C. 51.

acted in good faith, with strict decency, and with a proper motive (*n*).

A magistrate accordingly called on to convict summarily (*o*), or to commit for trial an accused person, may need closely to regard the quality of the act charged against him.

170. An act deemed criminal by our law is when analysed almost always found to have been done with a guilty mind or intention, or to have been accompanied with a guilty knowledge or possession of property.

171. In general, that which our law designates as criminal, and deems punishable, is an act done with a criminal intent. The act and the intention must concur to constitute a crime, nor amongst offences indictable at Common Law does any very material exception offer itself to this rule. Our law, indeed, holds that where, owing to immaturity of years, or the mental condition of the person implicated, inasmuch as there cannot have existed actual intention, so such a person could not commit a crime, in the legal sense of that word. And our Courts will, if possible, construe statutory words—without doing violence to them—in accordance with the rule which has already been mentioned. The *mens rea*, that is, a guilty mind or intent —*motive* being out of the question—it has been judicially observed, is an essential ingredient in an offence. No

(*n*) *Reg.* v. *Sharpe*, Dearsly & Bell, Cr. Cas. 160; 26 L. J. M. C. 47.

(*o*) See The Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, also The Summary Jurisdiction (Process) Act, 1881, 44 & 45 Vict. c. 24.

doubt it may be dispensed with by statute, but the terms which should induce Judges to infer that it is dispensed with must be very strong (*p*). To punish one who acted with an innocent intention, or under an innocent belief as to the quality of his act, might appear under any circumstances hard. Still we must remember that an act in itself indifferent is sometimes, for the protection of the revenue, or for the security of traders and others, forbidden and made punishable, also that every man is bound to know the law (*q*).

Simple instances, showing how essential the intent may be as a constituent element in a statutory crime, are such as the following.

By statute 24 & 25 Vict. c. 100, s. 31, whosoever shall set, or cause to be set, any engine calculated to destroy human life, or inflict grievous bodily harm with the intent that the same "may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith," shall be guilty of a misdemeanour. To support an indictment upon this statutory provision, the intent of the alleged transgressor must be proved;

(*p*) See *Fitzpatrick* v. *Kelly*, L. R. 8 Q. B. 337; 42 L. J. M. C. 132.

(*q*) It should rather be that every man is so far *presumed* to know the law that his ignorance of it will not excuse him for the commission of a wrongful act. Austin observes (Lect. xxv., Part 1, § 3) that, "to say that 'a man's ignorance shall not excuse him, *because* he is *bound* to know the law,' is simply to assign the rule as a reason for itself." He then goes on to state that "the only sufficient reason for the rule in question seems to be this: that if ignorance of the law were admitted as a ground of exemption, the Courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of the law next to impracticable."

and this will be done by drawing an inference from circumstances, such as the position of the gun or other instrument, the declarations of defendant, and so forth.

One particular kind of **cheating**, namely that **by the use of fraudulent labels, &c.**, is now provided for by statute 25 & 26 Vict. c. 88. By section 3 of this Act, any person who, with intent to defraud, shall apply a forged or counterfeit **trademark** to any label with which a chattel is to be sold or exposed for sale, is made guilty of a misdemeanour. And other provisions have been inserted in this statute with a view to repressing the practice, which had become prevalent, of imposing on the public and so damaging individuals by frauds analogous to that mentioned. Here again, the **intent to defraud** would be material to support an indictment under any one of such statutory clauses.

172. If it be asked how, at a trial in the Crown Court, the intent of the party charged is to be discovered, I reply, By the facts themselves. In other words, by closely observing the nature of the precedent, concomitant, and subsequent circumstances, and the manner of doing the principal act. For instance, if the indictment were for **wounding with intent to murder**, framed upon the stat. 24 & 25 Vict. c. 100 (s. 18), the kind of weapon used would be material, the force and violence with which it was used, the lying in wait, and so forth. If the means employed were appropriate for accomplishing the result charged, the jury would have to say whether that result was within the intention and design of the accused.

It sometimes happens, however, that even from the

overt acts constituting, together with the circumstances attending, the alleged crime, the requisite intention cannot with sufficient certainty be deduced or implied. When such is the case, other acts of the prisoner committed on some prior occasion but similar to that under investigation may, in some cases, have to be submitted to the jury, as showing more conclusively the intent as to the later event. Thus, on an indictment for **arson**, it being doubtful whether the burning was by accident or by design, proof has been admitted that at some other time the prisoner intentionally attempted to set fire to the same building as that specified in the indictment. And this rule of evidence will apply to other cases also (*r*).

173. The difficulty of proving the intent with which an act was done being great and peculiar, the law calls to its aid a **presumption**, and this is, that every man must be held to fully contemplate and intend the ordinary consequence of what he does or expressly permits, and to be answerable for the results of the act done or permitted (*s*). Accordingly, where a man is charged with having done a wrongful act, without lawful excuse, of which the probable consequence may be highly

(*r*) See Archbold's Crim. Pl. 208, 217 (17th ed.). But where a man was charged with having obtained goods by **false pretences**, evidence of a *subsequent* obtaining goods by the same pretence, but from a different person, was *not* admitted. The distinction between such a case and that in the text is obvious. See *Reg.* v. *Holt*, Bell's Cr. Cas. 280 ; 30 L. J. M. C. 11, cited in Archbold, 217.

(*s*) See *Haigh* v. *Town Council* or *The Corporation of Sheffield*, L. R. 10 Q. B. 102 ; 44 L. J. M. C. 17.

injurious, **the intention is an inference of law from the doing of the act.** And although the accused person may have had a different object in view, he must be taken to have intended that which is the natural consequence of the act.

If a man does an act which is illegal, the act is not rendered legal merely by the fact that it was done with a lawful object or even good motive (*t*). Unless the object were such as rendered the particular act lawful, there is no legal excuse disclosed for doing the act. Let us suppose such a case as this:—The law says that some printed or written matter of a certain kind or tendency shall not be **published,** but notwithstanding this, it is published, though with an ulterior intention of benefiting the public. Circumstances, however, show that the person doing this act must have known that it would produce the consequences contemplated by the legislature. In such a case, the offending party would certainly not be held excusable either on moral or legal grounds. He would not be justified simply because he thought or actually intended that some counterbalancing or greater good would be accomplished by his act. An appropriate answer to any such plea on his part would be "you shall not do evil that good may come" (*u*).

174. Although a criminal intent must usually accompany an act, in order that the full legal conception of crime may be satisfied, yet even a bare act is sometimes made indictable by statute. Thus, where an **act of violence,**

(*t*) This is seen from the case of *Reg.* v. *Sharpe*, referred to at p. 212.
(*u*) *Steele* v. *Brannan*, L. R. 7 C. P. 261; 41 L. J. M. C. 85.

involving a breach of the peace, is committed, the inquiry as to intent may be superfluous.

In the Forgery Act (24 & 25 Vict. c. 98, sect. 17) there is a provision against engravings which "shall resemble, or apparently be intended to resemble," any part of a note of the Bank of England. The above statute declares that whosoever shall make such engravings without lawful authority or excuse shall be guilty of felony. To convict under this section it would suffice to prove **merely the doing of the particular act specified.** This proof would be answered by showing lawful authority or excuse for doing it, but the burden of proof would here lie on the accused party.

To some **crimes of violence** reference will presently be made.

175. When proof of guilty knowledge, generally, is added to and combined with proof of suspicious possession of lost or stolen property, and the possession cannot be satisfactorily explained, it may go far towards ensuring a verdict against the accused person.

It has been the wise policy of our legislature to make **guilty knowledge** or **guilty possession** an essential element in each of certain acts which have to be repressed, prevented, or punished. Here can only be given a few instances in illustration of what has been said; but a perusal of recent statutes concerning Criminal Law would supply very many more.

It has been held that a person cannot be convicted for using ingredients prohibited by law (*x*) in the making of

(*x*) 6 & 7 Will. IV. c. 37, sect. 8.

bread for sale, unless there be knowledge either in himself, or in the person employed by him, of the presence of the ingredients (*y*). In other words, the man could not be convicted of *using* unless he had a guilty *knowledge that he was using* the prohibited ingredients.

Guilty knowledge is also an essential ingredient in the offence of **keeping a diseased animal** in one's possession, without giving notice to the police, as required by law, and by Orders issued by the Privy Council pursuant thereto (*z*).

Again, a **summary conviction** may be obtained against any man having in his possession, or on his premises, with his knowledge, an **engine for taking deer**, unless he can show that he had a lawful occasion for the same, and did not keep it for an unlawful purpose. Here the very fact of possession—subject to explanation—is made punishable; and it will be for the magistrate to determine whether the defendant had lawful occasion for the engine, and for what purpose he kept it.

176. In general, where the mere possession of a thing is made an indictable and punishable offence, the guilty knowledge or *scienter* is expressly or constructively made an ingredient in the offence charged against the prisoner. But proof of guilty or criminal possession must be adduced on the part of the prosecution, in order that a conviction may be had.

(*y*) *Core* v. *James*, L. R. 1 C. C. R. 135; 41 L. J. M. C. 19.

(*z*) *Nicholls* v. *Hall*, cited before at p. 210. The present governing statute on this subject is 41 & 42 Vict. c. 74 (The Contagious Diseases (Animals) Act, 1878).

Thus, by sect. 14 of the Forgery Act (24 & 25 Vict. c. 98), whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, shall **knowingly** have in his custody or possession paper water-marked in a certain manner shall be guilty of felony. Here the *scienter* is expressly made an ingredient in the crime. Proof of the *scienter* is sometimes held to be necessary by **construction**, that is, by gathering from other portions of a statute the intention of the Legislature.

It is enacted, by sect. 24 of the Act last cited, that whosoever without lawful authority or excuse, the proof whereof shall lie on the party accused, shall have in his custody or possession any **press for coinage**, knowing such press to be a press for coinage, shall be guilty of felony. To support an indictment framed upon this section it would only be necessary to show that the thing specified was in the custody or possession of the accused person, and his knowledge of that fact. It would be for the prisoner to show that he had lawful authority or excuse for the possession of the thing specified, because the mere possession is *primâ facie* made illegal.

177. The Legislature, with regard to some offences, has relieved juries from the perplexity in which they might find themselves at trials concerning those offences, by empowering them to convict without proof being adduced of the presence of certain matters ordinarily required to be proved in order to produce a conviction. And of late years, since our penal code has become milder, this course seems to have been more freely adopted than of old.

Thus by sect. 5 of the stat. 24 & 25 Vict. c. 99, which concerns offences relating to the **Coinage**, it is enacted that whosoever shall unlawfully have in his custody or possession any gold or silver bullion which shall have been produced or obtained by impairing any of the Queen's current gold or silver coin, knowing the same to have been so produced or obtained, shall be guilty of felony. Before this enactment became operative it frequently happened that filings, chippings, and gold dust were found under circumstances which left no doubt that they had been produced by impairing coin. In such cases evidence was frequently wanting to prove that any particular coin had been impaired, but the difficulty indicated was removed by the above statutory provision.

There can be no doubt that legislative intervention such as that referred to, which assists a jury without unfairly embarrassing the accused, is beneficial, and prevents lamentable failures of justice such as formerly occurred.

178. Where the **guilty knowledge** of an accused person is an **essential ingredient** in the offence with which he stands charged, it may sometimes be necessary to closely investigate **collateral facts**, with a view to establishing such knowledge. Thus, in the course of a prosecution for passing **counterfeit coin**, the fact that the accused, when apprehended, had other counterfeit money about him, is admissible in evidence to show a guilty knowledge. For such fact strongly indicates that the accused knew the money uttered by him to have been counterfeit.

That such a mode of proof is, under the circumstances, properly admitted, is recognised by the Legislature in sect. 10 of 24 & 25 Vict. c. 99. It is there enacted that whosoever shall utter false or counterfeit coin, having at the time any other such coin in his "custody or possession," shall be guilty of a misdemeanour; and such an offender is more severely punishable than one who is convicted merely of *uttering* counterfeit coin. By this enactment, accordingly, a criminal course of conduct is to be inferred from the **possession of spurious money.** And hence questions having reference to such possession would be relevant, and might properly be put by counsel for the Crown to his witness upon the trial of an indictment for **uttering** base coin.

179. We have already seen that proof of **guilty knowledge** may be set forth by showing that shortly before the occurrence of the principal offence charged against the accused, he was engaged in committing acts of a like nature. Evidence of this will accordingly raise presumption that the act charged was not done under a mistake, but that its precise character was known to the accused.

So, the **possession of property, shown to have been stolen,** shortly after the theft was committed, is held to afford strong and reasonable ground of presumption that the person in whose possession the stolen property is found was the real thief. Such presumption is of course rebuttable, and the accused person is at liberty to explain the fact of its being in his possession. Possession of the fruits of crime, under circumstances such

as supposed, is, therefore, strong *primâ facie* evidence of guilty possession, and, if unexplained, is usually regarded by a jury as conclusive. The question, what amounts to **recent possession** will naturally depend very much upon the nature of the stolen article, and whether it is or is not calculated to pass readily from hand to hand.

180. Criminal acts may be viewed in the order in which tortious acts have been noticed, and, this mode of treatment being adopted, a comparison of the former with the latter can readily be made. The **main ingredient in a crime** may be violence directed against the person or property; it may be constituted by breach of duty, negligence, malice, or fraud. In the following Articles, we shall endeavour to illustrate the foregoing statement by reference to crimes of common occurrence.

181. An act done forcibly and illegally to a man's person or property, of which the tendency or effect is to threaten the peace or prejudice the welfare of the community, may be indictable.

182. **Murder** is **homicide** done feloniously, wilfully, and of malice aforethought; **manslaughter** (*a*) is also **homicide** done feloniously, but without such malice. Either of these acts is obviously not only hurtful to the individual killed, but also to the community at large. Bearing in mind the foregoing definitions, we shall find that an

(*a*) What constitutes *murder* when done by design and of malice prepense, constitutes *manslaughter* when arising from culpable negligence :—*Reg.* v. *Hughes*, Dearsly & Bell, Cr. Cas. 248; 26 L. J. M. C. 202. See also Art. 188.

indictment for murder contains within it substantially a charge of manslaughter, aggravated by an averment of malice. For this reason it is, that a conviction for the minor of these two offences may be obtained upon an indictment which charges and sets forth the major of them.

The burden of proving the case against the person accused of murder necessarily lies on the prosecution, and in doing so it will be incumbent on counsel for the Crown to make out the case as fully as possible against him. Should, indeed, the facts proved on a trial for murder show that the death was caused by the accused, a **presumption of law** is against him. He will be presumed to have acted **maliciously**, and he will have to exculpate himself as best he may from the charge thus *primâ facie* established. It will be for the prisoner to reduce the homicide from murder to manslaughter (*b*), and this he may do through his counsel, either by analysing and commenting on the case for the prosecution, or by adducing new facts to explain or disprove it.

Where homicide occurs in the absence of any third person who can directly testify to it, it nevertheless generally happens that facts are adducible in some way implicating the prisoner. He may be the person last seen with the deceased; he may before the occurrence have expressed enmity towards him; he may have been seen coming from the scene of action; or the state of his dress or person when so seen may have been such as to provoke suspicion. Such a chain of facts would constitute what is termed **circumstantial evidence**, and such evidence may

(*b*) See Archbold, Cr. Pl. 622 (17th ed.).

frequently be more cogent than even direct evidence to establish the fact of the commission of a crime by a party charged therewith. The presumption of law just noticed will apply, for **homicide is murder**, unless shown to have been justifiable or excusable, or the killing can be reduced in quality and degree.

It may, and often does, happen that the accused person, when first charged with an offence such as spoken of, makes a statement which admits the homicide, but goes to show that it was excusable. In such a case, of course, he will be all the more bound to rebut the presumption which has been referred to. He will have to convince the jury that the negative portion of his statement is credible and trustworthy, and that appearances against him are fallacious, and explicable in a manner consistent with his innocence. Experience has shown how difficult it is for one conscious of his guilt, and suddenly charged with it, to concoct on the spur of the moment a story free from those discrepancies which are invariably fatal to the defence afterwards set up.

On a trial for murder the proofs adduced may be such as to necessitate either a conviction for that crime or an acquittal. Should, however, the facts deposed to justify a verdict of guilty of manslaughter, the Judge will direct the jury as to the proper mode of dealing with them.

183. In order to understand somewhat the manner of proving an indictable offence involving force to have been committed, let us suppose that the prisoner stands charged with **robbery**, a crime somewhat peculiar and

technical in its nature. Let us very shortly define this offence, note the averments in the indictment charging it, the proofs for the prosecution, and the grounds of defence which might be relied on.

Robbery, it has been judicially said (*c*), is the stealing or taking from the person of another, or in the presence of another, of property, with such a degree of force or fear as to induce the owner unwillingly to part with it. Whether the fear arises from real or expected violence to the person, or from a sense of injury to the character, matters not in legal contemplation (*d*); for to most men the idea of losing their good fame and reputation is as terrifying as the dread of personal injury. "The **principal ingredient in robbery** is a man's being forced to part with his property."

Such being the definition of the offence of robbery, the averments in the indictment charging it will be the following. That the accused in and upon one A. feloniously did make an assault, and him, the said A., in bodily fear and danger of his life feloniously did put, and the monies of the said A. to the amount of twenty pounds, &c., from his person and against his will feloniously did steal. The **putting in fear** is a special ingredient in the crime of **robbery**, and the prosecution must show either that the prosecutor was actually in fear from the defendant's action at the time alleged, or

(*c*) *Rex* v. *Hickman*, 1 Leach Cr. Cas. 278.

(*d*) Accordingly, if A. compels B. to give him money, by threatening to accuse B. of an infamous crime, this is **robbery**. Mr. Justice Stephen's Criminal Law, 209, citing 2 Russell on Crimes (5th edit.) 209-10.

else show circumstances from which may be presumed such a degree of apprehension of danger as would induce the prosecutor to part with his property (*e*). If the circumstances proved be such as were calculated to create that degree of fear, the Court will not further pursue the inquiry to ascertain whether the fear actually existed. A man suddenly knocked down and stripped of his property while senseless, cannot in strictness be said to be put in fear, yet such an occurrence would undoubtedly be a **robbery.**

In support of a prosecution for robbery the proofs, we may suppose, would be in part **direct,** and in part **circumstantial.** Thus, the evidence of the prosecutor himself would be **direct**: while evidence that the prisoner was seen near the place in question shortly before the act was done, that he was found in possession of the fruits of crime, that when apprehended he made certain pertinent but false statements, would be circumstantial.

If, on such a trial as supposed—as indeed in all others for crime—the case for the Crown being closed, there appear to be only a mere tittle of evidence against the accused, which, in the opinion of the Judge, would not justify or sustain a verdict of "guilty," the jury will be directed to acquit. Perhaps, again, on the close of the whole case, facts as well in favour of as against the prisoner, may have been deposed to. And in all cases, after the Judge has summed up and commented upon the evidence, the jury will balance the conflicting probabilities, and, should there be a reasonable doubt as to

(*e*) See Sir Michael Foster's Crown Law, 128.

his guilt, they will give the accused the benefit of such doubt.

On a trial for robbery the jury may, perhaps, on weighing the evidence come to the conclusion that no actual robbery was committed, but that there was **an assault with intent to rob.** When this appears in a charge of robbery, they may return a verdict of "guilty" as to such an assault, and the prisoner will thereupon be punishable as if he had been convicted upon an indictment charging it (*f*). A provision of this kind is meant to prevent a serious delay, if not a failure, in the administering of justice, and can in no respect prejudice the prisoner. For, by the terms of the section referred to, no person tried for robbery shall, if acquitted, be afterwards liable to be prosecuted for an assault with intent to commit the same robbery.

184. Let us now take a case of **burglary,** and treat it briefly in the manner just adopted, defining the offence, noticing the form of the indictment which charges it, and then considering the proofs adducible in support of, and in answer to, the charge.

Lord Coke (*g*) defines a **burglar** to be he who by night breaketh and entereth into a mansion-house, or, we may say, "dwelling-house" with intent to commit a felony.

In defining the term "**dwelling-house**" we are aided by the Legislature, which in sect. 58 of the Act just cited, has enacted that "no building, although within

(*f*) Statute 24 & 25 Vict. c. 96, s. 41, commonly called "The Larceny Act, 1861."

(*g*) 3rd Institute, 63.

the same curtilage with any dwelling-house and occupied therewith, shall be deemed to be part of such dwelling-house" for any of the purposes of the Act. But if there be "a communication between such building and dwelling-house either immediate or by means of a covered and inclosed passage leading from the one to the other," then otherwise. So in regard to "**night-time**" occurring in Lord Coke's definition, the practitioner is again assisted by the Legislature, which, for the purposes of the same Act just cited, enacts in its 1st section that the **night shall be deemed to commence at nine o'clock in the evening, and to terminate at six o'clock in the succeeding day.**

Let us next notice the form of the **indictment** for **burglary.** The charges or counts contained in it may be of breaking and entering with intent to commit a felony, or may, in addition to this, allege that an actual felony was committed (*h*). It matters not whether the felony be such at Common Law or by statute, neither does it signify what the felony actually was, though ordinarily the felony contemplated or committed almost always appears to have been **larceny.** The indictment, then, charges that the accused, "the dwelling-house of A., situate at (X), feloniously and burglariously did

(*h*) This is a marked exception to the rule, which forbids what is called **duplicity** in an indictment. This term implies the improper joinder of two or more offences in a count, and the rule is that one offence only can be charged in one count. In **embezzlement** cases, as many as *three* offences may be charged in the same **Indictment,** each in a separate count, provided they have all taken place within a period of *six months,* and against the same prosecutor.

break and enter, with intent the goods and chattels of one B. in the said dwelling-house then being, feloniously and burglariously to steal, take and carry away, and then in the said dwelling-house [such and such things] of the goods and chattels of the said B. of the value of [5*l.*] in the said dwelling-house then being found, feloniously and burglariously did steal, take and carry away, &c." Of course the use of the foregoing awkward forms of phraseology are by no means essential.

In this indictment the word "burglariously" must appear: it is a technical word, known to our customary law, for which no other expression may be substituted.

To the words "**break and enter**" an extended significance has been given by the Legislature; for in virtue of the 51st section of the Larceny Act (*i*), the entry may be before the breaking as well as after it. "Whosoever shall enter the dwelling-house of another with intent to commit any felony therein, *or being in such dwelling-house* shall commit any felony therein and shall, in either case, **break out** of the said dwelling-house in the night, shall be deemed guilty of burglary." We thus perceive that the Common Law definition of burglary given by Lord Coke must now be considerably amplified and altered. The Larceny Act has indeed provided against a class of offenders not less dangerous than burglars, as defined by him; but the **breaking out** of the dwelling-house must, however, to satisfy the statutory words, be in the **night-time.**

We have, in the next place, to consider what amounts

(*i*) 24 & 25 Vict. c. 96.

to "**breaking**" and an "**entering**" used in every indictment for burglary. To satisfy the word "break," there must in general be, not a mere legal trespass, as by passing over an invisible boundary, but there must be a substantive and forcible irruption. If a person leaves his house door or his window open, and a man enters thereby, this is no burglary, because the word "break" in the indictment is not satisfied. In such a case, the householder has but his own folly and negligence to blame. Yet to a case like this there is a clause in the Larceny Act which might be applicable. This enacts that any person found by night in a dwelling-house with intent to commit a felony therein, is guilty of a **misdemeanour**, and may be punished even with penal servitude (*k*).

To **support an indictment for burglary** very slight proof of a breaking may suffice, for the lifting up of the latch of a closed door, or the sash of a window, will do so, and even by thrusting the arm through a broken pane of glass if more of the glass be broken by the act (*l*). And competent authorities affirm that an entry into a house effected down a chimney is sufficient, for that mode of access is as much closed as the nature of things will permit.

As to the **entry**, there can be but little difficulty, since merely stepping over the threshold of a house, or the putting the hand in at a window to extract goods, may constitute a burglarious entry.

Lastly, on a trial for burglary, doubt cannot in general be felt by a jury as to the **intent**. If an actual felony,

(*k*) 24 & 25 Vict. c. 96, s. 58.
(*l*) See Archbold's Cr. Pl. 497 (17th ed.).

no matter what, is committed by a person who unlawfully enters a house, it may be presumed as against such person that his intention was to commit felony, and the nature of the felony is immaterial.

It may, however, happen that although the entire charge contained in the indictment is not made out, yet that some substantive portion of it is established. The charge exhibited in an indictment for burglary is, in truth, composite. Accordingly, if, on the trial of an indictment for this felony, the proofs for the Crown fail to show a breaking and entry *in the night-time*, but do show an actual breaking and entry and that property was stolen, a conviction for **housebreaking** might ensue (*m*). If the proofs failed to show the breaking and entering, a conviction for stealing in a dwelling-house to the amount of 5*l.* might be had. If the fact of a breaking and that of an entry were established, but *no actual larceny were shown* to have been committed, a conviction might be had for **breaking and entering the dwelling-house with intent to commit a felony therein.** The discretionary power thus given to a jury may be beneficially exercised to prevent justice from being for a time defeated, and to save delay and expense in administering it.

185. The offence of **Simple Larceny** consists in the felonious taking and carrying away of the chattel

(*m*) "The value of the goods stolen is immaterial if a *breaking and entry* be proved" Archbold, Cr. Pl. 399 (17th. ed.). With regard to the offence of **housebreaking**, it may be stated, generally, that what will constitute *burglary* between 9 P.M. of one day, and 6 A.M. of the next would constitute *housebreaking* between 6 A.M. and 9 P.M. of the same day.

property of another with intent to deprive the owner permanently of it. The indictment for this offence charges that the prisoner "feloniously did steal, take, and carry away" certain specified goods of the prosecutor: and the proof for the Crown, on a trial for simple larceny must establish—(1) a **taking**; (2) a **felonious intent**; (3) a **carrying away**, the latter ingredient being technically termed an "asportation."

To constitute **larceny at Common Law** there must be a taking; in other words a manual assumption of the chattel in question against the will of its owner. There must also be an act of trespass (*n*); so that if a person accused of stealing were guilty of no trespass in taking the goods, he could not be guilty of felony in carrying them away. Again, to support a charge of larceny the prosecutor must have had such a **possession** of the thing taken as would have enabled him to maintain an **action of trespass** for its removal from his possession.

By our Common Law, then, a chattel alleged to have been stolen must have been obtained **against the will of its owner.** And, generally, wherever property alleged to have been stolen, originally came into the hands of the accused rightfully, that is, without any guilty knowledge or intent on his part to steal—or as lawyers say without *animus furandi*—a subsequent wrongful appropriation of the chattel could not, at Common Law, have constituted

(*n*) But in law every actual **larceny**, includes a trespass. That is to say, if an act really amounts in law to larceny, trespass will be implied. If the mere act, although surrounded by very suspicious circumstances, is not shown to be larcenous there is no trespass and no felony.

larceny. If, therefore, **A. lends B. a horse, or sends goods by a carrier,** and the bailee in either case makes off with them, this is no larceny at Common Law. But if, in the latter case, the packages containing the goods had been or are opened and a portion of them are thence wrongfully abstracted, the case is different. The bailment is determined by the tortious act, or by the nonperformance of the trust, so that a constructive possession of the goods becomes thereby revested in the bailor.

The law in regard to **larceny by a bailee** has been amended by various sections of the Larceny Act (*p*), from amongst which reference may here especially be made to sect. 3. This declares that, whosoever "being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, though he shall not **break bulk** or otherwise determine the bailment, shall be guilty of larceny." This section, accordingly, gets rid of the technical difficulties in the way of convicting a bailee of larceny at Common Law resulting from the theory that where goods had passed to the bailee with the bailor's consent, there was no evidence of a taking. Even at Common Law, however, **fraud** practised by the accused person might so operate as to nullify the apparent consent of the owner to parting with the property in his goods (*q*). For instance, if the prosecutor has been **tricked out of the possession**

(*p*) 24 & 25 Vict. c. 96.

(*q*) And "although the goods had in the first instance been obtained *without a felonious intent*, yet if the possession of them had been

of a thing, and has had, therefore, presumably no intention of parting with the property in it, a transaction of this nature would naturally terminate in an incomplete transfer of such property. And that being the case, the accused having gone away with the chattel and having thus appropriated it to his own use, might be convicted of larceny (*r*).

To constitute larceny at Common Law a felonious intent must accompany the taking, "felonious" being a technical word applicable in early times to offences, which with few exceptions, were capitally punishable, and a conviction for which entailed forfeiture (*s*). At the present day, our criminal law having been consolidated and amended, there now exist certain **misdemeanours** which are more serious and more severely visited than many felonies, and these have been defined or created by the legislature.

A **felony** being, and always having been, deemed a crime generally speaking more heinous than any misdemeanour, the presumption of law was under certain circumstances strongly in favour of one accused of it. Our law, indeed, always presumes that a person charged with having done a criminal act is innocent until the contrary be proved, and sometimes it will even exclude evidence offered to counteract this presumption. A **married woman stealing in the presence of her husband** is

obtained by *trespass*, the subsequent fraudulent appropriation of them, during the continuauce of the same transaction was a **larceny.**" Archbold, Cr. Pl. 340 (17th edit.).

(*r*) See *Reg.* v. *McKale*, L. R. 1 C. C. R. 125 ; 37 L. J. M. C. 97.

(*s*) Now abolished for crimes, See Art. 158.

presumed to do so under his coercion, though facts of rare occurrence might be received to prove her guilt (*t*). It is a presumption of law that an **infant within the age of seven years** cannot conceive a felonious intent, and no evidence of precocity would avail by way of answer to this presumption. If, however, an infant between the age of seven and that of fifteen years commits felony, the presumption of law, although still in his favour, may be rebutted by evidence of **malice**, that is, a wicked mind and intent. "Wickedness," says the maxim, "makes up for want of age."

Regard being had to this ingredient of a **felonious intent** in the crime of larceny, an indictment charging it could obviously not be founded on a mere careless taking away of another's goods. For, to constitute **larceny** there must be an intent to "steal," which technical word indicates the offence and is indispensable in the indictment. The term implies a knowledge on the part of the taker that the property taken does not belong to him. And if all the facts concerning the title to a chattel are known to the accused, so that it becomes a pure question of law whether the property in it is his or not, still he may show that he honestly thought it was his through some misapprehension concerning it. And hence into the definition of larceny is sometimes introduced an additional feature, namely, that the taking must not be

(*t*) In other words, the presumption is rebuttable by evidence showing that she was a perfectly free and wilful actor in the matter. The presumption *does not* apply at all to cases of **murder**, **treason**, and **robbery**. It seems to apply to **misdemeanours** generally." Mr. Justice Stephen, Cr. Law, 18, Art. 30. See, *ante*, p. 66 n. (*z*).

justified by any colour of title, nor be made in the assertion of a right. For although ignorance of our criminal law could not be set up successfully in answer to a charge of larceny, yet ignorance of the rules of the law of property might probably give an innocent complexion to a taking which if unexplained might seem to be larcenous and felonious.

Where, therefore, a person is arraigned on a charge of larceny, it will be competent to him to adduce evidence concerning the transaction forming the subject of the charge, to show absence of a felonious intent on his part. And where there is even a particle of such evidence, his counsel would utilise it in support of the accused person. In such a case the counsel would contend that the taking was not felonious, that it occurred through mistake or carelessness, or in assertion of a right, or with intent to restore the thing taken, after it had served some casual purpose, to its lawful owner.

Counsel for the defence may also perhaps successfully contend, where the thing alleged to have been stolen was originally bailed to the prisoner, that there was no taking of it, and nothing done to satisfy the statutory provision already cited as sometimes applicable in such a case. Sometime since, a person was indicted for larceny as bailee of a coat. The evidence showed that the prosecutor had lent the coat to the prisoner to wear for a day, and some few days afterwards the prisoner was found wearing the coat and on board a vessel bound for Australia. It was held that no proof appeared of a conversion sufficient to satisfy the statute, because "the

determination of the bailment must be something analogous to larceny, and some act must be done inconsistent with the purposes of the bailment" (*u*).

Next, to constitute the crime of larceny the thing in question must have been carried away, or, in technical language, there must have been an **asportation** (*x*) of it by the prisoner. About this, however, there can in general be little difficulty, for a bare felonious removal of the chattel from the place in which he found it, is a sufficient asportation to satisfy the law. Accordingly, if a man found leading another's horse out of a field, is apprehended in the fact, or if a guest stealing goods out of an inn has removed them from his chamber down stairs, proof of either fact would suffice to sustain the allegation of *asportavit*.

Such, then, are the main legal ingredients in **larceny**, and it may be remarked that this particular offence has been more affected by legislation than any other known to, and originally constituted by, our Unwritten Law. Of **choses in action** (Art. 30) or **valuable securities**, of **deeds relating to land**, of **Wills** or **records**, of **things affixed to the freehold**, or **trees growing** upon and so parcel of it, of **wild or undomesticated animals** (*y*), and some other

(*u*) *Reg.* v. *Jackson*, 9 Con. Cr. Cas. 505. It may be observed that a *bailor* may steal his own goods, that is where he takes them out of the custody of the bailee with a fraudulent intent. And where such a thing occurs the property must necessarily be described as that of the bailee. See *Rex* v. *Wilkinson*, Russ. & Ryan, Cr. Cas. 470.

(*x*) In the old indictments for larceny, the word *asportavit*, (he carried away), was used, and it was sometimes a question whether the evidence "proved the *asportavit*."

(*y*) See Art. 198.

things, larceny could not at Common Law have been committed. It could only have been committed of "chattel" property, and to this expression our Common Law assigned a strict and technical significance which excluded the things specified. Now, however, larceny may be committed of such things as those previously excepted, by virtue of the **statute law** (*z*).

It was, we say, a feature in the Common Law that larceny could only be committed of that which it held to be the **subject of property**, that is, chattels only. That such a doctrine led to curious results and nice distinctions will appear from a consideration of the following illustrative case. Let us suppose that lead fixed to the dwelling house of A. was feloniously torn off and carried away immediately by B., a conviction could not at Common Law be obtained against B. for stealing this lead, because it had been affixed to the freehold and so "**savoured of the realty.**" But if B., having severed the lead on one day, came to the premises on the next and took it away, he might have been found guilty of larceny at Common Law. The lead having been severed and converted into a movable, the property therein would become vested in A. as owner of the freehold, and would be so described in the indictment against B. for stealing it.

With regard to wild and unreclaimed animals—technically spoken of as being *feræ naturæ*—if a man wrongfully killed an animal of this description, and at once carried it away for his own use, he must have been acquitted on an indictment for **stealing** it, the transac-

(*z*) See 24 & 25 Vict. c. 96, ss. 10—39, and s. 74.

tion of killing and carrying away being continuous and indivisible, and this is the rule of law at the present time (*a*). If, however, there were a decided break in such transaction, the result might be different, inasmuch as larceny can be committed of the **flesh of an animal feræ naturæ** which would serve for food. This, too, is the law at this day, and therefore, if a defendant, having unlawfully killed a **rabbit** on the prosecutor's land, abandon and leave it there, and after the lapse of some time return and take it away, he may be convicted of stealing the rabbit (*a*).

Such is the Common Law view of such acts as those referred to, but statutory provisions are now in force which relate to the stealing of lead from a building, and also to the unlawful killing of rabbits during the night (*b*).

186. Of crimes involving force or violence, referred to in the four preceding Articles, each is allied to other criminal acts more or less serious in degree.

Thus, an **assault**, aggravated or slight, is akin to felonious homicide. An assault does not of course necessarily mean only the act of striking or beating; it may comprise other acts where the consent of the party

(*a*) *Reg.* v. *Townley*, L. R. 1 C. C. R. 315; 40 L. J. M. C. 144. This case actually decides that there can be no larceny in cases like the above where the parties do not *absolutely abandon* their spoil in the first instance. As Baron (now Lord) Bramwell observed, the poachers had placed the rabbits "as it were in a place of deposit," but without any intention of giving up the possession of them. That possession was no doubt wrongful, but there was no larceny in the eye of the law. See also *Reg.* v. *Read*, L. R. 3 Q. B. D. 131; 47 L. J. M. C. 131. Here a gamekeeper having, as one continuous act, killed, removed, and sold rabbits the property of his master, it was held that he could not be convicted of **embezzling** the proceeds of the wrongful sale.

(*b*) 24 & 25 Vict. c. 96, ss. 31, 17.

who charges the offence may be involved. And where there was consent by the person alleged to have been assaulted, difficulty has been felt in determining what is **consent?** In the judgment in the case below (*c*), upon the facts in evidence, it was judicially observed, "There is no consent, though there is no active dissent," and a conviction was upheld upon this distinction (*c*).

With robbery and burglary divers criminal acts are closely connected, respecting which special provisions may be found in the Statute Book (*d*). In part these provisions affix specific penalties to offences long previously recognised, in part they alter the pre-existing law, or reproduce enactments which had force prior to the year 1861. At all events, out of pre-existent composite materials, they consolidate that department of criminal law which concerns offences against person and property.

A mere **trespass upon land** is not in itself an indictable offence (*e*). It may, however, be **punishable** if intended to effect some unlawful object. And where any such act entails penal consequences by statute, the significance of words indicating the quality of the act must be satisfied by proofs before a conviction for it can be had. Thus, in the case below (*f*) a Court of Law

(*c*) *Reg.* v. *Lock*, L. R. 2 C. C. R. 10; 42 L. J. M. C. 5—a case of **indecent assault.** See also *Reg.* v. *Barratt*, L. R. 2 C. C. R. 81: 43 L. J. M. C. 7, where the prisoner was convicted of an attempt to commit a rape on an idiot girl, and the conviction was affirmed.

(*d*) See 24 & 25 Vict. c. 96 (The Larceny Act) ss. 40—43, sect. 51, &c.

(*e*) See Art. 12 as to trespass.

(*f*) *Foulger* v. *Steadman*, L. R. 8 Q. B. 65; 42 L. J. Q. B. M. C. 3.

was called on to decide whether a trespass had been "wilful" within the meaning of an Act of Parliament.

Simple larceny may, as we have seen, be included in a crime of greater magnitude. And, as we shall presently see (*g*), this offence may with difficulty be distinguishable from one or other of certain criminal acts which do not at Common Law involve the element of force, actual or constructive. Larceny in an aggravated form may be exemplified by reference to the 67th section of the Larceny Act (*h*), which enacts that "whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master or employer," shall be guilty of felony, and liable to a punishment more severe than that for simple larceny. The nature of what may be termed aggravated larceny may further be exemplified by reference to the 69th section of the Larceny Act, which affixes a heavy punishment to the offence of stealing when committed by one employed in the **public service** of her Majesty, or when committed by the police.

187. Criminal as well as civil responsibility may be incurred either by breach of duty or by omission to perform it.

At a trial for **manslaughter** it appeared that the relation of master and servant had subsisted between the prisoner and the deceased, and two questions arose in the case as to the *cause* of the deceased person's death.

(*g*) Art. 190. (*h*) 24 & 25 Vict. c. 96.

First, whether it resulted from the want of proper nourishment and lodging, which the prisoner had neglected to supply to the deceased, and next, if so, whether it had been the prisoner's duty to supply the deceased with such necessaries. It was held that the duty specified had not been imposed, for the deceased was not shown to have been helplessly in the power of the accused and unable to withdraw from it. A conviction therefore could not be obtained for the offence charged (*i*). It is noteworthy, however, that a statutory provision applies where a master or mistress is bound to provide for an apprentice or servant necessary food, clothing, or lodging, and "wilfully and without lawful excuse" refuses or neglects to provide it (*k*). The section referred to applies also where a master "unlawfully and maliciously" does bodily harm to his apprentice or servant, so that his life is endangered or his health is permanently injured: in any such case the party offending is guilty of a misdemeanour.

Again, a strict legal duty is imposed on a father to provide for and protect his child. So that, when a child is left in a position of danger of which the father knows, and from which he has full power to remove it, and the father neglects his duty of protection, this is an exposure and abandonment of it by him punishable by statute (*l*).

An indictment will lie against a municipal corporation who have become bound to repair buildings, banks, and so

(*i*) *Reg.* v. *Smith*, Leigh & Cave, 607; 34 L. J. M. C. 153.

(*k*) 24 & 25 Vict. c. 100, s. 26.

(*l*) The same statute, s. 27; and see *Reg.* v. *White*, L. R. 1 C. C. R. 311; 40 L. J. M. C. 134.

forth, for not repairing them, such neglect to perform the legal duty cast upon the defendants being indictable (*m*).

From cases such as have just been cited we see that the **breach of a duty** towards the **public**, to the evil example of others, or directly damaging to the community, may be **indictable.**

188. There will not, perhaps, in general, be much difficulty in determining whether an act done *negligently* is indictable.

Thus, suppose that a workman throws rubbish from a housetop on to a road not much frequented, but in which a person passing at the moment of this act is thereby killed. Here the act done was evidently wrong: it certainly evidenced gross negligence, in fact indicated a reckless disregard of others, and such an act, causing homicide, might be felonious. In general, where an act assumes the form of a **nuisance**, the test to be applied for determining whether it is indictable or only actionable is to ask whether the alleged nuisance prejudices the **public**, or whether it is merely hurtful to the **prosecutor.** Numerous decisions are to be found upon this point in our Reports (*n*). A negligent omission or nonfeasance might be so culpable as to evidence malice (*o*).

(*m*) *Mayor, &c., of Lyme Regis* v. *Henley*, 2 Cl. & Fin. 331. See also *Whitfield* v. *South Eastern Ry. Co.*, E. B & E. 115; 27 L. J. Q. B. 229; where the general law on the subject of actions, &c., against **corporations** is discussed

(*n*) See *Reg.* v. *Stevens*, L. R. 1 Q. B. 702; 35 L. J. Q. B. 251; see also *Malton Local Board of Health* v. *Malton Farmers' Manure, &c., Co.*, L. R. 4 Ex. D. 302; 49 L. J. M. C. 90.

(*o*) *Reg.* v. *Hughes*, Dearsly & Bell, Cr. Cas. 248; 26 L. J. M. C. 202.

Having now exemplified the doctrine of **indictable negligence at Common Law**, it may be well to add that under particular statutes the various forms of this species of wrong-doing have to a great extent been provided for. In other words, the term "negligence" has been associated with other terms differing with circumstances, but intended to be construed with the main one—"negligence."

Thus, "whosoever by any unlawful act or by any wilful omission or neglect shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a **railway**," shall be guilty of a misdemeanour (*p*). And again in the Act concerning **Malicious Injuries to Property** (*q*), "whosoever by any unlawful act or by any wilful omission or neglect shall obstruct or cause to be obstructed any engine or carriage using any railway," shall also be guilty of a misdemeanour.

It is thus seen that a **wilful omission** of a dangerous character is regarded as equivalent to an **act** of the same description in regard to a matter not known at Common Law, namely, a **railway**, and each is a statutory misdemeanour. The very word "unlawful" applied to an act of course excludes all notions as to previous just cause or excuse. Accordingly, where the term is applied to an act *primâ facie* criminal, as wounding with a weapon, it indicates that the act was done wilfully, and under

(*p*) 24 & 25 Vict. c. 100, s. 31, which concerns **offences against the person.**

(*q*) 24 & 25 Vict. c. 97, s. 36.

circumstances not affording just cause or excuse for doing it. The word "unlawful" affixes to an act a wrongful, criminal character, while on the other hand, "wilful" is used in contradistinction to "accidental." The significance of the expression "wilful neglect" might be shown by the case of a man driving a carriage in a reckless and careless manner, or by knowingly and heedlessly leaving a truck upon a line of railway, and so either causing an accident or endangering life.

189. Malice is often an ingredient in crime. The doing of a wrongful act intentionally, or without just cause or excuse, may be characterised as a "malicious" proceeding—in legal contemplation.

Malice is express or implied. Express malice is evidenced by acts, words, or conduct of the accused person, indicative of ill-will towards another. Implied malice, or, as it is called, "**malice in law**," is evidenced by the doing of an illegal or wrongful act, which causes harm to person, property or reputation (Art 129).

To illustrate the nature of a malicious act, reference may best be made to the Statute Book, from which we produce some relevant extracts.

The statute 24 & 25 Vict. c. 100, s. 16, contains these words, indicating and defining a particular felony: —Whosoever shall maliciously send, or directly or indirectly cause to be received, knowing the contents thereof, any **letter threatening to murder** any person, shall be guilty of felony. No difficulty could here arise as to the proof of malice, because the very act of sending such a letter must obviously be malicious. There

might, however, be a doubt whether the expressions in the letter shown to have been sent or caused to be received by the prosecutor, would amount to a threat to murder, and any such doubt would have to be solved by the jury. Words meant merely to alarm, however wrongly used, could not be held to involve a threat to murder.

Malicious acts being of frequent occurrence, have been specially under the cognisance of our Legislature, and many such acts have been provided for by the statute 24 & 25 Vict. c. 97 (*r*), some references to which may further exemplify this subject.

Thus, by its 2nd section, "Whosoever shall unlawfully and maliciously **set fire to any dwelling-house, any person being therein**, shall be guilty of felony" (*s*). In an indictment framed under this section the words "unlawfully and maliciously" would appear; they would be equivalent to "wilfully without just cause or excuse," and would be opposed to "accidentally." It would not be necessary on the part of the prosecution to adduce evidence of **express malice** (p. 245), as of threats uttered, or words of enmity used against the owner of the house

(*r*) Which deals with **Malicious Injuries to Property.**

(*s*) **Arson** at Common Law meant house-burning, and "house" included structures connected therewith. The Common Law, however, dealt with what was called "burning" of other structures, and the Stat. 22 & 23 Car. II. c. 7, provided for the offence of setting fire to barns, stables, &c. &c. The idea of **criminal negligence** does not enter into any conception of the **offence** of arson, either at Common Law or as amplified by statute. For if a man by mere negligence set fire to another's house he is not guilty of **arson**, although he may be guilty of a trespass. See 1 Hale's Pleas of the Crown, 569, and Coke's 3rd Institute, 67.

or the person who chanced to be within it. If the act were unlawful the malice in law would be presumed, and to establish the charge it would suffice to show that the building referred to was a **dwelling-house**, that some person was in it at the time mentioned, and that it was set fire to wilfully. From these averments the **law** would infer that the act was done maliciously, mischievously, without just cause or excuse.

Under the 9th section of the Act last cited, whosoever shall unlawfully and maliciously, by the **explosion of gunpowder** or **other explosive substance**, destroy or damage the whole or part of a dwelling-house, any person being therein, &c., shall be guilty of felony. The words "unlawfully and maliciously" here used are equivalent to wilfully, not by accident, and without just cause or excuse (*t*).

It is important to bear in mind the distinction between express and implied malice, that is, between malice manifested by words or deeds, with which we commonly associate *spite*, &c., and malice inferred from, or inherent in, a particular course of conduct. It is not always easy to distinguish simple wickedness from what is the result of ill-will. The Legislature has accordingly sometimes thought fit to declare the kind of malice at which an enactment points, and to indicate the kind of

(*t*) See also as to this subject, the Explosives Act, 1875, and the Explosive Substances Act, 1883. The latter statute, passed to meet the exigencies of a political situation, is remarkable for having gone through both Houses of Parliament and receiving the Royal assent in something less than forty-eight hours.

proof of malice which may suffice to support an indictment charging it. Thus, for the purposes of the above-mentioned Act, it is immaterial whether the offence charged was committed from hatred or spite against the owner of the property injured or otherwise, so that evidence of express malice conceived against the owner of such property would be unnecessary (*u*). If only the offence committed is within the scope of the statute, the offender is liable to punishment independently of any question as to whether the injury committed was against the property itself or its owner. Bearing this provision in mind, we are able to assign a meaning to the words used in the 51st section of the same statute, viz., "Whosoever shall unlawfully and maliciously commit any **damage, injury,** or **spoil** to or upon any **real** or **personal property whatsoever,** either of a public or private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding 5*l.*, shall be guilty of misdemeanour." In order that a case may fall within the operation of this section, damage must have been done **unlawfully.** But no evidence of express malice, that is, of personal spite or ill-will against the owner of the property damaged, need be shown. The word "maliciously" would be satisfied by showing a wicked intent to commit injury deducible from the circumstances of the case.

In order to sustain a conviction for one or other of certain offences, proof may have to be given of a par-

(*u*) 24 & 25 Vict. c. 97, s. 58.

ticular intent, in addition to the proof of malice. Thus in the Act, which concerns Offences against the Person (*x*), we find this provision:—Whosoever shall unlawfully and maliciously place near any vessel, any **gunpowder** or other **explosive substance, with intent to do bodily injury** to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony (sect. 30). To convict under this statutory provision, proof must be given of the **intent**, which might be answered by showing that the prisoner could not have been aware, when he did the alleged act, that any person was near to the scene of the explosion, or spot where the attempt to cause it was made.

Again, by sect. 28 of the statute, 24 & 25 Vict. c. 97, "Whosoever shall **unlawfully** and **maliciously** cause water to be conveyed or run into any mine, . . with **intent** thereby to destroy or damage" it, shall be guilty of felony. In support of an indictment framed upon this section, proof might very likely be forthcoming of **express malice**. If it were not, malice might be implied from the doing of an unlawful act. The particular intent, viz., to destroy or damage the mine, might, if not expressly proved, be inferred, because every man is presumed to intend that which is the necessary or natural consequence of his act (*y*).

It may be observed that the law relating to malicious injuries directed against the **person** or **property** of an

(*x*) 24 & 25 Vict. c. 100.
(*y*) See Art. 173.

individual, as exemplified in foregoing paragraphs, has been to a certain extent codified by the Legislature (*z*), while the course of criminal procedure for publishing libellous and defamatory matter has also in some measure been regulated and improved by statute (*a*). Of this latter offence, commonly occurring, mention is here made, inasmuch as malice is involved in it; the slanderous act being deliberately and openly done imports malice—evidences a guilty mind.

190. Fraud will often necessarily give a criminal colour and complexion to conduct which, without this special attribute, would not be punishable. Lord Holt describes a **cheat**, for instance, as "a design to impose on the credulity of others, to induce them to believe a thing which is not true" (*b*). Such is a popular rather than technical definition of **cheating**, yet we may safely infer that, in order to justify a conviction for it, there must be in the matter before the Court something discernible of which our criminal law can take hold, as constituting or evidencing fraud. The mere **expression of an opinion** by A., though **acted upon by B.**, and meant to be so, to his prejudice, would not constitute an **indictable fraud.** Nor would a statement by A. that something will happen, as to which B. may exercise his own judgment and common sense, constitute an indictable fraud.

(*z*) The whole of our criminal law was expected to appear this year in a codified form, but the measure to effect this desirable result has not been allowed to pass through Parliament. See p. 254 (*m*).

(*a*) See 6 & 7 Vict. c. 96—Lord Campbell's (Libel) Act.

(*b*) *Reg.* v. *Hathaway*, 14 Howell's State Trials, 639.

Fraud obviously presents itself in many dissimilar acts which may be indictable or only summarily punishable; for instance, in **perjury, forgery,** or the uttering or passing of bad coin. Any such act involves a fraudulent intent, and our Statute Book teems with provisions meant to repress fraud. The catalogue, indeed, of statutory offences involving fraud is long, and still increases; for when a novel kind of fraud presents itself, Parliament may think fit to interfere and check it by special legislation (*c*).

Perhaps the most practically important species of fraud provided for by statute law is that of **obtaining money, goods, or valuable securities by false pretences.** "Whosoever shall, by any false pretence, obtain from any other person any chattel, money, or valuable security with intent to defraud, shall be guilty of a misdemeanour" (*d*). What is a "valuable security" is defined in sect. 1 of the Act.

This statutory misdemeanour comprises the following ingredients: 1st, a false pretence; 2ndly, a making of such pretence with intent to defraud; 3rdly, the obtaining thereby some chattel, money, or valuable security. The main distinction between this misdemeanour and the felony of **stealing** is that in the latter there must be a taking which, *theoretically,* is always accompanied

(*c*) See for instance, 37 & 38 Vict. c. 36: An Act to render **Personation,** with intent to deprive any person of Real Estate or other property, Felony. This Act was passed after the celebrated attempt of Arthur Orton to personate the deceased owner of the Tichborne Estates, Sir R. C. D. Tichborne.

(*d*) The Larceny Act, 24 & 25 Vict. c. 96, s. 58.

by force—whereas in the former the property in the chattel is voluntarily transferred to the defendant (Art. 185).

Where A., the owner of a chattel, induced by a false statement made by B., transfers to him the chattel, meaning to pass both the property in and the possession of it, the person guilty of the fraud is not indictable for larceny. But where the owner of the chattel intends to part merely with the possession of it, and the person guilty of the fraud obtains such possession only, the result is different. A. may, however, by a trick, get possession of a chattel belonging to B., the property in which is meant to pass only on performance of a condition which is not performed. In this case a conviction for larceny might be supported if the chattel were appropriated without its owner's consent. But if the property in the chattel be meant to pass as well as the possession of it, this surrender or transfer being induced by a trick or false representation, then an indictment for the statutory offence of cheating might be supported. In the former of these cases there is in contemplation of law a larcenous taking of the chattel, whereas in the latter there is not (*e*).

At one time the somewhat subtle distinctions between the felony of larceny and the misdemeanour of obtaining money by false pretences (*f*), frequently caused a failure of justice. But the law now declares that, if upon the trial of any person charged with the misdemeanour, the

(*e*) *Reg.* v. *Cohen*, 2 Denison, Cr. Cas. 249.
(*f*) See next Chapter.

evidence shows that he obtained the property in such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of the misdemeanour (*g*).

191. To facilitate and render more complete the **comparison of crime with tort**, and having regard to what has been said in Art. 152 as to the doctrine of **ratification**, we may observe that, in **criminal procedure** ratification really amounts to the adoption of an act done. Thus, a *feme covert*, that is a married woman, in her husband's absence and without his knowledge, received stolen goods and paid money on account of them. The thief and the husband afterwards met, and the latter becoming aware that the goods were stolen, agreed as to the price for them, and paid the balance to the thief. The husband, upon these facts, was convicted of receiving the goods knowing them to have been stolen, and the conviction was affirmed (*h*). He had ratified and adopted the act of his wife.

An **accessory after the fact** is one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. He in a certain sense may be said to have adopted the criminal act, and to have connived at it after its commission (*i*).

Then, as regards the **doctrine of finality** in connection

(*g*) 24 & 25 Vict. c. 96, s. 88 (Larceny Act).

(*h*) *Reg.* v. *Woodward*, Leigh & Cave's Cr. Cas. 122; 31 L. J. M. C. 93.

(*i*) It may be observed there can be no accessories in *misdemeanours*; what would make a person an accessory in *felony* would constitute him a *principal* in misdemeanour.

with criminal procedure, the latter being technically and in theory at suit of the Sovereign as custodian of the peace (*k*), the rule of our unwritten law, *tempus non occurrit regi*, generally applies (*l*). Upon this rule, however, many inroads have been made by statute in reference both to indictable offences and to offences summarily punishable. The drift of modern legislation has clearly been to restrict the time within which a prosecution may be commenced, a summons taken out, or an information laid; and the provisions upon this subject promulgated by the Legislature have been in favour of finality and in prevention of vexatious litigation.

192. Doubtless our criminal law, and the mode of administering it, have been zealously cared for by the Legislature and the Judges. Although not absolutely perfect—for what human code or institution is or can be?—criminal law and the administration of it have attained in this country to very great excellence. And it is not at all likely that any changes yet to be made in these matters will belie the oft-repeated declarations made in Parliament and by our learned Judges in a merciful and benignant spirit (*m*).

(*k*) See p. 9, n. (*q*).

(*l*) The maxim in full is *Nullum tempus aut locus occurrit regi.* The Sovereign in his political capacity is unaffected by time or place.

(*m*) The above observations of Dr. Broom have been allowed to stand, as they no doubt correctly express what is true at least of the *recent* past. The "changes yet to be made," which Dr. Broom hinted at five years ago, appeared, until recently, on the eve of coming about; but whether they were all founded on "that merciful and benignant spirit" of which he speaks, was doubtful. Most of them, however, would no doubt have

proved salutary. The measure lately under the consideration of Parliament—**The Criminal Procedure Bill**—proposed amongst other things that indictments should be framed in untechnical language, that the offences of burglary and robbery with violence should be triable at Quarter Sessions, and that the Court should have power to inflict a punishment of fourteen years' penal servitude. It also proposed to entirely repeal two criminal Statutes, namely, that "for the Removal of Defects in the Administration of Criminal Justice," 11 & 12 Vict. c. 46 (1848), and that "for the further Amendment of the Administration of the Criminal Law," 11 & 12 Vict. c. 78. What may be called the sweeping and doubtful provisions of the measure were those which were to confer upon the judges a power to frame rules for the "practice, procedure, and pleading under the Act" contemplated, a power hitherto appertaining only to tribunals of civil procedure. Next, it proposed that justices should have power to summon before them persons merely *suspected* of having committed crime; that the operation of *search warrants* should be greatly extended, and the power to use *depositions* at trial should be less circumscribed than formerly, and that in criminal trials at assizes a *special jury* might be ordered. Lastly, it proposed that "every one accused of any indictable offence shall be a competent witness for himself or herself upon his or her trial for any offence, and the *wife* or *husband*, as the case may be, of any such accused person shall be a competent witness for him or her upon such trial: Provided that no such person shall be liable to be called as a witness by the prosecutor, but every such witness called and giving evidence on behalf of the accused shall be liable to be cross-examined like any other witness on any matter, though not arising out of his examination in chief: Provided that, so far as the cross-examination relates to the credit of the accused, the Court may limit such cross-examination to such extent as it thinks proper, although the proposed cross-examination might be permissible in the case of any other witness." This was perhaps the most noteworthy of the changes contemplated by the Bill. If it be thought not conceived in the "merciful and benignant spirit" spoken of by our author, we must remember that the highest form of mercy exercisable by those who legislate on crime is the endeavour to prevent persons from committing it. Probably then, if ever such a rule as that referred to of permitting husbands to call their wives as witnesses on their behalf *does* come into full operation and be well known, married men with felonious "proclivities" will be induced to pause before committing an offence from the consequences of which they expect to be relieved by virtue of their wives' evidence. Of course

in certain cases, a wife's evidence may be of the highest importance to assist an innocent man charged with an offence. We are, however, inclined to think that a provision like the above would, at any rate for a time, open the door to some amount of perjury, and that husbands would probably not only themselves be convicted as often as before, but would have also the mortification of seeing their spouses ordered into custody before they themselves left the dock for the cells. If, however, such a rule—by its own, so to speak, negative operation—were ultimately to have a deterrent effect, the temporary inconvenience hinted at would not be very material.

The Criminal Code Procedure Bill had a somewhat peculiar career, which however, cannot be considered here. The history of the measure —abandoned on June 21, 1883, after having been five years before the public—may be found in the newspapers of the period. We may observe that a full dissertation on the subject, of very marked ability, appeared in *The St. James's Gazette* of June 26, 1883.

CHAPTER IX.

LEGAL PRINCIPLES APPLIED TO CRIMES.

"Though hand join in hand, the wicked shall not be unpunished."
PROVERBS.

193. NOTWITHSTANDING the above emphatic assurance given by "the wisest of men," criminals do occasionally slip through the meshes of the net of the Law and escape the punishment due to their misdeeds. This evasion may chance to happen notwithstanding the skill of our legal draftsmen, but subjoined cases will indicate the difficulties which usually beset a wrongdoer.

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194. A., having a horse which he knew to be vicious and to have kicked and injured persons, turned it out upon a common on which he had a right of pasture. Over this common ran footpaths known by him to be much used by the public, and not fenced off from the common. B., a child about eight years old, whilst on or very near to one of these pathways, was kicked by the horse and killed.

It was held upon the foregoing facts that A. had been properly convicted of manslaughter as having been guilty of **culpable negligence** causing death. "Turning out a horse upon a common traversed by a public

highway, if done with the knowledge that the horse is vicious, is unlawful, and if death ensues from such culpable negligence the offence of manslaughter is complete" (*a*).

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195. A. was indicted for **wounding** B. **with intent to do him grievous bodily harm**, which is a statutory felony. It appeared that A. and B. were in the habit of boating after wild fowl at night on a certain river, and that A. was jealous of B.'s intrusion on a part of the river which he himself specially visited. On one of these occasions A. fired off his gun in the direction of the prosecutor and wounded him. It could not be gathered from the evidence that there was any intent to *kill* or cause bodily hurt, but rather an intention of frightening the prosecutor, and so deterring him from again coming into that part of the river after wild fowl.

The jury, negativing the existence of a felonious intent on the part of the defendant, found nevertheless that he had been guilty of **unlawful wounding**. The intent accordingly laid in the indictment was negatived, though there was evidence that the act which injured the prosecutor was done maliciously, inasmuch as the defendant was not justified in trying even to alarm the prosecutor. This case shows that a guilty mind accompanying an act may give to it the colour of malicious in the eye of our law (*b*).

(*a*) *Reg.* v. *Dant*, L. & C. 567; 34 L. J. M. C. 153.

(*b*) *Reg.* v. *Ward*, L. R. 1 C. C. R. 356; 41 L. J. M. C. 69. It was held in this case that sect. 5 of 14 & 15 Vict. c. 19, must be construed as if the word "malicious" were applied to wounding.

In a case which recently came before a Crown Court the defendant was indicted for "unlawfully and maliciously" causing **damage to property** of the prosecutor. The proofs showed that defendant had thrown a stone at persons in the street intending to strike one or other of them, but missing them the stone had broken prosecutor's window. The jury expressly negatived the intention to break the window, and the Court unanimously held that the defendant could not be convicted of maliciously breaking it. A man could not be said to have maliciously done that which he did not mean to do. In other words, an act to be *malicious* must be done *wilfully* (*c*).

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196. In the following case, decided upon facts very different from those just set out, the effect of a course of conduct, although illegal, was also considered with a result favourable to the accused person.

The defendant's business was that of manufacturing **fireworks** contrary to the statute law (*d*). A fire having broken out amongst the combustibles on the defendant's premises, it ignited a rocket, which flying across the street set fire to a house, whereby a person's death was occasioned. The defendant was absent at the time of this mishap, which occurred through the negligence of his servants.

A conviction for manslaughter was upon these facts

(*c*) *Reg.* v. *Pembilton*, L. R. 2 C. C. R. 119; 43 L. J. M. C. 91.
(*d*) 9 & 10 Will. III. c. 7.

held not sustainable, for "The fire which caused the death did not happen through any personal interference or negligence of the defendant. The keeping of the fireworks in the house, although an illegal act, was disconnected with the negligence of the defendant's servants," from which the death ensued (*e*).

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197. The prisoner was indicted for **stealing a lamb** under the following circumstances. It appeared that, having in the first instance put twenty-nine black-faced lambs, belonging to himself, into a field which contained ten white-faced lambs of the prosecutor, he afterwards took away his own lambs and offered them for sale as amounting in number to twenty-nine. The proposed purchaser, however, on counting the lambs, pointed out to the prisoner that there were in fact thirty in the flock, which included one white-faced lamb belonging to the prosecutor. The prisoner nevertheless sold all the lambs in one lot to the other party on his own individual account. At the trial of this case, the jury found that, *at the time of leaving the field*, the prisoner did not know that the prosecutor's lamb was in the flock, but that he had a felonious intention when he sold it. The question accordingly was whether the prisoner, upon the above facts and finding, could be convicted of **larceny**, and the Court held that he could be convicted of that offence. The *original taking* was wrongful, for assuming that the

(*e*) *Reg.* v. *Bennett*, Bell, Cr. Cas. 1 ; 28 L. J. M. C. 27.

prisoner was ignorant of the fact of the lamb being in his flock when he drove it from the field, the driving it away and keeping it was a tortious act involving a trespass. By retaining the animal the trespass continued, and the continuing trespass became felonious when the prisoner, knowing that the lamb in question was not his own, sold it (*f*).

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198. The defendant induced the prosecutor to purchase a chain from him by fraudulently representing that it was of 15-carat gold, whereas in fact it was of a quality little better than 6-carat gold. A conviction for the statutory misdemeanour mentioned in Art. 190, was upon the above facts upheld, for the statement that the chain was of 15-carat gold could not be regarded as mere exaggerated praise. Nor was the statement uttered as a mere expression of opinion, but as concerning a specific fact within defendant's knowledge, and so constituted a false pretence (*g*).

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199. The nature of an **indictable cheat** may be thus further shown:—A. ordered goods of B. (the prosecutor) saying that he wished to pay ready money for them. A. gave cheques for the price of the goods, not however intending to meet them, but meaning to defraud. This was held to amount to a representation by defendant that the cheques would be paid, that the existing state of facts

(*f*) *Reg.* v. *Riley*, Dearsly, Cr. Cas. 149; 22 L. J. M. C. 48.
(*g*) *Reg.* v. *Ardley*, L. R. 1 C. C. R. 301; 40 L. J. M. C. 85.

was such that in ordinary course they would be met. The simple fact of giving a cheque does not, however, necessarily imply that the person giving it has at the time of doing so money in the bank upon which the cheque is drawn. He may intend to pay in money to meet it, or he may be authorised by the banker to overdraw his account (*h*). Misapprehension as regards this matter ought no longer to exist.

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200. The subjoined statement of facts may throw light upon the component ingredients in the crime of **larceny.**

The prisoner, being a depositor in a Post-Office Savings Bank, X., presented an order for payment of money which had been sent to office Y. by office X. The warrant for payment being handed to the clerk, a sum much exceeding that specified in it, and much exceeding the amount of prisoner's deposit, was, through a mistake, handed to him by the clerk. Whereupon the prisoner took up the money and went away, well knowing of course the money not to be his.

Upon these facts the jury found the prisoner guilty of larceny, and the conviction was affirmed (*i*). The main question was :—Had there been a **taking** essential to the constitution of simple larceny at Common Law (*k*). If the true owner of a chattel parts with the physical possession

(*h*) *Reg.* v. *Hazelton*, L. R. 2 C. C. R. 134 ; 44 L. J. M. C. 11.
(*i*) *Reg.* v. *Middleton*, L. R. 2 C. C. R. 38 ; 42 L. J. M. C. 73.
(*k*) See Art. 185.

of it to a person in one sense the taking of possession is not necessarily against the owner's will. On the other hand, if the prisoner from the beginning had the intent to steal, and with that intent obtained possession of the thing, there would be a sufficient **taking** to satisfy our customary law. In such a case, since the taking is clearly with a felonious intent, there is a **stealing**.

Upon facts such as above stated, a test somewhat differently worded may also be applied for determining the nature and quality of the act done by the accused. We may ask whether the **property** in the thing wrongfully obtained really passed to the prisoner when he assumed dominion over it, and dealt with it as his own. In the Savings Bank case just cited this was certainly not so. The money was technically, as it had before been, the property of the Postmaster-General, and had never vested in the prisoner. The case was similar to that of a person handing to a cabman a sovereign by mistake for a shilling, the property in the sovereign not thus becoming vested in the cabman. The question whether a cabman under such circumstances would be guilty of larceny in appropriating it, would depend upon whether at the time he took the sovereign he was aware of the mistake, and had then the guilty intent to appropriate the coin.

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201. The **distinction between the felony of larceny and the misdemeanour of obtaining goods**, money, or a valuable security **by false pretences**, may be illustrated

by reference to two well-known kinds of agency, a **general** and a **special agency.**

Where a servant authorised generally to act for his master in his business is entrusted with his master's property, and being so entrusted is induced by fraud to part with it, the person guilty of the fraud might be convicted of obtaining the property by **false pretences,** but would not be guilty of larceny.

Where, however, a servant is entrusted by his master with the possession of **goods for a special purpose,** and is tricked out of that possession by fraud, the person practising the fraud is guilty of the crime of **larceny.**

Now the ground of the distinction is this: in the first of these two cases there would be no evidence of a taking against the will of the owner. The servant obviously gives up the property voluntarily, meaning to part with it, and his act is the act of his principal.

In the latter case the servant has no authority to part with the property in the goods except in fulfilment of the special purpose for which they were entrusted to him. Accordingly, there is no surrendering or giving up of the property by the master through his agent. There is no taking by the prisoner, no ideal element of force in what he does.

Subtle as the above distinction may possibly be deemed, it has sometimes in connection with matters of practical importance come under judicial notice. Thus, the **cashier of a bank** is authorised generally to conduct the business of the bank within his own particular sphere of action, and to part with its property on presen-

tation of a genuine order from a customer. The cashier would have to decide as to the genuineness of such order, and therefore, if being deceived by a forged order he parts with the money of the bank, he parts with the property in, as well as with the possession of, it. Under such circumstances there can be no evidence of a taking, and therefore nothing to support an indictment for larceny, as against the other person. He might, however, be properly convicted on a charge of obtaining money by false pretences (*l*).

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202. Magisterial functions are most usefully exercised for the repression and punishment of crime, and this list of cases may therefore fitly terminate with the recital of a peculiar set of facts involving reference to the duties of Justices of the Peace.

It is an established and fundamental rule of law that a man shall not be twice punished, nor even be twice put in peril, on the same criminal charge. If, however, from any particular circumstance a trial has proved abortive, the case may then be submitted a second time to the consideration of a jury, and determined as right and justice may require (*m*). The rule in question is generally applicable irrespective of the degree or quality of the offence charged, and the test by which its

(*l*) *Reg.* v. *Prince*, L. R. 1 C. C. R. 150 ; 38 L. J. M. C. 8. This is, however, a peculiar case, and Mr. Justice (now Lord) Blackburn began his judgment upon it by observing, "I lament the state of the law on this subject."

(*m*) This has recently been exemplified in the trials at Dublin.

applicability is determined is to investigate whether the accused person was really in jeopardy at his first trial. The mere statement of this test shows how the rule must be understood and subject to what qualifications it must be received. For cases occur in which a Judge may in the exercise of his discretion properly discharge a jury without receiving their verdict, as where a juryman, or the prisoner, or the Judge himself has been taken ill, and the trial has thus been abruptly terminated, or in the common instance of the jury being unable to agree upon their verdict (*n*).

We now come to the circumstances referred to at the commencement of this paragraph. Under certain statutory regulations a charge of assault may be heard and adjudicated on by Justices of the Peace, and if at the hearing the complaint is dismissed either upon the merits, or as being too trifling to deserve punishment, the Justices are required to give to the defendant a certificate stating the fact of such dismissal. And by stat. 24 & 25 Vict. c. 100, s. 45, such certificate—or conviction, with payment of the fine or undergoing the imprisonment awarded—shall operate as a release from all other proceedings, civil or criminal, for the same cause. Would then a summary conviction for an assault with imprisonment operate to prevent an indictment from being subsequently preferred against the same defendant for **manslaughter**, if the person assaulted has died from the effects of the assault? It was held that the

(*n*) On the subject of this paragraph read *Charlotte Winsor* v. *Regina*, L. R. 1 Q. B. 289, 300; 35 L. J. M. C. 161 (Ex. Cham.).

proceeding by indictment was *not* thus barred, because the statutory provision applies only where there has been a former judicial decision on the *same accusation*. The charge of assault was not the same as that of manslaughter, and accordingly the principle adverted to at the commencement of this Article was not infringed by the decision given (*o*).

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203. I must now take leave of the Reader of this little Volume, and in doing so I venture to express a hope that a perusal of its pages will have indicated that the study of English Law is not so encumbered by technicalities as may have been supposed. It has been my endeavour to show the general accessibility of the subject, and that a knowledge of it is quite attainable by every educated man. The utility of such a study is obvious, and I am assured that a position involving difficulties may often be overcome, or at least avoided, by one whose intellect has been strengthened and tutored by some familiarity with **legal science.**

(*o*) *Reg.* v. *Morris*, L. R. 1 C. C. R. 20 ; 36 L. J. M. C. 84. Read with this, *Masper* v. *Brown*, L. R. 1 C. P. D. 97 ; 45 L. J. C. P. 203, which decides that after *conviction* for a common assault upon a married woman, the defendant cannot be sued by the husband for the loss occasioned to him by the assault on his wife. This decision turned on the words "same cause" in 24 & 25 Vict. c. 100, sect. 45.

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