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HARVARD

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THE HISTORY OF ASSUMPSIT.

I. — Express Assumpsit.

THE mystery of consideration has possessed a peculiar fascination for writers upon the English Law of Contract. No fewer than three distinct theories of its origin have been put forward within the last eight years. According to one view, "the requirements of consideration in all parol contracts is simply a modified generalization of *quid pro quo* to raise a debt by parol." [1] On the other hand, consideration is described as "a modification of the Roman principle of *causa*, adopted by equity, and transferred thence into the common law." [2] A third learned writer derives the action of assumpsit from the action on the case for deceit, the damage to the plaintiff in that action being the forerunner of the "detriment to the promisee," which constitutes the consideration of all parol contracts.[3]

To the present writer [4] it seems impossible to refer consideration to a single source. At the present day it is doubtless just and expedient to resolve every consideration into a detriment to the promisee incurred at the request of the promisor. But this definition of consideration would not have covered the cases of the six-

[1] Holmes, Early English Equity, 1 L. Q. Rev. 171; The Common Law, 285. A similar opinion had been previously advanced by Professor Langdell. Contracts, § 47.

[2] Salmond, History of Contract, 3 L. Q. Rev. 166, 178.

[3] Hare, Contracts, Ch. VII. and VIII.

[4] It seems proper to say that the substance of this article was in manuscript before the appearance of Judge Hare's book or Mr. Salmond's Essay.

teenth century. There were then two distinct forms of consideration: (1) detriment; (2) a precedent debt. Of these detriment was the more ancient, having become established, in substance, as early as 1504. On the other hand, no case has been found recognizing the validity of a promise to pay a precedent debt before 1542. These two species of consideration, so different in their nature, are, as would be surmised, of distinct origin. The history of detriment is bound up with the history of special assumpsit, whereas the consideration based upon a precedent debt must be studied in the development of *indebitatus assumpsit*. These two forms of assumpsit will, therefore, be treated separately in the following pages.

The earliest cases in which an *assumpsit* was laid in the declaration were cases against a ferryman who undertook to carry the plaintiff's horse over the river, but who overloaded the boat, whereby the horse was drowned;[1] against surgeons who undertook to cure the plaintiff or his animals, but who administered contrary medicines or otherwise unskilfully treated their patient;[2] against a smith for laming a horse while shoeing it;[3] against a barber who undertook to shave the beard of the plaintiff with a clean and wholesome razor, but who performed his work negligently and unskilfully to the great injury of the plaintiff's face;[4] against a carpenter who undertook to build well and faithfully, but who built unskilfully.[5]

In all these cases, it will be observed, the plaintiff sought to recover damages for a physical injury to his person or property caused by the active misconduct of the defendant. The statement of the *assumpsit* of the defendant was for centuries, it is true, deemed essential in the count. But the actions were not originally, and are not to-day, regarded as actions of contract. They have always sounded in tort. Consideration has, accordingly, never played any part in the declaration. In the great majority of

[1] Y. B. 22 Ass. 94, pl. 41.

[2] Y. B. 43 Ed. III. 6, pl. 11; 11 R. II. Fitz. Ab. Act. on the Case, 37; Y. B. 3 H. VI. 36, pl. 33; Y. B. 19 H. VI. 49, pl. 5; Y. B. 11 Ed. IV. 6, pl. 10; Powtuary *v.* Walton, 1 Roll. Ab. 10, pl. 5; Slater *v.* Baker, 2 Wils. 359; Sears *v.* Prentice, 8 East, 348.

[3] Y. B. 46 Ed. III. 19, pl. 19; Y. B. 12 Ed. IV. 13, pl. 9 (*semble*).

[4] 14 H. VII. Rast. Ent. 2, b. 1.

[5] Y. B. 11 H. IV. 33, pl. 60; Y. B. 3 H. VI. 36, pl. 33; Y. B. 20 H. VI. 34, pl. 4; Y. B. 21 H. VI. 55, pl. 12; 18 H. VII. Keilw. 50, pl. 4; 21 H. VII. Keilw. 77, pl. 25; Y. B. 21 H. VII. 41, pl. 66; Coggs *v.* Bernard, 2 Ld. Ray. 909, 920; Elsee *v.* Gatward, 5 T. R. 143. See also Best *v.* Yates, 1 Vent. 268.

the cases and precedents there is no mention of reward or consideration. In Powtuary *v.* Walton[1] (1598), a case against a farrier who undertook to cure the plaintiff's horse, and who treated it so negligently and unskilfully that it died, it is said: "Action on the case lies on this matter without alleging any consideration, for his negligence is the cause of the action, and not the *assumpsit*." The gist of the action being tort, and not contract, a servant,[2] a wife,[3] or a child,[4] who is injured, may sue a defendant who was employed by the master, the husband, or the father. Wherever the employment was not gratuitous, and the employer was himself the party injured, it would, of course, be a simple matter to frame a good count in contract. There is a precedent of assumpsit against a farrier for laming the plaintiff's horse.[5] But in practice assumpsit was rarely, if ever, resorted to.

What, then, was the significance of the *assumpsit* which appears in all the cases and precedents, except those against a smith for unskilful shoeing? To answer this question it is necessary to take into account a radical difference between modern and primitive conceptions of legal liability. The original notion of a tort to one's person or property was an injury caused by an act of a stranger, in which the plaintiff did not in any way participate. A battery, an asportation of a chattel, an entry upon land, were the typical torts. If, on the other hand, one saw fit to authorize another to come into contact with his person or property, and damage ensued, there was, without more, no tort. The person injured took the risk of all injurious consequences, unless the other expressly assumed the risk himself, or unless the peculiar nature of one's calling, as in the case of the smith, imposed a customary duty to act with reasonable skill. This conception is well shown by the remarks of the judges in a case against a horse-doctor.[6] Newton, C.J.: "Perhaps he applied his medicines *de son bon gré*, and afterwards your horse died; now, since he did it *de son bon gré*, you shall not have an action. . . . My horse is ill, and I come to a horse-doctor for advice, and he tells me that one of his horses had a similar trouble, and that he applied a certain medicine, and that he will do the same for my horse, and does so, and the horse

[1] 1 Roll. Ab. 10, pl. 5. See also to the same effect, Reg. Br. 105 b.
[2] Everard *v.* Hopkins, 2 Bulst. 332. [3] Flippin *v.* Sheppard, 11 Price, 400.
[4] Gladwell *v.* Steggall, 5 B. N. C. 733.
[5] 2 Chitty, Pl. (7 ed.) 458. [6] Y. B. 19 H. VI. 49, pl. 5.

dies; shall the plaintiff have an action? I say, No." Paston, J.: "You have not shown that he is a common surgeon to cure such horses, and so, although he killed your horse by his medicines, you shall have no action against him without an *assumpsit*." Newton, C. J.: "If I have a sore on my hand, and he applies a medicine to my heel, by which negligence my hand is maimed, still I shall not have an action unless he undertook to cure me." The court accordingly decided that a traverse of the *assumpsit* made a good issue.[1]

It is believed that the view here suggested will explain the following passage in Blackstone, which has puzzled many of his readers: "If a smith's servant lames a horse while he is shoeing him, an action lies against the master, but not against the servant."[2] This is, of course, not law to-day, and probably was not law when written. Blackstone simply repeated the doctrine of the Year-Books.[3] The servant had not expressly assumed to shoe carefully; he was, therefore, no more liable than the surgeon, the barber, and the carpenter, who had not undertaken, in the cases already mentioned. This primitive notion of legal liability has, of course, entirely disappeared from the law. An *assumpsit* is no longer an essential allegation in these actions of tort, and there is, therefore, little or no semblance of analogy between these actions and actions of contract.

An express *assumpsit* was originally an essential part of the plaintiff's case in another class of actions, namely, actions on the case against bailees for negligence in the custody of the things intrusted to them. This form of the action on the case originated later than the actions for active misconduct, which have been already considered, but antedates, by some fifty years, the action of assumpsit. The normal remedy against a bailee was detinue. But there were strong reasons for the introduction of a concurrent remedy by an action on the case. The plaintiff in detinue might be defeated by the defendant's wager of law; if he had paid in advance for the safe custody of his property, he could not recover in detinue his money, but only the value of the property; detinue could not be brought in the King's Bench by original writ; and the procedure generally was less satisfactory than that in case. It is

[1] See to the same effect Y. B. 48 Ed. III. 6, pl. 11; 11 R. II. Fitz. Ab. Act. on Case, 37; Rast. Ent. 463 b.

[2] 1 Bl. Com. 431.

[3] Y. B. 11 Ed. IV. 6, pl. 10; 1 Roll. Ab. 94, pl. 1; 1 Roll. Ab. 95, pl. 1.

not surprising, therefore, that the courts permitted bailors to sue in case. The innovation would seem to have come in as early as 1449.[1] The plaintiff counted that he delivered to the defendant nine sacks of wool to keep; that the defendant, for six shillings paid him by the plaintiff, assumed to keep them safely, and that for default of keeping they were taken and carried away. It was objected that detinue, and not case, was the remedy. One of the judges was of that opinion, but in the end the defendant abandoned his objection; and Statham adds this note: . . . "*et credo* the reason of the action lying is because the defendant had six shillings which he [plaintiff] could not recover in detinue." The bailor's right to sue in case instead of detinue was recognized by implication in 1472,[2] and was expressly stated a few years later.[3]

The action against a bailee for negligent custody was looked upon, like the action against the surgeon or carpenter for active misconduct, as a tort, and not as a contract. The immediate cause of the injury in the case of the bailee was, it is true, a nonfeasance, and not, as in the case of the surgeon or carpenter, a misfeasance. And yet, if regard be had to the whole transaction, it is seen that there is more than a simple breach of promise by the bailee. He is truly an actor. He takes the goods of the bailor into his custody. This act of taking possession of the goods, his *assumpsit* to keep them safely, and their subsequent loss by his default, together made up the tort. The action against the bailee sounding in tort, consideration was no more an essential part of the count than it was in actions against a surgeon. Early in the reign of Henry VIII., Moore, Sergeant, said, without contradiction, that a bailee, with or without reward, was liable for careless loss of goods either in detinue or case;[4] and it is common learning that a gratuitous bailee was charged for negligence in the celebrated case of Coggs *v.* Bernard. If there was, in truth, a consideration for the bailee's undertaking, the bailor might, of course, declare in contract, after special assumpsit was an established form of action. But, in fact, there are few instances of such declarations before the reign of Charles I. Even since that time, indeed, case has continued to be a frequent, if not the more frequent, mode of

[1] Statham Ab. Act. on Case (27 H. VI.). [2] Y. B. 12 Ed. IV. 13, pl. 10.
[3] Y. B. 2 H. VII. 11, pl. 9; Keilw. 77, pl. 25; Keilw. 160, pl. 2; Y. B. 27 H. VIII. 25, pl. 3. [4] Keilw. 160, pl. 2 (1510).

declaring against a bailee.[1] Oddly enough, the earliest attempts to charge bailees in assumpsit were made when the bailment was gratuitous. These attempts, just before and after 1600, were unsuccessful, because the plaintiffs could not make out any consideration.[2] The gratuitous bailment was, of course, not a benefit, but a burden to the defendant; and, on the other hand, it was not regarded as a detriment, but an advantage to the plaintiff. But in 1623 it was finally decided, not without a great straining, it must be conceded, of the doctrine of consideration, that a bailee might be charged in assumpsit on a gratuitous bailment.[3]

The analogy between the action against the bailee and that against the surgeon holds also in regard to the necessity of alleging an express *assumpsit* of the defendant. Bailees whose calling was of a *quasi* public nature were chargeable by the custom of the realm, without any express undertaking. Accordingly, so far as the reported cases and precedents disclose, an *assumpsit* was never laid in a count in case against a common carrier [4] or innkeeper [5] for the loss of goods. They correspond to the smith, who, from the nature of his trade, was bound to shoe skilfully. But, in order to charge other bailees, proof of an express *assumpsit* was originally indispensable. An *assumpsit* was accordingly laid as a matter of course in the early cases and precedents. Frowyk, C.J., says, in 1505, that the bailee shall be charged "*per cest parol super se assumpsit.*" [6] In Fooley *v.* Preston,[7] Anderson, Chief Justice of the Common Bench, mentions, it is true, as a peculiarity of the Queen's Bench, that "it is usual and frequent in B. R. if I deliver to you an objection to rebail unto me, I shall have an action upon the case without an express promise." And yet, twelve years later, in

[1] In Williams *v.* Lloyd, W. Jones, 179; Anon., Comb. 371; Coggs *v.* Bernard, 2 Ld. Ray. 909; Shelton *v.* Osborne, 1 Barnard. 260; 1 Selw. N. P. (13 ed.) 348, s. c.; Brown *v.* Dixon, 1 T. R. 274, the declarations were framed in tort.

[2] Howlet *v.* Osborne, Cro. El. 380; Riches *v.* Briggs, Cro. El. 885, Yelv. 4; Game *v.* Harvie, Yelv. 50; Pickas *v.* Guile, Yelv. 128. See, also, Gellye *v.* Clark, Noy, 126, Cro. Jac. 188, s. c.; and compare Smith's case, 3 Leon. 88.

[3] Wheatley *v.* Low, Palm. 281, Cro. Jac. 668, s. c.

[4] 1 Roll. Ab. 2, pl. 4; Rich *v.* Kneeland, Hob. 17; 1 Roll. Ab. 6, pl. 4; Kenrig *v.* Eggleston, Al. 93; Nichols *v.* More, 1 Sid. 36; Morse *v.* Slue, 1 Vent. 190, 238; Levett *v.* Hobbs, 2 Show. 127; Chamberlain *v.* Cooke, 2 Vent. 75; Matthews *v.* Hoskins, 1 Sid. 244; Upshare *v.* Aidee, Cro. 25; Heme's Pleader, 76; Brownl. Ent. 11; 2 Chitty, Pl. (1 ed.) 271.

[5] Y. B. 42 Lib. Ass. pl. 17; Y. B. 2 H. IV. 7, pl. 31; Y. B. 11 H. IV. 45, pl. 18; Cross *v.* Andrews, Cro. El. 622; Gellye *v.* Clark, Cro. Jac. 189; Beedle *v.* Norris, Cro. Jac. 224; Heme's Pleader, 170, 249.

[6] Keilw. 77, pl. 25.

[7] 1 Leon. 297.

Mosley *v.* Fosset [1] (1598), which was an action on the case for the loss of a gelding delivered to the defendant to be safely kept and redelivered on request, the four judges of the Queen's Bench, although equally divided on the question whether the action would lie without a request, which would have been necessary in an action of detinue, "all agreed that without such an *assumpsit* the action would not lie." [2] But with the lapse of time an express undertaking of the bailee ceased to be required, as we have already seen it was dispensed with in the case of a surgeon or carpenter. The acceptance of the goods from the bailor created a duty to take care of them in the same manner that a surgeon who took charge of a patient became bound, without more, in modern times, to treat him with reasonable skill.

Symons *v.* Darknoll [3] (1629) was an action on the case against a lighterman, but not a common lighterman, for the loss of the plaintiff's goods. "And, although no promise, the court thought the plaintiff should recover." Hyde, C.J., adding: "Delivery makes the contract." The later precedents in case, accordingly, omit the *assumpsit*.[4]

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[1] Moore, 543, pl. 720; 1 Roll. Ab. 4, pl. 5, s. c. The criticism in Holmes' "Common Law," 155, n. 1, of the report of this case seems to be without foundation.

[2] See also Evans *v.* Yeoman (1635), Clyt. p. 33: "Assumpsit. The case upon evidence was, that whereas the plaintiff did deliver a book or charter to the defendant, it was holden that unless there had been an express promise to redeliver this back again, this action will not lie."

The writer is tempted to suggest here an explanation of an anomaly in the law of waste. If, by the negligence of a tenant-at-will, a fire breaks out and destroys the house occupied by him as tenant, and another also belonging to his landlord, he must respond in damages to the landlord for the loss of the latter, but not of the former. Lothrop *v.* Thayer, 138 Mass. 466. This is an illustration of the rule that a tenant-at-will is not liable for negligent or permissive waste. Is it not probable that the tenant-at-will and a bailee were originally regarded in the same light? In other words, neither was bound to guard with care the property intrusted to him in the absence of a special undertaking to that effect. This primitive conception of liability disappeared in the case of chattels, but persisted in the case of land, as a rule affecting real property would naturally persist. In the Countess of Salop *v.* Crompton, Cro. El. 777, 784, 5 Rep. 13, s. c., a case against a tenant-at-will, Gawdy, J., admits the liability of a shepherd for the loss of sheep, "because he there took upon him the charge. But here he takes not any charge upon him, but to occupy and pay his rent." So also in Coggs *v.* Bernard, 2 Ld. Ray. 909. Powell, J., referring to the case of the Countess of Salop, says: "An action will not lie against a tenant-at-will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration the lessor would let him live in the house he promised to deliver up the house to him again in as good repair as it was then, the action would have lain upon that special undertaking. But there the action was laid generally." [3] Palm. 523. See, also, Stanian *v.* Davies, 2 Ld. Ray. 795.

[4] 2 Inst. Cler. 185; 2 Chitty, Pl. (7 ed.) 506, 507.

There is much in common between the two classes of actions on the case already discussed and still a third group of actions on the case, namely, actions of deceit against the vendor of a chattel upon a false warranty. This form of action, like the others, is ancient, being older, by more than a century, than special assumpsit. The words *super se assumpsit* were not used, it is true, in a count upon a warranty; but the notion of undertaking was equally well conveyed by "*warrantizando vendidit.*"

Notwithstanding the undertaking, this action also was, in its origin, a pure action of tort. In what is, perhaps, the earliest reported case upon a warranty,[1] the defendant objects that the action is in the nature of covenant, and that the plaintiff shows no specialty but "*non allocatur*, for it is a writ of trespass." There was regularly no allusion to consideration in the count in case; if, by chance, alleged, it counted for nothing.[2] How remote the action was from an action of contract appears plainly from a remark of Choke, J.: "If one sells a thing to me, and another warrants it to be good and sufficient, upon that warranty made by parol, I shall not have an action of deceit; but if it was by deed, I shall have an action of covenant."[3] That is to say, the parol contract of guaranty, so familiar in later times, was then unknown. The same judge, and Brian, C.J., agreed, although Littleton, J., inclined to the opposite view, that if a servant warranted goods which he sold for his master, that no action would lie on the warranty. The action sounding in tort, the plaintiff, in order to charge the defendant, must show, in addition to his undertaking, some act by him, that is, a sale; but the owner was the seller, and not the friend or servant, in the cases supposed. A contract, again, is, properly, a promise to act or forbear in the future. But the action under discussion must be, as Choke, J., said, in the same case, upon a warranty of a thing present, and not of a thing to come. A vendor who gives a false warranty may be charged to-day, of course, in contract; but the conception of such a warranty, as a contract, is quite modern. Stuart *v.* Wilkins,[4] decided in 1778, is said to have been the first instance of an action of assumpsit upon a vendor's warranty.

We have seen that an express undertaking of the defendant was

[1] Fitz. Ab. Moust. de Faits, pl. 160 (1383).
[2] Moor *v.* Russel, Skin. 104; 2 Show. 284, *s. c.*
[3] Y. B. 11 Ed. IV. 6, pl. 11.
[4] 3 Doug. 18.

originally essential to the actions against surgeons or carpenters, and bailees. The parallel between these actions and the action on a warranty holds true on this point also. A case in the Book of Assises is commonly cited, it is true, to show that from very early times one who sold goods, knowing that he had no title to them, was liable in an action on the case for deceit.[1] This may have been the law.[2] But, this possible exception apart, a vendor was not answerable to the vendee for any defect of title or quality in the chattels sold, unless he had either given an express warranty, or was under a public duty, from the nature of his calling, to sell articles of a certain quality. A taverner or vintner was bound as such to sell wholesome food and drink.[3] Their position was analogous to that of the smith, common carrier, and innkeeper.

The necessity of an express warranty of quality in all other cases is illustrated by the familiar case of Chandelor *v.* Lopus[4] (1606–1607). The count alleged that the defendant sold to the defendant a stone, affirming it to be a bezoar stone, whereas it was not a bezoar stone. The judgment of the King's Bench, that the count was bad, was affirmed in the Exchequer Chamber, all the justices and barons (except Anderson, C.J.) holding "that the bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action; and although he knew it to be no bezoar stone, it is not material; for every one in selling his wares will affirm that his wares are good, or that his horse is sound; yet, if he does not warrant them to be so, it is no cause of action." The same doctrine is repeated in Bailie *v.* Merrill.[5] The case of Chandelor *v.* Lopus has recently found an able defender in the pages of this REVIEW. In the number for November, 1887, Mr. R. C. McMurtrie urges that the decision was a necessary consequence of the rule of pleading, that the pleader must state the legal effect of his evidence, and not the evidence itself. It is possible that the judgment would have been arrested in Chandelor *v.* Lopus, if it had come before an English court of the present century.[6] But it is

[1] 3 Y. B. 42, Lib. Ass. pl. 8.

[2] But see Kenrick *v.* Burges, Moore, 126, per Gawdy, J., and Roswell *v.* Vaughan, Cro. Jac. 196, per Tanfield, C.B.

[3] Y. B. 9 H. VI. 53, pl. 37; Keilw. 91, pl. 16; Roswell *v.* Vaughan, Cro. Jac. 196; Burnby *v.* Bollett, 16 M. & W. 644, 654.

[4] Dy. 75 a, n. (23); Cro. Jac. 4.

[5] 1 Roll. R. 275. See also Leakins *v.* Clizard, 1 Keb. 522, per Jones.

[6] But see Crosse *v.* Gardner, 3 Mod. 261, Comb. 142, S. C.; Medina *v.* Stoughton, 1 Ld. Ray. 593, 1 Salk. 210, S. C.

certain that the judges in the time of James I. did not proceed upon this rule of pleading. To their minds the word "warrant," or, at least, a word equally importing an express undertaking, was as essential in a warranty as the words of promise were in the Roman *stipulatio*. The modern doctrine of implied warranty, as stated by Mr. Baron Parke in Barr *v.* Gibson,[1] "But the bargain and sale of a chattel, as being of a particular description, does imply a contract that the article sold is of that description," would have sounded as strangely in the ears of the early lawyers as their archaic doctrine sounds in ours. The warranty of title stood anciently upon the same footing as the warranty of quality.[2] But in Lord Holt's time an affirmation was equivalent to a warranty,[3] and to-day a warranty of title is commonly implied from the mere fact of selling.[4]

However much the actions against a surgeon or carpenter for misfeasance, those against a bailee for negligent custody, and, above all, those against a vendor for a false warranty, may have contributed, indirectly, to the introduction of special assumpsit, there is yet a fourth class of cases which seem to have been more intimately connected with the development of the modern parol contract than any of those yet considered. These cases were, also, like the actions for a false warranty, actions on the case for deceit. That their significance may be fully appreciated, however, it will be well to give first a short account of the successive attempts to maintain an action for the simple breach of a naked parol promise, *i.e.*, for a pure nonfeasance.

The earliest of these attempts was in 1400, when an action was brought against a carpenter for a breach of his undertaking to build a house. The court was unanimous against the plaintiff, since he counted on a promise, and showed no specialty.[5] In the same reign there was a similar case with the same result.[6] The harmony of judicial opinion was somewhat interrupted fifteen years later in a case against a millwright on a breach of promise to build a mill within a certain time. Martin, J., like his prede-

[1] 3 M. & W. 390.

[2] Co. Lit., 102 a; Springwell *v.* Allen (1649) Al. 91, 2 East, 448, *n.* (a), s. c.

[3] Crosse *v.* Gardner, 3 Mod. 261; 1 Show. 65, s. c.; Medina *v.* Stoughton, 1 Ld. Ray. 593, 1 Salk. 210, s. c.

[4] Eichholtz *v.* Bannister, 17 C. B. N. S. 708; Benj. Sale (3 ed.), 620–631.

[5] Y. B. 2 H. IV. 3, pl. 9.

[6] Y. B. 11 H. IV. 33, pl. 60. See also 7 H. VI. 1, pl. 3.

cessors, was against the action; Cockayne, J., favored it. Babington, C.J., at first agreed with Cockayne, J., but was evidently shaken by the remark of Martin, J.: "Truly, if this action is maintained, one shall have trespass for breach of any covenant[1] in the world," for he then said: "Our talk is idle, for they have not demurred in judgment. Plead and say what you will, or demur, and then it can be debated and disputed at leisure." The case went off on another point.[2] Martin, J., appears finally to have won over the Chief Justice to his view, for, eight years later, we find Babington, C.J., Martin and Cotesmore, JJ., agreeing in a *dictum* that no action will lie for the breach of a parol promise to buy a manor. Paston, J., showed an inclination to allow the action.[3] In 1435 he gave effect to this inclination, holding, with Juyn, J., that the defendant was liable in an action on the case for the breach of a parol promise to procure certain releases for the plaintiff.[4] But this decision was ineffectual to change the law. Made without a precedent, it has had no following. The doctrine laid down in the time of Henry IV. has been repeatedly reaffirmed.[5]

The remaining actions on the case for deceit before mentioned may now be considered. In the first of these cases the writ is

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[1] Covenant was often used in the old books in the sense of agreement, a fact sometimes overlooked, as in Hare, Contracts, 138, 139.

[2] Y. B. 3 H. VI. 36, pl. 33. One of the objections to the count was that it did not disclose how much the defendant was to have for his work. The remarks of the judges and counsel upon this objection seem to have been generally misapprehended. Holmes, Common Law, 267, 285; Hare, Contracts, 162. The point was this: Debt would lie only for a sum certain. If, then, the price had not been agreed upon for building the mill, the millwright, after completing the mill, would get nothing for his labor. It could not, therefore, be right to charge him in an action for refusing to throw away his time and money. Babington, C.J., and Cockayne, J., admitted the force of this argument, but the latter thought it must be intended that the parties had determined the price to be paid. There is no allusion in the case to a *quid pro quo*, or a consideration as a basis for the defendant's promise. Indeed, the case is valueless as an authority upon the doctrine of consideration.

[3] Y. B. 11 H. VI. 18, pl. 10, 24, pl. 1, 55, pl. 26. [4] Y. B. 14 H. VI. 18, pl. 58.

[5] Y. B. 20 H. VI. 25, pl. 11, per Newton, C.J.; Y. B. 20 H. VI. 34, pl. 4, per Aysceghe, J.; Y. B. 37 H. VI. 9, pl. 18, per Moyle, J.; Y. B. 2 H. VII. 11, pl. 9, and Y. B. 2 H. VII. 12, pl. 15, per Townsend, J.; 38 H. VII. Keilw. 50, pl. 4, per curiam; Doct. & St. Dial. II. c. 24; Cogge *v.* Bernard, 2 Ld. Ray. 909, 919, per Lord Holt; Elsee *v.* Gatward, 5 T. R. 143. Newton, C.J., said on several occasions (Y. B. 19 H. VI. 24 b, pl. 47; Y. B. 20 H. VI. 34, pl. 4; Y. B. 22 H. VI. 43, pl. 28) that one who bargained to sell land for a certain sum to be paid might have debt for the money, and, therefore, on the principle of reciprocity, was liable in an action on the case to his debtor. But this view must be regarded as an idiosyncracy of that judge, for his premise was plainly false. There was no *quid pro quo* to create a debt.

given, and the reader will notice the striking resemblance between its phraseology and the later count in assumpsit. The defendant was to answer for that he, for a certain sum to be paid to him by the plaintiff, undertook to buy a manor of one J. B. for the plaintiff; but that he, by collusion between himself and one M. N., contriving cunningly to defraud the plaintiff, disclosed the latter's evidence, and falsely and fraudulently became of counsel with M. N., and bought the manor for M. N., to the damage of the plaintiff. All the judges agreed that the count was good. Babington, C.J.: "If he discovers his counsel, and becomes of counsel for another, now that is a deceit, for which I shall have an action on my case." Cotesmore, J.: "I say, that matter lying wholly in covenant may by matter *ex post facto* be converted into deceit. . . . When he becomes of counsel for another, that is a deceit, and changes all that was before only covenant, for which deceit he shall have an action on his case."[1]

The act of the defendant did not affect, it is true, the person or physical property of the plaintiff. Still, it was hardly an extension of the familiar principle of misfeasance to regard the betrayal of the plaintiff's secrets as a tortious invasion of his rights. But the judges encountered a real difficulty in applying that principle to a case that came before the Exchequer Chamber a few years later.[2] It was a bill of deceit in the King's Bench, the plaintiff counting that he bargained with the defendant to buy of him certain land for £100 in hand paid, but that the defendant had enfeoffed another of the land, and so deceived him. The promise not being binding of itself, how could the enfeoffment of a stranger be a tortious infringement of any right of the plaintiff? What was the distinction, it was urged, between this case and those of pure nonfeasance, in which confessedly there was no remedy? So far as the plaintiff was concerned, as Ayscoghe, J., said, "it was all one case whether the defendant made a feoffment to a stranger or kept the land in his own hands." He and Fortescue, J., accordingly thought the count bad. A majority of the judges, however, were in favor of the action. But the case was adjourned. Thirty-five years later (1476), the validity of the action in a similar case was impliedly recognized.[3] In 1487 Townsend, J., and Brian, C.J., agreed that a traverse of the feoffment to the stranger was a good

[1] Y. B. 11 H. VI. 18, pl. 10, 24, pl. 1, 55, pl. 26. See also Y. B. 20 H. VI 25, pl. 11.
[2] Y. B. 20 H. VI. 34, pl. 4.
[3] Y. B. 16 Ed. IV. 9, pl. 7.

traverse, since "that was the effect of the action, for otherwise the action could not be maintained."[1] In the following year,[2] the language of Brian, C.J., is most explicit: "If there be an accord between you and me that you shall make me an estate of certain land, and you enfeoff another, shall I not have an action on my case? *Quasi diceret sic. Et Curia cum illo.* For when he undertook to make the feoffment, and conveyed to another, this is a great misfeasance."

In the Exchequer Chamber case, and in the case following, in 1476, the purchase-money was paid at the time of the bargain. Whether the same was true of the two cases in the time of Henry VII., the reports do not disclose. It is possible, but by no means clear, that a payment contemporaneous with the promise was not at that time deemed essential. Be that as it may, if money was in fact paid for a promise to convey land, the breach of the promise by a conveyance to a stranger was certainly, as already seen, an actionable deceit by the time of Henry VII. This being so, it must, in the nature of things, be only a question of time when the breach of such a promise, by making no conveyance at all, would also be a cause of action. The mischief to the plaintiff was identical in both cases. The distinction between misfeasance and nonfeasance, in the case of promises given for money, was altogether too shadowy to be maintained. It was formally abandoned in 1504, as appears from the following extract from the opinion of Frowyk, C.J.: "And so, if I sell you ten acres of land, parcel of my manor, and then make a feoffment of my manor, you shall have an action on the case against me, because I received your money, and in that case you have no other remedy against me. And so, if I sell you my land and covenant to enfeoff you and do not, you shall have a good action on the case, and this is adjudged. . . . And if I covenant with a carpenter to build a house and pay him £20 for the house to be built by a certain day, now I shall have a good action on my case because of payment of money, and still it sounds only in covenant and without payment of money in this case no remedy, and still if he builds it and misbuilds, action on the case lies. And also for nonfeasance, if money paid case lies."[3]

[1] Y. B. 2 H. VII. 12, pl. 15. [2] Y. B. 3 H. VII. 14, pl. 20.

[3] Keilw. 77, pl. 25, which seems to be the same case as Y. B. 20 H. VII. 8, pl. 18. 21 H. VII. 41, pl. 66, per Fineux, C.J., *accord.* See also Brooke's allusion to an "action on the case upon an *assumpsit pro tali summa.*" Br. Ab. Disceit, pl. 29.

The gist of the action being the deceit in breaking a promise on the faith of which the plaintiff had been induced to part with his money or other property, it was obviously immaterial whether the promisor or a third person got the benefit of what the plaintiff gave up. It was accordingly decided, in 1520, that one who sold goods to a third person on the faith of the defendant's promise that the price should be paid, might have an action on the case upon the promise.[1] This decision introduced the whole law of parol guaranty. Cases in which the plaintiff gave his time or labor were as much within the principle of the new action as those in which he parted with property. And this fact was speedily recognized. In Saint-Germain's book, published in 1531, the student of law thus defines the liability of a promisor: "If he to whom the promise is made have a charge by reason of the promise, . . . he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it."[2] From that day to this a detriment has always been deemed a valid consideration for a promise if incurred at the promisor's request.[3]

Jealousy of the growing jurisdiction of the chancellors was doubtless a potent influence in bringing the common-law judges to the point of allowing the action of assumpsit. Fairfax, J., in 1481, advised pleaders to pay more attention to actions on the case, and thereby diminish the resort to Chancery;[4] and Fineux, C.J., remarked, after that advice had been followed and sanctioned by the courts, that it was no longer necessary to sue a *subpœna* in such cases.[5]

That equity gave relief, before 1500, to a plaintiff who had incurred detriment on the faith of the defendant's promise, is reasonably clear, although there are but three reported cases. In one of

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[1] Y. B. 12 H. VIII. 11, pl. 3. [2] Doct. and Stud. Dial. II. c. 24.

[3] Y. B. 27 H. VIII. 24, pl. 3; Webb's Case (1578), 4 Leon. 110; Richards *v.* Bartlett (1584), 1 Leon. 19; Baxter *v.* Read (1585), 3 Dyer, 272, b, note; Foster *v.* Scarlett (1588), Cro. El. 70; Sturlyn *v.* Albany (1588), Cro. El. 37; Greenleaf *v.* Barker (1590), Cro. El. 193; Knight *v.* Rushworth (1596), Cro. El. 469; Bane's Case (1611), 9 Rep. 93, b. These authorities disprove the remark of Mr. Justice Holmes (Common Law, 287) that "the law oscillated for a time in the direction of reward, as the true essence of consideration." In the cases cited in support of that remark the argument turned upon the point of benefit, as the only arguable point. The idea that the plaintiff in those cases had, in fact, incurred a detriment would have seemed preposterous. Professor Langdell's observations (Summary of Contract, § 64) are open to similar criticism.

[4] Y. B. 21 Ed. IV. 23, pl. 6. [5] Y. B. 21 H. VII. 41, pl. 66.

them, in 1378, the defendant promised to convey certain land to the plaintiff, who, trusting in the promise, paid out money in travelling to London and consulting counsel; and upon the defendant's refusal to convey, prayed for a subpœna to compel the defendant to answer of his "disceit."[1] The bill sounds in tort rather than in contract, and inasmuch as even *cestuis que use* could not compel a conveyance by their feoffees to use at this time, its object was doubtless not specific performance, but reimbursement for the expenses incurred. Appilgarth *v.* Sergeantson[2] (1438) was also a bill for *restitutio in integrum*, savoring strongly of tort. It was brought against a defendant who had obtained the plaintiff's money by promising to marry her, and who had then married another in "*grete* deceit."[3] The remaining case, thirty years later,[4] does not differ materially from the other two. The defendant, having induced the plaintiff to become the procurator of his benefice, by a promise to save him harmless for the occupancy, secretly resigned his benefice, and the plaintiff, being afterwards vexed for the occupancy, obtained relief by subpœna.

Both in equity[5] and at law, therefore, a remediable breach of a parol promise was originally conceived of as a deceit; that is, a tort. Assumpsit was in several instances distinguished from contract.[6] By a natural transition, however, actions upon parol promises came to be regarded as actions *ex contractu*.[7] Damages were soon assessed, not upon the theory of reimbursement for the loss of the thing given for the promise, but upon the principle of compensation for the failure to obtain the thing promised. Again, the liability for a tort ended with the life of the wrong-doer. But after the struggle of a century, it was finally decided that the per-

[1] 2 Cal. Ch. II. [2] 1 Cal. Ch. XLI.

[3] An action on the case was allowed under similar circumstances in 1505, Anon., Cro. El. 79 (cited). [4] Y. B. 8 Ed. IV. 4, pl. 11.

[5] The Chancellor (Stillington) says, it is true, that a subpœna will lie against a carpenter for breach of his promise to build. But neither this remark, nor the statement in Diversity of Courts, Chancerie, justifies a belief that equity ever enforced gratuitous parol promises. But see Holmes, 1 L. Q. Rev. 172, 173; Salmond, 3 L. Q. Rev. 173. The practice of decreeing specific performance of any promises can hardly be much older than the middle of the sixteenth century. Bro. Ab. Act. on Case, pl. 72. But the invalidity of a *nudum pactum* was clearly stated by Saint-Germain in 1531. Doct. & St. Dial. II. Ch. 22, 23, and 24.

[6] Y. B. 27 H. VIII. 24, 25, pl. 3; Sidenham *v.* Worlington, 2 Leon. 234; Banks *v.* Thwaites, 3 Leon. 73; Shandois *v.* Simpson, Cro. El. 880; Sands *v.* Trevilian, Cro Car. 107.

[7] Williams *v.* Hide, Palm. 548, 549; Wirtal *v.* Brand, 1 Lev. 165.

sonal representatives of a deceased person were as fully liable for his assumpsits as for his covenants.[1] Assumpsit, however, long retained certain traces of its delictual origin. The plea of not guilty was good after verdict, "because there is a deceit alleged."[2] Chief Baron Gilbert explains the comprehensive scope of the general issue in assumpsit by the fact that "the gist of the action is the fraud and delusion that the defendant hath offered the plaintiff in not performing the promise he had made, and on relying on which the plaintiff is hurt."[3] This allegation of deceit, in the familiar form: "Yet the said C. D., not regarding his said promise, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff," etc.,[4] which persisted to the present century, is an unmistakable mark of the genealogy of the action. Finally, the consideration must move from the plaintiff to-day, because only he who had incurred detriment upon the faith of the defendant's promise, could maintain the action on the case for deceit in the time of Henry VII.

The view here advanced as to the origin of special assumpsit, although reached by an independent process, accords with, it will be seen, and confirms, it is hoped, the theory first proclaimed by Judge Hare.

The origin of *indebitatus assumpsit* may be explained in a few words: Slade's case,[5] decided in 1603, is commonly thought to be the source of this action.[6] But this is a misapprehension. *Indebitatus assumpsit* upon an express promise is at least sixty years older than Slade's case.[7] The evidence of its existence throughout the last half of the sixteenth century is conclusive. There is a note by Brooke, who died in 1558, as follows: "Where one is indebted to me, and he promises to pay before Michaelmas, I may have an action of debt on the contract, or an action on the case on the promise."[8] In Manwood *v.* Burston[9] (1588), Manwood, C.B., speaks of "three manners of considerations upon which an assump-

[1] Legate *v.* Pinchion, 9 Rep. 86; Sanders *v.* Esterby, Cro. Jac. 417.

[2] Corby *v.* Brown, Cro. El. 470; Elrington *v.* Deshant, 1 Lev. 142.

[3] Common Pleas, 53.

[4] In Impey's King's Bench (5 ed.), 486, the pleader is directed to omit these words in declaring against a Peer: "For the Lords have adjudged it a very high contempt and misdemeanor, in any person, to charge them with any species of fraud or deceit."

[5] 4 Rep. 92 a; Yelv. 21; Moore, 433, 667.

[6] Langdell, Cont. § 48; Pollock, Cont. (4 ed.) 144; Hare, Cont. 136, 137; Salmond, 3 L. Q. Rev. 179.

[7] Br. Ab. Act. on Case, pl. 105 (1542).

[8] Br. Ab. Act. on Case, pl. 5.

[9] 2 Leon. 203, 204.

sit may be grounded: (1) A debt precedent, (2) where he to whom such a promise is made is damnified by doing anything, or spends his labor at the instance of the promisor, although no benefit comes to the promisor . . . (3) or there is a present consideration." [1]

The Queen's Bench went even further. 'In that court proof of a simple contract debt, without an express promise, would support an *indebitatus assumpsit*.[2] The other courts, for many years, resisted this doctrine. Judgments against a debtor in the Queen's Bench upon an implied assumpsit were several times reversed in the Exchequer Chamber.[3] But the Queen's Bench refused to be bound by these reversals, and it is the final triumph of that court that is signalized by Slade's case, in which the jury found that "there was no other promise or assumption, but only the said bargain;" and yet all the judges of England resolved "that every contract executory implied an assumpsit."

Indebitatus assumpsit, unlike special assumpsit, did not create a new substantive right; it was primarily only a new form of procedure, whose introduction was facilitated by the same circumstances which had already made Case concurrent with Detinue. But as an express assumpsit was requisite to charge the bailee, so it was for a long time indispensable to charge a debtor. The basis or cause of the action was, of course, the same as the basis of debt, *i.e.*, *quid pro quo*, or benefit. This may explain the inveterate practice of defining consideration as either a detriment to the plaintiff or a benefit to the defendant.

Promises not being binding of themselves, but only because of the detriment or debt for which they were given, a need was naturally felt for a single word to express the additional and essential requisite of all parol contracts. No word was so apt for the purpose as the word "consideration." Soon after the reign of Henry VIII., if not earlier, it became the practice, in pleading, to lay all

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[1] See further, Anon. (B. R. 1572), Dal. 84, pl. 35; Pulmant's case (C. B. 1585), 4 Leon. 2; Anon. (C. B. 1587), Godb. 98, pl. 12; Gill *v.* Harwood (C. B. 1587), 1 Leon. 61. It was even decided that assumpsit would lie upon a subsequent promise to pay a precedent debt due by covenant. Ashbrooke *v.* Snape (B. R. 1591), Cro. El. 240. But this decision was not followed.

[2] Edwards *v.* Burt (1573), Dal. 108; Anon. (1583), Godb. 13; Estrigge *v.* Owles (1589), 3 Leon. 200.

[3] Hinson *v.* Burridge, Moore, 701; Turges *v.* Beecher, Moore, 694; Paramour *v.* Payne, Moore, 703; Maylard *v.* Kester, Moore, 711.

assumpsits as made *in consideratione* of the detriment or debt.[1] And these words became the peculiar mark of the technical action of *assumpsit*, as distinguished from other actions on the case against surgeons or carpenters, bailees and warranting vendors, in which, as we have seen, it was still customary to allege an undertaking by the defendant.

It follows, from what has been written, that the theory that consideration is a "modification of *quid pro quo*," is not tenable. On the one hand, the consideration of *indebitatus assumpsit* was identical with *quid pro quo*, and not a modification of it. On the other hand, the consideration of detriment was developed in a field of the law remote from debt; and, in view of the sharp contrast that has always been drawn between special assumpsit and debt, it is impossible to believe that the basis of the one action was evolved from that of the other.[2]

Nor can that other theory be admitted by which consideration was borrowed from equity, as a modification of the Roman "*causa*." The word "consideration" was doubtless first used in equity; but without any technical significance before the sixteenth century.[3] Consideration in its essence, however, whether in the form of detriment or debt, is a common-law growth. Uses arising upon a bargain or covenant were of too late introduction to have any influence upon the law of assumpsit. Two out of three judges questioned their validity in 1505, a year after assumpsit was definitively established.[4] But we may go further. Not only was the consideration of the common-law action of assumpsit not borrowed from equity, but, on the contrary, the consideration, which gave validity to parol uses by bargain and agreement, was borrowed from the common law. The bargain and sale of a use, as well as the agreement to stand seised, were not executory contracts, but conveyances. No action at law could ever be brought against a bargainor

1 In Joscelin v. Sheldon (1557), 3 Leon. 4, Moore, 13, Ben. & Dal. 57, pl. 53, s. c., a promise is described as made "in consideration of," etc. An examination of the original records might disclose an earlier use of these technical words in connection with an assumpsit. But it is a noteworthy fact, that in the reports of the half-dozen cases of the reign of Henry VIII. and Edward VI. the word "consideration" does not appear.

2 See also Mr. Salmond's criticism of this theory, in 3 L. Q. Rev. 178.

3 31 H. VI. Fitz. Ab. Subp. pl. 23; Fowler v. Iwardby, 1 Cal. Ch. LXVIII.; Pole v. Richard, 1 Cal. Ch. LXXXVIII.; Y. B. 20 H. VII. 10, pl. 20; Br. Feff. al use, pl. 40; Benl. & Dal. 16, pl. 20.

4 Y. B. 21 VIII. 18, pl. 30. The consideration of blood was not sufficient to create a use, until the decision, in 1563, of Sharrington v. Stratton, Plow. 295.

or covenantor.[1] The absolute owner of land was conceived of as having in himself two distinct things, the seisin and the use. As he might make livery of seisin and retain the use, so he was permitted, at last, to grant away the use and keep the seisin. The grant of the use was furthermore assimilated to the grant of a chattel or money. A *quid pro quo*, or a deed, being essential to the transfer of a chattel or the grant of a debt,[2] it was required also in the grant of a use. Equity might conceivably have enforced uses wherever the grant was by deed. But the chancellors declined to carry the innovation so far as this. They enforced only those gratuitous covenants which tended to "the establishment of the house" of the covenantor; in other words, covenants made in consideration of blood or marriage.[3]

J. B. Ames.

CAMBRIDGE.

[*To be continued.*]

THE PRINCIPLE OF LUMLEY *v.* GYE, AND ITS APPLICATION.

THE facts in the case of Lumley *v.* Gye[4] may be stated in a few words. The plaintiff, the lessee of a theatre, had made a contract with Johanna Wagner to perform in his theatre for a certain time, with a condition in the contract that she should not sing nor use her talents elsewhere during the term, without the plaintiff's consent in writing. The defendant, whilst the agreement with Wagner was in force, and with full knowledge of its existence, and maliciously intending to injure the plaintiff, persuaded her to break her contract and refuse to perform in the plaintiff's theatre, and to depart from the employment. Mr. Justice Coleridge, in his dissenting opinion in the case, which has

[1] Plow. 298, 308; Buckley *v.* Simonds, Winch, 35–37, 59, 61; Hore *v.* Dix, 1 Sid. 25, 27; Tybus *v.* Mitford, 2 Lev. 75, 77.

[2] That a debt was, as suggested by Professor Langdell (Contracts, § 100), regarded as a grant, finds strong confirmation in the fact that Debt was the exclusive remedy upon a covenant to pay money down to a late period. Chawner *v.* Bowes, Godb. 217. See, also, 1 Roll. Ab. 518, pl. 2 and 3; Brown *v.* Hancock, Hetl. 110, 111, *per Bartlay.*

[3] Bacon, St. of Uses (Rowe's ed.), 13–14.

[4] 2 El. & Bl. 216.

been so much admired, says: "In order to maintain this action one of two propositions must be maintained; either that an action will lie against one by whose persuasions one party to a contract is induced to break it to the damage of the other party, or that the action for seducing a servant from the master, or persuading one who has contracted for service from entering into the employ, is of so wide application as to embrace the case of one in the position and profession of Johanna Wagner." The opinion of the majority of the court, sustaining the action, was based principally, it seems, upon the second proposition above stated, viz., that the action on the case for enticing a servant applied to any case of a contract for personal service, regardless of the nature of the services. The principle stated in the first proposition was also affirmed and sanctioned, with the qualification, not stated by Coleridge, J., that the persuasion used by the defendant, to cause the breach of contract, must be malicious.

In Bowen *v.* Hall, 6 Q. B. D. 333, which was an action for persuading a skilled workman, who, with a few others, possessed a secret process for manufacturing glazed bricks, to break his contract with the plaintiff for exclusive service for five years, the question was presented, for the first time, in a court of error, whether the decision in Lumley *v.* Gye should be affirmed or reversed; and the Court of Appeal — one judge dissenting — affirmed the decision, but distinctly rejected the proposition that the action could be maintained as an action for enticing a servant. Upon that point the court declared that the reasoning of Coleridge, J., to the effect that the action for enticing servants from their employment was given by the Statute of Labourers, and applied only in case of menial servants, was as nearly as possible, if not quite, conclusive. The Court of Appeal rested its decision upon a broad principle, deduced from the historical case of Ashby *v.* White,[1] which was asserted to have been the foundation of the decision of the majority of the judges in Lumley *v.* Gye, in one branch of their arguments, and which is stated by Lord Justice Brett in these words: "That whenever a man does an act which, in law and in fact, is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which, in the particular case, does produce such an injury, an action on the case will lie." In other words, the case of Lumley *v.* Gye, as

[1] Ld. Raym. 938; s. c. 1 Sm. L. C. (8th ed.) 472.

it must now be read and understood, is an ordinary action on the case for a tort, in which the plaintiff must show damage resulting to him, more or less directly, from a wrongful act of the defendant.

In Lumley *v.* Gye the report states that special damage was alleged, but the case does not show what the special damage was. Neither in that case nor in Bowen *v.* Hall does it appear that there was any damage beyond the breach of the contract; and, in Bowen *v.* Hall, at least, the opinion of the court does not require the plaintiff to prove any damage which could not be assessed in an action for breach of the contract itself. The mere breach of the contract by the obligor supplies to the obligee the element of damage which is necessary to support an action of tort.[1] Such damage is, to be sure, the direct act of the party who breaks the contract, but the defendant is chargeable therefor, upon the ground that he has done an act which was likely to result in a breach of contract, and consequent damage to the plaintiff; and he is liable for the probable consequences of his act, even though the wrongful act of another must intervene to cause the damage.[2]

But what is the wrongful act of which the plaintiff complains? An act cannot be said to be wrongful unless it is in violation of some right in the plaintiff, or of some duty owed by the defendant to the plaintiff. A person who enters into a contract with another, acquires as against that other a right to performance of the contract according to its terms, or to damages for non-performance. Those are the only rights created by the contract; and, from the point of view of contract, those are the only rights which the obligee acquires. But the court, in Lumley *v.* Gye, announced the principle that the mere existence of the contract imposed upon all third persons who knew of its existence, a duty to forbear from

[1] One effect of the decision in Lumley *v.* Gye is to give the plaintiff two causes of action, one in tort and the other in contract, for what may be substantially the same damage. As the causes of action are distinct and consistent, the plaintiff is not obliged to elect, and a recovery upon one cannot be a bar to an action upon the other; but the plaintiff is not entitled to double compensation; and, it would seem, in the absence of direct authority, that an actual recovery of damages in one action ought to be admissible in evidence to reduce damages in the other. See, however, Bird *v.* Randall, 1 W. Bl. 373, 387; Thompson *v.* Howard, 31 Mich. 309.

[2] In this aspect the case of Lumley *v.* Gye is opposed to Vicars *v.* Wilcocks, 8 East, 1, which held that the wrongful act of a third person in discharging the plaintiff from his employ, in consequence of words uttered by the defendant, did not constitute such special damage as would make the words actionable; but that case has been questioned (see Lynch *v.* Knight, 9 H. L. Cas. 577), and the decision in Lumley *v.* Gye is more in harmony with the general rule of damages, both in contract and tort.

doing any act maliciously, for the purpose of procuring a breach of the contract. In other words, it gave to the obligee a right to such limited forbearance as against all the world.[1]

The right or duty thus declared is imposed by law, and, like all other rights and duties so created, is based upon reasons of expediency or sound policy, as understood by the court; and since it rests upon this foundation, and has been declared by a competent authority, the only practical question is how far the limitation extends.

Neither in Lumley *v.* Gye nor in Bowen *v.* Hall is it stated in general terms that it is a wrongful act to procure a breach of contract; but it is expressly declared that the defendants' act is not wrongful, and therefore not a violation of any right, unless it is malicious. Thus, in the opinion of Lord-Justice Brett, "Merely to persuade a person to break his contract may not be wrongful in law or fact, as in the second case put by Coleridge, J.[2] But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore an actionable act, if injury ensues from it. We think it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as Lumley *v.* Gye, and which is complained of in the present case, is therefore, because malicious, wrongful."[3]

It is perfectly clear that the word "malicious" is not used by the court in its ordinary meaning, and that the persuasion used by the defendant need not be for the purpose of gratifying feelings of hatred or ill-will toward the plaintiff; but it is also clear that a bad motive, a purpose in acting which the law condemns as unjustifi-

[1] Another method of stating the foundation of the rule in Lumley *v.* Gye is that the obligation created by a contract is a *res* which is the subject of ownership, and the obligee is protected as owner. See 1 Harvard Law Review, pp. 9–10, by Professor Ames. Also Piggott, Law of Torts, pp. 363, 368. Conceding this position, it may still be said that the duties imposed upon the world at large in favor of the owner of property are really founded on expediency and policy, and limited by the same considerations. Thus trespasses to property, and even the destruction of property, are often justifiable against the will of the owner. See Ames's Cases on Torts, ch. vii. §§ 3, 4; Addison on Torts (6th ed.), ch. ii. § 1.

[2] The case put was this: B agrees with A to go as supercargo for A to Sierra Leone, "and C, urgently, and *bona fide* advises B to abandon his contract, which, on consideration, B does, whereby loss results to A. I think no one will be found bold enough to maintain that an action would lie against C." 2 El. & Bl. at p. 247, per Coleridge, J., dissenting.

[3] 6 Q. B. D. at p. 338.

able, is necessary, in order to make out the wrongful act. The same idea is expressed in a Massachusetts case, brought upon a cause of action similar to that in Lumley *v.* Gye. The declaration set forth intentional and wilful acts, done with the unlawful purpose to cause damage to the plaintiff, without right or justifiable cause on the part of the defendant; "which," says Mr. Justice Wells, "constitutes malice." Walker *v.* Cronin, 107 Mass. 555, 562.

It is in this aspect that the case of Lumley *v.* Gye is most interesting. It is a conspicuous example of an action on the case for a tort, in which malice is declared to be an essential element.

In Lumley *v.* Gye the judges apparently limited the principle to the case of contracts for exclusive personal service. In Bowen *v.* Hall the contract which the defendant had procured to be broken was a contract for such service; but the reasoning of the court was not confined to that class of cases, and was in no manner restricted, except by the statement that the question presented by the case was whether the decision in Lumley *v.* Gye should be affirmed or reversed. As the principle was stated and combated by Coleridge, J., and as it was elaborated by the Court of Appeal, in Bowen *v.* Hall, it embraced the whole field of contract. If it is a tort maliciously to procure the breach of a contract for exclusive personal service, why is it not a tort maliciously to procure the breach of any contract? All that the plaintiff is obliged to prove is a wrongful act, and damage. To procure the breach of a contract of sale is a damage in the same manner as to procure the breach of a contract of service. Why is it not equally a wrongful act? It may be said that, for reasons of policy, contracts for personal service should receive extraordinary protection, especially in the case of persons employed on account of their talents or peculiar skill, because the loss of the contract cannot be made good to the employer. But similar considerations can readily be suggested in the case of many other contracts, and they afford a very uncertain ground upon which to limit the application of the rule. If the case of Lumley *v.* Gye is to rest upon the principle stated in Bowen *v.* Hall, consistency requires that it should be extended to the breach of any contract. In one case, at least, it has been so applied.[1]

[1] Jones *v.* Stanley, 76 N. C. 355. In cases where the defendant has caused the breach of a contract for exclusive personal service, the decision in Lumley *v.* Gye has been generally followed without question. Bixby *v.* Dunlap, 56 N. H. 456; Jones *v.* Blocker, 43 Georgia, 331; Jones *v.* Mills, 2 Devereux, 540; Haskins *v.* Royster, 70 N. C. 601; Dickson *v.* Dickson, 33 La. An., 1261.

It is immaterial also whether the breach of the contract is caused by persuasion or by any other means. If performance of a contract becomes impossible through an act of violence of the defendant, done for the express purpose of preventing performance, the element of damage which is necessary to support the action is present, and the damage — the non-performance of the contract — is the same as in the case of persuasion. If a man should be prevented from performing a contract through an assault and battery committed upon his person, with knowledge of the existence of the contract, and for the purpose of preventing its performance, every reason upon which the action in Lumley *v.* Gye was sustained would require that the defendant should be held. Or if a man should agree to sell a horse, and before the time for performance arrived, a third person, with knowledge of the contract of sale, kills the horse, for the same reasons he should be held.[1] Indeed, there is an additional reason for sustaining the action in these cases; for the person prevented from performing his contract would have a valid defence in an action for breach of the contract; and if the party injured by the breach of contract could not hold the trespasser he would have no remedy. In the case of Taylor *v.* Neri,[2] which is the only English case upon the point, Lord Chief Justice Eyre ruled at *nisi prius* that no action would lie for an assault and battery upon a performer, whereby the plaintiff lost his services; but that case was distinguished by the judges in Lumley *v.* Gye, upon the ground that the damages were too remote, and furthermore, no malice, or knowledge on the part of the defendant that the contract existed, was proved.

Neither does the principle require, in the case of contracts for personal service, that the service should be for a fixed term. If a man who is in the employ of another merely at will is induced by the persuasion of a third person to abandon the employment, it is a damage to the employer; for he is deprived of the advantages or profits which he would have obtained from the continuance of the service. And if the persuasion used by the third person was malicious, it is a wrongful act, and he is liable in an action of tort.

[1] It seems that by the Roman law in such a case an action was given to the person to whom the promise was made, but it was the action *de dolo*. "Si servum, quem tu mihi promiseras, alius occiderit, de dolo malo actionem in eum dandam plerique recte putant, quia tu a me liberatus sis: ideoque legis Aquiliae actio tibi denegabitur." D. 4, 3, 18, 5 (Paulus). Mommsen inserts *mihi* after *de dolo malo actionem*.

[2] 1 Esp. 386. See, also, Burgess *v.* Carpenter, 2 Richardson (S. C.), 7.

This is the case of Walker *v.* Cronin, above cited. It was an action on the case for enticing shoemakers to leave the employment of the plaintiff, and the court held, on a demurrer to the declaration, that a good cause of action was stated in each of the three counts, although the first two contained no allegation that the men were in the employ of the plaintiff or about to enter his employ, under a contract for a term, or under any fixed contract. Mr. Justice Wells stated the principle involved in these terms: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to." Walker *v.* Cronin, 107 Mass. 555, at 564.[1]

This case is no doubt a more extreme case than Lumley *v.* Gye, but it is fairly within the principle. The only difficulty is to establish the element of damage, for no contract has been broken, and in departing from the service of the plaintiff the shoemakers did nothing but what they had a perfect right to do. But the court held that "the loss of advantages, either of property or of personal benefit, which, but for such interference, the plaintiff would have been able to attain or enjoy," constituted damage.

From the principle of damage here stated it is plain that logically at least the principle of Lumley *v.* Gye is applicable outside of the domain of contracts; and in point of authority the same principle, or something very similar, has often been applied in the law. Thus in the case of Keeble *v.* Hickeringill,[2] in the time of Lord Holt, an action was sustained for preventing wild-fowl from alighting near the defendant's decoy pond, by firing off guns in the neighborhood to frighten them away. In Tarleton *v.* Magawley[3]

[1] See Evans *v.* Walton, L. R. 2 C. P. 615; Noice *v.* Brown, 39 N. J. (Law) 569; Peters *v.* Lord, 18 Conn. 337.

[2] 11 East, 573, note; s. c. 11 Mod. 74, 130; 3 Salk. 9; Holt, 14, 17, 19. The same point was decided on similar facts in Carrington *v.* Taylor, 11 East, 571.

[3] Peake, 205.

Lord Kenyon held that an action on the case would lie for discharging cannon-balls at negroes on the coast of Africa, whereby they were frightened and prevented from coming to the plaintiff's vessel to trade. In New York it has been held actionable in two instances[1] to cause the breach of a contract of sale, which was within the Statute of Frauds, and as to which the statute had not been satisfied, although both parties intended to perform. The means used by the defendant in each case were false representations, — in one case that the plaintiff did not want the goods which were the subject of the contract, and in the other that he did not intend to supply them, whereby the defendant procured the advantage of a contract with himself. In New Jersey, in the case of Hughes *v.* McDonough,[2] an action on the case was sustained, in which the defendant loosened a horseshoe put on by the plaintiff, for the purpose of causing the owner of the horse to believe that the plaintiff, who was a blacksmith, was an unskilful workman, whereby he lost the owner's trade. So a trader, in an action in his own right for defamatory words spoken of his wife, who assisted him in his business, was successful upon showing a falling off of custom at his store. Riding *v.* Smith, Ex. D. 91.

The above cases differ from Lumley *v.* Gye in the fact that the damage sustained was not the breach of a contract, nor indeed the loss of any property, but merely the failure to make a profit or gain; but that is sufficient to constitute damage.[3] As to the other important element in the action on the case, viz., the wrongful act, the *injuria*, in each of the above instances, whether it consisted of violence, as in Tarleton *v.* Magawley, or of fraud, as in Rice *v.* Manley, it was wrongful as against the plaintiff, only because it was done without justifiable cause, for the purpose of causing the damage, or with knowledge that the damage would result. But such an act, as the word is used in Lumley *v.* Gye, and as it is used in the law of libel, is malicious, and wrongful only because it is malicious, or done without justifiable cause. It

[1] Denton *v.* Pratt, 2 Wend. 385; Rice *v.* Manley, 66 N. Y. 82. See Green *v.* Button, 2 C., M. & R. 707.

[2] 43 N. J. (Law) 459. See, also, Rogers *v.* Rajendro Dutt, 13 Moore P. C. 209, at 240.

[3] This principle existed in the Roman law. The failure to make a profit (lucrum cessans), as well as a positive loss or injury to property (damnum emergens), was taken into account in assessing damages for a tort under the lex Aquilia. "Inde Neratius scribit, si servus institutus occisus sit, etiam hereditatis aestimationem venire." D. 9, 2, 23, pr. (Ulpian). See Grueber, Lex Aquilia, 62, 268.

follows that the case of Lumley *v.* Gye is only one example of a class of cases in the law of torts, not included under any specific name, where damage is made actionable because it is malicious.

The act to be malicious must be done without a justifiable cause. In all of the cases thus far cited the act done by the defendant, where it was a lawful act, was done in the exercise of some common right, like the right to enter into a contract or to carry on a business or trade; and, in such cases, it may safely be stated that if such an act is done with a malicious purpose, or, what is the same thing, in violation of superior rights acquired by others, with knowledge of the existence of such rights, the act becomes wrongful and subjects the defendant to damages. So far actual decision has gone, though not without conflict.[1] But where the act is done by the defendant in the exercise of some right vested in him, individually, as by contract or grant, or as owner of property, a malicious purpose will not render the act unlawful, provided the method of exercising the right is lawful. In that class of cases the principle of Lumley *v.* Gye has no application, for the weight of authority is strongly in favor of the proposition that malice is immaterial.[2] As a question of principle, much might be said in favor of making all malicious acts unlawful, where malice is clearly proved; but the question being one that depends entirely upon reasons of expediency and policy, a course of decision, in different jurisdictions, tending strongly in one direction, is very convincing evidence of the weight of reason in the case.[3]

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[1] Heywood *v.* Tillson, 75 Maine, 225; Payne *v.* Western R.R. Co., 13 Lea, 507.

[2] See Cooley on Torts, 81, 581, where authorities are collected. There are dicta to the contrary, and the case of Chesley *v.* King, 74 Maine, 164, was directly *contra*; but that case seems to be of no authority since the decision in Heywood *v.* Tillson, *supra*.

[3] In the Roman law, in the case of adjoining owners, it seems that a malicious use of property was actionable. "Denique Marcellus scribit, cum eo qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem; et sane non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit." D. 39, 3, 1, 12 (Ulpian). A similar principle is recognized in the Scotch law. See Pollock on Torts, 136, 137.

THE RIGHT TO FOLLOW TRUST PROPERTY WHEN CONFUSED WITH OTHER PROPERTY.

IT is a commonplace of text-books and cases on trusts that if the trustee converts money or property belonging to the trust and mingles it with other property, the trust is gone. The general theory on this point is well expressed by Lewis, J., in Thompson's appeal:[1] "Whenever a trust fund has been converted into another species of property, if its identity can be traced, it will be held in its new form liable to the right of the *cestui que trust*. So long as it can be identified either as the original property of the *cestui que trust*, or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a *bona fide* purchaser for a valuable consideration without notice. The substitute for the original thing follows the nature of the thing itself so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fail. This is always the case when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description." If, however, it can be shown that the trust fund has gone to increase another fund, or has been used in the purchase of property, though what has been bought with trust money and what has not are entirely confused, has the *cestui que trust* only the rights of an ordinary creditor, or, if he has greater rights, what are they? It is this question which it is proposed to treat.

Throughout the discussion the word "trustee" is used broadly to indicate any one holding money or property in a fiduciary capacity, and the property is termed the trust fund, and the beneficial owner the *cestui que trust*. As the principles determining the rights of the parties are the same in every fiduciary relation, whether strictly that of trustee and *cestui que trust*, principal and agent, executor or administrator, and heirs or legatees, the terminology adopted is convenient and not misleading.

The question most frequently arises when the trustee, after having used the trust property, becomes insolvent and the *cestui que*

[1] 22 Pa. St. 16.

trust endeavors to make good a claim to priority against the general creditors. If the trust fund were traceable to a separate piece of property the right to that property would be clear,[1] and it is inequitable if the chance circumstance that the trustee has mingled the trust money with his own should deprive the *cestui que trust* of all rights against the property which his money has purchased, and such a distinction could only be defended on the ground that when the trust fund is confused with other money it is beyond the power of the court to give the relief which it gives when the money is not mingled. This does not seem to be the case, though formerly the Court of Chancery may have so considered it. If the trust fund is traceable as having furnished in part the money with which a certain investment was made, and the proportion it formed of the whole money so invested is known or ascertainable, the *cestui que trust* should be allowed to regard the acts of the trustee as done for his benefit, in the same way that he would be allowed to if all the money so invested had been his; that is, he should be entitled in equity to an undivided share of the property which the trust money contributed to purchase, — such a proportion of the whole as the trust money bore to the whole money invested.

The reason in one case as in the other is that the trustee cannot be allowed to make a profit from the use of trust money, and if the property which he wrongfully purchased were held subject only to a lien for the amount invested, any appreciation in value would go to the trustee.

It will often happen, however, that the *cestui que trust* cannot identify any property as being purchased wholly or in a fixed proportion with his money, and therefore equity cannot regard him as the owner of any property either individually or in common, and yet that he can show that the trust fund has gone to swell the general assets of the trustee's estate, for instance, if used in a general business which soon afterwards becomes insolvent. In such a case there can be no trust, strictly speaking. It is as necessary for equitable as for legal ownership that there should be fixed property as the subject-matter of it. In both cases the necessity rests rather on the nature of things than on any rule of law. It would, however, be in the highest degree unjust that the rights of the *cestui que trust* should be made to depend on whether his property

[1] 1 Perry on Trusts, § 127.

is distinguishable from the general mass of the trustee's property, or indistinguishable. Though indistinguishably confused, still his money or his money's worth is there, and if the machinery of the court can work it out he should be enabled to get at it. Equity accomplishes justice in this case by giving the *cestui que trust* a lien on the property of the trustee, analogous to the vendor's lien, — a right to be paid from the estate in priority to the general creditors.

This latter right the *cestui que trust* always has, even though he may also be able to follow his money into a certain investment.[1] In case the investment has turned out badly, it would be for his advantage not to regard the investment as having been made for him, not to treat it as his property, but to assume that it has been wrongfully converted, and take a lien on what was purchased with his money and come in with the general creditors for the deficit occasioned by the depreciation of the investment.[2]

The different classes of cases involving these points will now be examined somewhat more particularly.

If a trustee purchase real estate partly with his own money and partly with trust money, it is universally allowed that the *cestui que trust* has a claim in equity against the land, but the exact nature of the right allowed is not entirely uniform. If the property purchased should increase in value, it is for his interest to obtain an undivided share of it, rather than a lien on the property for the bare amount of the trust money put in. If the proportion which the trust money bore to the purchase money is known or ascertainable, the larger right should, it seems, be allowed, as the trustee's estate otherwise benefits by the misappropriation. The question has not, however, been very fully discussed and the decisions are not uniform. In England the point can hardly be considered entirely settled, but in Knatchbull *v.* Hallett,[3] Sir George Jessel, M. R., after speaking of the *cestui que trust's* right "to elect either to take the property purchased, or to hold it as a security for the amount of the trust money laid out in the purchase," makes the dictum: "But in the second case, where a trustee has mixed the money with his own there is this distinction, that the *cestui que trust*, or beneficial owner, can no longer elect to

[1] 1 Perry on Trusts, § 128.

[2] Riehl *v.* Evansville Foundry Assoc., 104 Ind. 70.

[3] 13 Ch. D. 696, 709.

take the property, because it is no longer bought with the trust money purely and simply, but with a mixed fund. He is, however, still entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase."

In Massachusetts it is held that where the consideration for the purchase of land is paid in part only by one person and the title is taken in the name of another, no resulting trust will be created unless "the part of the purchase money paid by him in whose favor the resulting trust is sought to be enforced be shown to have been paid for some specific part or distinct interest in the estate, for 'some aliquot part' as it is sometimes expressed; that is, for a specific share, as a tenancy in common or joint tenancy of one-half, one-quarter, or other particular fraction of the whole; or for a particular interest, as a life estate, or tenancy for years, or remainder in the whole; and a general contribution of a sum of money towards the entire purchase is not sufficient."[1] As this is the case where the transaction is rightful, it was supposed to follow that when the consideration was wrongfully paid in part with the *cestui que trust's* money he could not claim a specific portion of the land, for the misappropriated money must have been used as a general contribution only to the purchase money, and consequently he would not be entitled to a specific share under the rule above given. The point was so decided in Bresnihan *v.* Sheehan.[2]

The considerations, however, determining the rights of the *cestui que trust* when his money has been wrongfully used as part of the consideration, are different from those determining the rights of one who has paid part of the consideration, the conveyance being taken in the name of another. In the latter case there is a resulting trust, which depends on the presumed intention of the parties.[3] When A pays the purchase money and B takes the title, equity compels B to hold the title in trust for A, because it is presumed that was the intention; and similarly when A pays only a part, the court will regard B as holding an aliquot part proportioned to the amount paid, in trust for A, if it is presumed that such was the intention. The Massachusetts court in effect decided that if A's intention was not expressed, that the money which he furnished should pay for an

[1] M'Gowan *v.* M'Gowan, 14 Gray, 119. [2] 125 Mass. 11.

[3] 1 Perry on Trusts, § 125. If the evidence shows no trust was intended, none will result although the purchase money was not paid by the grantee. Livermore *v.* Aldrich, 5 Cush. 431; Bibb *v.* Smith, 12 Heisk. 728; Carter *v.* Montgomery, 2 Tenn. Ch. 216; Darrier *v.* Darrier, 58 Mo. 222; Seibold *v.* Christman, 75 Mo. 308.

aliquot part, the court could not presume it. And similar decisions have been reached elsewhere.[1] Other courts have reached an opposite conclusion.[2] The real difference is on the question whether it is a fair inference from the simple fact that A paid $3,000 and B paid $2,000, B taking the title, that the intention of the parties is that A shall have three-fifths interest in the land and B two-fifths, or, on the other hand, that the intention is that the land shall be B's, A's only interest in it being to secure a debt to him. Consider now the case where misappropriated trust money forms a part of a purchase by the trustee. The rights which the *cestui que trust* has of following the property rest, not on any presumed intention, but on the principle devised for the protection of beneficiaries of trusts that the trustee cannot be allowed to make a profit for himself by dealing with the trust estate. To avoid this the *cestui que trust* should be allowed to regard the investment of his money in the way most favorable to him, throwing the risks on the wrong-doer. So that if the property decreases in value the *cestui que trust* would take only a lien on the property, but if it increases in value, he should be allowed to treat the transaction as if for his benefit, that is, he should be allowed to claim a proportional part of the property. This, though often called a resulting trust, is properly a constructive trust, being purely the consequence of rules of equity, irrespective of intention.

In Day *v.* Roth[3] also the court gave the plaintiff, whose money had been used in the purchase of the property in question, an equitable lien, but there is nothing in the case to show that any greater right was asked.

According to the latest decisions in Pennsylvania, the *cestui que trust* may recover a specific share, and he is confined to that relief, for the court repudiates the whole doctrine of equitable lien. In a recent case[4] misappropriated trust money belonging to the plaintiff was used in improving land, and the plaintiff was endeavoring to secure a right against the land. Gordon, J., in delivering the opinion of the court, made use of the following language: "It is said the money of these beneficiaries has been used to improve this property, and that they ought, therefore, to have a lien

[1] Ames' Cas. Trusts, 289; Shaffer *v.* Fetty, 4 S. E. Rep. 278 (W. Va.).

[2] Springer *v.* Springer, 114 Ill. 550; Bowen *v.* McKean, 82 Mo. 594; Shaw *v.* Shaw, 86 Mo. 594; Parker *v.* Coop, 60 Tex. 111.

[3] 18 N. Y. 448.

[4] Appeal of Cross and Gault, 97 Pa. St. 421.

upon it to the extent of the moneys so expended, but what kind of a lien? Not a statutory one. . . . A lien arising from the equitable circumstances of the case? But such a lien is unknown in Pennsylvania jurisprudence. It has not been as yet engrafted upon our legal system, and it is to be hoped never will be." Sharswood, C.J., dissented. An earlier case,[1] where trust money was deposited in a bank with other money, had held that the beneficiaries did not lose their rights; but dicta to the contrary occur in the People's Bank Appeal,[2] and also in Hopkins' Appeal.[3] Though an equitable lien is thus disallowed, the very recent case of M'Laughlin *v.* Fulton[4] allowed a woman, whose money had been invested by her son with his own, to recover specifically $\frac{33}{60}$ of the land, that being the ratio her money bore to the whole purchase price.

The general rule in this country allows the *cestui que trust* to recover a specific share of the property purchased. In White *v.* Drew,[5] the trustee bought land for $1,590; $950 of this was paid with money in his hands as administrator. The land was sold under order of the court for over $6,000, and the plaintiff received $\frac{950}{1590}$ of this. In Tilford *v.* Torrey,[6] the court, although finally deciding that there was not sufficient evidence to hold the defendant, in discussing the question, said, "If part only of the purchase money be paid with trust funds, a resulting trust will be created to the extent of the payment, or the *cestui que trust* may charge the land with the repayment to him of the sum so paid." Similarly, in Greene *v.* Haskell,[7] where the agent of the plaintiff, contrary to his instructions, invested funds of his principal together with his own in the purchase of ivory, the court decreed that the ivory should be sold by a master, and that the plaintiff was entitled to take the amount misappropriated, with interest, or his proportionate amount, from the proceeds. In other jurisdictions also the decisions or remarks of the court favor this view.[8]

A question, similar to that which has been considered, arises where trust money is paid into a bank to the private account of

[1] Farmers' and Mechanics' National Bank *v.* King, 57 Pa. St. 202. See also Rupp's Appeal, 100 Pa. St. 531.

[2] 93 Pa. St. 107. [3] 9 Atl. Rep. 867. [4] 104 Pa. St. 161.

[5] 42 Mo. 561. [6] 53 Ala. 120. [7] 5 R. I. 447.

[8] Roberts *v.* Haley, 65 Cal. 397; Bazemore *v.* Davis, 55 Ga. 594; Fausler *v.* Jones, 7 Ind. 277; Derry *v.* Derry, 98 Ind. 319; Morrison *v.* Kinstra, 55 Miss. 71; Lyon *v.* Atkin, 78 N. C. 253; Watson *v.* Thompson, 12 R. I. 466.

the trustee, funds of his own being paid to the same account. Here the question is not whether the *cestui que trust* is entitled to a lien or to a proportionate part, for it is entirely immaterial in the case of money, but whether he has any rights at all against the bank account. There can be little doubt that, according to the older English precedents, the question would have to be answered in the negative. Money when mixed with other money could not be followed, because it had no ear-mark. A consideration of these old cases led Justice Fry, so late as 1879, to decide that the rights of the *cestui que trust* were gone.[1] It had been decided, however, in Pennell *v.* Deffell,[2] that the *cestui que trust* was entitled in equity to his money though mingled with other money, and did not become an ordinary creditor. This case was followed by Frith *v.* Cartland,[3] and other cases.[4] But, as stated before, Mr. Justice Fry, finding it impossible to reconcile the early decisions with the late ones, took the extraordinary course of following the early cases and disregarding the later ones, though admitting their doctrine to be preferable. The law on the subject was thus in a very unsettled state till Sir George Jessel, M.R., in a case involving the state of facts now under consideration,[5] made a thorough review of the whole subject. He frankly admitted that formerly equity would give no relief, but was of opinion that the modern doctrine in equity was at variance, that equity had advanced. He accordingly overruled Mr. Justice Fry's decision, and again placed the matter in a satisfactory shape. Any other result would involve the consequence that a trustee by simply putting one dollar of his own with a sum of trust money would make himself merely a debtor instead of a trustee, although the trust fund were still in existence and in his possession. The doubt arose because the judges were not (to quote Jessel's words), "Aware of the rule of equity, which gave you a charge — that if you lent £1,000 of your own and £1,000 trust money on a bond for £2,000 or on a mortgage for £2,000, or on a promissory note for £2,000, equity could follow it, and create a charge." The case has been followed very recently.[6]

In this country what Sir G. Jessel calls the modern doctrine of

[1] *Ex parte* Dale, 11 Ch. D. 672. [2] 4 De G., M. & J. 372.
[3] 2 H. & M. 417.
[4] Brown *v.* Adams, L. R. 4 Ch. App. 764; *Ex parte* Cooke, 4 Ch. D. 123; Birt *v.* Burt, 36 L. T. Rep. 943.
[5] Knatchbull *v.* Hallett, 13 Ch. D. 696. [6] Gilbert *v.* Gonard, 54 L. J. Ch. 439.

equity has generally found favor with the courts.[1] But in two States, at least, there are decisions to the contrary.[2] They rest on the simple fact that the subject-matter of the trust is confused with other property. For instance, in Steamboat Co. *v.* Locke[3] the court say: "The bill states in substance that S at the time of his death had on deposit upon his individual account $898.08, and that 'said deposit included and covered' a balance of $559.35 held by said S in trust, and the prayer of the bill is, that the defendant as administrator upon S's estate may be required to pay over said balance. It is plain from these statements that the trust funds were not only deposited to the private and individual account of S, but that the funds had become in some way mixed with other funds belonging to him, for the balance claimed to be due from him to the company is considerably less than the amount remaining on deposit in the bank. The identity of the trust fund is therefore lost, and in such a case the *cestui que trust* can stand no better than other creditors." Such reasoning as this shows that the court had in mind the possibility of a strict trust only, and not a charge on the whole fund to the amount of the trust.

In most of the cases which come up on this point there is a complicating circumstance not hitherto mentioned. That is, the trustee, after mingling his own money and the trust money in his private account, draws on the account to a greater or less extent. Can the *cestui que trust* still claim to be reimbursed in full from the amount left on deposit, or should it rather be held that a portion of the fund withdrawn was his money? It is a general rule of presumption, when it becomes important to decide to which of several deposits drafts on the account should be charged, that the deposits shall be deemed to have been drawn out in the same order in which they were put in, so that each draft when paid would be charged against the earliest deposit in the account.[4] This rule was applied in Pennell *v.* Deffell,[5] the court deciding that it made no difference that some of the deposits were of trust money.

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[1] Third Nat. Bank *v.* Stillwater Gas Co., 21 Am. Law Rev. 192 (Minn.); Rabel *v.* Griffin, 12 Daly, 241; Van Alen *v.* American Nat. Bank, 52 N. Y. 1; Farmers' and Mechanics' Nat. Bank *v.* King, 57 Pa. St. 202 (see *supra*); Overseers *v.* Bank of Va., 2 Gratt. 544; Nat. Bank *v.* Ins. Co., 104 U. S. 54.

[2] Neely *v.* Rood, 54 Mich. 134; Goodell *v.* Buck, 67 Me. 514; Steamboat Co. *v.* Locke, 73 Me. 370; *Ex parte* Hobbs, 14 N. B. R. 495.

[3] 73 Me. 370.

[4] Clayton's Case, 1 Mer. 608.

[5] 4 De G., M. & J. 372.

Subsequent English cases followed this decision.[1] In Knatchbull *v.* Hallett,[2] however, the court (Thesiger, L. J., dissenting, as he felt bound by authority), after having disposed of the view that the *cestui que trust* had no claim at all, decided that the presumption did not apply where the balance was composed in part of trust funds and in part of the trustee's private funds, but that in such a case it should be presumed that the trustee drew out what he had a right to use, that is, his own money. It certainly should not be presumed unnecessarily that the trustee is a wrong-doer. It frequently happens that a trustee deposits trust money to his private account, not from any bad intent, but merely from ignorance of the duties of his position, and he carefully keeps a balance at least as great as the amount of the trust. The presumption of the court should be that fair dealing was intended, so far as the facts proved will allow such a presumption. The American cases which allow the *cestui que trust* any right against such a mingled deposit are in accordance with the later English rule.

Let it be supposed, however, that the balance at some time falls below the amount of the trust money. In such a case the conclusion cannot be avoided that as to the difference between the two the trust money has been withdrawn, so that as to this difference the *cestui que trust* must follow it into what is purchased with it, or if unable to do that, must take the position of an ordinary creditor. Nor will subsequent deposits of the trustee's own money give any larger right in the absence of special circumstances indicating an intention on the part of the trustee to fill the deficit in the amount of the trust money, for such an intention cannot be presumed. Unless such an intention be shown, therefore, the equitable charge on the account can never exceed the smallest balance to the trustee's credit, since the deposit of the trust money. Thus, if the balance were reduced to nothing, even for a day, the *cestui que trust* would have no specific claim.

In all the cases hitherto considered, the trust money has been traced into some specific investment or deposit, although confused with other property. The case remains to be considered where this cannot be done, but a whole estate can be shown to be increased by the amount of a trust fund. A case illustrating this well is People *v.* The Bank of Rochester.[3] The defendant bank

[1] Merriman *v.* Ward, 1 J. & H. 377; Frith *v.* Cartland, 2 H. & M. 417; Brown *v.* Adams, L. R. 4 Ch. 764; *Ex parte* Cooke, 4 Ch. D. 123.

[2] 13 Ch. D. 696. [3] 96 N. Y. 32.

had discounted notes for H, and the latter, wishing to anticipate payment, gave the bank checks for the amount of the notes less rebate of interest. These checks the bank received and charged to H's account as depositor, and made entries in its books that the notes were paid. As a matter of fact, the bank had previously sold the notes. About a month after this, and before the notes became due, the bank failed. It was held that an order requiring the receiver to pay the notes out of the funds in his hands was properly granted; that the transaction between the bank and H was not in their relation of debtor and creditor, but that by it a trust was created, the violation of which constituted a fraud by which the bank could not profit and to the benefit of which the receiver was not entitled.

In two cases in Kansas,[1] the facts were very similar and the decisions the same as in People *v.* Bank of Rochester,[2] and the same principle is involved in other decisions.[3] The decided weight of authority is shown by these cases. In the case of Illinois Trust & Savings Bank *v.* The First National Bank of Buffalo[4] the Circuit Court for the northern district of New York reached an opposite result, holding that though the defendant had collected a draft as agent for the plaintiff, and had kept instead of remitting the proceeds, and in a few days had suspended payment, the plaintiff had no priority over other creditors. But three years later the Supreme Court of New York decided[5] on almost precisely the same facts that the party sending the draft for collection was entitled to such priority, the court saying, "If the identical money collected by the bank did not pass into the hands of the receiver it makes no difference, for, in some shape or form, they went to swell the assets which fell into his hands."[6]

There were several decisions[7] under the late national bankruptcy

[1] Peak *v.* Ellicott, 30 Kan. 156; Ellicott *v.* Barnes, 31 Kan. 170.

[2] 96 N. Y. 32.

[3] Harrison *v.* Smith, 83 Mo. 210 (overruling Mills *v.* Post, 76 Mo. 420); Stoller *v.* Coates, 88 Mo. 514; Thompson *v.* Gloucester Bank, 8 Atl. Rep. 97 (N. J.); People *v.* Bank of Dansville, 39 Hun, 187; McColl *v.* Fraser, 40 Hun, 111; McLeod *v.* Evans, 66 Wis. 401.

[4] 15 Fed. Rep. 853; and see, to the same effect, Bank of Commerce *v.* Russell, 2 Dill. 215.

[5] People *v.* Bank of Dansville, 39 Hun, 187.

[6] A decision to the same effect has recently been rendered in New Jersey, Thompson *v.* Gloucester Bank, 8 Atl. Rep. 97.

[7] White *v.* Jones, 6 N. B. R. 175; *In re* Hosie, 7 N. B. R. 601; *In re* C. & T. D. Manuf'g Co., 12 N. B. R. 203.

law, denying the *cestui que trust* any priority. In none of them is there any discussion of the question, and the decisions are based on the wording of the Bankrupt Act very largely. "A proper construction of this clause [exempting trust property from assignment on the trustee's bankruptcy] of the Bankrupt Act will only apply it to property still held *in specie* and which can be distinguished from other property of the bankrupt, or where the proceeds constitute a separate and distinct fund, — not to cases where they have become mingled with the general assets of the bankrupt, even by his wrongful act."[1]

It is frequently of the utmost importance how far the burden is placed on the *cestui que trust* to make out that his property actually forms a part of the whole estate on which he is endeavoring to obtain a lien, that is, how much he must prove to make out a *prima facie* case. If he had to show not only that his property had been mingled with the trustee's, but also that in the payments made from the combined property the money in fact used was not derived from the trust, he could seldom make out his case. It has been held, therefore, that the wrongful commingling of the property being shown, it is incumbent on the trustee to show what property is his,[2] and it follows that in the case supposed the *cestui que trust* need not show that payments made indiscriminately from the mixed funds were not made with his money, but the trustee must show that they were if he wishes to disprove the claim of the *cestui que trust* to an equitable charge; and the assignee in bankruptcy or creditors of the trustee can have no greater right than the trustee himself.

A distinction, however, should be observed which has not always been noticed by the courts.[3] It is not enough, that the trust money should have been used to the benefit of the private estate. Unless the court is of opinion that the trust fund forms part of the estate under consideration, the *cestui que trust* can have no other standing than that of an ordinary creditor. If, for instance, the trustee pays his private debts with the money of the *cestui que trust*, it cannot give a lien on the trustee's estate. To allow this would be injustice to the simple creditors, as may easily be seen by taking a concrete example. A is trustee of $10,000 for B.

[1] *In re* C. & T. B. Manuf'g Co., 12 N. B. R. 203.

[2] 3 Perry on Trusts, § 828.

[3] McColl *v.* Fraser, 40 Han, 111; McLeod *v.* Evans, 66 Wis. 401.

He has $20,000 of property of his own, and is indebted $30,000. He takes the trust money, and with it reduces his indebtedness to $20,000. Now if B is allowed a lien on A's private property there will be but $10,000 left for the other creditors, from which they will get fifty cents on the dollar, whereas, if A had not touched the trust money, there would have been $20,000 to pay $30,000 debts, or sixty-six cents on the dollar.

It was suggested in a dissenting opinion in McLeod *v.* Evans,[1] that the *cestui que trust* should receive priority to the extent which the estate had benefited by the misappropriation, irrespective of whether any part of the trust money was in any form in the estate; but it is believed that this is mistaking the true reason for allowing priority, which is brought out in a very recent case in New York.[2] The court say: "The courts below seem to have proceeded upon a supposed equity springing from the circumstance that, by the application of the fund to the payment of White's creditors, the assigned estate was relieved *pro tanto* from debts which otherwise would have been charged upon it, and that thereby the remaining creditors, if entitled to distribution, without regard to the petitioner's claim, will be benefited. We think this is quite too vague an equity for judicial cognizance, and we find no case justifying relief under such circumstances."

"If it appears that trust property has been wrongfully converted by the trustee and constitutes, although in a changed form, a part of the assets, it would seem to be equitable and in accordance with equitable principles that the things into which the trust property has been changed should, if required, be set apart for the trust, or, if separation is impossible, that priority of lien should be adjudged in favor of the trust estate for the value of the trust property entering into and constituting a part of the assets. This rule simply asserts the right of the true owner to his own property."

Samuel Williston.

HARVARD LAW SCHOOL.

[1] 66 Wis. 401.

[2] Matter of Cavin *v.* Gleason, 105 N. Y. 256.

HARVARD LAW REVIEW

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WITH the present number the HARVARD LAW REVIEW begins its second volume. During the coming year we purpose to continue the same general policy. The leading articles will be contributed by the professors in the School and the others already indicated in the list of contributors. We hope, besides, to make a special feature of short articles, written by younger members of the profession and by students in the School, which shall deal, if possible, with subjects of current interest. The summary of work in the Law School will be the same as before. We wish to say a word about the "Recent Cases." The field is too wide for us to attempt a complete digest, however brief, of the multitude of cases decided every month. It is our aim to present only the cases, comparatively few in number, which show the progress and general tendencies of the law. All such cases will be given, and comments and references added, wherever practicable, in the hope that by making this department suggestive rather than exhaustive, we may render it of more value.

In conclusion, we realize that the REVIEW is yet only an experiment, but, prompted by the kind encouragement we have already received, we shall do our best to keep the standard as high as possible. We trust that in a few years, with the continuance of this encouragement, it will have an established place, and contribute its share in spreading the influence and work of the Harvard Law School.

THE recent Ohio Common Pleas case of *State v. Yates*[1] is not authority for the proposition that a dog may be the subject of larceny at common law, as it has been currently reported. The defendants were indicted for burglary, in breaking and entering a stable with intent to steal two dogs, and stealing two dogs of the value of $40. The defendants demurred to the indictment. The court overruled the demurrer on the ground that as the Ohio Larceny Act declares "anything of value may be stolen," a dog, being a "thing of value," may, under the

[1] Reported in The Albany Law Journal, vol. 37, p. 233.

statute, be stolen. Breaking and entering with intent to steal a dog is, therefore, burglary in Ohio.

The case is interesting reading, on account of the various authorities cited, including poetical citations from Byron, Pope, and Burns, and prose from Motley and the Bible.

MR. SEYMOUR D. THOMPSON contributes an interesting article to the "Central Law Journal" on the use of documents to refresh the memory of witnesses.[1] The notion contained in this practice is, that it is sufficient if the witness is "able to swear that the memorandum is correct, although he may have forgotten the facts." Therefore it is not material by whom the memorandum is made, or even that it is a copy. Mr. Thompson does not extend this principle so far as to regard the time when it was made as immaterial; on the contrary, he argues that because the memorandum must have been made at or about the time of the events to which it relates, therefore a witness should not be allowed to refer to his own previous testimony or depositions.

It seems formerly to have been thought that the witness could not use memoranda, unless he had some independent recollections which merely needed a little revivifying; but that idea has been broadened to the rule quoted above. A witness may now refer to a memorandum of events of which he has no positive recollection, provided he will swear that it is an accurate record. In that case, Mr. Thompson thinks, the document itself may be given to the jury, though he admits a difficulty in finding any settled rule on the point.

The article contains many references to authorities.

IN the January "Law Quarterly Review" Mr. Herbert Stephen discusses the recent New Zealand case of *Reg.* v. *Hall*,[2] which is chiefly valuable in the specific limitation that it sets upon the doctrine of *Reg.* v. *Geering*[3] and other later cases, that, where it is a question whether a given act was accidental or intentional, evidence is admissible that such act was one of a series of circumstances in each of which the defendant was similarly concerned.

In *Reg.* v. *Hall* the defendant was indicted for the murder by poisoning of one Cain, his wife's step-father. On the trial evidence was offered that the defendant had subsequently attempted to poison his wife, in order to show that the administration of poison to Cain was not accidental. The court held that the evidence was not admissible, because there was not sufficient prior evidence that the defendant was the person who administered the poison to Cain, and because the evidence went less to show that the administration was intentional than it did to show that Hall was the person who administered it. The court held, says Mr. Stephen, that "evidence of this class could only be admitted on account of its relevancy to the question of accident or intention, when there was evidence *aliunde* fixing the prisoner with the administration."

In other words, the court limits the doctrine of *Reg.* v. *Geering* to cases where the fact that the prisoner committed the act in question

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[1] Memoranda to Refresh Recollection of Witnesses. The Cent. L. Jour. vol. 26, no. 18, p. 341.
[2] Evidence in Criminal Cases of Similar but Unconnected Acts. The Law Quarterly Review, vol. iv. no. 13, p. 75.
[3] 18 L. J. M. C. 215.

has first been proved by other evidence; only then does the evidence of other similar acts become admissible to rebut the theory of accident.

THE decision of the United States Supreme Court in the "telephone cases," on March 19, involved a principle of patent law of far reaching importance. The court held not only that Bell was the first discoverer and inventor of the telephone, but that his patent covered the entire principle of transmitting sound by means of the vibratory or undulatory electric current, and not merely the special apparatus by which he accomplished that result. The reasoning of the court is as follows: —

Bell found out that by gradually changing the intensity of a continuous electric current, so as to make it correspond exactly with the change in the density of the air caused by sonorous vibrations, vocal and other sounds could be transmitted to a distance. This was his discovery. He then devised an apparatus for making these changes of intensity, so that speech could be actually transmitted. This was his invention. The law patented not only the invention but the discovery. The patent granted him is not limited to the mere appliance by which the discovery is made of actual value, but extends to the process or principle itself. His patent, therefore, extends to the entire art of transmitting sound by means of the changing density of a continuous electric current.

The justices who dissented from the opinion, on the ground that Drawbaugh was in fact the inventor of the telephone, did not dissent from this general principle.

WE have received from Mr. John F. Baker, of New York City, an interesting communication upon the subject of the authorship of the Statute of Frauds, from which we make the following extracts: —

"Lord Mansfield, in the important case of *Wyndham* v. *Chetwynd* (1 Burr. 418), assumed that the act was introduced into Parliament in the common way, and not upon any reference to the judges; and there expresses the belief that Lord Hale could not have drawn the statute, as it was not passed by Parliament until after his death. . . .

"The Statute of Frauds must have been prepared as early as 1673, for at the first session of that year it was introduced in Parliament; and after that it went before several committees, and was discussed at several sessions previous to its passage in the spring of 1677. Hence, the theory advanced by Lord Mansfield would hardly seem tenable or sound, nor is it certainly borne out by the facts of contemporaneous history.

"After a careful investigation of the question, I think the conclusion will not escape the mind of the student that Sir Matthew Hale was the master-spirit in formulating the statute, and that he prepared the bulk of that instrument; that Sir Leoline Jenkins, an able authority in probate law, drew the sections as to wills; that Lord Guilford took some part in preparing the statute; and that Lord Nottingham not only drew the sections in relation to trusts and devises, but was conspicuously active in piloting the bill through Parliament."

THE following classified list of the members of the Harvard Law School Association, by States and Territories, on April 1, 1888, has been kindly sent us by Mr. Winthrop W. Wade, treasurer of the Association. He also writes the gratifying statement that "since January

1, 1888, the Association has increased its membership by 120 new members, 75 joining during the month of January, and 45 during the months of February and March."

STATES AND TERRITORIES REPRESENTED.

	No. of Members.		No. of Members.		No. of Members.
Alaska	1	Louisiana	1	Pennsylvania	11
Alabama	1	Maine	13	Rhode Island	8
Arkansas	1	Maryland	8	Tennessee	2
California	11	Massachusetts	409	Texas	5
Colorado	9	Michigan	11	Vermont	2
Connecticut	6	Minnesota	11	Virginia	1
Dakota	2	Mississippi	1	Washington Territory	1
Delaware	4	Missouri	22	West Virginia	1
District of Columbia	15	Montana	2	Wisconsin	3
Georgia	2	Nebraska	1		
Illinois	18	New Hampshire	7	New Brunswick	10
Indiana	3	New Jersey	4	Nova Scotia	5
Iowa	2	New York	89	France	1
Kansas	1	North Carolina	1	United States of Colombia	1
Kentucky	6	Ohio	47		
		Oregon	1		

Total 761

STATES AND TERRITORIES UNREPRESENTED.

Arizona,	New Mexico,	Wyoming.
Florida,	South Carolina,	
Nevada,	Utah,	

THE LAW SCHOOL.

IN THE MOOT COURT.

Coram GRAY, J.

Bond v. *Selwyn.*

The acquisition by prescription of a right of way over land is not prevented by orders or threats on the part of the owner of the land against the use of the way, if such orders or threats are not complied with or yielded to.

TRESPASS QUARE CLAUSUM. The time of trespass alleged was January 11, 1887, with a *continuando*. The plaintiff and defendant owned adjoining parcels of land. The defendant in 1876 began to cross the plaintiff's land by a defined path from his own land to the highway, and continued, openly and constantly, to use the path till the date of the writ, October 20, 1887.

The plaintiff repeatedly told the defendant that he must not use the path; that the plaintiff forbade him to use it; that the defendant was a trespasser; and that he would sue the defendant for trespass in using the

path. But the plaintiff never prevented the defendant, or attempted to prevent him, by physical force, from using the path, nor did he ever obstruct it, nor, until this suit, had he brought any action against the defendant.

The Statute of Limitations to suits for the recovery of land is ten years.

On the facts above stated, which were not in dispute, the judge directed a verdict for the defendant, which was returned, and the plaintiff alleged exceptions.

W. H. Cowles and *L. P. Frost*, for the Plaintiff.

H. H. Johnson and *H. N. Castle*, for the Defendant.

GRAY, J. Statutes providing for the acquisition of easements by lapse of time are comparatively modern. The claim to an easement could always be supported by immemorial prescription, but when, by 3 Edw. I. *c.* 39, it was enacted that in a writ of right none should declare of the seisin of his ancestors prior to 1189, the courts, by analogy to that statute, held that the enjoyment of an easement from before that year would give a good title.

When the 32 Henry VIII. *c.* 2, shortened the time which would bar a writ of right to a period of sixty years before the *teste* of the writ, the courts did not shorten the time for acquiring an easement accordingly, but the year 1189 still remained the date from which such time was to be reckoned.

Later, indeed, it was held that the enjoyment of an easement for twenty years raised a presumption that it had existed from 1189. But this presumption was rebuttable, and could often be easily rebutted.

To take away, however, a right which had been enjoyed perhaps two hundred years because it could be shown that it had not existed five hundred years, was not to be endured. The judges escaped this result by instructing juries, that if a man had enjoyed an incorporeal hereditament for twenty years, they might presume that he had received a grant of it which had been lost. This was at first a mere presumption of fact, which juries might disregard if they pleased. It was gradually hardening in England into a presumption of law, when the Prescription Act of 2 and 3 Wm. IV. *c.* 71 (1832) was passed. In *Angus v. Dalton*, 3 Q. B. D. 85; 4 Q. B. D. 162; 6 Ap. Cas. 740, a question arose which had slipped through the meshes of this Act, and had to be decided without its aid. The great majority of the judges in that case were of opinion that the presumption of a lost grant raised by twenty years' enjoyment was a presumption of law. As might be expected when a legal conception has been passing through such a transition, the language of judges and writers concerning it is vacillating and confusing.

In this country the time held necessary to raise a presumption of a lost grant has generally followed every change in the Statutes of Limitations; the nature and effect of personal disabilities in determining questions of prescription have been borrowed from those Statutes; and several courts have of late rejected the doctrine of a lost grant, and declared that the presumption of such a grant is an unnecessary fiction; that though it might once have had its use as a scaffolding before the modern doctrine of prescription was established, it is now to be considered settled that the statute provisions as to the limitation of actions

for the recovery of land are to be extended, so far as applicable, to the acquirement of incorporeal rights by prescription; and that the doctrine of a lost grant is a stumbling-block, which is best out of the way. These cases have met with general acceptance, and represent, I think, the law of the United States to-day. *Wallace* v. *Fletcher*, 10 Fost. 434; *Tracy* v. *Atherton*, 36 Vt. 503. Even if the theory of a lost grant is still to be perpetuated, the law in this country is now that the presumption of such grant is a legal presumption, and that no evidence can be introduced that in fact such grant was never made.

This conclusion disposes of some of the cases cited for the defendant, such as *Nichols* v. *Ayler*, 7 Leigh, 546, which go upon the ground that the presumption is one of fact; but it does not dispose of the whole case.

I have said that the law arising under the Statute of Limitations is to be extended, *so far as it is applicable*, to cases of the acquirement of easements; but the question remains, how far it is applicable; corporeal and incorporeal rights are not identical, and it may not be possible to apply the rules which govern the one class to the other.

The ordinary form of the Statute of Limitations is that no one shall bring an action to recover land or make an entry thereon more than twenty years after the right of action or entry accrues. Here, of course, threats and complaints by a disseisee will not stop the running of the Statute against him. The right to bring an action first accrued to him when he was disseised, and this fact is unaffected alike by his holding his tongue, or by his threats. Whether he is silent, or whether he complains and threatens, is immaterial, except so far as the complaints and threats tend to rebut any notion that the holding is by license.

But no action will lie by the owner of a servient tenement to recover an easement over his land, nor can he make any entry upon such easement. He is already seised of the land over which the easement is exercised, and therefore it does not seem conclusive against the proposition that threats will interrupt the acquisition of an easement, that they will not stop the running of the Statute of Limitations.

The real question seems, in applying the rules of the Statute of Limitations to cases of prescription, to be this: What acts amount to an interruption of the possession of an easement, corresponding to an interruption of the possession of a freehold? To stop the running of prescription, there must be a dispossession of the person exercising the easement from the right which he is exercising.

Some learned persons have denied that there can be any true possession of easements; but this seems to overlook the fact that the only things of which we have legal possession are rights. The things which we can hold in our hands are very few, and in extending the idea of possession beyond such things it must be referred to the power and intention to exercise rights, and it makes no difference whether they be single rights like rights of way, or the bundles of rights which constitute the rights in a corporeal hereditament.

For a man to have possession there must be (1) a desire on his part that persons generally may not do anything concerning a material object which is inconsistent either with his doing any act concerning that thing, or with his doing certain specified acts concerning that thing; (2) there must have been some outward act on or touching the thing

sufficient to indicate that desire (what such act shall be is often highly conventional); (3) there must be no act done by a third person which is inconsistent and intended to be inconsistent with the fulfilment of such desire.

Now, here the defendant's desire was that no one should do anything concerning a strip of land which was in any way inconsistent with his going how and when he pleased over it, and he had indicated this in the ordinary way by walking over the strip when and how he pleased.

Did the plaintiff do anything which was inconsistent with the defendant's going when and how he pleased over the strip? If he had placed a physical obstruction there, he would have done something inconsistent with the defendant's using the way as he pleased; so if he had frightened him off, for then his fears would not have allowed him to use it. But here that the threats were not inconsistent with his going how and when he pleased appears from the fact that he continued to go how and when he pleased.

I therefore think that there was no dispossession or interruption of the defendant's exercise of his easement. Another line of thought leads to the same conclusion. Nothing can be an interruption preventing the acquisition of a right of way unless it would be an actionable disturbance of a right of way already acquired. Suppose the defendant in this case had had a way by grant over the land of the plaintiff, and the plaintiff had done as he has done now, his conduct would not have amounted to a disturbance of the way for which an action would have lain.

For these reasons I am of opinion that the easement has been acquired, and that the verdict for the defendant was correct. This is in accord with *Lehigh Valley R.R. Co.* v. *McFarlan*, 43 N.J.L. 605, the case in which the matter has been most fully discussed, and which has been lately followed by *Jordan* v. *Lang*, 22 S. C. 159.

Exceptions overruled.

LECTURE NOTES.

LARCENY. — (*From Prof. Thayer's Lectures.*) — In Middleton's case[1] it was decided that one who receives money offered him by a mistake not caused by him, and knowing that the money is not his, is guilty of larceny. As to the reason for the decision, all that can be said is that, on one ground and another, the majority held this doctrine. Seven out of the fifteen judges before whom the case was argued, and of the eleven who composed the majority of the court, held that it was larceny because the title did not pass.

But this case does not support that doctrine. I have always been inclined to think the opinion of the minority the sound one, — that it was no crime.

In Ashwell's case[2] the verdict was directed by the court, that the case might be reserved, and was sustained simply because the court above were equally divided. There was no question of agency or of power to pass title. Though there was mistake, yet the owner intended to hand that coin to that particular person; and it is a reason-

[1] *Queen* v. *Middleton*, L. R. 2 C. C. R. 38.

[2] *Queen* v. *Ashwell*, 16 Q. B. D. 190.

able view which Mr. Holmes supports,[1] that the line should be drawn just here. The defendant was not, therefore, guilty of larceny. In Flowers' case[2] the question, as it was presented, was simply whether one is guilty of larceny who receives money without a felonious intention, and afterwards (no matter how soon) appropriates it; and the court say that, without question, he would not be.

BILLS AND NOTES ON WHICH ARE FICTITIOUS NAMES. RIGHTS OF INNOCENT HOLDERS FOR VALUE. — (*From Prof. Ames' Lectures.*)

1. If one draws a bill or makes a note in the belief that it is payable to a particular person, his intent is to pay to the order of that person. Hence if any one else indorses the instrument, the drawer or maker cannot be held, such indorsement not being within the contract.[3] But if one accept a bill payable to A, under the impression that A_1 is meant, while the drawer really means A_2, the court would probably hold the acceptor on the indorsement of A_2, on the ground that the identity of the payee is a matter of indifference to the acceptor, who relies on only the drawer in accepting. On principle the acceptor of a bill payable to a fictitious name, which he believed to be the name of a real person, should be held under an indorsement by the drawer in that name. On the same reasoning one who draws a bill or makes a note for accommodation should be held, even if the payee is other than he supposed. He relies on the credit of the friend he is accommodating, and the identity of the payee is a matter of indifference to him.

2. If one draws or accepts a bill, or makes a note which he knows to be payable to a fictitious payee, he is bound by an indorsement which in form is the same as the name of the payee. But to hold the acceptor of a bill drawn in a fictitious name and payable to the drawer's order, it must be shown that the indorsement in the name of the payee was made by the drawer, or by his authority, for the acceptor's contract is to pay to the order of the drawer under this fictitious name.[4]

3. If one draws or accepts a bill or makes a note payable to some name of which he knows nothing, he is bound if the indorsement is by one having a right to use that name. If the name of the payee is fictitious, and is known to be such at the time of signing, the case comes under (2) above; if it is not known to be fictitious, or if no inquiry is made, or a blank form is signed, an acceptor is bound.[5] This is on the theory that if the acceptance is given after the bill is drawn the acceptor contracts either (*a*) to pay to the order of any person, firm, etc., properly using that name, or (*b*) to pay to any one who holds the note as indorsee under an indorsement corresponding in form to the payee's name and made by the drawer; for the bill is really in the interest of the drawer, and not, as where there is a real payee, in the interest of the payee. Hence only the drawer properly has the right to indorse it. Thus the acceptor is liable whether the facts are as indicated in (*a*) or as in (*b*). If the acceptance is on a blank form the above reasoning applies, on the principle that an acceptance in blank binds the acceptor in the same way that he would be

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[1] Holmes' Com. Law, 312, 313; cf. 135 Mass. 283.
[2] *Queen v. Flowers*, Q. B. D. 625.
[3] *Bennett v. Farnell*, 1 Campb. 130; Ames' Cases on Bills and Notes, vol. 1, 461.
[4] *Cooper v. Meyer*, 10 B. & C. 468; Ames' Cases on Bills and Notes, vol. 1, 493.
[5] *Cooper v. Meyer*, *supra*.

bound if he had accepted the bill after it was drawn.[1] A drawer or maker would be bound in the same way and for the same reasons, but it is well to remark that a bill would seldom be drawn or a note made to a fictitious payee, except by way of accommodation.

4. A bill or note payable to an inanimate object is treated as payable to bearer, for otherwise it would be void, and as the essence of the contract is simply to pay money, the contract will be sustained if possible.[2]

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ADMINISTRATORS — INDIRECT SALE BY ADMINISTRATOR TO HIMSELF. — A, an administrator with the will annexed, was ordered by the probate court to sell certain land at auction. At the sale, B, a banker, was purchaser for a certain sum, part of which was to be paid down in money, and the remainder in notes secured by a mortgage. No money was actually paid down, because A trusted B to credit him with the requisite sum on his bank account. The court then confirmed the sale, and A forthwith executed a deed to B, leaving it with counsel to be delivered on B's giving the notes and mortgage. This B did. He then conveyed the land to A upon A's oral agreement to discharge him from his liability as purchaser. There was nothing to show that he purchased originally because of any understanding with A. *Held*, that the whole transaction was void, since it came within the general proposition that a trustee cannot become a purchaser at his own sale. The case is an illustration of how far a court will go in the application of this principle. *Caldwell* v. *Caldwell*, 15 N. E. Rep. 297 (Ohio).

AGENCY — KNOWLEDGE OF AGENT IMPUTED TO PRINCIPAL. — A broker employed by plaintiff to reinsure a vessel, having heard that the ship was lost, notified plaintiff that insurance could only be effected at a high figure, which plaintiff declined to pay. The plaintiff then insured through other brokers. The reported loss was not communicated to him, and the policy was renewed in entire good faith. *Held*, that the knowledge of the broker could not be imputed to the plaintiff. *Blackburn, Low, & Co.* v. *Vigors*, 57 L. T. 730.

This case has excited wide comment. The House of Lords affirmed the original decision of Mr. Justice Day, and reversed the decision of Lords Justices Lindley and Lopes in the Court of Appeal; and, it would seem, correctly. The Lords apparently distinguish this case from two other cases of agency: (1) captains or ship agents who have charge of the ship insured; (2) agents through whom the insurance is effected. "The one class is especially employed for the purpose of communicating to [the principal] the very facts which the law requires him to divulge to the insurer; the other is employed, not to procure or give information concerning the ship, but to effect an insurance." For somewhat doubtful reasons the knowledge of the first class is imputed to the principal; that the knowledge of the second should be imputed is clear. But, in this case, there was no legal duty resting on the broker to disclose what he knew, nor did he procure the insurance. His knowledge, therefore, is merely that of a stranger.

ATTORNEY — DISBARMENT — OFFERING MONEY FOR TESTIMONY. — Respondent, an attorney, believing a certain paper to be a forgery, employed an expert to examine it. The expert expressed his doubt as to the forgery; but the respondent, supposing that the expert believed it to be a forgery and only expressed his doubt to extort money for his testimony, offered him a large sum of money to testify that it was a forgery. *Held*, no sufficient ground for disbarment; "such conduct may be

[1] *London & S. W. Bank* v. *Wentworth*, 5 Ex. D. 96.
[2] *Mechanics' Bank* v. *Straiton et al.*, 3 Keyes, 365; Amos' Cases on Bills and Notes, vol. 1, p. 594.

open to criticism, but attorneys should not permit the interests of their clients to suffer by reason of any refined ideas of propriety." *In re Barnes*, 16 Pac. Rep. 856 (Cal.).

BANKS AND BANKING — INSOLVENCY — DRAFTS FOR COLLECTION. — Plaintiff sent to F. bank a draft indorsed "for collection," accompanied with instructions to "collect and credit proceeds." F. bank sent the draft to defendant, and the latter collected it, received the proceeds and credited them to the F. bank. Defendant notified F. bank of the collection, but the latter suspended business before crediting plaintiff with the proceeds. *Held*, that defendant's title depended upon that of the F. bank, and that as the relation of principal and agent, which existed between the F. bank and plaintiff, could only be changed to that of debtor and creditor by a credit of proceeds on books of bank while it was solvent, and as such credit took place after suspension of bank, plaintiff was entitled to recover full amount of draft. *First Nat. Bank of Circleville* v. *Bank of Monroe*, 33 Fed. Rep. 409 (New York); *In re Armstrong*, id. 405 (Ohio). See also *Giles* v. *Perkins*, 9 East, 13.

BILL OF EXCHANGE — ORAL ACCEPTANCE. — The drawee of an order on presentment and demand, after taking time to consider, told the payee, "I think there will be money enough to pay you, and it will be all right, and I will pay it." On another occasion, the payee's agent asked the drawee about the order, and said he "would not pay it that afternoon; but tell Short [the payee] it is all right, and I will pay it;" and the agent so informed the payee. *Held*, that these words, though not in writing, in absence of a statute requiring written acceptances, constituted a valid acceptance. *Short* v. *Blount*, 5 S. E. Rep. 190 (N. C.). For comment and collection of authorities on oral acceptances see Ames' Cas. on Bills and Notes, Vol. II., p. 168, note 2.

CHARITABLE CORPORATIONS — CIVIL LIABILITY. — The plaintiff purchased a grave of the defendant, a cemetery association. His wife died, and when the funeral procession reached the grave, it was found that the defendant had carelessly permitted the burial of two other bodies in the plaintiff's grave. Trespass was brought, and plaintiff recovered damages. The defence was, that the defendant was a charitable association, and as such not subject to civil liability. It was shown that no member received any profit, but that all the funds were used in ornamenting the grounds, burying the poor, giving graves to public institutions, and the like. But the court said that the association was not legally a charitable one, because there was nothing in the charter which compelled the application of any part of its funds to charitable uses. That the funds were, in fact, so applied, ought to be no more a defence, than if defendant were a private individual. *Donnelly* v. *Boston Catholic Cem. Ass'n*, 15 N. E. Rep. 505 (Mass.).

CHECK UPON FUND — EQUITABLE ASSIGNMENT. — A check drawn on a general deposit before bankruptcy does not operate as an equitable assignment *pro tanto*. *Florence Min. Co.* v. *Brown*, 8 Sup. Ct. Rep. 531, 534.

CONTRACT — CONSIDERATION — FORBEARANCE TO SUE. — Defendants agreed to pay the plaintiff $400, in consideration of his forbearing to contest a will which was, in fact, perfectly valid. *Held*, that where a person gives up what he in good faith believes to be a right of action, on the promise of another to pay money for such surrender, the real consideration of the contract consists in the detriment suffered by the person consenting to the surrender, arising from the alteration in his position caused by the promise of the other. *Rue* v. *Miers et al.*, 12 Atl. Rep. 369 (N. J.).

Callisher v. *Bischoffsheim*, L. R. 5 Q. B. 449, is followed as authority. See also *Miles* v. *New Zealand Alford Estate Co.*, 32 Ch. D. 266; *Eckford* v. *Barelli*, 20 W. R. 116; *Grandin* v. *Grandin*, 9 Atl. Rep. 756. To the effect that forbearance to sue is not a good consideration for a promise, unless there is a reasonable doubt as to the validity of the claim, see Langdell, Summary of Contracts (2d ed.), §§ 56, 57, and cases there cited.

CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWER. — A local option law forbidding the sale of intoxicating liquors, providing that any county, or any town or city having a population of over 2,500 inhabitants, may by a majority vote come under the operation of the law, is not a delegation of legislative power, but is a law to take effect upon the happening of a future contingency, namely, the vote of the people of the respective localities. Sherwood, J., dissenting. The case contains a full collection and discussion of authorities. *State* v. *Pond*, 6 S. W. Rep. 469 (Mo.).

CONSTRUCTIVE TRUST — LAND OBTAINED BY FRAUD — RESTITUTION. — B sold to M a certain tract of land which was misdescribed in the deed. M, intending to convey the land he had purchased of B, executed a deed to G, who, knowing of the error in original description, had prepared the deed containing a description of a portion of the premises actually conveyed by B to M. G sold to a *bona fide* purchaser. B in the meantime had sold the land described in the deed from B to M to one Mullen, from whom plaintiff traces title. *Held*, that G was a constructive trustee of the property while the title was in his name; that having disposed of the land he was chargeable to plaintiff with its value at the time of the conveyance to the *bona fide* purchaser; and that the amount due from such purchaser should be applied in satisfaction of the same. *Coggswell v. Griffith*, 39 N. W. Rep. 538 (Neb.).

There are two theories upon which the plaintiff may recover in such a case as this: — (1) On the theory of constructive trust, where the plaintiff recovers either the land or its proceeds. (2) On the theory that the defendant must make restitution for that which he has taken from the plaintiff; that is, restore the land if he has it, if not, give its equivalent. This case, which was apparently decided upon the latter theory, says that the equivalent is the value of the land at the time it was conveyed to the *bona fide* purchaser. It may be asked, why would it not be complete restitution to give the plaintiff the present value of the land?

COPYRIGHT — ADAPTATION OF SHEET MUSIC TO ORGANETTES. — The manufacture and sale of perforated strips of paper, to be used in organettes for producing a certain tune, is not a violation of the copyrighted sheet music of the same tune. *Kennedy v. McTammany*, 33 Fed. Rep. 584 (Mass.).

CRIMINAL LAW — ASSAULT WITH INTENT TO KILL. — A nurse administered to a little child tincture of assafœtida, which she supposed to be poisonous, but was really not so. There was no direct evidence that force was used. *Held*, that she was guilty of an assault with intent to kill, and the jury was authorized to find that force was used from the fact that so small a child had drunk so nauseous a drug. *State v. Glover*, 4 S. E. Rep. 564 (S. C.).

EMINENT DOMAIN — ILLEGAL TAKING OF LAND — INTERVENTION OF PUBLIC RIGHTS. — Ejectment was brought against a railroad company which had wrongfully seized land. The owner had apparently acquiesced in the seizure for a long time. The case turned upon another point, but the court said that acquiescence until after public rights had intervened would prevent the owner from recovering the land, although acquiescence would be no bar to an action for compensation. It is no principle of estoppel which prevents recovery of the land, but public policy simply. *Indiana, B., & W. Ry. Co. v. Allen*, 15 N. E. Rep. 446 (Ind.).

ESTATES — DEED RESERVING TITLE TILL GRANTOR'S DEATH. — In consideration of personal services, A granted, bargained, sold, aliened, conveyed, and confirmed certain land to B and his heirs, the title to remain in A during his lifetime, and at his death to vest in B. *Held*, that B had an immediate estate in fee, subject to a life estate in A. *White v. Hopkins*, 4 S. E. Rep. 863 (Ga.).

EVIDENCE — ACCOUNT-BOOKS. — In an action by the administrator of the payee of a promissory note against the maker, in order to establish certain alleged payments on the note, an account-book kept by the maker himself, and containing entries of the payments in question, was offered in evidence. The maker was alive and present in court. *Held*, inadmissible. The court said: "There is no doubt that shop-books may be introduced as evidence of *sales* made or *work* done, etc., under pressure of certain necessities; but the record of payments on a debt evidenced by a bond or note of the debtor, made by the debtor himself, do not come within the rule." *Wells' Adm'r v. Ayres*, 5 S. E. Rep. 21 (Va.).

EVIDENCE — CHARACTER. — In an action against a railroad company for injuries due to the negligence of its employés, it was held that the general reputation of a flagman at a railroad crossing for carelessness is inadmissible in evidence to prove his carelessness on a particular occasion. *Baltimore & O. R. Co. v. Colvin*, 12 Atl. Rep. 337 (Pa.).

EVIDENCE — DEPOSITION — CONVICTION AND EXECUTION OF DEPONENT BEFORE SECOND TRIAL. — The deposition of one C, then confined in jail on a charge of murder, was taken and read at the trial of a civil action. On appeal, judgment was reversed and a new trial ordered. Before the second trial, C was convicted of murder and executed. *Held*, that C's deposition was inadmissible as evidence in the second trial. If C had been convicted before the second trial, but not yet executed being

infamous and unable to testify himself, his deposition would have been inadmissible. Nor did his execution give reason for admitting the deposition as proof of the testimony of a deceased witness at a former trial. The testimony of a deceased witness in a former trial is open to every objection which could be made if the witness were alive and personally offered for the first time. *St. Louis, I. M., & S. Ry. Co.* v. *Harper*, 6 S. W. Rep. 720 (Ark.).

EVIDENCE — OPINION. — In an action for negligently causing the death of A, the defendant, in order to show negligence on A's part, asked a witness if he did not have time to jump after he saw the train. *Held*, that, on the assumption that it was an opinion, the evidence was admissible. But the court say, "It would seem to be rather matter of fact, discernible by judgment or estimate." *Quinn* v. *N. Y., N. H., & H. R.R. Co.*, 12 Atl. Rep. 97 (Conn.).

In an action against a railroad company for personal injury caused by defendant's steam-shovel, the evidence was offered of the operator of the shovel, not shown to be an expert, that, after the shovel had started, "no human force could have prevented the lever, or bucket, from swinging around to its accustomed place." *Held*, admissible. Such evidence is not mere opinion, but is a summary of a number of involved facts; it is the statement of "the result of personal observation and knowledge as to a collective fact." *Alabama G. S. R.R. Co.* v. *Vardraugh*, 3 So. Rep. 447 (Ala.).

These two cases may be profitably compared with the cases of *Com.* v. *Sturtevant*, 117 Mass. 122, in which a witness, having examined with a lens a fresh blood-stain on a coat, and the stain having been since partly rubbed off, was allowed to testify that its appearance then indicated that it had fallen upon the coat from a certain direction, although the witness had never experimented with blood or any other fluid in this respect. It is said that such evidence of a common observer, testifying to the result of his observation made at the time, is not a mere opinion, but is "a conclusion of fact to which his judgment, observation, and common knowledge have led him;" its admissibility is subject to two conditions: first, that the subject-matter of the testimony is a state of things which cannot be properly reproduced or described to the jury; second, that it is a state of things which a common observer is capable of comprehending.

EVIDENCE — PERJURY — FALSE STATEMENTS AS TO DETAILS. — In a trial for perjury, in order to show the falsity of the defendant's statement assigned for perjury, evidence is admissible of the falsity of the defendant's statements as to the details of the principal statement, although such details are not assigned for perjury, and their falsity is not direct evidence of the falsity of the principal statement. *Anderson* v. *State*, 7 S. W. Rep. 44 (Tex.). *State* v. *Buie*, 43 Tex. 532, is overruled.

EQUITY JURISDICTION — CONTINUING TRESPASS. — The defendant obtained permission of plaintiff to put a few stones upon his land. In plaintiff's absence he piled boulders, fourteen feet high, upon the land, and the plaintiff asks a mandatory injunction to compel their removal.

Held, that it was a continuing trespass, and, while equity will ordinarily require the right to be tried at law first, that rule is rather one of discretion than jurisdiction, and relief will be granted. *Wheelock* v. *Noonan*, 15 N. E. Rep. 67 (N. Y.).

FEDERAL JURISDICTION — VENUE. — For construction and interpretation of Act of Congress of March 3, 1887, which provides that a suit between citizens of different States shall be brought only in the district where either the plaintiff or defendant resides, see *St. Louis, V., & T. H. R. Co.* v. *Terre Haute & I. R. Co.*, 33 Fed. Rep. 385 (Ill.); *Pitkin County Min. Co.* v. *Markell*, id. 386 (Col.); *Harold* v. *Iron Silver Min. Co.*, id. 529 (Col.); *Carpenter* v. *Talbot*, id. 537 (Vt.).

GENERAL ASSUMPSIT — PROMISSORY NOTE AS EVIDENCE OF DEBT. — A promissory note varying from the one specially pleaded is admissible under the common counts as evidence of money had and received, in connection with evidence that the defendant admitted his indebtedness on the note. *Hopkins* v. *Orr*, 8 Sup. Ct. Rep. 590.

This case assumes that a note does not extinguish the debt, or even suspend the remedy.

HIGHWAY — DEDICATION. — Where one, in making a deed of a piece of his land, refers as a boundary to a street laid out, but not opened, he does not thereby dedicate so much of his lands as lies within the street limits to the public. *In re Brooklyn Street*, 12 Atl. Rep. 664 (Pa.).

INSOLVENCY — PREFERRED CREDITOR — MISAPPROPRIATED FUNDS. — Plaintiff deposited certain bonds for safe-keeping with a banker, who wrongfully deposited them

as collateral security for the payment of a note of which he was maker. The bonds were applied in part payment of the note, and the banker shortly afterwards became insolvent. *Held*, that the proceeds of the bond went to increase the assets of the bank, and that plaintiff's claim should be preferred to those of general creditors. *Bowers* v. *Evans*, 36 N. W. Rep. 629 (Wis.).

It is questionable whether, in the above case, the facts warrant the conclusion that the proceeds of the bonds "went to increase the assets of the bank which were assigned." Wherever it is clear, however, that the fund of the assignee is greater than it would have been if there had been no misappropriation, the defrauded person is to be preferred to the amount of such excess. For collection of authorities see 1 Harv. L. Rev. 104, note.

MASTER AND SERVANT — SUPERVISING ARCHITECT — LIABILITY FOR NEGLIGENCE. — When, in the erection of a building on the defendant's premises, the work is done under the direction of a supervising architect having discretion as to the mode of doing the work, but subject to the control of the defendant, who has the ultimate power of ordering how the work shall be done, *semble*, that the defendant is liable for personal injuries to a workman, caused by negligent performance of the work. The architect in such a case is not an independent contractor. *Campbell* v. *Lunsford*, 3 So. Rep. 522 (Ala.).

A note cites cases on the question as to when the terms of a written contract for work are sufficient to prevent the contractor from being independent, so that the rule *respondeat superior* will apply.

MISTAKE OF LAW — VOLUNTARY PAYMENT OF JUDGMENT DEBT. — Plaintiff, to avoid an execution sale, made a voluntary payment of a judgment debt. In the mean time an appeal had been entered which resulted in a reversal of the judgment. *Held*, that the payment being voluntary, plaintiff was not entitled to restitution. *Gould et ux.* v. *McFall*, 12 Atl. Rep. 346 (Pa.).

In support of the proposition that money voluntarily paid with a full knowledge of all the facts cannot be recovered back because the party was ignorant of, or mistook, the law as to his liability, see *County of Jefferson* v. *Hawkins*, 2 South. Rep. 362 (Fla.); *Baldwin* v. *Post*, 32 N. W. Rep. 389 (Iowa); *Shipman* v. *Dist. of Columbia*, 7 Sup. Ct. Rep. 134; *Gillum* v. *Alford*, 6 S. W. Rep. 757 (Tex.).

PERPETUITIES — STATUTORY RULE AGAINST. — Under a statute which provides that every future estate shall be void in its creation which shall suspend the absolute power of alienation for more than two lives in being, *held*, that a clause in a will which conflicted with such statute, thus making invalid certain trusts created by the will, should be treated as a nullity. *Palms* v. *Palms*, 36 N. W. Rep. 419 (Mich.).

As the property was devised to trustees with a power of sale, the case is valuable as showing that the conception of the common-law rule against perpetuities, that if the future estate *may not vest* within the required limits it is void, is applied to a statutory rule which simply prohibits the suspension of the power of alienation. A statute similar to the above exists in California, Indiana, Minnesota, New York, and Wisconsin.

STATUTE OF ANOTHER STATE — HOW FAR ENFORCEABLE. — Plaintiff's intestate was killed by defendant railroad company in Michigan, where, by statute, a right of action accrued to the personal representatives of deceased. Action was brought in Indiana, where a similar statute was in force. *Held*, that a right of action arising under a statute of another State will be enforced as readily as if it arose under the common law, provided that the statute in question is not against the express provisions or the policy of the law of the State where action is brought. Cases for and against this proposition are collected. *Burns* v. *Grand Rapids & I. R. Co.*, 15 N. E. Rep. 330 (Ind.).

TRUSTS — RESULTING. — A conveyed land to B upon which C had a mortgage, D paid off the mortgage and directed C to convey his interest to B. *Held*, that there was no resulting trust in favor of D, because a trust will result only when consideration is furnished for a conveyance of the land itself, not when money is advanced merely to discharge an incumbrance. The court makes some interesting observations in regard to resulting trusts. "The doctrine of resulting trusts is a very difficult one; indeed, it should be swept away by legislation, and should have no resting-place in this State. It served its purpose long ago. When a man makes a deed to another, no trust being reserved in the deed, but the whole title being conveyed, with warranty, etc., no trust should result." *Boyer* v. *Henry*, 5 S. E. Rep. 63 (Ga.).

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THE HISTORY OF ASSUMPSIT.

II. — IMPLIED ASSUMPSIT.

NOTHING impresses the student of the Common Law more than its extraordinary conservatism. The reader will easily call to mind numerous rules in the law of Real Property and Pleading which illustrate the persistency of archaic reverence for form and of scholastic methods of interpretation. But these same characteristics will be found in almost any branch of the law by one who carries his investigations as far back as the beginning of the seventeenth century. The history of Assumpsit, for example, although the fact seems to have escaped general observation, furnishes a convincing illustration of the vitality of mediæval conceptions.

We have had occasion, in the preceding part of this paper, to see that an express *assumpsit* was for a long time essential in the actions of tort against surgeons or carpenters, and bailees. It also appeared that in the action of tort for a false warranty the vendor's affirmation as to quality or title was not admissible, before the time of Lord Holt, as a substitute or an express undertaking. We are quite prepared, therefore, to find that the action of Assumpsit proper was, for generations, maintainable only upon an express promise. Furthermore, Assumpsit would not lie in certain cases even though there were an express promise. For example, a defendant who promised to pay a sum certain in ex-

change for a *quid pro quo* was, before Slade's case,[1] chargeable only in Debt unless he made a second promise to pay the debt.

It was only by degrees that the scope of the action was enlarged. The extension was in three directions. In the first place, *Indebitatus Assumpsit* became concurrent with Debt upon a simple contract in all cases. Secondly, proof of a promise implied in fact, that is, a promise inferred from circumstantial evidence, was at length deemed sufficient to support an action. Finally, *Indebitatus Assumpsit* became the appropriate form of action upon constructive obligations, or quasi-contracts for the payment of money. These three developments will be considered separately.

Although *Indebitatus Assumpsit* upon an express promise was valuable so far as it went, it could not be resorted to by plaintiffs in the majority of cases as a protection from wager of law by their debtors. For the promise to be proved must not only be express, but subsequent to the debt. In an anonymous case, in 1572, Manwood objected to the count that the plaintiff "ought to have said *quod postea assumpsit*, for if he assumed at the time of the contract, then Debt lies, and not Assumpsit; but if he assumed after the contract, then an action lies upon the *assumpsit*, otherwise not, *quod* Whiddon and Southcote, JJ., with the assent of Catlin, C.J., *concesserunt*."[2] The consideration in this class of cases was accordingly described as a "debt precedent."[3] The necessity of a subsequent promise is conspicuously shown by the case of Maylard *v.* Kester.[4] The allegations of the count were, that, in consideration that the plaintiff would sell and deliver to the defendant certain goods, the latter promised to pay therefor a certain price; that the plaintiff did sell and deliver the goods, and that the defendant did not pay according to his promise and undertaking. The plaintiff had a verdict and judgment thereon in the Queen's Bench; but the judgment was reversed in the Exchequer Chamber "because Debt lies properly, and not an action on the case; the matter proving a perfect sale and contract."

What was the peculiar significance of the subsequent promise? Why should the same courts which, for sixty years before Slade's case, sanctioned the action of Assumpsit upon a promise in consideration of a precedent debt, refuse, during the same period, to

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[1] 4 Rep. 92 a. [2] Dal. 84, pl. 35.
[3] Manwood *v.* Burston, 2 Leon. 203, 204; *supra*, 16, 17.
[4] Moore, 711 (1601).

allow the action, when the receipt of the *quid pro quo* was contemporaneous with or subsequent to the promise? The solution of this puzzle must be sought, it is believed, in the nature of the action of Debt. A simple contract debt, as well as a debt by specialty, was originally conceived of, not as a contract, in the modern sense of the term, that is, as a promise, but as a grant.[1] A bargain and sale, and a loan, were exchanges of values. The action of debt, as several writers have remarked, was a real rather than a personal action. The judgment was not for damages, but for the recovery of a debt, regarded as a *res*. The conception of a debt was clearly expressed by Vaughan, J., who, some seventy years after Slade's case, spoke of the action of Assumpsit as "much inferior and ignobler than the action of Debt," and characterized the rule that every contract executory implies a promise as "a false gloss, thereby to turn actions of Debt into actions on the case; for contracts of debt are reciprocal grants."[2]

Inasmuch as the simple contract debt had been created from time immemorial by a promise or agreement to pay a definite amount of money in exchange for a *quid pro quo*, the courts could not allow an action of Assumpsit also upon such a promise or agreement, without admitting that two legal relations, fundamentally distinct, might be produced by one and the same set of words. This implied a liberality of interpretation to which the lawyers of the sixteenth century had not generally attained. To them it seemed more natural to consider that the force of the words of agreement was spent in creating the debt. Hence the necessity of a new promise, if the creditor desired to charge his debtor in Assumpsit.

As the actions of Assumpsit multiplied, however, it would naturally become more and more difficult to discriminate between promises to pay money and promises to do other things. The recognition of an agreement to pay money for a *quid pro quo* in its double aspect, that is, as being both a grant and a promise, and the consequent admissibility of Assumpsit, with its procedural advantages, as a concurrent remedy with Debt were inevitable. It was accordingly resolved by all the justices and barons in Slade's case, in 1603, although "there was no other promise or assumption but the said bargain," that "every contract executory imports

[1] See Langdell, Contracts, § 100.

[2] Edgecomb v. Dee, Vaugh. 89, 101.

in itself an *assumpsit*, for when one agrees to pay money, or to deliver anything, thereby he assumes or promises to pay or deliver it; and, therefore, when one sells any goods to another, and agrees to deliver them at a day to come, and the other, in consideration thereof, agrees to pay so much money at such a day, in that case both parties may have an action of Debt, or an action on the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case as well as actions of Debt." Inasmuch as the judges were giving a new interpretation to an old transaction; since they, in pursuance of the presumed intention of the parties, were working out a promise from words of agreement which had hitherto been conceived of as sounding only in grant, it was not unnatural that they should speak of the promise thus evolved as an "implied *assumpsit*." But the promise was in no sense a fiction. The fictitious *assumpsit*, by means of which the action of *Indebitatus Assumpsit* acquired its greatest expansion, was an innovation many years later than Slade's case.

The account just given of the development of *Indebitatus Assumpsit*, although novel, seems to find confirmation in the parallel development of the action of Covenant. Strange as it may seem, Covenant was not the normal remedy upon a covenant to pay a definite amount of money or chattels. Such a covenant being regarded as a grant of the money or chattels, Debt was the appropriate action for their recovery. The writer has discovered no case in which a plaintiff succeeded in an action of Covenant, where the claim was for a sum certain, antecedent to the seventeenth century; but in an action of Debt upon such a claim, in the Queen's Bench, in 1585, "it was holden by the Court that an action of Covenant lay upon it, as well as an action of Debt, at the election of the plaintiff."[1] The same right of election was conceded by the Court in two cases[2] in 1609, in terms which indicate that the privilege was of recent introduction. It does not appear in what court these cases were decided; but it seems probable that they were in the King's Bench, for, in Chawner *v.* Bowes,[3] in the Common Bench, four years later, Warburton and Nichols, JJ., said: "If a man covenant to pay £10 at a day certain, an action of debt

[1] Anon., 3 Leon. 119.

[2] Anon., 1 Rolf. Ab. 518, pl. 3; Strong *v.* Watts, 1 Roll. Ab. 518, pl. 2. See also Mordant *v.* Watts, Brownl. 19; Anon., Sty. 31; Frere *v.* ——, Sty. 133; Norice's Case, Hard. 178.

[3] Godb. 217.

lieth for the money, and not an action of covenant." As late as 1628, in the same court, Berkeley, Serjeant, in answer to the objection that Covenant did not lie, but Debt, against a defendant who had covenanted to perform an agreement, and had obliged himself in a certain sum for its performance, admitted that, "if a covenant had been for £30, then debt only lies; but here it is to perform an agreement."[1] Precisely when the Common Bench adopted the practice of the King's Bench it is, perhaps, impossible to discover; but the change was probably effected before the end of the reign of Charles I.

That Covenant became concurrent with Debt on a specialty so many years after Assumpsit was allowed as a substitute for Debt on a simple contract, was doubtless due to the fact that there was no wager of law in Debt on a sealed obligation.

Although the right to a trial by jury was the principal reason for a creditor's preference for *Indebitatus Assumpsit*, the new action very soon gave plaintiffs a privilege which must have contributed greatly to its popularity. In declaring in Debt, except possibly upon an account stated, the plaintiff was required to set forth his cause of action with great particularity. Thus, the count in Debt must state the quantity and description of goods sold, with the details of the price, all the particulars of a loan, the names of the persons to whom money was paid with the amounts of each payment, the names of the persons from whom money was received to the use of the plaintiff with the amounts of each receipt, the precise nature and amount of services rendered. In *Indebitatus Assumpsit*, on the other hand, the debt being laid as an inducement or conveyance to the *assumpsit*, it was not necessary to set forth all the details of the transaction from which it arose. It was enough to allege the general nature of the indebtedness, as for goods sold,[2] money lent,[3] money paid at the defendant's request,[4] money had and received to the plaintiff's use,[5] work and labor at the defendant's request,[6] or upon an account stated,[7] and that the

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[1] Brown *v.* Hancock, Hetl. 110, 111.

[2] Hughes *v.* Rowbotham (1592), Poph. 30, 31; Woodford *v.* Deacon (1608), Cro. Jac. 206; Gardiner *v.* Bellingham (1672), Hob. 5, 1 Roll. R. 24, s. c.

[3] Rooke *v.* Rooke (1610), Cro. Jac. 245, Yelv. 175, s. c.

[4] Rooke *v.* Rooke, *supra*; Moore *v.* Moore (1611), 1 Bulst. 169.

[5] Babington *v.* Lambert (1616), Moore, 854.

[6] Russell *v.* Collins (1669), 1 Sid. 425, 1 Mod. 8, 1 Vent. 44, 2 Keb. 552, s. c.

[7] Brinsley *v.* Partridge (1611), Hob. 88; Vale *v.* Egles (1605), Yelv. 70, Cro. Jac. 69.

defendant being so indebted promised to pay. This was the origin of the common counts.

In all the cases thus far considered there was a definite bargain or agreement between the plaintiff and defendant. But instances, of course, occurred in which the parties did not reduce their transactions to the form of a distinct bargain. Services would be rendered, for example, by a tailor or other workman, an innkeeper or common carrier, without any agreement as to the amount of compensation. Such cases present no difficulty at the present day, but for centuries there was no common-law action by which compensation could be recovered. Debt could not be maintained, for that action was always for the recovery of a liquidated amount.[1] Assumpsit would not lie for want of a promise. There was confessedly no express promise; to raise by implication a promise to pay as much as the plaintiff reasonably deserved for his goods or services was to break with the most venerable traditions. The lawyer of to-day, familiar with the ethical character of the law as now administered, can hardly fail to be startled when he discovers how slowly the conception of a promise implied in fact, as the equivalent of an express promise, made its way in our law.

There seems to have been no recognition of the right to sue upon an implied *quantum meruit* before 1609. The innkeeper was the first to profit by the innovation. Reciprocity demanded that, if the law imposed a duty upon the innkeeper to receive and keep safely, it should also imply a promise on the part of the guest to pay what was reasonable.[2] The tailor was in the same case with the innkeeper, and his right to recover upon a *quantum meruit* was recognized in 1610.[3] Sheppard,[4] citing a case of the year 1632, says: "If one bid me do work for him, and do not promise anything for it; in that case the law implieth the promise, and I may sue for the wages." But it was only four years before that the

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[1] "If I bring cloth to a tailor to have a cloak made, if the price is not ascertained beforehand that I shall pay for the work, he shall not have an action against me." Y. B. 12 Ed. IV. 9, pl. 22, per Brian, C. J. To the same effect, Young v. Ashburnham (1587), 3 Leon. 161; Mason v. Welland (1688), Skin. 238, 242.

[2] "It is an implied promise of every part, that is, of the part of the innkeeper, that he will preserve the goods of his guest, and of the part of the guest, that he will pay all duties and charges which he caused in the house." Warbrooke v. Griffin, 2 Brownl. 254, Moore, 876, 877, s. c.

[3] Six Carpenters' Case, 8 Rep. 147 a. But the statement that the tailor could recover in Debt is contradicted by precedent and following authorities.

[4] Actions on the Case (2 ed.), 52.

Court in a similar case were of opinion that an action lay if the party either before or after the services rendered promised to pay for them, "but not without a special promise."[1] In Nichols v. More[2] (1661) a common carrier resisted an action for negligence, because, no price for the carriage being agreed upon, he was without remedy against the bailor. The Court, however, answered that "the carrier may declare upon a *quantum meruit* like a tailor, and therefore shall be charged."[3] As late as 1697, Powell, J., speaking of the sale of goods for so much as they were worth, thought it worth while to add: "And note the very taking up of the goods implies such a contract."[4]

The right of one, who signed a bond as surety for another without insisting upon a counter bond or express promise to save harmless, to charge his principal upon an implied contract of indemnity, was developed nearly a century later. In Bosden v. Thinne[5] (1603) the plaintiff at the defendant's request had executed a bond as surety for one F, and had been cast in a judgment thereon. The judges all agreed that upon the first request only Assumpsit did not lie, Yelverton, J., adding: "For a bare request does not imply any promise, as if I say to a merchant, I pray trust J. S. with £100, and he does so, this is of his own head, and he shall not charge me, unless I say I will see you paid, or the like." The absence of any remedy at law was conceded in 1662.[6] It was said by Buller, J., in Toussaint v. Martinnant,[7] "that the first case in which a surety, who had paid the creditor, succeeded in an action at law against the principal for indemnity, was before Gould, J.,[8] at Dorchester, which was decided on equitable grounds." The innovation seems to be due, however, to Lord Mansfield, who ruled in favor of a surety in Decker v. Pope, in 1757, "observing that when a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law."[9]

The late development of the implied contract to pay *quantum*

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[1] Thursby v. Warren, W. Jones, 208.

[2] 1 Sid. 36. See also Boson v. Sandford (1689), per Eyres, J.

[3] The defendant's objection was similar to the one raised in Y. B. 3 H. VI. 36, pl. 33, *supra*, 11, n. 2.

[4] Hayward v. Davenport, Comb. 426. [5] Yelv. 40.

[6] Scott v. Stephenson, 1 Lev. 71, 1 Sid. 89, s. c. But see Shepp. Act on Case (2 ed.) 49.

[7] 2 T. R. 100, 105. [8] Justice of the Common Pleas, 1763–1794.

[9] 1 Sel. N. P. (13 ed.) 91.

merwit, and to indemnify a surety, would be the more surprising, but for the fact that Equity gave relief to tailors and the like, and to sureties long before the common law helped them. Spence, although at a loss to account for the jurisdiction, mentions a suit brought in Chancery, in 1567, by a tailor, to recover the amount due for clothes furnished. The suit was referred to the queen's tailor, to ascertain the amount due, and upon his report a decree was made. The learned writer adds that "there were suits for wages and many others of like nature."[1] A surety who had no counter bond filed a bill against his principal, in 1632, in a case which would seem to have been one of the earliest of the kind, for the reporter, after stating that there was a decree for the plaintiff, adds "*quod nota*."[2]

The account just given of the promise implied in fact seems to throw much light upon the doctrine of "executed consideration." One who had incurred a detriment at the request of another, by rendering service, or by becoming a surety with the reasonable expectation of compensation or indemnity, was as fully entitled, in point of justice, to enforce his claim at law, as one who had acted in a similar way upon the faith of an express promise. Nothing was wanting but an express *assumpsit* to make a perfect cause of action. If the defendant saw fit to make an express *assumpsit*, even after the detriment was incurred, the temptation to treat this as removing the technical objection to the plaintiff's claim at law might be expected to be, as it proved to be, irresistible.[3] The already established practice of suing upon a promise to pay a precedent debt made it the more easy to support an action upon a promise when the antecedent act of the plaintiff at the defendant's request did not create a strict debt.[4] To bring the new doctrine into harmony with the accepted theory of consideration, the promise was "coupled with" the prior request by the fiction of relation,[5] or, by a similar fiction, the consideration was brought forward or continued to the promise.[6] This fiction doubt-

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[1] 1 Spence, Eq. Jur. 694. [2] Ford *v.* Stobridge, Nels. Ch. 24.

[3] The view here suggested is in accordance with what has been called, in a questioning spirit, the "ingenious explanation" of Professor Langdell. Holmes, Common Law, 286. The general tenor of this paper will serve, it is hoped, to remove the doubts of the learned critic.

[4] Sidenham *v.* Worlington (1585), 2 Leon. 224.

[5] Langdell, Contracts, § 92.

[6] Langdell, Contracts, § 93; 1 Vin. Ab. 280, pl. 13.

less enabled plaintiffs sometimes to recover, although the promise was not identical with what would be implied, and in some cases even where it would be impossible to imply any promise.[1] But after the conception of a promise implied in fact was recognized and understood, these anomalies gradually disappeared, and the subsequent promise came to be regarded in its true light of cogent evidence of what the plaintiff deserved for what he had done at the defendant's request.

The non-existence of the promise implied, in fact, in early times, also makes intelligible a distinction in the law of lien, which greatly puzzled Lord Ellenborough and his colleagues. Williams, J., is reported to have said in 1605: "If I put my cloths to a tailor to make up, he may keep them till satisfaction for the making. But if I contract with a tailor that he shall have so much for the making of my apparel, he cannot keep them till satisfaction for the making."[2] In the one case, having no remedy by action, he was allowed a lien, to prevent intolerable hardship. In the other, as he had a right to sue on the express agreement, it was not thought necessary to give him the additional benefit of a lien.[3] As soon as the right to recover upon an implied *quantum meruit* was admitted, the reason for this distinction vanished. But the acquisition of a new remedy by action did not displace the old remedy by lien.[4] The old rule, expressed, however, in the new form of a distinction between an express and an implied contract, survived to the present century.[5] At length, in 1816, the judges of the King's Bench, unable to see any reason in the distinction, and unconscious of its origin, declared the old *dicta* erroneous, and allowed a miller his lien in the case of an express contract.[6]

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[1] Langdell, Contracts, §§ 93, 94.

[2] 2 Roll. Ab. 92, pl. 1, 2.

[3] An innkeeper had the further right of selling a horse as soon as it had eaten its value, if there were no express contract. For, as he had no right of action for its keep, the horse thereafter was like a *damnosa hereditas*. The Hostler's case (1605), Yelv. 66, 67. This right of sale disappeared afterwards with the reason upon which it was founded. Jones v. Pearle, 1 Str. 556.

[4] "And it was resolved that an innkeeper may detain a horse for his feeding, and yet he may have an action on the case for the meat." Watbrooke v. Griffith (1609), Moore, 876, 877.

[5] Chapman v. Allen, Cro. Car. 271; Collins v. Ongly, Selw. N. P. (13 ed.) 1312, n. (x), per Lord Holt; Brennan v. Currint (1755), Say. 224, Buller, N. P. (7 ed.) 45, n. (c); Cowell v. Simpson, 16 Ves. 275, 281, per Lord Eldon; Searle v. Morgan, 4 M. & W. 270, 283, per Parke, B.

[6] Chase v. Westmore, 5 M. & Sel. 180.

The career of the agistor's lien is also interesting. That such a lien existed before the days of implied contracts is intrinsically probable, and is also indicated by several of the books.[1] But in Chapman v. Allen[2] (1632), the first reported decision involving the agistor's right of detainer, there happened to be an express contract, and the lien was accordingly disallowed. When a similar case arose two centuries later in Jackson v. Cummins,[3] this precedent was deemed controlling, and, as the old distinction between express and implied contracts was no longer recognized, the agistor ceased to have a lien in any case. Thus was established the modern and artificial distinction in the law of lien between bailees for agistment and "bailees who spend their labor and skill in the improvement of the chattels" delivered to them.[4]

The value of the discovery of the implied promise in fact was exemplified further in the case of a parol submission to an award. If the arbitrators awarded the payment of a sum of money, the money was recoverable in debt, since an award, after the analogy of a judgment, created a debt. But if the award was for the performance of a collateral act, as, for example, the execution of a release, there was, originally, no mode of compelling compliance with the award, unless the parties expressly promised to abide by the decision of the arbitrators. Tilford v. French[5] (1663) is a case in point. So, also, seven years later, "it was said by Twisden, J., that if two submit to an award, this contains not a reciprocal promise to perform; but there must be an express promise to ground an action upon."[6] This doctrine was abandoned by the time of Lord Holt, who, after referring to the ancient rule, said: "But the contrary has been held since; for if two men submit to the award of a third person, they do also thereby promise expressly to abide by this determination, for agreeing to refer is a promise in itself."[7]

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[1] 2 Roll. Ab. 85, pl. 4 (1604); Mackerney v. Erwin (1628), Hutt. 101; Chapman v. Allen (1632), 2 Roll. Ab. 92, pl. 6, Cro. Car. 271, s. c.

[2] 2 Roll. Ab. 92, pl. 6, Cro. Car. 271, s. c.

[3] 5 M. & W. 342.

[4] The agistor has a lien by the Scotch law. Schouler, Bailments (2 ed.), § 122.

[5] 1 Lev. 113, 1 Sid. 160, 1 Keb. 599, 635. To the same effect, Penruddock v. Monteagle (1612), 1 Roll. Ab. 7, pl. 3; Browne v. Downing (1620), 2 Roll. R. 194; Read v. Palmer (1648), Al. 69, 70.

[6] Anon., 1 Vent. 69.

[7] Squire v. Crovell (1703), 6 Mod. 34, 35. See similar statements by Lord Holt in Allen v. Harris (1695), 1 Ld. Ray. 122; Freeman v. Barnard (1696), 1 Ld. Ray. 248; Puralow v. Baily (1704), 2 Ld. Ray. 1039; Lupart v. Welson (1708), 11 Mod. 171.

In the cases already considered the innovation of Assumpsit upon a promise implied in fact gave a remedy by action, where none existed before. In several other cases the action upon such a promise furnished not a new, but a concurrent remedy. Assumpsit, as we have seen,[1] was allowed, in the time of Charles I., in competition with Detinue and Case against a bailee for custody. At a later period Lord Holt suggested that one might "turn an action against a common carrier into a special assumpsit (which the law implies) in respect of his hire."[2] Dale *v.* Hall[3] (1750) is understood to have been the first reported case in which that suggestion was followed. Assumpsit could also be brought against an innkeeper.[4]

Account was originally the sole form of action against a factor or bailiff. But in Wilkins *v.* Wilkins[5] (1689) three of the judges favored an action of Assumpsit against a factor because the action was brought upon an express promise, and not upon a promise by implication. Lord Holt, however, in the same case, attached no importance to the distinction between an express and an implied promise, remarking that "there is no case where a man acts as bailiff, but he promises to render an account." The requisite of an express promise was heard of no more. Assumpsit became theoretically concurrent with Account against a bailiff or factor in all cases, although by reason of the competing jurisdiction of equity, actions at common law were rare.[6]

In the early cases of bills and notes the holders declared in an action on the case upon the custom of merchants. "Afterwards they came to declare upon an *assumpsit*."[7]

It remains to consider the development of *Indebitatus Assumpsit* as a remedy upon quasi-contracts, or, as they have been commonly called, contracts implied in law. The contract implied in fact, as we have seen, is a true contract. But the obligation created by law is no contract at all. Neither mutual assent nor consideration is essential to its validity. It is enforced regardless of the intention of the obligor. It resembles the true contract, however, in one important particular. The duty of the obligor is a positive one, that is, to act. In this respect they both differ

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[1] *Supra*, 7. [2] Comb. 334.
[3] 1 Wils. 281. See, also, Brown *v.* Dixon, 1 T. R. 274, per Buller, J.
[4] Morgan *v.* Ravey, 6 H. & N. 265. But see Stanley *v.* Bircher, 78 Mo. 245.
[5] Carth. 89, 1 Salk. 9. [6] Tompkins *v.* Willshaer, 5 Taunt. 430.
[7] Milton's Case (1668), Hard. 485, per Lord Hale.

from obligations, the breach of which constitutes a tort, where the duty is negative, that is, to forbear. Inasmuch as it has been customary to regard all obligations as arising either *ex contractu* or *ex delicto*, it is readily seen why obligations created by law should have been treated as contracts. These constructive duties are more aptly defined in the Roman law as obligations *quasi ex contractu* than by our ambiguous "implied contracts." [1]

Quasi-contracts are founded (1) upon a record, (2) upon a statutory, official, or customary duty, or (3) upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another.

As Assumpsit cannot be brought upon a record, the first class of quasi-contracts need not be considered here. Many of the statutory, official, or customary duties, also, *e.g.*, the duty of the innkeeper to entertain,[2] of the carrier to carry,[3] of the smith to shoe,[4] of the chaplain to read prayers, of the rector to keep the rectory in repair,[5] of the *fidei-commiss* to maintain the estate,[6] of the finder to keep with care,[7] of the sheriff and other officers to perform the functions of their office,[8] of the ship-owner to keep medicines on his ship,[9] and the like, which are enforced by an action on the case, are beyond the scope of this essay, since *Indebitatus Assumpsit* lies only where the duty is to pay money. For the same reason we are not concerned here with a large class of duties growing out of the principle of unjust enrichment, namely, constructive or quasi trusts, which are enforced, of course, only in equity.

Debt was originally the remedy for the enforcement of a statutory or customary duty for the payment of money. The right to sue in *Indebitatus Assumpsit* was gained only after a struggle. The *assumpsit* in such cases was a pure fiction. These cases were not, therefore, within the principle of Slade's case, which required, as we have seen,[10] a genuine agreement. The authorities leave no room for doubt upon this point, although it is a common opinion

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[1] In Fitch, Law, 150, they are called "as it were" contracts.
[2] Keil. 50, pl. 4.
[3] Jackson v. Rogers, 2 Show. 327; Anon., 12 Mod. 3.
[4] Steinson v. Heath, Lev. 400.
[5] Bryan v. Clay, 1 E. & B. 38.
[6] Batthyany v. Walford, 36 Ch. Div. 269.
[7] Story, Bailments (8 ed.), §§ 85–87.
[8] 3 Bl. Com. 165.
[9] Couch v. Steel, 3 E. & B. 402. But see Atkinson v. Newcastle Co., 2 Ex. Div. 441.
[10] *Supra*, 55, 56.

that, from the time of that case, *Indebitatus Assumpsit* was concurrent with Debt in all cases, unless the debt was due by record, specialty, or for rent.

The earliest reported case of *Indebitatus Assumpsit* upon a customary duty seems to be City of London *v.* Goree,[1] decided seventy years later than Slade's case. "Assumpsit for money due by custom for scavage. Upon *non-Assumpsit* the jury found the duty to be due, but that no promise was expressly made. And whether Assumpsit lies for this money thus due by custom, without express promise, was the question. Resolved it does." On the authority of that case, an officer of a corporation was charged in Assumpsit, three years later, for money forfeited under a by-law.[2] So, also, in 1688, a copyholder was held liable in this form of action for a customary fine due on the death of the lord, although it was objected "that no *Indebitatus Assumpsit* lieth where the cause of action is grounded on a custom."[3] Lord Holt had not regarded these extensions of *Indebitatus Assumpsit* with favor. Accordingly, in York *v.* Toun,[4] when the defendant urged that such an action would not lie for a fine imposed for not holding the office of sheriff, "for how can there be any privity of assent implied when a fine is imposed on a man against his will?" the learned judge replied: "We will consider very well of this matter; it is time to have these actions redressed. It is hard that customs, by-laws, rights to impose fines, charters, and everything, should be left to a jury." By another report of the same case,[5] "Holt seemed to incline for the defendant. . . . And upon motion of the plaintiff's counsel, that it might stay till the next term, Holt, C.J., said that it should stay till dooms-day with all his heart; but Rokesby, J., seemed to be of opinion that the action would lie. — *Et adjournatur.* Note. A day or two after I met the Lord Chief Justice Treby visiting the Lord Chief Justice Holt at his house, and Holt repeated the said case to him, as a new attempt to extend the *Indebitatus Assumpsit*, which had been too much encouraged already, and Treby, C.J., seemed also to be of the same opinion with Holt."

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[1] Lev. 174, 1 Vent. 298, 3 Keb. 677, Freem. 433, S.C.

[2] Barber Surgeons *v.* Pelson (1679), 2 Lev. 252. To the same effect, Mayor *v.* Hunt (1681), 37, Assumpsit for weighage; Duppa *v.* Gerard (1683), 1 Show. 78, Assumpsit for fees of knighthood.

[3] Shuttleworth *v.* Garrett, Comb. 151, 1 Show. 35, Carth. 90, 3 Mod. 240, 3 Lev. 261, S. C.

[4] 5 Mod. 444.

[5] 1 Ld. Ray. 502.

But Rokesby's opinion finally prevailed. The new action continued to be encouraged. Assumpsit was allowed upon a foreign judgment in 1705,[1] and the "metaphysical notion"[2] of a promise implied in law became fixed in our law.

The equitable principle which lies at the foundation of the great bulk of quasi-contracts, namely, that one person shall not unjustly enrich himself at the expense of another, has established itself very gradually in the Common Law. Indeed, one seeks in vain to-day in the treatises upon the Law of Contract for an adequate account of the nature, importance, and numerous applications of this principle.[3]

The most fruitful manifestations of this doctrine in the early law are to be found in the action of Account. One who received money from another to be applied in a particular way was bound to give an account of his stewardship. If he fulfilled his commission, a plea to that effect would be a valid discharge. If he failed for any reason to apply the money in the mode directed, the auditors would find that the amount received was due to the plaintiff, who would have a judgment for its recovery. If, for example, the money was to be applied in payment of a debt erroneously supposed to be due from the plaintiff to the defendant, either because of a mutual mistake, or because of fraudulent representations of the defendant, the intended application of the money being impossible, the plaintiff would recover the money in Account.[4] Debt would also lie in such cases, since, at an early period, Debt became concurrent with Account, when the object of the action was to recover the precise amount received by the defendant.[5] By means of the fiction of a promise implied in law *Indebitatus Assumpsit* became concurrent with Debt, and thus was established the familiar action of Assumpsit for money had and received to recover money paid to the defendant by mistake. Bonnel *v.* Fowke[6] (1657) is, perhaps, the first action of the kind.

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[1] Duplein *v.* De Rover, 2 Vern. 540. [2] Starke *v.* Cheeseman, 1 Ld. Ray. 538.

[3] The readers of this Review will be interested to learn that this gap in our legal literature is about to be filled by Professor Keener's "Cases on the Law of Quasi-Contracts."

[4] Mewer *v.* Bartholomew (1597), Cro. El. 614; Anon. (1696), Comb. 447; Cavendish *v.* Middleton, Cro. El. 141, W. Jones, 196, s.c.

[5] Lincoln *v.* Topliff (1597), Cro. El. 644.

[6] 2 Sid. 4. To the same effect, Martin *v.* Sitwell (1690), 1 Show. 156, Holt, 25; Newdigate *v.* Dary (1693), 1 Ld. Ray. 742; Palmer *v.* Staveley (1700), 12 Mod. 510.

Although Assumpsit for money had and received was in its infancy merely a substitute for Account, it gradually outgrew the limits of that action. Thus, if one was induced by fraudulent representations to buy property, the purchase-money could not be recovered from the fraudulent vendor by the action of Account. For a time, also, *Indebitatus Assumpsit* would not lie in such a case. Lord Holt said in 1696: "But where there is a bargain, though a corrupt one, or where one sells goods that were not his own, I will never allow an *indebitatus*."[1] His successors, however, allowed the action. Similarly, Account was not admissible for the recovery of money paid for a promise which the defendant refused to perform. Here, too, Debt and *Indebitatus Assumpsit* did not at once transcend the bounds of the parent action.[2] But in 1704 Lord Holt reluctantly declined to nonsuit a plaintiff who had in such a case declared in *Indebitatus Assumpsit*.[3] Again, Account could not be brought for money acquired by a tort, for example, by a disseisin and collection of rents or a conversion and sale of a chattel.[4] It was decided, accordingly, in Philips *v.* Thompson[5] (1675), that Assumpsit would not lie for the proceeds of a conversion. But in the following year the usurper of an office was charged in Assumpsit for the profits of the office, no objection being taken to the form of action.[6] Objection was made in a similar case in 1677, that there was no privity and no contract; but the Court, in disregard of all the precedents of Account, answered: "An *Indebitatus Assumpsit* will lie for rent received by one who pretends a title; for in such cases an Account will lie. Wherever the plaintiff may have an Account an *indebitatus* will lie."[7] These precedents were deemed conclusive in Howard *v.* Wood[8] (1678), but Lord Scroggs remarked: "If this were now an original case, we are agreed it would by no means lie." Assumpsit soon became concurrent with Trover, where the goods had been sold.[7]

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[1] Anon. Comb. 447.

[2] Brig's Case (1623), Palm. 364; Dewbery *v.* Chapman (1695), Holt. 35; Anon. (1696), Comb. 447.

[3] Holmes *v.* Hall, 6 Mod. 161, Holt. 36, s. c. See, also, Dutch *v.* Warren (1720), 1 Stra. 406, 2 Burr. 1010, s. c.; Anon., 1 Stra. 407.

[4] Tottenham *v.* Bedingfield (1572), Dal. 99, 3 Leon. 24, Ow. 35, 83, s. c. Accordingly, an account of the profits of a tort cannot be obtained in equity to-day except as an incident to an injunction.

[5] 3 Lev. 191.

[6] Woodward *v.* Aston, 2 Mod. 95.

[7] Arris *v.* Stukely, 2 Mod. 260.

[8] 2 Show. 23, 2 Lev. 245, Freem. 473, 478, T. Jones, 126, s. c.; Jacob *v.* Allen (1703), 1 Salk. 27; Lamine *v.* Dorell (1705), 2 Ld. Ray. 1216. Philips *v.* Thompson, *supra*, was overruled in Hitchins *v.* Campbell, 2 W. Bl. 827.

Finally, under the influence of Lord Mansfield, the action was so much encouraged that it became almost the universal remedy where a defendant had received money which he was "obliged by the ties of natural justice and equity to refund." [1]

But one is often bound by those same ties of justice and equity to pay for an unjust enrichment enjoyed at the expense of another, although no money has been received. The quasi-contractual liability to make restitution is the same in reason, whether, for example, one who has converted another's goods turns them into money or consumes them. Nor is any distinction drawn, in general, between the two cases. In both of them the claim for the amount of the unjust enrichment would be provable in the bankruptcy of the wrong-doer as an equitable debt,[2] and would survive against his representative.[3] Nevertheless, the value of the goods consumed was never recoverable in *Indebitatus Assumpsit*. There was a certain plausibility in the fiction by which money acquired as the fruit of misconduct was treated as money received to the use of the party wronged. But the difference between a sale and a tort was too radical to permit the use of Assumpsit for goods sold and delivered where the defendant had wrongfully consumed the plaintiff's chattels.

The same difficulty was not felt in regard to the quasi-contractual claim for the value of services rendered. The averment, in the count in Assumpsit, of an indebtedness for work and labor was proved, even though the work was done by the plaintiff or his servants under the compulsion of the defendant. Accordingly, a defendant, who enticed away the plaintiff's apprentice and employed him as a mariner, was charged in this form of action for the value of the apprentice's services.[4]

By similar reasoning, Assumpsit for use and occupation would be admissible for the benefit received from a wrongful occupation of the plaintiff's land. But this count, for special reasons connected with the nature of rent, was not allowed upon a quasi-contract.[5]

In Assumpsit for money paid the plaintiff must make out a payment at the defendant's request. This circumstance prevented

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[1] Moses *v.* MacFerlan, 2 Burr. 1005, 1012.
[2] *Ex p.* Adams, 8 Ch. Div. 807, 819.
[3] Phillips *v.* Homfray, 24 Ch. Div. 439.
[4] Lightly *v.* Clouston, 1 Taunt. 112. See, also, Gray *v.* Hill, Ry. & M. 420.
[5] But see Mayor *v.* Sanders, 3 B. & Ad. 411.

for a long time the use of this count in the case of quasi-contracts. Towards the end of the last century, however, the difficulty was overcome by the convenient fiction that the law would imply a request whenever the plaintiff paid, under legal compulsion, what the defendant was legally compellable to pay.[1]

The main outlines of the history of Assumpsit have now been indicated. In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded Debt, became concurrent with Account, with Case upon a bailment, a warranty, and bills of exchange, and competed with Equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment. Surely it would be hard to find a better illustration of the flexibility and power of self-development of the Common Law.

J. B. Ames.

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[1] Turner v. Davies (1796), 2 Esp. 476; Cowell v. Edwards (1800), 2 B. & P. 268; Craythorne v. Swinburne (1807), 14 Ves. 160, 164; Exall v. Partridge (1799), 8 T. R. 308.