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SELECTION

OF

LEGAL MAXIMS,

CLASSIFIED AND ILLUSTRATED.

BY

HERBERT BROOM, ESQ.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

Maxims are the condensed Good Sense of Nations.—*Sir J. Mackintosh.*

Juris Præcepta sunt hæc; honeste vivere, alterum non lædere, suum cuique
tribuere.—I. I. I. 3.

Third Edition.

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PREFACE

TO THE SECOND EDITION.

THE reasonableness of the hope which I formerly ventured to express, as to the utility of a work upon Elementary Legal Principles, has, I think, been established, as well by the rapid sale of the first edition of this Treatise, as by the very flattering communications respecting it which have been made to me by some of the most distinguished members of that Profession for which it was designed. Thus kindly encouraged, I have endeavoured to avail myself of the opportunity for improvement which the preparation of a new Edition affords, by making a careful revision of the entire Work, by the insertion of many important Maxims which had been previously unnoticed, and by the addition of much new matter illustrative of those originally commented upon or cited. During the interval which has elapsed since the first appearance of this Work, I have, moreover, devoted myself to a perusal of various treatises upon our own Law, which I had not formerly, from lack of time or opportunity, consulted; to the examination of an extensive series of American Reports, and also to a review of such portions of and commentaries upon the Roman Law, as seemed most likely to disclose the true sources from which very many of our ordinary rules and maxims have been ultimately derived. I trust that a very slight comparison of the present with the former Edition of this Work, will suffice to show that the time thus employed with a view to its improvement has not been unprofitably spent; but that much new matter has been collected and inserted, which may reasonably be expected to prove alike serviceable to the Practitioner and the Student.

Besides the additions just alluded to, I may observe, that the order of arrangement formerly adopted has been on the present occasion in some respects departed from. For instance, that portion of the Work which related to Property and its attributes, has now been subdivided into three sections, which treat respectively of its Acquisition, Enjoyment, and Transfer: a mode of considering this subject which has been adopted for the sake of simplicity, and with a

view to showing in what manner the most familiar and elementary Maxims of our Law may be applied to the exposition and illustration of its most difficult and comprehensive branches. Further, it may be well to mention, that in the Alphabetical List of Maxims which precedes the text, I have now inserted not only such as are actually cited in the body of the Work, but such also from amongst those with which I have become acquainted, as seem to be susceptible of useful practical application, or to possess any real value. The List, therefore, which has thus been compiled, with no inconsiderable labour, from various sources, and to which some few notes have been appended, will, I trust, be found to render this Volume more complete, as a Treatise upon Legal Maxims, than it formerly was; and will, moreover, appear, on examination, to possess some peculiar claims to the attention of the-reader.

It only remains for me further to observe, that, in preparing this Volume for the press, I have anxiously kept before me the twofold object with a view to which it was originally planned. On the one hand, I have endeavoured to increase its usefulness to the Practitioner, by adding references to very many important, and, for the most part, recent decisions illustrative of those principles of Law to the application of which his attention must necessarily be most frequently directed; whilst, on the other hand, I have been mindful of preserving to this Work its strictly elementary character, so that it may prove no less useful than formerly to the Student as a Compendium of Legal Principles, or as introductory to a systematic course of reading upon any of the various branches of our Common law.

In conclusion, I can truly say, that, whatever amount of time and labour may have been bestowed upon the preparation of this Work, I shall esteem myself amply compensated if it be found instrumental in extending knowledge with regard to a Science which yields to none either in direct practical importance or in loftiness of aim—if it be found to have facilitated the study of a System of Jurisprudence, which, though doubtless susceptible of improvement, presents, probably, the most perfect development of that science which the ingenuity and wisdom of man have hitherto devised.

HERBERT BROOM.

4 BRICK COURT, TEMPLE,
March 16th, 1848.

PREFACE

TO THE FIRST EDITION.

IN the legal science, perhaps more frequently than in any other, reference must be made to first principles. Indeed, a very limited acquaintance with the earlier Reports will show the importance which was attached to the acknowledged Maxims of the Law, in periods when civilization and refinement had made comparatively little progress. In the ruder ages, without doubt, the great majority of questions respecting the rights, remedies, and liabilities of private individuals, were determined by an immediate reference to such Maxims, many of which obtained in the Roman Law, and are so manifestly founded in reason, public convenience, and necessity, as to find a place in the code of every civilized nation. In more modern times, the increase of commerce, and of national and social intercourse, has occasioned a corresponding increase in the sources of litigation, and has introduced many subtleties and nice distinctions, both in legal reasoning and in the application of legal principles, which were formerly unknown. This change, however, so far from diminishing the value of simple fundamental rules, has rendered an accurate acquaintance with them the more necessary, in order that they may be either directly applied, or qualified, or limited, according to the exigencies of the particular case, and the novelty of the circumstances which present themselves. If, then, it be true, that a knowledge of first principles is at least as essential in Law as in other sciences, certainly in none is a knowledge of these principles, unaccompanied by a sufficient investigation of their bearing and practical application, more likely to lead into grievous error.

In the present Work I have endeavoured, not only to point out the most important Legal Maxims, but also to explain and illustrate their meaning: to show the various exceptions to the rules which they

enunciate, and the qualifications which must be borne in mind when they are applied. I have devoted considerable time, and much labour, to consulting the Reports, both ancient and modern, as also the standing Treatises on leading branches of the Law, in order to ascertain what Maxims are of most practical importance, and most frequently cited, commented on, and applied. I have likewise repeatedly referred to the various Collections of Maxims which have heretofore been published, and have freely availed myself of such portions of them as seem to possess any value or interest at the present day. I venture, therefore, to hope that very few Maxims have been omitted which ought to have found place in a work like that now submitted to the Profession. In illustrating each Rule, those cases have in general been preferred as examples in which the particular Maxim has either been cited, or directly stated to apply. It has, however, been necessary to refer to many other instances in which no such specific reference has been made, but which seems clearly to fall within the principle of the Rule; and whenever this has been done, sufficient authorities have, it is hoped, been appended, to enable the reader, without very laborious research, to decide for himself whether the application suggested has been correctly made, or not.

In arranging the Maxims which have been selected as above mentioned, the system of Classification has, after due reflection, been adopted; first, because this arrangement appeared better calculated to render the Work, to some extent, interesting as a Treatise, exhibiting briefly the most important Rules of Law, and not merely useful as a book of casual reference; and, secondly, because by this method alone can the intimate connexion which exists between Maxims appertaining to the same class be directly brought under notice and appreciated. It was thought better, therefore, to incur the risk of occasional false or defective classification, than to pursue the easier course of alphabetical arrangement. An Alphabetical List has, however, been appended, so that immediate reference may be made to any required Maxim. The plan actually adopted may be thus stated:—I have in the first Two Chapters, very briefly treated of Maxims which relate to Constitutional Principles, and the mode in which the Laws are administered. These, on account of their comprehensive character, have been placed first in order, and have been briefly considered, because they are so very generally known, and so easily comprehended. After these, are placed certain Maxims

which are rather deductions of reason than Rules of Law, and consequently admit of illustration only. Chapter IV. comprises a few principles which may be considered as fundamental, and not referable exclusively to any of the subjects subsequently noticed, and which follow thus: Maxims relating to Property, Marriage, and Descent; the Interpretation of Written Instruments in general; Contracts; and Evidence. Of these latter subjects, the Construction of Written Instruments, and the Admissibility of evidence to explain them, as also those Maxims which embody the Law of Contracts, have been thought the most practically important, and have therefore been noticed at the greatest length. The vast extent of these subjects has undoubtedly rendered the work of selection and compression one of considerable labour; and it is feared that many useful applications of the Maxims selected have been omitted, and that some errors have escaped detection. It must be remarked, however, that, even had the bulk of this Volume been materially increased, many important branches of Law to which the Maxims apply must necessarily have been dismissed with very slight notice; and it is believed that the reader will not expect to find, in a Work on Legal Maxims, subjects considered in detail, of which each presents sufficient materials for a separate Treatise.

One question which may naturally suggest itself remains to be answered: For what class of readers is a Work like the present intended; I would reply, that it is intended not only for the use of students proposing to practise at the bar, or as attorneys, but also for the occasional reference of the practising barrister, who may be desirous of applying a Legal Maxim to the case before him, and who will, therefore, search for similar, or, at all events, analogous cases, in which the same principle has been held applicable and decisive. The frequency with which Maxims are not only referred to by the Bench, but cited and relied upon by Counsel in their arguments; the importance which has, in many decided cases, been attached to them; the caution which is always exercised in applying, and the subtlety and ingenuity which have been displayed in distinguishing between them, seem to afford reasonable grounds for hoping, that the mere Selection of maxims here given may prove useful to the profession, and that the examples adduced, and the authorities referred to by way of illustration, qualification, or exception, may, in some limited degree, add to their utility.

In conclusion, I have to express my acknowledgments to several Professional Friends of practical experience, ability, and learning, for

many valuable suggestions which have been made, and much useful information which has been communicated, during the preparation of this Work, and of which I have very gladly availed myself. For such defects and errors as will, doubtless, notwithstanding careful revision, be apparent to the reader, it must be observed, that I alone am responsible. It is believed, however, that the Professional public will be inclined to view with some leniency this attempt to treat, more methodically than has hitherto been done, a subject of acknowledged importance, and one which is surrounded with considerable difficulty.

HERBERT BROOM.

TEMPLE,
January 30th, 1845.

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The volumes to which a (*) is attached have been reprinted with American notes, by T. & J. W. Johnson at \$2 50 per volume. The pages referred to are those between brackets [].

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ALPHABETICAL

LIST OF LEGAL MAXIMS.

* Throughout this List, Wingate's Maxims are indicated by the letter (W.) Lofft's Reports (Ed. 1790), to which is appended a very copious Collection of Maxims, are signified by the letter (L.) The Grounds and Rudiments of Law (Ed. 1751), by the letter (G.); and Halkerston's Maxims (Ed. 1823), by the letter (H.); the reference in the last instance only being to the number of the Page, in the others to that of the Maxim. Of the above Collections, as also of those by Noy (9th ed.), and Branch (5th ed.), I have, in preparing the following List, freely availed myself. I have also inserted some few Maxims from the Civil Law, the Digest being referred to by the letter (D.), as in the body of the work.

The figures at the end of the line without the Parenthesis denote the pages of this Treatise where the maxim is commented upon or cited.

The pages referred to are those between brackets [].

	PAGE		PAGE
A COMMUNI observantiâ non est recedendum. (W. 203.)		Actio quælibet it sua viâ. (Jenk. Cent. 77.)	
A verbis legis non est recedendum	480	Actionem genera maxime sunt servanda. (L. 460.)	
Absoluta sententiâ expositore non indiget. (2 Inst. 533.)		Actore non probante absolvitur reus. (Hob. 103.)	
Abundans cautela non nocet. (11 Rep. 6.)		Actor sequitur forum rei. ¹ (Branch M. 4.)	
Accessorium non ducit, sed sequitur suum principale, . . . 368, 369, 370, 373		Actori incumbit onus probandi. (Hob. 103.)	
Accessorius sequitur naturam sui principalis, . . . 374	374	Actus curiâ neminem gravabit, . . . 86	86
Accusator post rationabile tempus non est audiendus, nisi se bene de omissione excuserit. (Moor. 817.)		Actus Dei nemini facit injuriam, . . . 181	181
Acta exteriora indicant interiora secreta, . . . 221	221	Actus inceptus cujus perfectio pendet ex voluntate partium revocari potest si autem pendet ex voluntate tertii personæ vel ex contingenti revocari non potest. ² (Bac. Max. reg. 20.)	
Actio non datur non damnificato. (Jenk. Cent. 69.)		Actus judicarius coram non giudice irritus habetur, de ministeriali au-	
Actio personalis moritur cum personâ, . . . 179 n., 702	179 n., 702		

¹ With reference to this maxim, an adequate notice of which could not be comprised within the limits of a work professing to be of an elementary character, we may observe generally, that the jurisdiction of a particular tribunal is founded, either in respect of the domicile of the defendant being within the territory—*ratione domicilii*; or in respect of his being possessed of property there situated—*ratione rei sitæ*. 3 Burge, Col. L. 1016. For information respecting the above maxim, reference should also be made to Mr. Justice Story's valuable Treatise on the Conflict of Laws.

² The law, observes Lord Bacon, makes this difference, that, if the parties have put it in the power of a third person, or of a contingency, to give a perfection to their act, then they have put it out of their own reach and liberty to revoke it; but where the completion of their act or contract depends upon the mutual consent of the original parties only, it may be rescinded by express agreement. So, in judicial acts, the rule of the civil law holds, *sententiâ interlocutoria revocari potest*, that is, an order may be revoked, but a judgment cannot. Bac. M. reg. 20. See Story on Agency, 424, for illustrations of the above maxim.

tem a quocunque provenit ratum esto. (L. 458.)		A non posse ad non esse sequitur argumentum necessarie negativè licet non affirmativè. (Hob. 336.)	
Actus legis nemini est damnosus.	89	Apices juris non sunt jura, Applicatio est vita regulæ. (2 Bulstr. 79.)	142
Actus legitimi non recipiunt modum. (Hob. 153.)		Arbitramentum æquum tribuit cuique suum. (Noy, M. 248.)	
Actus non facit reum nisi mens sit rea,	226, 232, 239, 275, 633, n.	Argumentum ab auctoritate est fortissimum in lege. (Co. Litt. 254.)	
Ad ea quæ frequentius accidunt jura adaptantur,	35	Argumentum ab impossibili plurimum valet in lege. (Co. Litt. 92.)	
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Ædificare in tuo proprio solo non licet quod alteri noceat,	276	Argumentum à majori ad minus negativè non valet—valet e converso. (Jenk. Cent. 281.)	
Ædificatum solo, solo cedit,	289	Argumentum à simili valet in lege. (Co. Litt. 191.)	
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Affirmanti non neganti incumbit probatio. ¹ (H. 9.)		Aucupia verborum sunt judice indigna. (Hob. 343.)	
Alienatio licet prohibeatur consensu tamen omnium in quorum favorem prohibita est potest fieri. (Co. Litt. 98.)		BELLO parta cedunt reipublicæ. (Cited 2 Russ. & My. 56.)	
Alienatio rei præfertur juri accrescendi,	331, 345	Benedicta est expositio quando res redimitur à destructione. (4 Rep. 26.)	
Aliquid conceditur ne injuria remaneat impunita quod alias non concederetur. (Co. Litt. 197.)		Benignè faciendæ sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat,	413, 434, 500
Aliquis non debet esse iudex in propria causâ, quia non potest esse iudex et pars,	85	Benignior sententia, in verbis generalibus seu dubiis, est preferenda. (4 Rep. 15.)	
Aliud est possidere—aliud esse in possessione. (Hob. 163.)		Bona fides non patitur, ut bis idem exigatur,	249, n
Aliud est tacere—aliud celare,	616	Bonæ fidei possessor, in id tantum quod ad se pervenerit tenetur. (2 Inst. 285.)	
Allegans contraria non est audiendus,	127, 129, 219	Bonus iudex secundum æquum et bonum iudicat, et æquitatem stricto juri præfert,57
Allegans suam turpitudinem non est audiendus. ² (4 Inst. 279.)		Boni iudicis est ampliare jurisdictionem,	56, 59
Allegari non debuit quod probatum non relevat. (1 Chan. Cas. 45.)		Boni iudicis est iudiciam sine dilatione mandare executioni. (Co. Litt. 289.)	
Alterius circumventio alii non præbet actionem. (D. 50, 17, 49.)		Boni iudicis est lites dirimere, ne lis ex lite oritur, et interest reipublicæ ut sint fines litium. (4 Rep. 15.)	
Ambigua responsio contra proferentem est accipienda. (10 Rep. 58.)		CASUS omissus et oblivioni datus dispositioni communis juris relinquitur,	37
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Ambiguitas verborum patens nullâ verificatione excluditur. (L. 249.)		Certa debet esse intentio, et narratio, et certum fundamentum, et certa res quæ deducitur in iudicium. (Co. Litt. 303, a.)	
Ambiguum placitum interpretari debet contra proferentem,	461	Certum est quod certum reddi potest,	481, 485
Ambulatoria est voluntas defuncti usque ad vitæ supremum exitum. (D. 34, 4, 4.)			
Angliæ jura in omni casu libertati dant favorem. (H. 12.)			
Animus hominis est anima scripti. (3 Bulstr. 67.)			
Annua aut debitum iudex nec separat ipse. ³ (8 Rep. 52.)			

¹ See 1 Phill. Ev. 9th ed., 493.

² See Judgment, U. S. v. Leffler, 11 Peters, R. (U. S.) 94, 95; 1 H. Bla. 597; 14 Johnson, R. (U. S.) 271; Steadman v. Duhamel, 1 C. B. 888; Judgment, The Ville de Varsovie, 2 Dod. Adm. R. 184 et seq.; Glenister v. Lady Thynne, cited 1 Tayl. Evid. 565.

³ See 1 Story, Eq. Jurisp., 4th ed., 517.

Cessante causâ, cessat effectus, . . .	118	Contemporanea expositio est optima et fortissima in lege, . . .	532
Cessante ratione legis, cessat ipsa lex, . . .	118, 119	Contra negantem principia non est disputandum. (G. 57.)	
Cessante statu primitivo, cessat derivativus, . . .	372	Contra non valentem agere nulla currit præscriptio, . . .	700
Charta de non ente non valet. (Co. Litt. 36, a.)		Conventio privatorum non potest publico juri derogare. (W. 201.)	
Chirographum apud debitorem repositum præsumitur solutum. (H. 20.)		Copulatio verborum indicat acceptationem in eodem sensu, . . .	450
Clausulæ inconsumetæ semper inducunt suspicionem, . . .	217	Corporalis injuria non recipit æstimationem de futuro, . . .	208
Clausula generalis de residuo non ea complectitur quæ non ejusdem sint generis cum iis quæ speciâtim dicta fuerant. (L. 419.)		Cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit, . . .	362
Clausula generalis non refertur ad expressa. (8 Rep. 154.)		Culibet in suâ arte perito est credendum, . . .	720
Clausula quæ abrogationem excludit ab initio non valet, . . .	24	Cui licet quod majus non debet quod minus est non licere, . . .	130
Clausula vel dispositio inutilis, per præsumptionem vel causam remotam ex post facto non fulcitur, . . .	521	Cujus est dare ejus est disponere, . . .	346, 348, 350
Cogitationis pœnam nemo patitur, . . .	228	Cujus est instituere ejus est abrogare, 681, n.	
Cohæredes una persona consentur propter unitatem juris quod habent. (Co. Litt. 163.)		Cujus est solum, ejus est usque ad cælum, . . .	289, 290, 292
Communis error facit jus, . . .	104	Culpâ caret, qui scit, sed prohibere non potest. (D. 50, 17, 50.)	
Conditio beneficialis quæ statum constituit, benignè, secundum verborum intentionem est interpretanda; odiosa, autem, quæ statum destruit, strictè, secundum verborum proprietatem accipienda. (8 Rep. 90.)		Culpa eat immicere se rei ad se non pertinenti. (D. 50, 17, 36.)	
Conditio præcedens adimpleri debet priusquam sequatur effectus. (Co. Litt. 201.)		Cum duo inter se pugnancia reperiuntur in testamento, ultimum ratum est, . . .	446
Conditiones quælibet odiosæ; maxime autem contra matrimonium et commercium. (L. 644.)		Cum in testamento ambigue aut etiam perperam scriptum est benigne interpretari et secundum id quod credibile est cogitatum credendum est, . . .	437
Confirmare nemo potest priusquam jus ei acciderit. (10 Rep. 48.)		Cum par delictum est duorum, semper oneratur petitor et melior habetur possessoris causa, . . .	566
Confirmatio omnes supplet defectus, licet id quod actum est ab initio non valuit. (Co. Litt. 295, b.)		Cum principalis causa non consistit, ne ea quidem quæ sequuntur, locum habent. (D. 50, 17, 129, § 1.)	
Consensus, non concubitus, facit matrimonium, . . .	379, 380, 388	Curia parliamenti suis propriis legibus subsistit. (4 Inst. 50.)	
Consensus tollit errorem, . . .	100, 101, 103	Cursus curiæ eat lex curiæ, . . .	98, 100
Consentientes et agentes pari pœnâ plectentur. (5 Rep. 80.)		DEBILE fundamentum fallit opus, . . .	135, 136
Consentire matrimonio non possunt infra annos nubiles. (5 Rep. 80.)		Debita sequuntur personam debitoris. (2 Kent, Com. 429.)	
Constructio legis non facit injuriam, . . .	464	Debitorum pactionibus creditorum petitio nec tolli nec minui potest, . . .	545
Consuetudo ex certâ causâ rationabili usitata privat communem legem, . . .	714	Debitum et contractus sunt nullius loci. (7 Rep. 61.)	
Consuetudo manerii et loci observanda est, . . .	713	Deficiente uno non potest esse hæres. (G. 77.)	
Consuetudo neque injuriâ oriri neque tolli potest. (L. 340.)		De fide et officio judicis non recipitur quæstio, sed de scientiâ sive sit error juris sive facti, . . .	61
Consuetudo regni Angliæ eat lex Angliæ. (Jenk. Cent. 119.)		De gratiâ speciali, certâ scientiâ, et mero motu, talis clausula non valet in his in quibus præsumitur principem esse ignorantem. (1 Rep. 53.) . . .	42
Consuetudo semel reprobata non potest amplius induci. (G. 53.)		Delegata potestas non potest delegari, . . .	665

¹ Where, for instance, a bill of exchange or promissory note is found in the possession of the drawee or maker, a presumption is raised that he has paid the money due upon the instrument; 1 Tayl. Ev. 117. See *Phillips v. Warren*, 14 M. & W. 379. As to the necessity of producing the bill in an action by the payee, see *Howard v. Crowe*, 1 Exch. 187.

² *Gosset v. Howard*, cited post, p. 734.

³ Personal property is subject to that law which governs the person of the owner. Debts and personal contracts have no locality; 2 Kent, Com. 429.

⁴ See the note to *Mostyn v. Fabrigas*, 1 Smith, L. C., 340; Story, Conf. Laws, tit. "Contracts."

Delegatus debitor est odiosus in lege. (2 Bulstr. 148.)	
Delegatus non potest delegare, . . .	666
De minimis non curat lex, 105, 107, 124, 266	
De non apparentibus, et non existentibus, eadem est ratio, . . .	121
Derivativa potestas non potest esse major primitivâ. (W. 26.)	
Deus solus hæredem facere potest, non homo, . . .	388
Dies dominicus non est juridicus, . . .	18
Discretio est discernere per legem quod sit justum, . . .	60, n.
Divinatio, non interpretatio est, quæ omnino recedit à literâ. (Bac. Max. reg. 3.)	
Dolo malo pactum se non servaturum, 573	
Dolus versatur in generalibus, . . .	216
Dolus circuitu non purgatur, . . .	170
Dominium non potest esse in pendenti. (H. 39.)	
Domus sua cuique est tutissimum refugium, . . .	321
Donari videtur, quod nullo jure cogente conceditur. (D. 50, 17, 82.)	
Dona clandestina sunt semper suspiciosa, . . .	217
Donatio non præsumitur. (Jenk. Cent. 109.)	
Donatio perficitur possessione accipientis. (Jenk. Cent. 109.)	
Duo non possunt in solido unam rem possidere, . . .	351, n.
EADÉM mens præsumitur regis quæ est juris, et quæ esse debet, præsertim in dubiis, . . .	41
Ea quæ raro accidunt, non temere in agendis negotiis computantur. (D. 50, 17, 64.)	
Ea quæ commendandi causâ in venditionibus dicuntur si palam appareant venditorem non obligant, . . .	517
Ecclesia ecclesiæ decimasolvere non debet. (Cro. El. 479.)	
Ecclesia meliorari non deteriorari potest. ¹	
Ejus nulla culpa est cui parere necesse sit, . . .	9, n.
Eodem modo quo quid constituitur, eodem modo dissolvitur—destruitur. (6 Rep. 53.)	
Ex antecedentibus et consequentibus fit optima interpretatio, . . .	442, 452
Exceptio probat regulam. (11 Rep. 41.) ²	
Excusatus aut extenuatus delictum in capitalibus quod non operatur idem in civilibus, . . .	238
Ex delicto non ex supplicio emergit infamia. ⁴	
Ex dolo malo non oritur actio, . . .	220, 571
Executio juris non habet injuriam, . . .	95
Ex facto jus oritur, . . .	77
Ex maleficio non oritur contractus, . . .	576
Ex multitudine signorum colligitur identitas vera, . . .	497 ⁵
Ex nudâ submissione non oritur actio. (G. 143.)	
Ex nudo pacto non oritur actio, . . .	583, 590, 659
Ex pacto illicito non oritur actio, . . .	581
Expedit reipublicæ ne suâ re quis male utatur, . . .	274
Expressa nocent, non expressa non nocent. (D. 50, 17, 195.)	
Expressio eorum quæ tacitè insunt nihil operatur, . . .	518, 591
Expressio unius est exclusio alterius, . . .	505, 521
Expressum facit cessare tacitum, . . .	505, 518
Extra territorium jus dicenti impune non paretur, . . .	77
Ex turpi causâ non oritur actio . . .	573
FACTUM à iudice, quod ad officium ejus non pertinet ratum non est. (D. 50, 17, 170.) ⁶	
Falsa demonstratio non nocet, . . .	490, 500
Felsâ demonstratione legatum non perimit, . . .	500
Falsus in uno falsus in omnibus. ⁷	
Favorabiliores rei potius, quam actores habentur, . . .	562
Fictio legis iniquè operatur alicui damnum vel injuriam . . .	92
Filiatio non potest probari. (Co. Litt. 126, a.)	
Fortior est custodia legis quam hominis. (2 Rol. Rep. 325.)	
Fortior et potentior est dispositio legis quam hominis, . . .	545
Fractionem diei non recipit lex (L. 572.) ⁸	
Frater fratri uterino non succedet in hereditate paternâ, . . .	403
Fraus est celare fraudem. (1 Vern. 240.)	
Fraus est odiosa et non præsumenda. (Cro. Car. 550.)	
Frequentia actus multum operatur. (4 Rep. 78.) (W. 192.)	
Frustrâ fit per plura, quod fieri potest	

¹ Vid. pp. 374 et seq., 394.

² Argument, Attorney-General v. Cholmley, 2 Eden, 318.

³ "Every exception that can be accounted for is so much a confirmation of the rule, that it has become a maxim, *exceptio probat regulam*," per Lord Kenyon, C. J., 3 T. R. 722. See also, Id., 38; 4 T. R. 793; 1 East, 647, n.

⁴ See 1 Phill. Ev., 9th ed., 18; 1 Stark. Ev., 3d ed., 94 et seq.; Wood, Civ. Law, 4th ed., 338. By stat. 6 & 7 Vict. c. 85, s. 1, no person shall be excluded from giving evidence by incapacity from crime.

⁵ See p. 69.

⁶ This maxim may properly be applied in those cases only where a witness speaks to a fact with reference to which he cannot be presumed liable to mistake; see per Story, J., The Santissima Trinidad, 7 Wheaton, R. (U. S.) 338, 339.

⁷ The law will not in general notice the fraction of a day, but it will do so if requisite for the ends of justice; post, pp. 106, 266.

per pauciora. (Jenk. Cent. 68.) (W. 177.) (G. 161.)	
Frustrà legis auxilium quærit qui in legem committit, 209, 221	
Frustrà petis quod statim alteri reddere cogaris. (Jenk. Cent. 256.)	
Frustrà probatur quod probatum non relevat. (H. 50.)	
Furiosi nulla voluntas est, 231	
Furiosus absentis loco est. (D. 50, 17, 124, § 1.)	
Furiosus solo furore punitur, 11	
Furtum non est ubi initium habet detentionis per dominum rei. (3 Inst. 107.)	
GENERALE , nihil certi implicat. (W. 164.)	
Generalia specialibus non derogant. (Jenk. Cent. 120.)	
Generalia verba sunt generaliter intelligenda, 502	
Generalibus specialia derogant. (H. 51.)	
Generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa. (8 Rep. 154.)	
Generalis regula generaliter est intelligenda. (6 Rep. 65.)	
HABEMUS optimum testem confitentem reum. ¹	
Hæredi magis parcendum est. (D. 31, 1, 47.)	
Hæreditas nihil aliud est, quam successio in universum jus, quod defunctus habuerit. (D. 50, 17, 62.)	
Hæreditas nunquam ascendit, 400	
Hæres est aut jure proprietatis aut jure representationis. (3 Rep. 40.)	
Hæres est nomen juris, filius est nomen naturæ. ² (Bac. M. reg. 11.)	
Hæres legitimus est quem nuptiæ demonstrant, 388	
IDEM est non esse et non apparere 123	
Id, quod nostrum est, sine facto nostro ad alium transferri non potest. ³ (D. 50, 17, 11.)	
Id possumus quod de jure possumus. (G. 183.)	
Ignorantia eorum quæ quis scire tenetur non excusat, 201	
Ignorantia facti excusat; ignorantia juris non excusat, 190	
Imperitia culpæ adnumeratur. (D. 50, 17, 132.)	
Impossibile nulla obligatio est, 186	
Impotentia excusat legem, 182, 188	
In æquali jure melior est conditio possidentis, 561	
In ambigüa voce legis ea potius accipienda est significatio quæ vitio caret,	præsertim cum etiam voluntas legis ex hoc colligi possit, 442
	In ambiguis orationibus maxime sententia spectanda est ejus, qui eas protulisset, 436
	In Angliâ non est interregnum, 39
	In casu extremæ necessitatis omnia sunt communia, 2, n.
	Incaute factum pro non facto habetur. (D. 28, 4, 1.)
	Incerta pro nullis habentur. (G. 191.)
	Incivile est, nisi totâ sententiâ inspectâ de aliquâ parte judicare. (G. 194.)
	In consimili casu, consimile debet esse remedium. (G. 195.)
	In contractis tacite insunt quæ sunt moris et consuetudinis, 667
	In conventionibus contrahentium voluntas potius quam verba spectari placuit, 422
	In criminalibus sufficit generalis malitia intentionis cum facto paris gradus, 238
	Index animi sermo, 480
	In disjunctivis, sufficit alteram partem esse veram, 455
	In eo, quod plus sit, semper inest et minus. (D. 50, 17, 110.)
	In favorem vitæ libertatis et innocentiam omnia præsumuntur. (L. 125.)
	In fictione juris semper æquitas existit, 90
	In judicio non creditur nisi juratis. (Cro. Car. 64.)
	In jure, non remota causa, sed proxima spectatur, 165
	Injuria non præsumitur. (Co. Litt. 232, b.)
	In majore summâ continetur minor. (5 Rep. 115.)
	In malificiis voluntas spectatur non exitus, 239
	In odium spoliatoris omnia præsumuntur, 726
	In omnibus pœnalibus judiciis et ætati et imprudentiæ succurritur, 231
	In omnibus quidem, maxime tamen in jure æquitas spectanda sit. (D. 50, 17, 90.)
	In pœnalibus causis benignius interpretandum est. (D. 50, 17, 155, § 1.)
	In pari causâ possessor potior haberi debet, 562
	In pari delicto potior est conditio defendentis, 572
	In pari delicto potior est conditio possidentis, 567
	In stipulationibus cum quæritur quid actum sit verba contra stipulatorem interpretanda sunt, 461
	Intentio cæca mala. (2 Bulstr. 179.)
	Intentio inservire debet legibus non leges intentioni. (Co. Litt. 314, b.)
	Interest reipublicæ ne maleficia rema-

¹ In the various treatises upon the law of evidence will be found remarks as to the weight which should be attached to the confession of a party. Respecting the above maxim, Lord Stowell has observed, that, "What is taken *pro confesso* is taken as indubitable truth. The plea of guilty by the party accused shuts out all further inquiry. *Habemus confitentem reum* is demonstration, unless indirect motives can be assigned to it." *Mortimer v. Mortimer*, 2 Hagg. 315.

² Cited Arg., 11 East, 15.

³ See this maxim under a somewhat different form, p. 350.

neant impunita. (Jenk. Cent. 31.) (W. 140.)	Lex beneficialis rei consimili remedium præstat. (2 Inst. 689.)
Interest reipublicæ ut sit finis litium, 244, 254	Lex neminem cogit ad vana seu inutilia peragenda, 181
Interest reipublicæ suprema hominum testamenta rata haberi. (Co. Litt. 236, b.)	Lex neminem cogit ostendere quod nescire præsumitur. (L. 569.)
Interpretare et concordare leges legibus est optimus interpretandi modus. (8 Rep. 169.)	Lex nil facit frustra, 189
In testamentis plenius voluntates testantium interpretantur, 437	Lex non cogit ad impossibilia, 15, n., 181, 187
In testamentis plenius testatoris intentionem scrutamur, 425	Lex non requirit verificari quod apparet curiæ. (9 Rep. 54.)
In toto et pars continetur. (D. 50, 17, 113.)	Lex plus laudatur quando ratione probatur, 118
Invito beneficium non datur, 547, n.	Lex rejicit superflua, pugnantia, incongrua. (Jenk. Cent. 133, 140, 176.)
Ita semper fiat relatio ut valeat dispositio. (6 Rep. 76.)	Lex semper dabit remedium, 147
Judicium a non suo iudice datum nullius est momenti, 69	Lex semper intendit quod convenit rationi. (Co. Litt. 78, b.)
Judicium redditur in invitum. (Co. Litt. 248, b.)	Lex spectat naturæ ordinem, 189
Judicis est judicare secundum allegata et probata. (H. 73.)	Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens quæ sortiatur effectum, interveniente novo actu, 374
Judicis est jus dicere non dare. (L. 42.)	Licita bene miscentur, formula nisi juris obstat. (Bac. Max. reg. 24.) ¹
Jura eodem modo destituuntur quo constituuntur, 681	Linea recta semper præfertur transversali, 402
Jura sanguinis nullo jure civili dirimi possunt, 407	MAJUS dignum trahit ad se minus dignum, 130, n.
Jure naturæ æquum est neminem cum alterius detrimento et injuriâ fieri locupletiozem. (D. 50, 17, 206.)	Mala grammatica non vitiat chartam, 535
Jus accrescendi inter mercatores locum non habet pro beneficio commercii, 343	Maledicta expositio quæ corrumpit textum, 480
Jus ex injuriâ non oritur. (Arg., 4 Bing. 639.)	Meliora supplet ætatem, 232
Jus respicit æquitatem, 112	Malus usus est abolendus, 715
Jus superveniens auctori accrescit successori. (H. 76.)	Mandata licita strictam recipiunt interpretationem sed illicita latam et extensam. (Bac. Max. reg. 16.) ²
LEX citius tolerare vult privatum damnum quam publicum malum. (Co. Litt. 152.)	Mandatarius terminos sibi positos transgredi non potest. (Jenk. Cent. 53.)
Leges posteriores priores contrarias abrogant, 23, 25	Matrimonia debent esse libera. (H. 86.)
Le salut du peuple est la suprême loi, 2, n.	Meliozem conditionem suam facere potest minor, deteriozem nequaquam. (Co. Litt. 337, b.)
Les lois ne se chargent de punir que les actions extérieures, 228	Melior est conditio defendentis, 562
Lex aliquando sequitur æquitatem. (3 Wils. 119.)	Melior est conditio possidentis et rei quam actoris. (4 Inst. 180.)
Lex Angliæ sine parlamento mutari non potest. (2 Inst. 619.)	Misera est servitus, ubi jus est vagum aut incertum, 111
	Mobilia sequuntur personam. (H. 89.)
	Modus de non decimando non valet. (L. 427.) ³
	Modus et conventio vincunt legem, 538, 543
	Modus legem dat donationi, 347
	Multa conceduntur per obliquum quæ

¹ "The law," says Lord Bacon, "giveth that favour to lawful acts, that although they be executed by several authorities, yet the whole act is good;" if, therefore, tenant for life and remainderman join in granting a rent, "this is one solid rent out of both their estates, and no double rent, or rent by confirmation;" Bac. Max., reg. 24; and if tenant for life and reversioner join in a lease for life reserving rent, this shall enure to the tenant for life only during his life, and afterwards to the reversioner. So, if the reservation be to the lessor and to those to whom the reversion and inheritance may belong during the term, this is a good reservation to those in remainder, and the law will distribute the rent according to the several interests under the settlement. See 1 Crabb, Real Prop., 179.

² A principal is civilly liable for those acts only which are strictly within the scope of the agent's authority, post, p. 648. But if a man incite another to do an unlawful act, he shall not, in the language of Lord Bacon, "excuse himself by circumstances not pursued;" as if he command his servant to rob I. D. on Shooter's Hill, and he doth it on Gad's Hill; or to kill him by poison, and he doth it by violence; Bac. Max., reg. 16.

³ In lay hands, a modus, or prescription for the non-payment of tithes is bad, see Com. Dig., "Dimes," (E. 5, 7); 2 Bla. Com. 31, 32; Hob. 297. Accordingly, it was held in a recent case, that mere non-payment of tithes is no answer to a claim of tithes by a lay proprietor, for, as against him, there can be no prescription *in non decimando* (Andrews v. Drever, 2 Bing., N. C. 5; 8 C., 3 Gl. & Fln. 814.). As to the stat. 2 & 3 Will. 4, c. 100, see Salkeld v. Johnson, 2 C. B. 749; Knight v. Marquis of Waterford, 15 M. & W. 419.

non conceduntur de directo. (6 Rep. 47.)		Nihil tam conveniens est naturali æquitati quàm unumquodque dissolvi eo ligamine quo ligatum est,	681
Multa in jure communi, contra rationem disputandi, pro communi utilitate introducta sunt,	117	Nil consensui tam contrarium est quàm vis atque metus,	208, n.
NECESSITAS inducit privilegium quoad jura privata,	8, 14	Nil facit error nominis cum de corpore constat,	493
Necessitas publica major est quam privata,	15	Nil tam conveniens est naturali æquitati quàm voluntatem domini volentis rem suam in alium transferre ratam haberi. (I. 2, 1, 40.)	
Necessitas quod cogit, defendit,	10	Nihil tam naturale est, quam eo genere quidque dissolvere, quo colligatum est: ideo verborum obligatio verbis tollitur, nudi consensus obligatio contrario consensu dissolvitur,	686
Nemo contra factum suum venire potest. (2 Inst. 66.)		Nimia subtilitas in jure reprobatur, et talis certitudo certitudinem confundit,	141
Nemo dat qui non habet. (Jenk. Cent. 250.)		Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram,	498
Nemo debet bis puniri pro uno delicto. (4 Rep. 43.)		Non aliter à significatione verborum recedi oportet quam cum manifestum est aliud sensisse testatorem,	437
Nemo debet bis vexari, si constat curiæ quod sit pro unâ et eâdem causâ, 241, 257		Non deo melioris conditionis esse, quam auctor meus, à quo jus in me transit. (D. 50, 17, 175, § 1.)	
Nemo debet esse iudex in propriâ causâ, 84		Non debet adduci exceptio ejus rei cujus petitur dissolutio,	125
Nemo debet locupletari ex alterius incommodo. (Jenk. Cent. 4.)		Non debet alteri pro alterum iniqua conditio inferri. (D. 50, 17, 74.)	
Nemo de domo suâ extrahi potest, 321, n.		Non debet cui plus licet, quod minus est, non licere,	130
Nemo ejusdem tenementi simul potest esse hæres et dominus. (1 Reeve, Hist. Eng. L. 106.)		Non dubitatur etsi specialiter venditor evictionem non promiserit re evictâ ex empto competere actionem,	605
Nemo est hæres viventis,	393, 396	Non decipitur qui scit se decipi. (5 Rep. 6.)	
Nemo ex alterius facto prægravari debet. (See 1 Poth., by Evans, 133.)		Non est novum ut priores leges ad posteriores trahantur,	24
Nemo ex proprio dolo consequitur actionem,	221	Non ex opinionibus singularum sed ex communi usu nomina exaudiri debent, (D. 33, 10, 7, § 2.)	
Nemo ex suo delicto meliorem suam conditionem facere potest. (D. 50, 17, 134, § 1.)		Non impedit clausula derogatoria quo minus ab eâdem potestate res dissolvantur a quâ constituuntur,	24
Nemo in propriâ causâ testis esse debet. (1 Bla. 443; 3 Id. 370.)		Non in tabulis est jus. (10 East, 60.)	
Nemo patriam in quâ natum est exuere nec ligentis debitum ejurare possit,	52	Non jus sed seisisna facit stipitem, 397, 399	
Nemo plus juris in alium transferre potest quam ipse habet,	354	Non omnium quæ a majoribus nostris constituta sunt ratio reddi potest,	116
Nemo potest contra recordum verificare per patriam. (2 Inst. 380.)		Non possessori incumbit necessitas probandi possessiones ad se pertinere,	562
Nemo potest esse tenens et dominus. (Gilb. Ten. 142.)		Non potest adduci exceptio ejusdem rei cujus petitur dissolutio,	124
Nemo potest mutare consilium suum in alterius injuriam,	29	Non potest probari quod probatum non relevat.*	
Nemo præsumitur alienam posteritatem suæ prætulisse. (W. 285.)		Non potest rex gratiam facere cum injuriâ et damno aliorum,	45
Nemo punitur pro alieno delicto. (W. 336.)		Non potest videri desisse habere, qui nunquam habuit. (D. 50, 17, 208.)	
Nemo tenetur ad impossibile. (Jenk. Cent. 7.)		Non quod dictum est, sed quod factum est, inspicitur. (Co. Litt. 36, a.)*	
Nemo tenetur divinare. (4 Rep. 28.)			
Nemo tenetur prodere seipsum. (W. 486.)*			
Nihil aliud potest rex quàm quod de jure potest. (11 Rep. 74.)			
Nihil consensui tam contrarium est quàm vis atque metus. (D. 50, 17, 116.)			
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* Reg. v. Greenaway, 7 Q. B. 126. "The proposition is clear, that no man can be compelled to answer what has any tendency to criminate him:" per Lord Eldon, C., Ex parte Symes, 11 Ves. 525. "A man is competent to prove his own crime, though not compellable:" per Alderson, B., Udal v. Walton, 14 M. & W. 256.

* See Attorney-General v. Hitchcock, 1 Exch. 91, 92.

* Cited, White v. Trustees of British Museum, 6 Bing. 319; Ilott v. Genge, 3 Curt. 175.

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^a In Moore v. Durden, Exch., 12 Jur. 138, it was held that stat. 3 & 9 Vict. c. 109, has not a retrospective operation, so as to prevent a party from prosecuting an action for money won on a wager, such action having been commenced before the above statute was passed. In this case, Rolfe, B., observed, that the principle of the above maxim is one of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively. See, also, per Parke, B. Id. 142.

^b Cited 2 Bla. Com. 162; Co. Litt. 3, a.; Argument, 1 M. & S. 172; per Buller, J., 3 T. R. 664.

^c By stat. 9 & 10 Vict. c. 62, deodanda, were, however, abolished.

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¹ See p. 592 (L).² See Reg. v. Millis, 10 Cl. & Fin. 534, where this maxim was applied.³ See 4 Bla. Com. 303; Horwood v. Smith, 2 T. R. 753; post, p. 631.⁴ A deed or other writing must be taken to speak from the time of the execution, and not from the date apparent on the face of it: per Patteson, J., Browne v. Burton, 17 L. J., Q. B., 50; citing Clayton's case, 5 Rep. 1, and recognising Steele v. Mart, 4 B. & C. 272, 279. See, also, Shaw v. Kay, 17 L. J., Exch., 17.⁵ 3 Bla. Com. 309; cited, per Tindal, C. J., 1 Bing. N. C. 622. This maxim is taken from the Roman law, see C. 3, 1, 13, § 6.

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* * * It was not without considerable reluctance that I abandoned my original intention of translating such of the above Maxims as are *not* subsequently cited in the body of this Treatise. Of many of such Maxims, however, the true meaning may be ascertained by referring to the various works quoted as authorities for them. It is feared, indeed, that the student will not derive much benefit from the translations to be found in the collections of Branch and Halkerston, many of which are exceedingly inaccurate, and altogether fail in conveying to the reader a notion of their proper legal signification. In the list above given, which will of course be regarded as a Selection merely, translations have been omitted with a view to save space, and to avoid the possibility of repetition, many analogous maxims and principles having been incidentally mentioned or commented upon in the ensuing pages.

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LEGAL MAXIMS.

CHAPTER I.

§ I.—RULES FOUNDED ON PUBLIC POLICY.

THE Maxims contained in this section are of such universal application, and result so directly and manifestly from motives of public policy and the simple and fundamental principles on which the social relations depend, that it has been thought better to place them first in this collection, as being in some measure, introductory to those more precise and technical rules which embody the elementary doctrines of English law, and are continually recurring to the notice of practitioners in our courts of justice.

SALUS POPULI SUPREMA LEX.

(Bacon Max., reg. 12.)

That regard be had for the public welfare, is the highest law.

There is an implied assent on the part of every member of society, that his own individual welfare shall, in cases of necessity, yield to that of the community;¹ and that his property, liberty and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good.² **“There are,”* says Buller, J.,³ *“many cases in which individuals sustain an injury for which the law* [*2]

¹ See 1 Bla. Com. 139.

² *Alibi diximus res subditorum sub eminenti dominio esse civitatis, ita ut civitas, aut qui civitatis vice fungitur, iis rebus uti, easque etiam perdere et alienare possit, non tantum ex summa necessitate, quæ privatus quoque jus aliquod in aliena concedit, sed ob publicam utilitatem, cui privatis cedere illi ipsi voluisse censendi sunt qui in civilem cæstum coierunt.* Grotius De Jure Belli et Pac. Bk. 3, c. 20, s. 7 § 1. —*Le salut du peuple est la suprême loi.* Mont. Esp. des Lois, L. XXVII. Ch. XXIII. In causa extremæ necessitatis omnia sunt communia. Hale, P. C. 54.

³ Per Buller, J., *Plate Glass Company v. Meredith*, 4 T. R. 797; *Noy, Max.* 9th ed. p. 36; *Dyer*, 60 b; 12 Rep. 12, 13.

gives no action; as, where private houses are pulled down, or bulwarks raised on private property, for the preservation and defence of the kingdom against the king's enemies." Commentators on the civil law, indeed, have said,¹ that in such cases, those who suffer have a right to resort to the public for satisfaction; but no one ever thought that our own common law gave an action against the individual who pulled down the house or raised the bulwark.² On the same principle, viz., that a man may justify committing a private injury for the public good, the pulling down of a house when necessary, in order to arrest the progress of a fire, is permitted by the law.³

Likewise, in less stringent emergencies, the maxim is, that a private mischief shall be endured, rather than a public inconvenience;⁴ and, therefore, if a public highway be out of repair, and impassable, a passenger may lawfully go over the adjoining land, [*3] since it is for the public good *that there should be, at all times, free passage along the thoroughfares for the subjects of the realm.⁵

In the instances above given, an interference with private property is obviously dictated and justified *summâ necessitate*, by the immediate urgency of the occasion, and a due regard to the public safety or convenience. The general maxim, however, likewise applies to cases of more ordinary occurrence, in which the legislature, *ob publicam utilitatem*, disturbs the possession or restricts the enjoyment of the property of individuals.

"The great end," it has been observed,⁶ "for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, &c., are all

¹ See Puff. de Jure Nat. Bk. 8, c. 5, s. 7; Grotius de Jur. Bell. et Pac. Bk. 8 c. 20, s. 7, § 2; 2 Kent. Com., 4th ed. 389 (a).

² Per Buller, J., 4 T. R. 797.

³ Noy, Max. 9th ed. p. 86; 12 Rep. 12; Dyer 86 b; Plowd. 322; Finch's Law, 89.

⁴ Absor v. French, 2 Show. 28. Per Pollock, C. B. Attorney-General v. Briant, 15 M. & W. 185; 2 Kent. Com. 4th ed. 388.

⁵ Per Lord Mansfield, C. J., Taylor v. Whitehead, Dougl. 749; per Lord Ellenborough, C. J., Bullard v. Harrison, 4 M. & S. 398; 1 Wms. Saund., 6th ed., 322, c. (3); and see the cases collected, Robertson v. Gantlett, 16 M. & W. 296 (a). Secus of a private right of way. Ib.

⁶ Per Lord Camden, Entick v. Carrington, 19 How. St. Tr. 1066.

of this description, wherein every man, by common consent, gives up that right for the sake of justice and the general good.”

In the familiar instance likewise of an act of Parliament, for promoting some specific object or undertaking of public utility, as a turnpike, navigation, canal, railway, or paving act, the legislature will not scruple to interfere with private property, and will compel the owner of the land to alienate his possessions on receiving a reasonable price and compensation for so doing; but such an arbitrary exercise of power¹ is indulged with caution; the true *principle [^{*4}] applicable to all such cases being, that the private interest of the individual is never to be sacrificed to a greater extent than is necessary to secure a public object of adequate importance.² The courts, therefore, will not so construe an act of Parliament as to deprive persons of their estates and transfer them to other parties without compensation, in the absence of any manifest or obvious reason of policy for so doing, unless they are so fettered by the express words of the statute as to be unable to extricate themselves, for they will not suppose that the legislature had such an intention.³ And, as was observed in a recent case, where large powers are entrusted to a company to carry their works through a great extent of country without the consent of the owners and occupiers of land through which they are to pass, it is reasonable and just, that any injury to property which can be shown to arise from the prosecution of those works should be fairly compensated to the party sustaining it.⁴

In accordance with the general principle under consideration, it was held, that, where the commissioners appointed by a paving act occasioned damage to an individual, without any excess of jurisdiction on their part, neither the *commissioners nor the paviors [^{*5}] acting under them were liable to an action, the act of Parlia-

¹ See per Lord Eldon, C., 1 My. & K. 162. Judgment, *Tawney v. The Lynn and Ely Railway Company*, 16 L. J., Chan., 282; *Webb v. Manchester and Leeds Railway Company*, 4 My. & Cr. 116, where the principles on which Equity will exercise its jurisdiction over companies invested with compulsory powers are considered. The proper mode of construing such acts will be explained hereafter.

² 1 Bla. Com. 139; 1 Steph. Com. 154. See Judgment, *Simpson v. Lord Howden*, 1 Keen, 598, 599; *Lister v. Lobley*, 7 A. & E. 124.

³ See per Lord Abinger, C. B., *Stracey v. Nelson*, 12 M. & W. 540, 541; per Alderson, B., *Doe d. Hutchinson v. Manchester and Rosendale Railway Company*, 14 M. & W. 694; *Anon.*, Loft, 442; *R. v. Croke*, Cowp. 29; *Clarence Railway Company v. Great North of England Railway Company*, 4 Q. B. 46.

⁴ Judgment, *Reg. v. The Eastern Counties Railway Company*, 2 Q. B. 859; *Blake-more v. Glamorganshire Canal Company*, 1 Mylne & K. 162.

ment under which the commissioners acted not giving them power to award satisfaction to the individuals who happened to suffer; and it was observed, that some individuals suffer an inconvenience under all such acts of Parliament, but the interests of individuals must give way to the accommodation of the public,¹—*privatum incommodum publico bono pensatur.*²

We shall hereafter have occasion to consider more minutely the general principles applicable to the interpretation of statutes passed with a view to the carrying out of undertakings calculated to interfere with private property. We may, however, observe, in connexion with our present subject, that the extraordinary powers with which railway and other similar companies are invested by the legislature, are given to them "in consideration of a benefit which, notwithstanding all other sacrifices, is, on the whole, hoped to be obtained by the public;" and that, since the public interest is to protect the private rights of all individuals, and to save them from liabilities beyond those which the powers given by such acts necessarily occasion, they must always be carefully looked to, and must not be extended further than the legislature has provided or than is necessarily and properly required for the purposes which it has sanctioned.³ It is, moreover, important to observe the distinction which exists between public and private Acts of Parliament, with reference to the obligations which they impose. "Where an act of Parliament, in express terms, or by necessary implication, empowers an individual or individuals to [*6] take or interfere with the property or rights of another, and, upon a sound construction of the act, it appears to the Court that such was the intention of the legislature—in such case it may well be the duty of the Court, whose province it is to declare, and not to make the law, to give effect to the decrees of the legislature so expressed. But, where an act of Parliament merely enables an individual or individuals to treat with property of his or their own, for their own benefit, and does not, in terms, or by necessary implication, empower him or them to take or interfere with the property or rights of others, questions of a very different character arise;" and here the distinction above mentioned becomes material, for public acts, it is said in the books, bind all the Queen's subjects; but of

¹ *Plate Glass Company v. Meredith*, 4 T. R. 794. See *Sutton v. Clarke*, 6 Taunt. 29; *Alston v. Scales*, 9 Bing 8.

² *Jenk. Cent.* 85.

³ Per Lord Langdale, M.R., *Colman v. Eastern Counties Railway Company*, 16 L. J. Chan., 78.

private acts of Parliament, meaning thereby not merely private estate acts, but local and personal,¹ as opposed to general public acts, "it is said, that they do not bind strangers, unless by express words or necessary implication the intention of the legislature to affect the rights of strangers is apparent in the act, and whether an act is public or private, does not depend upon any technical considerations (such as having a clause or declaration, that the act shall be deemed a public act), but upon the nature and substance of the case."²

From the principle under consideration, and from the very nature of the social compact on which all municipal law is founded, and in consequence of which every man, when he enters into society, gives up a part of his natural liberty,³ result those laws which, in certain cases, authorize *the infliction of penalties, the privation of [*7] liberty, and even the destruction of life, with a view to the future prevention of crime, and to insuring the safety and well-being of the public; penal laws, however, and such as impose capital punishment, must evidently be restrained within the narrowest limits which may be deemed by the legislature compatible with the above objects, and should be interpreted by the judges, and administered by the executive, in a mild and liberal spirit. A maxim is, indeed, laid down by Lord Bacon, which will at first sight appear inconsistent with these remarks; for he observes, that the law will dispense with what he designates as the "*placita juris*" "rather than crimes and wrongs should be unpunished, *quia salus populi suprema lex,*" and "*salus populi,* is contained in the repressing offences by punishment," and, therefore, *receditur a placitis juris potius quam injuriæ et delicta maneamt impunita.*⁴ This maxim must, however, at the present day, be understood to apply to those cases only in which the judges are invested with a discretionary power to permit such amendments to be made, *ex. gr.*, in an indictment,—as may prevent justice from being defeated by mere verbal inaccuracies, or by a non-observance of certain legal technicalities;⁵ and a distinction must, therefore, still be remarked between the "*placita*" and the "*regulæ juris*," inasmuch as the law will rather suffer a particular offence to escape without punishment, than permit a violation of its fixed and positive rules.⁶

¹ See *Cook v. Gent*, 12 M. & W. 234.

² Per Wigram, V. C., *Dawson v. Paver*, 5 Hare, 434, citing *Barrington's case*, 8 Rep. 138 a; and *Lucy v. Levington*, 1 Ventr. 175.

³ 2 Steph. Com. 486.

⁴ Bac. Max. reg. 12.

⁵ See *Stats. 7 Geo. 4, c. 64, ss. 19, 20, 21*; *9 Geo. 4, c. 15.* ⁶ Bac. Max., reg. 12.

[*8] *NECESSITAS INDUCIT PRIVILEGIUM QUOAD JURA PRIVATA.

(Bac. Max., reg. 5.)

With respect to private rights, necessity privileges a person acting under its influence.

As a general rule, the law charges no man with default where the act done is compulsory, and not voluntary, and where there is not a consent and election on his part; and, therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carries a privilege in itself.¹

Necessity, as contemplated in the above rule, may be considered under three different heads:—1. Necessity of self-preservation; 2. Of obedience; 3. Necessity resulting from the act of God or of a stranger.²

1. Where two persons, being shipwrecked, have got on the same plank, but, finding it not able to save them both, one of them thrusts the other from it, and he is drowned; this homicide is excusable through unavoidable necessity, and upon the great universal principle of self-preservation, which prompts every man to save his own life in preference to that of another, where one of them must inevitably perish.³ So, if a ferry-man overload his boat with merchandise, a passenger may, in case of necessity, throw overboard the goods to save his own life, and the lives of his fellow-passengers.⁴ For the same reason, where one man attacks another, and the latter, [*9] without fighting, flies, and, after retreating *as far as he safely can, until no means remain to him of escaping his assailant, then turns round and kills his assailant, this homicide is excusable, as being committed in self-defence; the distinction between this kind of homicide and manslaughter being, that here the slayer could not otherwise escape although he would,—in manslaughter he would not escape if he could.⁵ The same rule extends to the principal civil and natural relations of life; therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused, the

¹ Bac. Max., reg. 5, cited argument, 1 T. R. 32; Jenk. Cent. 280.² Bac. Max., reg. 5; Noy, Max., 9th ed. p. 32.³ Bac. Max., reg. 5; 4 Bla. Com. 186; 1 Russ. on Crimes, 8d ed. 664.⁴ Mouse's Case, 12 Rep. 63.⁵ Arch. Cr. Pl., 8th ed. 412; 1 Russ. on Crimes, 8d ed. 661.

act of the relation assisting being construed the same as the act of the party himself.¹

It should, however, be observed, that, as the excuse of self-defence is founded on necessity, it can in no case extend beyond the actual continuance of that necessity by which alone it is warranted; for, if a person assaulted does not fall upon the aggressor till the affray is over, or when the latter is running away, this is revenge, and not defence.² There is also another instance of necessity, which may be mentioned,—where a man, being in extreme want of food or clothing, steals either in order to relieve his present necessities. In this case the law of England admits no such excuse as that above considered; but the Crown has a power to soften the law, and to extend mercy in a case of peculiar hardship.³

2. Obedience to existing laws is a sufficient extenuation of guilt before a civil tribunal.⁴ As, where the proper *officer executes a criminal in strict conformity with his sentence, or where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it.⁵ And where a known felony is attempted upon any one, not only the party assaulted may repel force by force, but his servant attending him, or any other person present, may interpose to prevent the mischief, and, if death ensue, the party so interposing will be justified.⁶ So, in executing process, a sheriff, it has been observed, acts as a ministerial officer in pursuance of the command he receives in the king's name from a court of justice, and which command he is bound to obey. He is not a volunteer, acting from his own free will or for his own benefit, but imperatively commanded to execute the king's writ. He is the servant of the law, and the agent of an overruling necessity; and if the service of the law be a reasonable service, he is (in accordance with the above maxim) justly entitled to expect indemnity,⁷ so long as he acts with diligence, caution, and pure good faith; and it should be

¹ 1 Russ. on Crimes, 3d ed. 662.

² Id. 665.

³ 4 Bla. Com. 31; 1 Hale, P. C. 54.

⁴ *Ejus vero nulla culpa est cui parere necesse sit*, D. 50, 17, 169.

⁵ 4 Bla. Com. 28.

⁶ 1 Russ. on Crimes, 3d ed. 670.

⁷ Hence, the proceeding by Interpleader, as to which see per Maule, J., *Hollier v. Laurie*, 3 C. B. 841, 2; and in *Williams v. Crossling*, 16 L. J., C. P., 112; *Judgment, King v. Simmonds*, 7 Q. B. 810; *King v. Birch*, Id. 696; *Abbott v. Richards*, 15 M. & W. 194; *Slaney v. Sidney*, 14 M. & W. 800.

remembered, he is not at liberty to accept or reject the office at his pleasure, but must serve if commanded by the Crown.¹ In this case, therefore, the rule of law usually applies, that *necessitas quod cogit defendit*.² Although instances do occur where the sheriff is placed in a situation of difficulty, because he is the mere officer of the Court, and the Court are bound to *see that suitors obtain the fruits of decisions in their favour.³

In the private relations of society, the same principle is likewise, in some cases, applicable; as, where obedience proceeds from the matrimonial subjection of the wife to the husband, from which the law presumes coercion, and which, in many cases, excuses the wife from the consequences of criminal misconduct. Thus, if a larceny be committed by a feme covert in the presence of her husband, the law presumes that she acted under his immediate coercion, and excuses her from punishment.⁴ This presumption, however, may be rebutted by evidence; and if it appear that the wife was principally instrumental in the commission of the crime, acting voluntarily, and not by constraint of her husband, although he was present and concurred, she will be guilty and liable to punishment;⁵ and if, in the absence of her husband, she commit a like offence, even by his order or procurement, her coverture will be no excuse.⁶

But the private relation which exists between parent and child, or master and servant, will not excuse or extenuate the commission of any crime, of whatever denomination; for the command to commit a crime is void in law, and can protect neither the commander nor the instrument.⁷

3. In criminal cases, idiots and lunatics are not chargeable for their own acts, if committed when in a state of incapacity, it being a rule of our law, that *furiosus solo furore punitur*,—*a madman is only punished by his madness;⁸ the reason of this rule obviously being, that, where there exists an incapacity or a defect of understanding, inasmuch as there can be no consent of the will, so

¹ Per Vaughan, B., *Garland v. Carlisle* (in error), 2 Cr. & M. 77; S. C., 4 Cl. & Fin. 701.

² 1 Hale, P. C. 54.

³ See particularly the important case of *Stockdale v. Hansard*, 11 A. & E. 258.

⁴ Hale, P. C. 45; 1 Hawk., c. 1, s. 9; 4 Bla. Com. 28.

⁵ 1 Hale, P. C. 516.

⁶ 1 Russ. on Crimes, 3d ed. 18, n. (2).

⁷ 1 Hale, P. C. 44, 516; 4 Bla. Com. 28.

⁸ Co. Litt. 247 b; 4 Bla. Com. 24, 25.

the act done cannot be culpable. Every man is, however, *presumed* to be sane, and to possess a sufficient degree of reason to be responsible for his actions, until the contrary has been satisfactorily proved; and in order to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know what he was doing, that he did not know he was doing what was wrong. "If," said the majority of the judges, in answer to the questions recently proposed to them by the House of Lords, relative to insane criminals, "the accused was conscious that the act was one which he ought not to do, and if that act was, at the same time, contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require."¹

Where the party charged with an offence was, at the time of its commission, under the influence of insane delusion, the application of the general rule thus laid down is, in practice, often attended with considerable difficulty, and *the rule itself will require to [*13] be modified according to the peculiar nature of the delusion and the infinite diversity of facts which present themselves in evidence. The following rules and illustrations, mentioned by the learned judges, will be found to throw considerable light upon this difficult and interesting subject:—

1st. Where an individual labours under an insane delusion in respect of some particular subject or person, and knew, at the time of committing the alleged crime, that he was acting contrary to law, he will be punishable according to the nature of the crime committed. And, 2dly, where such delusion is as to existing facts, and the individual labouring under it is not, in other respects, insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion existed were real. For instance,

¹ 8 Scott, N. R. 601; Reg. v. Higginson, 1 Car. & K. 129. As to the criterion of testamentary capacity, see *Mudway v. Croft*, 3 Curt. 671; *Greenwood v. Greenwood*, Id. App.; *Frere v. Peacocke*, 1 Robertson, 442.

if a man, under the influence of his delusion, supposes another to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment; whereas, if his delusion was that the deceased had inflicted a serious injury upon his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.¹

The immunity from punishment, which the law, through motives of humanity and justice, allows to persons mentally affected, is not, however, extended to him who commits a felony, or other offence, while in a state of drunkenness; he shall not be excused, because his incapacity arose from his own default, but is answerable to the law equally as if he had been in the full possession of his faculties at the [*14] *time,² a principle of law which is embodied in the familiar adage, *qui peccat ebrius luat sobrius*.³ As for a drunkard, says Sir E. Coke,⁴ who is *voluntarius dæmon*, he hath no privilege thereby, but what hurt or ill soever he doeth his drunkenness doth aggravate it, *omne crimen ebrietas et incendit et detegit*. But, although drunkenness is clearly no excuse for the commission of any crime, yet proof of the fact of drunkenness is often very material, as tending to show the *intention* with which the particular act charged as an offence was committed.⁵

From the principle that *necessitas inducit privilegium*, we may further remark that the law excuses the commission of an act *prima facie* criminal, if such an act be done involuntarily, and under circumstances which show that the individual doing it was not really a free agent. Thus, if A., by force take the hand of B., in which is a weapon, and therewith kill C., A. is guilty of murder, but B. is excused; though if merely a moral force be used, as threats, duress of imprisonment, or even an assault to the peril of his life, in order to compel him to kill C., this is no legal excuse.⁶ It must be observed, however, that necessity privileges only *quoad jura privata*, and that, if the act be done against the commonwealth, necessity does not excuse—*privilegium contra rempublicam non valet*;⁷ and hence protection is not allowed in the case of a wife, if the crime be *malum*

¹ 8 Scott, N. R. 601, 608.

² Bac. Max., reg. 5 ad finem. As to the civil liability which may be incurred by one intoxicated, see *Gore v. Gibson*, 18 M. & W. 628.

³ Carey, 98, 188.

⁴ 1 Inst. 247 a.

⁵ 1 Russ. on Crimes, 8d ed. 7, 8.

⁶ 1 Hale, P. C. 484; 1 East, P. C. 225.

⁷ Bac. Max., reg. 5; Noy, Max., 9th ed. p. 84.

in se, and prohibited by the law of Nature, or if it be heinous in its character or dangerous in its consequences; if a married woman, for instance, be guilty of treason, murder, or *offences of the like [*15] description, in company with, and by coercion of her husband, she is punishable equally as if she were sole.¹ So, if a man be violently assaulted, and has no other possible means of escaping death than by killing an innocent person, this fear and force shall not acquit him of murder, for he ought rather to die himself, than escape by the murder of an innocent man.²

Lastly, it is evident that cases do, although rarely, occur, in which an individual may be required to sacrifice his own life for the good of the community, and in which, consequently, the necessity of self-preservation, which excuses *quoad jura privata*, is overruled by that higher necessity which regard to the public welfare imposes, and in such cases, therefore, the maxim applies *necessitas publica major est quàm privata*. Death, it has been observed, is the last and farthest point of particular necessity, and the law imposes it upon every subject, that he prefer the urgent service of his king and country to the safety of his life.³

SUMMA RATIO EST QUÆ PRO RELIGIONE FACIT.

(Co. Litt. 841, a.)

That rule of conduct is binding which is consistent with religion.

It is accordingly laid down, by a high authority, that if ever the laws of God and man are at variance, the former are to be obeyed in derogation of the latter;⁴ and we may observe, that the maxim we have above cited from *the commentaries of Sir E. Coke is, in truth, derived from the Roman law, where Papinian, after [*16] remarking that certain religious observances were favoured by that law, gives as a reason *summam esse rationem quæ pro religione facit*.⁵ It is, indeed, sufficiently evident that the law of God must, under all circumstances, be superior in obligation to that of man; and that, consequently, if any general custom were opposed to the Divine law, or if any statute were passed directly contrary thereto, as if it were enacted generally that no one should give alms to any object in ever so

¹ 4 Bla. Com. 29; 1 Russ. on Crimes, 8d ed. 18, 19.

² 4 Bla. Com. 80.

³ Bac. Max., reg. 5; Noy, Max., 9th ed. p. 84. In connexion with the subject above considered, see the maxim, "Lex non cogit ad impossibilia," post.

⁴ 1 Bla. Com. 16th ed. 68, n. (6).

⁵ Dig. 11, 7. 48.

necessitous a condition, such a custom, or such an act would be void.¹ *I doubt it.*

It may further be observed, that, upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, that no human laws can be suffered to contradict these. For instance, in the case of murder; this is expressly forbidden by the divine, and demonstrably by the natural law, and if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine.² It cannot, however, be doubted that obedience to the laws of our country, provided such laws are not opposed to the law of God, is a moral duty; and, therefore, although disobedience is justifiable in the one case supposed of a contradiction between divine and human laws, yet this is not so, either where the human law affirms the divine in a matter not indifferent in itself,—as where it forbids theft,—or where the human law commands or prohibits in a matter purely indifferent; and in *both these cases it becomes a moral duty [17] on the part of the subject to obey.³ In order to form a correct judgment on this subject, it is necessary to take into consideration, that the true principle both of moral and positive law is, in effect the same—viz. utility, or the general welfare; and that the disobedience of either sort of precept must be presumed to involve in it, some kind of mischievous consequence, if for no other reason, yet for this, that such example of disobedience may encourage others to violate laws of a beneficial character, and tend to lessen that general reverence which ought to be entertained by the community for the institutions of the country.⁴

Not only would the general maxim which we have been considering apply, if a conflict should arise between the law of the land and the law of God, but it likewise holds true with reference to foreign laws, wheresoever such laws are deemed by our courts inconsistent with the divine; for although it is well known that courts of justice in this country will recognise foreign laws and institutions, and will administer the *lex loci* in determining as to the validity of contracts, and in adjudicating upon the rights and liabilities of litigating parties, yet inasmuch as the proceedings in our courts are founded upon

¹ Doct. & Stud., 18th ed. 15, 16; Noy, Max. 9th ed. p. 2; 2 Dwarr. Stats. 642 et seq; Finch's Law, 75, 76.

² 1 Bla. Com. 42, 48. See 2 Dwarr. Stats. 642.

³ 1 Bla. Com., 16th ed. 58, n. 6; Plowd. Com. 288, 269.

⁴ See 1 Steph. Com. 88, 89.

the law of England, and since that law is founded upon the law of nature and the revealed law of God, it follows, that, if the right sought to be enforced is inconsistent with either of these, the English municipal courts cannot recognise it; and it may, therefore, be laid down generally, that what is called international comity, or the *comitas inter communitates*, cannot prevail here in any case, where its observance would tend *to violate the law of this [*18] country, the law of nature, or the law of God.¹ *The true rule in the absence of legislation is that the common law is the common law.*

DIES DOMINICUS NON EST JURIDICUS.

(Noy, Max. 2.)

Sunday is not a day for judicial or legal proceedings.

The Sabbath-day is not *dies juridicus*, for that day ought to be consecrated to divine service.² The keeping of one day in seven holy as a time of relaxation and refreshment, as well as for public worship, is, indeed, of admirable service to a state, considered merely as a civil institution; and it is the duty of the legislature to remove as much as possible, impediments to the due observance of the Lord's day.³ Accordingly, the judges cannot sit on a Sunday, this day being exempt from all legal business by the common law.⁴

So, by stat. 29 Car. 2, c. 7, s. 6, service of a writ of summons or other process on a Sunday is void, and no subsequent act of the defendant will be deemed a waiver of this irregularity; and, by the same statute, no arrest can be made upon a Sunday, except for treason, felony, breach of the peace, or generally for some indictable offence.⁵ So, service of the declaration in ejectment, or of a rule of court, must not be made on that day; nor can an attachment be put in force, or an execution be *executed then.⁶ So, an arrest [*19] made on a Sunday is illegal,⁷ unless after a negligent escape.⁸ Bail may, however, take their principal on that day.⁹ And it has been

¹ See per Best, J., *Forbes v. Cochrane*, 2 B. & C. 471.

² Co. Litt. 135, a; Wing. Max. 5, p. 7; Finch's Law, 7.

³ 4 Bla. Com. 63.

⁴ See the preamble of stat. 3 & 4 Will. 4, c. 31.

⁵ *Fiah v. Broket*, Plowd. 265; S. C., Dyer, 181 b; Noy, Max., 9th ed. 2; 8 & 4 Will. 4, c. 42, s. 43.

⁶ *Taylor v. Phillips*, 3 East, 155.

⁷ *Rawlins v. Ellis*, 10 M. & W. 172.

⁸ 2 Chit. Arch. Pr., 8th ed. 921, 1415, 1524. A writ of *distringas* returnable on a Sunday is a nullity. *Morrison v. Manley*, 1 Dowl. N. S. 773; *Kenworthy v. Papiatt*, 4 B. & Ald., 288.

⁹ 29 Car. 2, c. 7, s. 6.

¹⁰ 1 Chit. Arch. Pr., 8th ed. 616. *Sir William Moore's case*, 2 Lord Raym. 1028.

¹¹ 1 Chit. Arch. Pr., 8th ed. 548, (*).

held, also, that, when the 20th of July, which is the last day for service of notice of claim under the Registration Act, 6 & 7 Vict. c. 18, s. 4, happens to fall on a Sunday, service at the dwelling-house of the overseer upon that day is good service, for such delivery is no violation of any known rule of law, the overseer who receives the notice not being called upon to perform any duty which can interfere with the most scrupulous observance of the Lord's day.¹

If the day fixed for the commencement of term happens to be a Sunday, it must, for the purpose of computation, and in the absence of any express statutory provisions, be considered as the first day of the term, although, as the courts do not sit, no judicial act can be done, or supposed to be done, till the following Monday.² Where, however, the last day of term falls on a Sunday, it is enacted, by stat. 1 Will. 4, c. 3, that the Monday next following shall be deemed and taken to be the last day of term.

Again, the stat. 29 Car. 2, c. 7, s. 1, enacts, that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings on Sunday (works *of necessity and charity only excepted), and that every person of the age of fourteen years offending in the premises shall forfeit the sum of 5s.³ The effect of which enactment is, that, if a man in the exercise of his ordinary calling,⁴ make a contract on a Sunday, that contract will be void, so as to prevent a party who was privy to what made it illegal from suing upon it in a court of law, but not so as to defeat a claim made upon it by an innocent party.⁵ A horse-dealer, for instance, cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday,⁶ though, if the contract be not completed on the Sunday, it will not be affected by the statute.⁷

¹ Rawlins App. Overseers of West Derby, Resp., 2 C. B. 72, 82.

² 1 Chit. Arch. Pr., 8th ed. 127.

³ See also the stats. 10 & 11 Will. 3, c. 24; 5 & 6 Will. 4, c. 37; 84 Geo. 3, c. 61, which allow exceptions to the general rule in certain cases of necessity, *Rex v. Younger*, 5 T. R. 449; there are also some other statutes which engraft additional exceptions on the rule.

⁴ See *Rex v. Inhabitants of Whitnash*, 7 B. & C. 596; *Smith v. Sparrow*, 4 Bing. 84; *Peate v. Dicken*, 1 Cr., M. & R. 422; *Scarfe v. Morgan*, 4 M. & W. 270.

⁵ Judgment, *Fennell v. Ridler*, 5 B. & C. 408, explaining Lord Mansfield's remarks in *Drury v. De la Fontaine*, 1 Taunt. 135.

⁶ *Fennell v. Ridler*, 5 B. & C. 406.

⁷ *Bloxsome v. Williams*, 3 B. & C. 282; *Smith v. Sparrow*, 4 Bing. 84. See also *Williams v. Paul*, 6 Bing. 653, observed upon in *Simpson v. Nicholls*, 3 M. & W. 240.

In a recent case before the House of Lords, it appeared, that an apprentice to a barber in Scotland, who was bound by his indentures "not to absent himself from his master's business on holiday or week-day, late hours or early, without leave," went away on Sundays without leave, and without shaving his master's customers:—*Held* by the Lords (reversing the interlocutors of the Court of Session), that the apprentice could not be lawfully required to attend his master's shop on Sundays, for the purpose of shaving *the cus- [*21] tomers, and that that work, and all other sorts of handicraft, were illegal in England as well as in Scotland, not being works of necessity, mercy, or charity.¹

Where, in an action of assumpsit for breach of the warranty of a horse, the defendant alone was in the exercise of his ordinary calling, and it appeared that the plaintiff did not know what his calling was, so that, in fact, defendant was the only person who had violated the statute:—The Court held, that it would be against justice to allow the defendant to take advantage of his own wrong, so as to defeat the rights of the plaintiff, who was innocent.² And for the like reason, in an action by the indorsee against the acceptor of a bill of exchange which was drawn on a Sunday, it was held, that the plaintiff might recover, there being no evidence that it had been accepted on that day; but the Court said, that, if it had been accepted on a Sunday, and such acceptance had been made in the ordinary calling of the defendant, and if the plaintiff was acquainted with this circumstance when he took the bill, he would be precluded from recovering on it, though the defendant would not be permitted to set up his own illegal act as a defence to an action at the suit of an innocent holder.³

A person, however, can commit but one offence on the same day by exercising his ordinary calling in violation of the above-mentioned statute; and if a justice of the peace convict him in more than one penalty for the same day, it is an excess of jurisdiction, for which an action will lie before the convictions are quashed.⁴

*In addition to the class of cases which have been decided [*22] under the statute of Charles, we may refer to a recent case of a somewhat different description, in which the principle of public

¹ Phillips v. Innes, 4 Cl. & Fin. 284.

² Bloxsome v. Williams, 3 B. & C. 232, cited 5 B. & C. 408, 409.

³ Begbie v. Levi, 1 Cr. & J. 180.

⁴ Crepps v. Durden, Cowp. 640.

policy, which dictated that statute, was, however, discussed. In the case alluded to, a question arose as to the validity of a by-law, by which the navigation of a certain canal was ordered to be closed on every Sunday throughout the year (works of necessity only excepted). In support of this by-law was urged the reasonableness of the restriction sought to be imposed thereby, and its conformity in spirit and tendency with those acts by which Sunday trading is prohibited; the Court, however, held, that the navigation company had no power, under their act, to make the by-law in question, their power being confined to the making of laws for the government and orderly use of the navigation, but not extending to the regulation of moral or religious conduct, which must be left to the general law of the land, and to the laws of God.¹

[*23]

*§ II.—RULES OF LEGISLATIVE POLICY.

In this section are comprised certain maxims which relate generally to the operation of statutes, and develop some important principles, which the legislature of every civilized country must for the most part observe in its enactments. These maxims are three in number: 1st, that a later shall repeal an earlier and conflicting statute; 2dly, that laws shall not have a retrospective operation; and 3dly, that enactments should be framed with a view to ordinary rather than to extraordinary occurrences. We shall hereafter have occasion to consider the rules applicable to the construction of statutes, and shall therefore, for the present, confine our attention to those elementary principles of legislative policy which have been just enumerated.

LEGES POSTERIORES PRIORES CONTRARIAS ABROGANT.

(1 Rep. 25 b.)

When the provisions of a later statute are opposed to those of an earlier, the earlier statute is considered as repealed.

The legislature, which possesses the supreme power in the state, possesses, as incidental to that power, the right of changing, modifying, and abrogating the existing laws. To assert that any one Parliament can bind a subsequent Parliament by its ordinances,

¹ *Calder and Hebble Navigation Company v. Pilling*, 14 M. & W. 76.

would in fact be to contradict the above plain proposition; if, therefore, an act of Parliament contains a clause, "that it shall not be lawful for the king, by authority of Parliament, during the space of seven years, to repeal and determine the same act," such a clause, which is technically termed "*clausula derogatoria*," will be simply void, and the act may, nevertheless, *be repealed in the seven [*24] years,¹ for *non impedit clausula derogatoria quo minus ab eadem potestate res dissolvantur a quibus constituentur*.² And again, *perpetua lex est nullam legem humanam ac positivam perpetuam esse, et clausula quæ abrogationem excludit ab initio non valet*.³ The principle thus set forth seems to be of universal application, though it will be remembered, that in our own Parliament an act cannot be altered or repealed in the same session in which it is passed, unless there be a clause inserted, expressly reserving a power to the legislature for this purpose.⁴

It is then an elementary and necessary rule, that a prior statute shall give place to a later. *Non est novum ut priores leges ad posteriores trahantur*,⁵ provided the intention of the legislature to repeal the previous statute be expressed in clear and unambiguous language, and be not merely left to be inferred from the subsequent statute.⁶ It is, indeed, peculiarly important to observe, that a more ancient statute will not be repealed by a more modern one, unless the latter expressly negative the former, or unless the provisions of the two statutes are manifestly repugnant, in which latter case the earlier enactment will be impliedly modified or repealed:⁷ implied repeals, moreover, are not *favoured by the law, since they [*25] carry with them a tacit reproach, that the legislature has ignorantly, and without knowing it, made one act repugnant to and inconsistent with another;⁸ and the repeal itself casts a reflection upon the wisdom of former Parliaments.⁹

¹ Bac. Max., reg. 19.

² Id.

³ Id.

⁴ 2 Dwarr. Stats. 678.

⁵ D. 1. 3. 26. *Constitutiones tempore posteriores potiores sunt his quæ ipsas præcesserunt*. D. 1. 4. 4. A rule of court will, of course, in like manner be overridden by a statute. *Harris v. Robinson*, 2 C. B. 908.

⁶ See *Phipson v. Harvett*, 1 Cr., M. & R. 478; judgment, *Reg. v. St. Edmund's, Salisbury*, 2 Q. B. 84.

⁷ 1 Bla. Com. 89; Gr. & Rud. of Law, 190; argument, *Reg. v. Mayor of London*, 16 L. J., Q. B. 191; 19 Vin. Abr. 525, "*Statutes*," (E. 6), pl. 182; 2 Dwarr. Stats. 638, 673. See per Lord Kenyon, C. J., *Williams v. Pritchard*, 4 T. R. 2, 4; *Rix v. Borton*, 12 A. & E. 470; *Dakins v. Seaman*, 9 M. & W. 777.

⁸ Vin. Abr. "*Statutes*," (E. 6), cited argument, *Phipson v. Harvett*, 1 Cr., M. & R. 481.

⁹ 2 Dwarr. Stats. 674.

"The rule," says Lord Hardwicke, "touching the repeal of laws, is *leges posteriores priores contrarias abrogant*; but subsequent acts of Parliament, in the affirmative, giving new penalties, and instituting new methods of proceeding, do not repeal former methods and penalties of proceeding, ordained by preceding acts of Parliament, without negative words."¹ It seems to be true, therefore, and in accordance with the opinion here expressed, that, in order to repeal an existing enactment, a statute must either have express words of repeal, or must be contrary to the provisions of the law said to be repealed, or that at least mention must be made of that law, showing an intention of the framers of the later act of Parliament to repeal the former.²

Where, then, both acts are merely affirmative, and the substance such that both may stand together, the later does not repeal the former, but they shall both have a concurrent efficacy.³ For instance, if, by a former law, an offence is indictable at the quarter sessions, and the later law makes the same offence indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both *have a concurrent jurisdiction, and the offender may [*26] be prosecuted at either, unless the new statute subjoins express negative words, as that the offence shall be indictable at the assizes, and not elsewhere.⁴ So, the general rule of law and construction undoubtedly is, that, where an act of Parliament does not create a duty or offence, but only adds a remedy in respect of a duty or offence which existed before, it is to be construed as cumulative; this rule must, however, in each particular case, be applied with due attention to the language of the act of Parliament in question.⁵ If, for instance, a crime be created by statute, with a given

¹ *Middleton v. Crofts*, 2 Atk. 674, cited *Wynn v. Davis*, 1 Curt. 79.

² Per Sir H. Jenner, 1 Curt. 80. See also the cases cited; argument *Reg. v. Mayor of London*, 16 L. J., Q. B. 191.

³ 1 Bla. Com. 90; *Dr. Foster's case*, 11 Rep. 62, 68; argument, *Ashfon v. Poynter*, 1 Cr., M. & R. 739; *Rex v. Aslett*, 1 B. & P., N. R., 7; *Langton v. Hughes*, 1 M. & S. 597; *Com. Dig.* "Parliament," (R. 9).

⁴ 1 Bla. Com. 90. See also the arguments in *Reg. v. St. Edmund's, Salisbury*, 2 Q. B. 72; *Reg. v. Justices of Suffolk*, *Id.* 85, where it was held, that, where a separate court of quarter sessions has been granted to a borough under stat. 5 & 6 Will. 4, c. 76, the recorder, under sect. 105, has exclusive jurisdiction of appeals against orders of removal made by the borough justices. See also *Reg. v. Deane*, 2 Q. B. 96.

⁵ *Judgment, Richards v. Dyke*, 3 Q. B. 268. 2 Darr. Stats. 674, 678. See *Thibault, q. t. v. Gibson*, 12 M. & W. 88.

penalty, and be afterwards repeated in a subsequent enactment, with a lesser penalty attached to it, the new act would, in effect, operate to repeal the former penalty; for, though there may no doubt be two remedies in respect to the same matter, yet they must be of different kinds.¹

It has been long established, that when an act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it never had existed.² There is, however, a difference to be remarked between *temporary* statutes and statutes which have been repealed; *for, although the latter (except so far as they relate to transactions already completed under them) [*27] become as if they had never existed, yet, with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction.³

If a statute which repeals another is itself subsequently repealed, the first statute is thereby revived, without any formal words for that purpose;⁴ but where a contract for insuring tickets in the lottery was void by statute when made, such contract was held not to be set up again by a repeal of the statute between the time of contracting and the commencement of the suit.⁵

Prior to the stat. 33 Geo. 3, c. 13, it was not possible to know the precise day on which an act of Parliament received the royal assent, and all acts passed in the same session of Parliament were considered to have received the royal assent on the same day, and were referred to the first day of the session; but, by the above statute, it is provided that a certain parliamentary officer, styled "the clerk of the Parliaments," shall indorse, on every act of Parliament, "the day, month, and year, when the same shall have passed and shall have received the royal assent, and such indorsement shall be taken to be a part of such act, and to be the date of its commencement, where no other commencement shall be therein

¹ *Henderson v. Sherborne*, 2 M. & W. 239; per Lord Abinger, C. B., *Attorney-General v. Lockwood*, 9 M. & W. 391; *Rex v. Davis*, Leach, C. C. 271. See also *Wrightup v. Greenacre*, 16 L. J., Q. B. 246; recognising *Pillington v. Cooke*, cited *Id.* 251.

² Per Lord Tenterden, *Surtees v. Ellison*, 9 B. & C. 752; per Parke, B., *Simpson v. Ready*, 11 M. & W. 346.

³ Per Parke, B., *Steavenson v. Oliver*, 8 M. & W. 241.

⁴ 1 Bla. Com. 90. See 2 Inst. 685.

⁵ *Jaques v. Withy*, 1 H. Bla. 65, cited per Coleridge, J., *Hitchcock v. Way*, 6 A. & E. 946.

provided." When, therefore, two acts, passed in the same session of Parliament, are repugnant or contradictory to each other, that act which last received the royal assent will prevail, and will have the effect of repealing the previous statute.¹ The same principle [*28] moreover applies where the proviso of an act is directly repugnant to the purview of it; for in this case the proviso shall stand, and be held to be a repeal of the purview, as it speaks the last intention of the makers.²

Not merely does an old statute give place to a new one, but, where the common law and the statute differ, the common law gives place to the statute,³ if expressed in negative terms.⁴ And, in like manner, an ancient custom may be destroyed by the express provisions of a statute.⁵ Statutes, however, "are not presumed to make any alteration in the common law further or otherwise than the act does expressly declare; therefore, in all general matters, the law presumes the act did not intend to make any alteration, for, if Parliament had had that design, they would have expressed it in the act."⁶

NOVA CONSTITUTIO FUTURIS FORMAM IMPONERE DEBET,
NON PRÆTERITIS.

(2 Inst. 292.)

A legislative enactment ought to be prospective, and not retrospective, in its operation.

Every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past, must be deemed retrospective⁷ in its operation, [*29] and opposed *to those principles of jurisprudence which have been universally recognised as sound. In the Roman law we find it laid down generally, that *nemo potest mutare consilium suum*

¹ *Rex v. Justices of Middlesex*, 2 B. & Ad. 818; *Paget v. Foley*, 2 Bing. N. C. 691.

² *Attorney-General v. The Chelsea Waterworks Company*, Fitagib. 195, cited 2 B. & Ad. 826.

³ 1 Bla. Com. 89; Co. Litt. 115, b; *Paget v. Foley*, 2 Bing. N. C. 679; Per Lord Ellenborough, C. J., *R. v. Aslett*, 1 N. R. 7.

⁴ Bac. Abr., 7th ed., "Statute," (G).

⁵ See *The Salters' Company v. Jay*, 3 Q. B. 109.

⁶ Per Trevor, C. J., 11 Mod. 150.

⁷ Per Story, J., 2 Gallis. R. (U. S.) 189. In the judgment of Kent, C. J., *Dash v. Van Kleeck*, 7 Johns. R. (U. S.) 608, et seq., the rule as to *nova constitutio* is fully considered, and the cases and authorities upon this subject are reviewed.

in alterius injuriam;¹ and this maxim has, by the civilians,² been specifically applied as a restriction upon the law-giver, who was thus forbidden to change his mind to the prejudice of a vested right; and that this interpretation of the rule is at all events in strict conformity with the spirit of the civil law appears clearly by a reference to the Code, where the principle which we here propose to consider, is thus stated: *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari; nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit.*³ Laws should be construed as prospective and not retrospective, unless they are expressly made applicable to past transactions, and to such as are still pending.⁴

It is then in general true, that a statute shall not be so construed as to operate retrospectively, or to take away a vested right, unless it contain either an enumeration of the cases in which it is to have such an operation, or words which can have no meaning unless such a construction is adopted.⁵

In a very recent case it was, in accordance with the above doctrine, laid down, that, where the law is altered by statute pending an action, the law, as it existed when the action was commenced, must decide the rights of the parties in the suit, unless the legislature express a clear intention to vary the relation of litigant parties to each other.⁶ And on the same principle it was held, that the statute 2 & 3 Vict. c. 29, s. 2, does not apply to a case [*30] where the assignees in bankruptcy were appointed before its passing; for, if so, it would operate to defeat rights antecedently vested in the assignees.⁷ Again, the Statute of Frauds (29 Car. 2, c. 3) was passed in 1676, and by Sect. 4 provides, that, "from and after the 14th June, 1677, no action shall be brought whereby to charge any

¹ D. 50, 17, 75.

² Taylor, Elem. Civ. Law, 168.

³ Cod. 1, 14, 7.

⁴ See 15 Tyng. R. (U. S.) 454.

⁵ 7 Bac. Abr., 7th ed., "Statute," (C), p. 439. See *Latless v. Holmes*, 4 T. R. 660; *Doe d. Johnson v. Liversedge*, 11 M. & W. 517; *Dash v. Van Kleeck*, 7 Johnson, R. (U. S.) 477.

⁶ *Hitchcock v. Way*, 6 A. & E. 948, 951; *Paddon v. Bartlett*, 8 A. & E. 895, 896. In *Chappell v. Purday*, 12 M. & W. 308, Lord Abinger, C. B., observed, with reference to sects. 11 & 14 of the statute 5 & 6 Vict. c. 45, for amending the Law of Copy-right, "The statute cannot in reason apply to the case of a controversy existing at the time it was passed."

⁷ *Moore v. Phillips*, 7 M. & W. 536. See also *Edmonds v. Lawley*, 6 M. & W. 285. As to the operation of stat. 6 Geo. 4, c. 16, see *Young v. Rishworth*, 8 A. & E. 470; *Benjamin v. Belcher*, 11 A. & E. 350.

person upon any agreement made upon consideration of marriage, &c., unless the agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing, and signed by the party or some other person thereunto by him lawfully authorized;" and the question was, whether a promise of marriage made before the new act, but to be performed after, would maintain an action without note in writing. The Court were of opinion that the action lay, notwithstanding the act, and agreed that the act did not extend to promises made before the 24th of June; and judgment was given for the plaintiff.¹

Where a patent originally void was amended under 5 & 6 Will. 4, c. 88, by filing a disclaimer of part of the invention, it was held that the above act has not a retrospective operation, so as to make a party liable for an infringement of the patent prior to the time of entering such disclaimer. "The rule," observes Parke, B., "by which *we are to be guided in construing acts of Parliament, [*31] is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice, and, if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done. Now, if the construction contended for was to be considered as the right construction, it would lead to the manifest injustice of a party who might have put himself to great expense in the making of machines or engines, the subject of the grant of a patent, on the faith of that patent being void, being made a wrong-doer by relation; that is an effect the law will not give to any act of Parliament, unless the words are manifest and plain."²

Where, however, the words of a statute "are manifest and plain," the Court will give effect to them, notwithstanding any particular hardship, inconvenience, or detriment, which may be thereby occasioned. For instance, by letters-patent granted to the plaintiff, it was, amongst other things, provided, that, if the plaintiff should not particularly describe and ascertain the nature of his invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled

¹ *Gillmore v. Shuter*, Jones, R. 108; S. C., 2 Lev. 227.

² *Perry v. Skinner*, 2 M. & W. 471, 476. See also *Stocker v. Warner*, 1 C. B. 148, 167; *Russell v. Ledsam*, 14 M. & W. 574, S. C. (in error), 16 L. J., Exch. 146. As to the general principle illustrated in the text, see *Doe d. Evans v. Pye*, 5 Q. B. 767, 772, decided with reference to stat. 3 & 4 Will. 4, c. 27, s. 7; *Thompson v. Lack*, 3 C. B. 640, decided with reference to stat. 7 & 8 Vict. c. 96, s. 25.

in her Majesty's High Court of Chancery, within four calendar months next and immediately after the date of the said letters-patent, then the said letters-patent should become void. By an act of Parliament, 4 & 5 Vict. c. 1, subsequently obtained, which recited that *letters-patent had been granted to the plaintiff; that the specification was enrolled within six months, instead of being [*32] enrolled within four months of the date thereof, as required by the letters-patent; that such non-enrolment had arisen from inadvertence and misinformation; and that it was expedient that the patent should be rendered valid to the extent thereafter mentioned; it was enacted, that the letters-patent should, during the remainder of the term, be considered, deemed, and taken to be as valid and effectual, to all intents and purposes, as if the specification thereunder so enrolled by the plaintiff within six months after the date thereof, had been enrolled within four months. In case for infringement of the patent by the defendant, who had himself obtained letters-patent for a bona fide improvement upon the plaintiff's invention prior to the passing of the said act of Parliament, and at a time when the plaintiff's patent had ceased to have any validity, by reason of its non-enrolment; it was held that the act of Parliament in question operated as a complete confirmation of the plaintiff's patent, although such a construction imposed upon the defendant the hardship of having his patent destroyed by an *ex post facto* law.¹

The preceding may perhaps be considered a strong, but is by no means a solitary instance² of a statute being held to have a retrospective operation. Thus, the plaintiff sued in Hilary Term, 1829, for a debt which had accrued due more than six years previously: it was held that the stat. 9 Geo. 4, c. 14, which came into operation on the 1st January, 1829, precluded him from recovering on an *oral promise to pay the debt made by defendant in February, 1828.³ In this case the action was brought *after* [*33] statute had begun to operate; but the same principle was applied where the action was brought *before*, though not tried till *after*, the

¹ Stead v. Carey, 1 C. B. 496.

² See as to stat. 2 & 3 Vict. c. 37, s. 1, Hodgkinson v. Wyatt, 4 Q. B. 749; as to stat. 6 & 7 Vict. c. 78, s. 37, Brooks v. Bockett, 16 L. J., Q. B. 178. Quære, whether stat. 9 & 10 Vict. c. 66, is *retrospective*: vid. Reg. v. Justices of Middlesex, 16 L. J., M. C. 135.

³ Towler v. Chatterton, 6 Bing. 258. See also Bradshaw v. Tasker, 2 My. & K. 221; Fourdrin v. Gowdey, 3 My. & K. 388.

statute came into force.¹ There are, moreover, several authorities for extending remedial enactments to inchoate transactions,² yet these appear to have turned on the peculiar wording of particular acts, which seemed to the Court to compel them to give the law an *ex post facto* operation.³ We may also, in connexion with this part of the subject, observe, that, where an act of Parliament is passed to correct an error by omission in a former statute of the same session, it relates back to the time when the first act passed, and the two must be taken together, as if they were one and the same act, and the first must be read as containing in itself in words the amendment supplied by the last.⁴

The injustice and impolicy of *ex post facto*⁵ or retrospective legislation are yet more apparent with reference to criminal laws, than to such as regard property or contracts; it would, as observed by Mr. Justice Blackstone, be highly unreasonable, after an action is committed, then for the first time to declare it to have been a crime, and to inflict a punishment upon the person who has committed it, because it was impossible that the party could foresee that an action, innocent when it was done, would be afterwards converted into guilt [*34] by a subsequent law; he had therefore *no cause to abstain from it, and all punishment for not abstaining must, of consequence, be cruel and unjust.⁶ With reference, therefore, to the operation of a new law, the maxim of Paulus,⁷ adopted by Lord Bacon, applies, *nunquam crescit ex post facto præteriti delicti æstimationis*, the law does not allow a later fact, a circumstance or matter subsequent, to extend or amplify an offence: it construes neither penal laws nor penal facts by intendment, but considers the offence in degree as it stood at the time when it was committed.⁸

In illustration of the evils which may result from a violation of the general rule, which we have been considering as to *nova constitutio*, we may, in conclusion, refer to a very recent and important case,⁹ where it was held that an order of the Court of Review, con-

¹ Kirkhaugh v. Herbert, and an anonymous case, cited 6 Bing. 265.

² See the cases cited, argument, 6 A. & E. 946, and *supra* (c).

³ Judgment, 6 A. & E. 951. See Burn v. Carvalho, 1 A. & E. 895.

⁴ 2 Darr. Stats. 685.

⁵ As to the meaning and derivation of this expression, see note, 2 Peters's R. (U. S.) 688.

⁶ 1 Bla. Com. 46; 2 Darr. Stats. 680, 681.

⁷ D. 50. 17. 138. § 1.

⁸ Bac. Max., reg. 8; 2 Darr. Stats. 685.

⁹ Judgment, Smallcombe v. Olivier, 13 M. & W. 87.

firmed by the Lord Chancellor, for annulling a fiat in bankruptcy, does not invalidate the *previous* proceedings under the fiat, unless the annulment were on some ground which rendered the fiat originally void. The Court of Exchequer, in delivering judgment in this case, adverted to several startling consequences which would result from the doctrine contended for by the plaintiff, viz., that the order had a retrospective operation. "If," they observed, "the bankrupt does not duly surrender at the time required by the statutes, he is guilty of a felony, now punishable by transportation for life, and which, until lately, was capital; and yet what is contended for is, that, before conviction, it is in the power of the Lord Chancellor to convert that which was a capital felony into a perfectly innocent act. Again, while the fiat *is in force, if the bankrupt has omitted to surrender, and has so committed felony, it may become [*35] necessary for peace officers or others to use force towards him, in order to his apprehension, and, under certain circumstances, even to take away his life, if he cannot be otherwise taken. Can it be possible that the Lord Chancellor, by superseding a commission, or now by annulling the fiat, can make a man a criminal and a murderer, who, at the time of the act done, did no more than his duty?" It was further observed, that the legislature could hardly be supposed to have meant to invest the Lord Chancellor with the power which it was contended he possessed—that the exercise of such a power would have the effect of divesting property from purchasers and revesting it in them again—of making acts, which were criminal when committed, become innocent, and acts which were perfectly innocent become criminal—and by thus essentially altering the character of past transactions, would be productive of evils to third persons, which it would be impossible to foresee, and against which it would be impossible to guard.¹

AD EA QUÆ FREQUENTIUS ACCIDUNT JURA ADAPTANTUR.

(2 Inst. 187.)

The laws are adapted to those cases which most frequently occur.

Laws ought to be, and usually are, framed with a view to such cases as are of frequent rather than such as are of rare or accidental occurrence, or, in the language of the civil law, *jus constitui*

¹ See the judgment, 13 M. & W. 90, 91.

[*36] *oportet in his quæ ut plurimum accidunt non *quæ ex inopinato;*¹ for, *neque leges neque senatusconsulta ita scribi possunt ut omnes casus qui quandoque inciderint comprehendantur, sed sufficit ea quæ plerumque accidunt contineri;*² laws cannot be so worded as to include every case which may arise, but it is sufficient if they apply to those things which most frequently happen. Public acts, it may likewise be observed, are seldom made for one particular person, or limited to one single case; but they are made for the common good, and prescribe such rules of conduct as it is useful to observe in the ordinary occurrences of life.³

Where, for instance, a private act of Parliament, intituled, "An Act to enable the N. Union Society for Insurance against Loss by Fire, to sue in the name of their Secretary, and to be sued in the names of their Directors, Treasurers, and Secretary," enacted that all actions and suits might be commenced in the name of the secretary, as nominal plaintiff, it was held that this act did not enable the secretary to petition, on behalf of the society, for a commission of bankruptcy against their debtor; for the expression "to sue," generally speaking, means to bring actions, and *ad ea quæ frequentius accidunt jura adaptantur*. "Taking out a commission of bankruptcy," observed Bayley, J., "is a well-known mode of recovering a debt, and if the legislature had intended to include that remedy, I should have expected to find more comprehensive words than 'to sue.' A commission of bankruptcy is not ordinarily spoken of in that way."⁴

[*37] *It is then true, that, "when the words of a law extend not to an inconvenience rarely happening, but do to those which often happen, it is good reason not to strain the words further than they reach, by saying it is *casus omissus*, and that the law intended *quæ frequentius accidunt*." "But," on the other hand, "it is no reason when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom."⁵ Where, however, a *casus omissus* does really occur in a statute, either through the inadvertence of the legislature, or on the principle *quod*

¹ D. 1. 3. 3. See Lord Camden's judgment in *Entick v. Carrington*, 19 How. St. Tr. 1061.

² D. 1. 3. 10.

³ See Wood's *Treatise of Laws*, 121.

⁴ *Guthrie v. Fisk*, 3 B. & C. 178, 183. *Argument, Attorney-General v. Jackson*, 2 Cr. & J. 108; *Wing. Max.* 716. *Argumentum à communiter accidentibus in jure frequens est*, *Gothofred*, ad. D. 44. 2. 6.

⁵ *Vaugh. R.* 378.

*semel aut bis existit prætereunt legislatores,*¹ the rule is, that the particular case thus left unprovided for, must be disposed of according to the law as it existed prior to such statute—*Casus omissus et oblivioni datus dispositioni communis juris relinquitur.*²

*CHAPTER II.

[*38]

MAXIMS RELATING TO THE CROWN.

THE principal attributes of the Crown are sovereignty or pre-eminence, perfection, and perpetuity; and these attributes are attached to the wearer of the crown by the constitution, and may be said to form his constitutional character and royal dignity. On the other hand, the principal duty of the sovereign is to govern his people according to law; and this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has always been esteemed an express part of the common law of England, even when prerogative was at the highest. In the pages immediately following are collected some of the more important technical rules, embodying the above general attributes of the Crown, with their meaning and qualifications.³

REX NUNQUAM MORITUR.

(Branch. Max., 5th ed., 107.)

The king never dies.

The law ascribes to the king, in his political capacity, an absolute immortality; and, immediately upon the decease* of the reigning prince in his natural capacity, the kingly dignity [*39] and the prerogatives and politic capacities of the supreme magis-

¹ D. 1. 8. 6.² 5 Rep. 38.

³ See further on the subject of this section, Mr. Chitty's Treatise on the Prerogative of the Crown, particularly chaps. i. ii. xv. xvi.; Mr. Serjt. Stephen's Com., vol. ii. pp. 494-504; Fortescue de Laud. Leg. Ang., by Amos., chap. ix.; Finch's Law, 81; Plowd. Com., chap. xi.; Bracton, chap. viii.; De Lolme, Const. of England, chap. vi.

trate, by act of law, without any interregnum or interval, vest at once in his successor, who is, eo instante king, to all intents and purposes; and this is in accordance with the maxim of our constitution, *In Angliā non est interregnum*.¹ So tender, moreover, is the law of supposing even a possibility of the death of the sovereign that his natural dissolution is generally called his demise—*demissio regis vel coronæ*—an expression which signifies merely a transfer of property; and when we speak of the demise of the Crown, we mean only, that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. It has, indeed, usually been thought prudent, when the sovereign has been of tender years, at the period of the devolution upon him of the royal dignity, to appoint a protector, guardian, or regent, to discharge the functions of royalty, for a limited time; but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority, for he has no legal guardian; and the appointment of a regency must, therefore, be regarded as a provision made by the legislature, in order to meet a special and temporary emergency.² It appears, moreover, that the Duchy of Cornwall vests in the king's eldest son and heir apparent at the instant of his birth, without gift or creation, and as if minority could no more be predicated of him than of the sovereign himself.³

REX NON POTEST PECCARE.

(2 Roll. R. 304.)

The king can do no wrong.

It is an ancient and fundamental principle of the English constitution, that the king can do no wrong.⁴ But this maxim must not be understood to mean, that the king is above the laws, in the unconfined sense of those words, and that everything he does is of course just and lawful. Its true meaning is, First, that the sovereign, individually and personally, and in his natural capacity, is

¹ Jenk. Cent. 205.

² 1 Bla. Com. 249; 2 Steph. Com. 498, and n. (k); Chitt. Pre. Crown, 5; 1 Plowd. 177, 234.

³ Per Lord Brougham, C. Coop., R. 125.

⁴ Jenk. Cent. 9. 308.

independent of and is not amenable to any other earthly power or jurisdiction; and that whatever may be amiss in the condition of public affairs is not to be imputed to the king, so as to render him answerable for it personally to his people. Secondly, the above maxim means, that the prerogative of the Crown extends not to do any injury, because, being created for the benefit of the people, it cannot be exerted to their prejudice,¹ and it is therefore a fundamental general rule, that the king cannot sanction any act forbidden by law; so that, in this point of view he is under, and not above the laws,—and is bound by them equally with his subjects.² If, then, the sovereign command an unlawful act to be done, the offence of the instrument is not thereby indemnified; for, though the king is not himself under the coercive power of the law, yet, in many cases, his commands are under the directive power of the law, which makes the act itself invalid if unlawful, and so *renders the instrument of execution thereof obnoxious to the punishment of [*41] the law.³

The king, moreover, is not only incapable of doing wrong, but even of thinking wrong. Whenever, therefore, it happens, that, by misinformation or inadvertence, the Crown has been induced to invade the private rights of any of its subjects,—as by granting any franchise or privilege to a subject contrary to reason, or in any way prejudicial to the commonwealth or a private person,—the law will not suppose the king to have meant either an unwise or an injurious action, for *eadem præsumitur regis quæ est juris et quæ esse debet præsertim in dubiis*,⁴ but declares that the king was deceived in his grant; and, thereupon, such grant is rendered void, merely upon the supposition of fraud and deception either by or upon those agents whom the Crown has thought proper to employ.⁵ In like manner, also, the king's grants are void whenever they tend to pre-

¹ 1 Bla. Com. 246; 3 Bla. Com. 254; Chit. Pre. Crown, 5.

² Chit. Pre. Crown, 5; Jenk. Cent. 208. See Fortescue de Laud. Leg. Ang. by Amos, p. 28.

³ 1 Hale, P. C. 48, 44. Per Coleridge, J., Howard v. Gossett, 14 L. J., Q. B. 377.

⁴ Hobart, 154.

⁵ 1 Bla. Com. 246; 2 Steph. Com. 500; Gledstones v. The Earl of Sandwich, 5 Scott, N. R., 719; R. v. Kempe, 1 Lord Raym. 49, cited Id. 720; Finch's Law, 101. And as to repealing letters patent, see per Lord Denman, C. J., Reg. v. Arnaud, 16 L. J., Q. B., 55.

judice the course of public justice.¹ And in this manner it is, that, while the sovereign himself is, in a personal sense, incapable of doing wrong, yet his acts may, in themselves, be contrary to law, and, on that account, be avoided or set aside by the law.² It must further be observed, that even where the king's grant purports to be made *de gratiâ speciali, certâ scientâ, et mero motu*, the grant will, nevertheless, be void, if it appears to the Court that the king was deceived in the purpose and intent thereof; and this agrees [*42] with a text of the civil law, which says, *that the above clause *non valet in his in quibus præsumitur principem esse ignorantem*; therefore, if the king grant such an estate as by law he could not grant, forasmuch as the king was deceived in the law, his grant will be void.³ It does not seem, however, that this doctrine can be extended to invalidate an act of the legislature on the ground that it was obtained by a *suggestio falsi*, or *suppressio veri*. It would indeed be something new, as recently observed by Cresswell, J.,⁴ to impeach an act of Parliament by a plea stating that it was obtained by fraud.

Lastly, in connexion with this part of our subject, it is worthy of remark, that the power which the Crown possesses of calling back its grants, when made under mistake, is not like any right possessed by individuals; for, when it has been deceived, the grant may be recalled notwithstanding any derivative title depending upon it, and those who have deceived it must bear the consequences.⁵

On the same principle, no suit or action⁶ can be brought against the sovereign, even in respect of civil matters; and as to any cause of complaint which a subject may happen to have against his sovereign in respect of some personal injury of a private nature, but distinct from a mere claim of property, the sovereign is not personally chargeable, nor can he be subjected to the usual common-law proceedings which may be instituted between subject and subject.⁷ The law will, in such a case, presume that the subject cannot have sustained any such personal wrong from the Crown, because it feels

¹ Chit Pre. Crown, 385.

² 2 Step. Com. 500.

³ Case of Alton Woods, 1 Rep. 58.

⁴ Stead v. Carey, 1 C. B. 516, per Tindal, C. J. Id. 522.

⁵ Judgment, Cumming v. Forrester, 2 Jac. & W. 342.

⁶ See Munden v. Duke of Brunswick, 16 L. J., Q. B. 800.

⁷ Chit. Pre. Crown, 389, 340; 3 Bla. Com. 255; 4 Bla. Com. 38; Jenk. Cent. 78; Viscount Canterbury v. The Attorney-General, *infra*.

itself incapable of *furnishing an adequate remedy,—and want of right and want of remedy are the same thing in law.¹ [*43]

With respect to injuries to the rights of property, these can scarcely be committed by the Crown, except through the medium of its agents, and by misinformation or inadvertency, and the law has furnished the subject with a decent and respectful mode of terminating the invasion of his rights, by informing the king of the true state of the matter in dispute, viz., by Petition of Right: and as it presumes, that to know of any injury and to redress it are inseparable in the royal breast, it then issues, as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.²

If, for instance, a legacy is claimed under the will of a deceased sovereign, it seems that the only course to be pursued by the claimant, for the recovery of such legacy, is by Petition of Right to the grace and favour of the reigning sovereign. "I know of no reason," said Lord Langdale, in a recent case, "why a Petition of Right might not have been presented, and am far from thinking that it is competent to the king, or rather competent to his responsible advisers, to refuse, capriciously, and without sufficient reason, to put into a due course of investigation any proper question raised on a Petition of Right. The form of the application being, as it should be, to the grace and favour of the king, affords no foundation for any such *suggestion, for that grace and favour must be shown in due course, when required for the purposes of [*44] justice."³

In another recent and remarkable case,⁴ the petitioner by Petition of Right claimed compensation from the Crown for damages alleged to have been done in the preceding reign to some property of the petitioner, while Speaker of the House of Commons, by the fire, which in the year 1834 destroyed the two Houses of Parliament, and the question consequently arose, whether, assuming that the

¹ Chit. Pre. Crown, 340; and see 2 Steph. Com. 501.

² 3 Bla. Com. 255; Chit. Pre. Crown, 40, where the nature of and mode of proceeding on a Petition of Right are treated of at length. See also *In re Robson*, 16 L. J., Chan. 105; *Attorney-General v. Hallett*, 15 M. & W. 106; 16 L. J., Exch. 181, 262; *Doe d. Legh v. Roe*, 8 M. & W. 579; and in the case of *Baron de Bode*, 4 Jur. 645; 10 Id. 778. As to the jurisdiction of a court of equity, and the rules by which it will be guided, when the proceedings are against the Crown, see per Lord Brougham, C., *Clayton v. The Attorney-General*, Coop. R. 120.

³ *Ryves v. The Duke of Wellington*, 15 L. J., Chan. 461.

⁴ *Viscount Canterbury v. The Attorney-General*, 1 Phill. 306.

parties whose negligence caused the fire were the servants of the Crown (it being contended that they were the servants of the Commissioners of Woods and Forests), the sovereign was responsible for the consequences of their negligence. The argument, with reference to this point, turned chiefly upon the meaning of the legal maxim—that *the king can do no wrong*; and the Lord Chancellor, in deciding against the petitioner, intimated an opinion, that since the sovereign is clearly not liable for the consequences of his own personal negligence, he cannot be made answerable for the acts of his servants. “If it be said,” continued Lord Lyndhurst, “that the master is answerable for the negligence of his servant, because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the sovereign, to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy.”

In like manner, if it be asked, what remedy is afforded to the subject for such public oppressions, or acts of tyranny, as have not, in fact, been instigated by bad advisers, but have proceeded from the personal delinquency of the monarch *himself,—the [*45] answer is, that there is no legal remedy, and that to such cases, so far as the ordinary course of law is concerned, the maxim must be applied, that the sovereign can do no wrong.¹

NON POTEST REX GRATIAM FACERE CUM INJURIA ET
DAMNO ALIORUM.

(3 Inst. 236.)

The king cannot confer a favour on one subject, which occasions injury and loss to others.

It is an ancient and constant rule of law,² that the king's grants are invalid when they destroy or derogate from rights, privileges, or immunities previously vested in another subject: the Crown, for example, cannot enable a subject to erect a market or fair so near that of another person as to affect his interest therein.³ Nor can the

¹ 2 Steph. Com. 502, 508; 1 Bla. Com., by Stewart, 256.

² 3 Inst. 236; Vaugh. R. 388. A similar doctrine prevailed in the civil law. See Cod. 7. 38. 2.

³ Chit. Pre. Crown, 119, 232, 386; The Earl of Rutland's case, 8 Rep. 57; Alcock v. Cook, 5 Bing. 840; Gledstanes v. The Earl of Sandwich, 5 Scott, N. R. 689, 719. Grant of port where vested rights are not interfered with. See Mayor of Exeter v. Warren, 5 Q. B. 778.

king grant the same thing in possession to one, which he or his progenitors have granted to another.¹ On the same principle, the Crown cannot pardon an offence against a penal statute after information brought, for thereby the informer has acquired a private property in his part of the penalty.² Nor can the king pardon a private nuisance, while it remains unredressed, or so as to prevent an abatement of *it, though afterwards he may remit the fine, [*46] and the reason is, that, though the prosecution is vested in the Crown, to avoid multiplicity of suits, yet (during its continuance) this offence savours more of the nature of a private injury to each individual in the neighbourhood, than of a public wrong.³ So, if the king grant lands, forfeited to him upon a conviction of treason, to a third person, he cannot afterwards, by his grant, divest the property so granted in favour of the original owner.

NULLUM TEMPUS OCCURRIT REGI.

(2 Inst. 278.)

Lapse of time does not bar the right of the Crown.

In pursuance of the principle already considered, of the sovereign's incapability of doing wrong, the law also determines that in the Crown there can be no negligence or laches; and, therefore, it was formerly held, that no delay in resorting to his remedy would bar the king's right;⁴ for the time and attention of the sovereign must be supposed to be occupied by the cares of government, nor is there any reason that he should suffer by the negligence of his officers, or by their fraudulent collusion with the adverse party:⁵ and although, as we shall hereafter see, the maxim *vigilantibus et non dormientibus jura subveniunt* is a rule for the subject, yet *nullum tempus occurrit regi* is, in general, the king's plea.⁶ From this doctrine it followed, not only that the civil claims of the Crown received *no [*47] prejudice by the lapse of time, but that criminal prosecutions for felonies or misdemeanours (which are always brought in the sove-

¹ Per Cresswell, J., 1 C. B. 523; argument, *Rex v. Amery*, 2 T. R. 565; *Chit. Pre. Crown*, 125. But the grant of a mere license or authority from the Crown, or a grant during the king's will, is determined by the demise of the Crown. (*Id.* 400.) See n. 3, p. 80.

² 4 Bla. Com. 399.

³ 4 Bla. Com. 398; *Vaugh. R.* 333.

⁴ 1 Bla. Com. 247; 2 *Steph. Com.* 504.

⁵ *Godb.* 295; *Hobart*, 347; *Bac. Abr.* 7th ed. "Prerogative," (E. 6).

⁶ *Hobart*, 347.

reign's name) might be commenced at any distance of time from the commission of the offence; and all this is, to some extent, still law, though it has been largely qualified by the legislature in modern times;¹ for, by stat. 9 Geo. 3, c. 16, in suits relating to landed property, the lapse of sixty years, and adverse possession for that period, operate as a bar even against the prerogative, in derogation of the above maxim,² that is, provided the acts relied upon as showing adverse possession are acts of ownership done in the assertion of a right, and not mere acts of trespass, not acquiesced in on the part of the Crown.³ Again, the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, does not bind the king;⁴ but, by 32 Geo. 3, c. 58, the Crown is barred, in informations for usurping corporate offices or franchises, by the lapse of six years;⁵ and by statute 7 Will. 3, c. 3, an indictment for treason (except for an attempt to assassinate the king) must be found within three years after the commission of the act of treason.

Another important instance of the application of the above general doctrine occurs where church preferment lapses to the Crown. Lapse is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary, by neglect of the patron to present,—to the metropolitan, by neglect of the ordinary,—and to the Crown, by neglect of *the metropolitan: the term in which the [*48] title to present by lapse accrues from one of the above parties to the other is six calendar months, after the expiration of which period the right becomes forfeited by the person neglecting to exercise it. But no right of lapse can accrue when the original presentation is in the Crown; and, in pursuance of the above maxim, if the right of presentation lapses to the Crown, prerogative intervenes, and, in this case, the patron shall never recover his right till the Crown has presented; and if, during the delay of the Crown, the patron himself presents, and his clerk is instituted, the Crown, by presenting another, may turn out the patron's clerk, or, after induction, may remove him by *quare impedit*;⁶ though, if neither of these

¹ 2 Steph. Com. 504.

² 3 Bla. Com. 307; 2 Darr. Stats. 976. See *Doe d. Watt v. Morris*, 2 Scott, 276; *Goodtitle v. Baldwin*, 11 East, 488.

³ *Doe d. William IV. v. Roberts*, 13 M. & W. 520.

⁴ Judgment, *Lambert v. Taylor*, 4 B. & C. 151, 152; Bac. Abr. 7th ed. "Prerogative," (E. 5).

⁵ See Bac. Abr. 7th ed. "Prerogative," (E. 6), p. 467, and stat. 7 Will. 4 & 1 Vict. c. 78, s. 28; *R. v. Harris*, 11 A. & E. 518.

⁶ 6 Rep. 50.

courses is adopted, and the patron's clerk dies incumbent, or is canonically deprived, the right of presentation is lost to the Crown.¹

Lastly, if a bill of exchange be seized under an extent before it has become due, the neglect of the officer of the Crown to give notice of dishonour, or to make presentment of the bill, will not discharge the drawer or endorsers; and this likewise results from the general principle above stated, that laches cannot be imputed to the Crown.²

*QUANDO JUS DOMINI REGIS ET SUBDITI CONCURRUNT, [*49]
JUS REGIS PRÆFERRI DEBET.

(9 Rep. 129.)

*Where the title of the king and the title of a subject concur, the king's title shall be preferred.*³

In the above case, *detur digniori* is the rule,⁴ and accordingly the king's debt shall, in suing out execution, be preferred to that of every other creditor who had not obtained judgment before the king had commenced his suit.⁵

The king's judgment also affects all lands which the king's debtor had at or after the time of contracting his debt, or which any of his officers, mentioned in the stat. 13 Eliz. c. 4, had at or after the time of his entering on the office; so that, if such officer of the Crown aliens for a valuable consideration, the land shall be liable to the king's debt, even in the hands of a bona fide purchaser, though the debt due to the king was contracted by the vendor many years after the alienation;⁶ whereas, between subject and subject, the general rule is, that a judgment has relation only to the day when signed.

So, the rule of law is, that, where the sheriff seizes under a *fi. fa.*, and, after such seizure, but before the sale⁷ under such writ, a writ of extent is sued out and delivered to the sheriff, the Crown is entitled to the priority, and the sheriff must sell under the extent, and satisfy the Crown's debt, before he sells under the *fi. fa.* Nor does it make any difference whether the extent is in chief or in aid, i. e., whether it is directly against the king's debtor, or brought to recover

¹ 2 Bla. Com. 276, 277; Baskerville's case, 7 Rep. 111; Bac. Abr. 7th ed., "Prerogative" (E. 6); Hobart, 166; Finch Law, 90.

² West on Extents, 28-30; Byles on Bills, 5th ed. 159, 160, 225.

³ Co. Litt. 30. b.

⁴ 2 Ventr. 268.

⁵ Stat. 33 Hen. 8, c. 39, s. 74; 3 Bla. Com. 420.

⁶ 3 Bla. Com. 420.

⁷ See *R. v. Sloper*, 6 Price, 114.

[*50] a debt due from some third party to such debtor; it *having been the practice in very ancient times, that, if the king's debtor was unable to satisfy the king's debt out of his own chattels, the king would betake himself to any third person who was indebted to the king's debtor,¹ and would recover of such third person what he owed to the king's debtor, in order to get payment of the debt due from the latter to the Crown.² And the same principle was held to apply where goods in the hands of the sheriff, under a *fi. fa.*, and before sale, were seized by the officers of the customs under a warrant to levy a penalty incurred by the defendant for an offence against the revenue laws; the Court observing, that there was no sound distinction between a warrant issued to recover a debt to the Crown and an extent.³

ROY N'EST LIÉ PER ASCUN STATUTE, SI IL NE SOIT EXPRESSEMENT
NOSME.

(Jenk. Cent. 307.)

The king is not bound by any statute, if he be not expressly named to be so bound.⁴

The king is not bound by any statute, if he be not expressly named therein, unless there be equivalent words, or unless the prerogative be included by necessary implication; for it is inferred *prima facie* that the law made by the Crown, with the assent of Lords and Commons, is made for subjects, and not for the Crown;⁵

[*51] but this rule seems *to apply only where the property or peculiar privileges of the Crown are affected; and this distinction is laid down, that where the king has any prerogative, estate, right, title, or interest, he shall not be barred of them by the general words of an act, if he be not named therein.⁶ Yet, if a

¹ See *R. v. Larking*, 8 Price, 688.

² *Giles v. Grover*, 9 Bing. 128, 191, recognising *Rex v. Cotton, Parker, B.*, 112. See *Attorney-General v. Trueman*, 11 M. & W. 694; *Attorney-General v. Walsley*, 12 M. & W. 179; *Reg. v. Austin*, 10 M. & W. 698.

³ *Grove v. Aldridge*, 9 Bing. 428. As to the jurisdiction of the Court of Exchequer since the stat. 5 Vict. c. 5, see *Attorney-General v. Halling*, 15 M. & W. 687.

⁴ Jenk. Cent. 307; Wing. Max. 1.

⁵ Per Alderson, B., *Attorney-General v. Donaldson*, 10 M. & W. 123, 124, citing *Willion v. Berkley*, Plowd. 236.

⁶ The case of *Magdalen College*, 11 Rep. 66, cited Bac. Abr. "Prerogative," (E. 5;) Com. Dig. "Parl.," R. 8. See the qualifications of this position laid down in 2 Dwarr. Stats. 668, 669.

statute be intended to give a remedy against a wrong, the king, though not named, shall be bound by it;¹ and the king is impliedly bound by statutes passed for the public good, the relief of the poor, the general advancement of learning, religion, and justice, or for the prevention of fraud;² and, though not named, he is bound by the general words of statutes which tend to perform the will of a founder or donor.³

The stat. 11 Geo. 4 & 1 Will. 4, c. 70, intituled, "An Act for the more effectual Administration of Justice in England and Wales," in the preamble declares its intention to be, to make more effectual provision for the administration of justice in England and Wales, and by the 8th section enacts, "that writs of error upon *any* judgment given by *any* of the said Courts (Queen's Bench, Common Pleas, and Exchequer) shall hereafter be made returnable only before the judges, or judges and barons, as the case may be, of the other two courts in the Exchequer Chamber." It was held, that this statute extends to a judgment given against a defendant on an indictment in the Queen's Bench; and it was observed, that, in the case of an act of Parliament *passed expressly for the further advancement of justice, and in its particular enactment using [*52] terms so comprehensive as to include all cases brought up by writ of error, there was not, in the opinion of the Court, either authority or principle for implying the exception of criminal cases, upon the ground that the king, as the public prosecutor, is not expressly mentioned in the act, and that, by such a construction of the act, its object and intent could best be attained.⁴

But, as above stated, acts of Parliament which would divest the king of any of his prerogatives do not, in general, extend to or bind the king, unless there be express words to that effect; therefore, the Statutes of Limitation, Bankruptcy, Insolvency, and Set-off are irrelevant in the case of the king, nor does the Statute of Frauds relate to him.⁵ Also, by mere indifferent statutes, directing that certain

¹ Willion v. Berkley, Plowd. 239, 244. See the authorities cited in the argument in *Rex v. Wright*, 1 A. & E. 436 et seq.

² Chit. Pre. Crown, 382; 2 Dwarr. Stats. 668.

³ Vin. Abr. "Statutes," E. 10, pl. 11; 5 Rep. 146; Willion v. Berkley, Plowd. 236; 2 Dwarr. Stats. 669.

⁴ Judgment, *Rex v. Wright*, 1 A. & E. 447.

⁵ Chit. Pre. Crown, 366, 383; *Rex v. Copland, Hughes*, 204, 230; Vin. Abr. "Statutes," (E. 10); *Flather's Arch. Bank*. 9th ed. 179.

matters shall be performed as therein pointed out, the king is not, in many instances, prevented from adopting a different course in pursuance of his prerogative.¹

NEMO PATRIAM IN QUA NATUS EST EXUERE NEC LIGEANTLÆ
DEBITUM EJURARE POSSIT.

(Co. Lit. 129, a.)

A man cannot abjure his native country nor the allegiance which he owes to his sovereign.

Allegiance is defined, by Sir E. Coke, to be "a true and faithful obedience of the subject due to his sovereign."² And in the words of the late Mr. Justice Story, "Allegiance *is nothing more [*53] than the tie or duty of obedience of a subject to his sovereign, under whose protection he is; and allegiance by birth is that which arises from being born within the dominions, and under the protection, of a particular sovereign. Two things usually occur to create citizenship: first, birth, locally within the dominions of the sovereign; secondly, birth, within the protection and obedience, or, in other words, within the legiance of the sovereign. That is, the party must be born within a place where the sovereign is, at the time, in full possession and exercise of his power, and the party must also, at his birth, derive protection from, and consequently owe obedience or allegiance to, the sovereign as such de facto. There are some exceptions, which are founded upon peculiar reasons, and which indeed illustrate and confirm the general doctrine."³

Allegiance is the tie which binds the subject to the Crown, in return for that protection which the Crown affords to the subject, and is distinguished by the law into two sorts or species, the one natural, the other local. Natural allegiance is such as is due from all men born within the dominions of the Crown, immediately upon their birth; and to this species of allegiance it is that the above maxim, which is taken in its full extent by the English laws, is applicable.⁴ It cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature. It is a principle of universal law that the natural-born subject of one prince cannot, by any act of his own, not even by swearing allegiance to another, put off or discharge his

¹ Chit. Pre. Crown, 888, 884.

² 8 Peters's R. (U. S.) 155.

³ Calvin's case, 7 Rep. 5.

⁴ Foster, Cr. Law, 184.

natural allegiance to the former, **origine propria neminem posse voluntate sua eximi manifestum est,*¹ for this natural [*54] allegiance was intrinsic and primitive, and antecedent to the other, and cannot be divested without the concurrent act of that prince to whom it was first due;² and the reason is, that the very existence, or at all events the welfare, of a state would be endangered if its natural-born subjects could withdraw or transfer with impunity that natural allegiance which the law of every nation has rendered perpetual and unalienable.³ Hence, although a British subject may, in certain cases, forfeit his rights as such by adhering to a foreign power, he yet remains always liable to his duties, and if in the course of such employment, he violates the laws of his native country, he will be exposed to punishment when he comes within reach of her tribunals.⁴

The tie of natural allegiance may, however, be severed with the concurrence of the legislature—for instance, upon the recognition of the United States of America, as free, sovereign, and independent states, it was decided that the natural-born subjects of the English Crown adhering to the United States ceased to be subjects of the Crown of England, and became aliens and incapable of inheriting lands in England.⁵

It remains to add, that local allegiance is such as is due *from an alien or stranger born whilst he continues within the do- [*55] minion and protection of the Crown; but it is merely of a temporary nature, and ceases the instant such stranger transfers himself from this kingdom to another. For, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence, and in point of locality, to the dominions of the British Empire;⁶ the rule being that, *protectio trahit subjectionem et sub-*

¹ Cod. 10, 38, 4.

² See 1 Bla. Com. c. 10; Foster, Cr. Law, 184; Hale, P. C. 68, judgment, Wilson v. Marryat, 8 T. R. 45; S. C. affirmed in error, 1 B. & P. 480; Jackson v. White, 20 Johnson, R. (U. S.) 318; Shanks v. Dupont, 8 Peters, R. (U. S.) 246; Ingliss v. Trustees of the Sailors' Snug Harbour, Id. 122. But see Vattel, b. 1, c. 19, ss. 220-228.

³ Chit. Pre. Crown, 15.

⁴ 2 Steph. Com. 425.

⁵ Doe d. Thomas v. Acklam, 2 B. & C. 779; Doe d. Stansbury v. Arkwright, 5 C. & P. 575. In Blight's Lessee v. Rochester, 7 Wheaton's R. (U. S.) 535, it was held that British subjects, born before the Revolution, are equally incapable with those born after, of inheriting or transmitting the inheritance of lands in the United States.

⁶ 1 Bla. Com. 370; Chit. Pre. Crown, 16. See Wolf v. Oxholm, 6 M. & S. 92; Rex v. Johnson, 6 East, 583.

*jectio protectionem*¹—a maxim which has obtained in every age and every country, and extends not only to those who are born within the king's dominions, but also to foreigners who live within them, even though their sovereign is at war with this country, for they equally enjoy the protection of the Crown.²

[*56]

*CHAPTER III.

§ I.—THE JUDICIAL OFFICE.

THE maxims contained in this section exhibit very briefly the more important of those duties which attach to individuals filling judicial offices, and discharging the various functions appertaining thereto; it would have been inconsistent with the plan and limits of this volume to consider them at greater length, and would not, it is believed, have added materially to its practical utility.³

BONI JUDICIS EST AMPLIARE JURISDICTIONEM.

(Chanc. Prec. 329.)

It is the duty of a judge, when requisite, to extend the limits of his jurisdiction.

“The maxim of the English law is to amplify its remedies, and, without usurping jurisdiction, to apply its rules, to the advancement of substantial justice;”⁴ and, accordingly, the principle upon which our courts of law act is to enforce the performance of contracts not injurious to society, and to administer justice to a party who can
 [*57] make *that justice appear, by enlarging the legal remedy, if necessary, in order to attain the justice of the case; for the common law of the land is the birthright of the subject, and *bonus judex secundum æquum et bonum judicat, et æquitatem stricto juri*

¹ Calvin's case, 7 Rep. 5; *Craw v. Ramsay*, Vaughan, R. 279; Co. Litt. 65, a.

² Chit. Pre. Crown, 12, 13. As to the important distinctions between a natural-born subject and an alien, see 2 Steph. Com. 426.

³ As to the authority of, and necessity of adhering to, judicial decisions, refer to Ram's Treatise on the Science of Legal Judgment, chaps. iii. v. xiv.

⁴ Per Lord Abinger, C. B., *Russell v. Smyth*, 9 M. & W. 818; see also per Lord Mansfield, C. J., 4 Burr. 2239.

*præfert.*¹ "I commend the judge," observes Lord Hobart, "who seems fine and ingenious, so it tend to right and equity; and I condemn them who, either out of pleasure to show a subtle wit, will destroy, or out of incogiousness or negligence will not labour to support, the act of the party by the art or act of the law."²

The action for money had and received may be mentioned as peculiarly illustrative of the principle above set forth; for the very nature and foundation of this action is that the plaintiff is in conscience entitled to the money sought to be recovered; and it has been observed, that this kind of equitable action to recover back money which ought not in justice to be kept is very beneficial, and, therefore, much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund.³ "The ground," observed Tindal, C. J., in a recent case,⁴ "upon which an action of this description is maintainable, is that the money received by the defendants is money which, *ex æquo et bono*, ought to be paid over to the plaintiff. Such is the principle upon which the action has rested from the time of Lord Mansfield. When money has been received without consideration, or upon a consideration that has failed, the recipient holds it *ex æquo et bono* for the plaintiff."

The power of directing an amendment of the record, *which [58] a judge at Nisi Prius in certain cases possesses,⁵ may likewise be instanced as one which is confided to him by the legislature, in order that it may be applied "to the advancement of substantial justice."

The general maxim under consideration is also peculiarly applicable with reference to the jurisdiction of a judge at chambers,⁶ and

¹ Per Buller, J., 4 T. R. 844. See *Ashmole v. Wainwright*, 2 Q. B. 887.

² Hobart, 125.

³ Per Lord Mansfield, C. J., *Moses v. Macfarlane*, 2 Bur. 1012.

⁴ *Edwards v. Bates*, 8 Scott, N. R. 414.

⁵ See 3 & 4 Will. 4, c. 42, s. 23. "The only guide which the judge at Nisi Prius can have as to making an amendment, is that pointed out by the act, viz., whether the amendment is or is not to correct a misstatement not material to the interests of the case, and by which the opposite party cannot have been prejudiced;" per Rolfe, B., *Cooke v. Stratford*, 18 M. & W. 387. See also *Culverwell v. Nugee*, 15 M. & W. 559; *Christie v. Bell*, 16 L. J., Exch. 179, where an amendment of writ was allowed to save the Statute of Limitations; *Moore v. Magan*, 16 M. & W. 95; *Campbell v. Smart*, 11 Jur. 1018.

⁶ "I think the jurisdiction which judges have of setting aside demurrers as frivolous, is productive of the best effects, and prevents vexatious and expensive litigation," per Lord Denman, C. J., 16 L. J., Q. B., 16.

to the many important and arduous duties which are there discharged by him.

The proceeding by application to a judge at chambers, has indeed been devised and adopted by the courts under the sanction of the legislature, for the purpose of preventing the delay, expense, and inconvenience which must inevitably ensue if applications to the courts were in all cases, and under all circumstances, indispensably necessary. A judge in chambers, indeed, acts under the delegated authority of the court, and his jurisdiction is essentially different from that of a judge sitting at Nisi Prius; for in the latter case, the judge, it has been said, has no equitable jurisdiction, and can only look to the strict legal rights of the parties on record, whereas in the former, the judge has a wider field for the exercise of his discretion, and in some instances has a supreme jurisdiction, which is not subject to the review of the court in banc.¹

[*59] *In a recent case, where it was held that a judge at chambers has jurisdiction to fix the amount of costs to be paid as the condition of making an order, the maxim to which we have here directed our attention, was expressly applied. "As to the power of the judge to tax costs," remarked Vaughan, J., "if he is willing to do it, and can save expense, it is clear that what the officer of the court may do, the judge may do, and *boni judicis est ampliari jurisdictionem, i. e. justitiam.*"²

Again, in construing an act of Parliament, it is a settled rule of construction, that cases out of a letter of a statute, yet within the same mischief or cause of the making of the same, shall be within the remedy thereby provided;³ and, accordingly, it is laid down, that for the sure and true interpretation of all statutes (be they penal or beneficial, restrictive or enlarging of the common law), four things must be considered: 1st, what was the common law before the making of the act; 2dly, what was the mischief for which the common law did not provide; 3dly, what remedy has been appointed by the legislature for such mischief; and, 4thly, the true reason of the remedy; and then the duty of the judges is to put such a construction upon the statute, as shall suppress the mischief, and advance the remedy

¹ Bagley, Ch. Pr., 1, 2, 4. Per Lord Ellenborough, C. J., *Alner v. George*, 1 Camp. 398.

² *Collins v. Aron*, 4 Bing. N. C. 238, 235. See *Clement v. Weaver*, 4 Scott, N. R. 229, and cases cited Id. 281, n. (44). "The true text is *boni judicis est ampliari justitiam, not jurisdictionem*, as it has been often cited," per Lord Mansfield, C. J., 1 Burr. 304.

³ Co. Litt. 24, b; Jenk. Cent. 58, 60, 226; 3 Bla. Com. 430, 431.

—to suppress subtle inventions and evasions for continuing the mischief *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the act *pro bono publico*.¹

*In expounding remedial laws, then, the courts will extend [60] the remedy so far as the words will admit.² Where, however, a case occurs which was not foreseen by the legislature, it is the duty of the judge to declare it *casus omissus*; or where the intention, if entertained, is not expressed, to say of the legislature, *quod voluit non dixit*; or where the case, though within the mischief, is not clearly within the meaning, or where the words fall short of the intent, or go beyond it,—in every such case it is held the duty of the judge, in a land jealous of its liberties, to give effect to the expressed sense or words of the law in the order in which they are found in the act, and according to their fair and ordinary import and understanding;³ for it must be remembered, that the judges are appointed to administer, and not to make the law, and that the jurisdiction with which they are entrusted, has been defined and marked out by the common law or acts of Parliament.⁴ It is, moreover, a principle consonant to the spirit of our constitution, and which may constantly be traced as pervading the whole body of our jurisprudence, that *optima est lex quæ minimum relinquit arbitrio iudicis, optimus iudex qui minimum sibi*⁵—that system of law is best, which confides as little as possible to the discretion⁶ of the judge—that judge the best, who relies as little as possible on his own opinion.

*DE FIDE ET OFFICIO JUDICIS NON RECIPITUR QUÆSTIO, [61]
SED DE SCIENTIA SIVE SIT ERROR JURIS SIVE FACTI.

(Bac. Max., reg. 17.)

The bona fides and honesty of purpose of a judge cannot be questioned, but his decision may be impugned for error either of law or of fact.

The Law, says Lord Bacon, has so much respect for the certainty of judgments, and the credit and authority of judges, that it will not

¹ Heydon's case, 3 Rep. 7; Wood's Treat. on Laws, 106; per Coleridge, J., In the matter of Gedge, 9 Jurist, 470.

² Per Lord Kenyon, C. J., *Turtle v. Hartwell*, 6 T. R. 429.

³ 2 Dwarr. Stats. 790.

⁴ R. v. Almon, *Wilmot's Notes*, 256.

⁵ Bac. Aphorisms, 46; 2 Dwarr. Stats. 782. See per Wilmot, C. J., *Collins v. Blantern*, 2 Wilson, 341; per Buller, J., *Master v. Miller*, 4 T. R. 344, affirmed in error, 2 H. Bla. 141; *Co. Litt. 24, b*; per Tindal, C. J., 6 Scott, N. R. 180.

⁶ *Discretio est discernere per legem quid sit justum*, 4 Inst. 41, cited per Tindal, C. J., 6 Q. B. 700. See *Rooke's case*, 5 Rep. 99, 100.

permit any error to be assigned which impeaches them in their trust and office, and in wilful abuse of the same, but only in ignorance and mistaking either of the law or of the case and matter in fact;¹ and, therefore, it cannot be assigned for error, that a judge did that which he ought not to do, as that he entered a verdict for the defendant where the jury gave it for the plaintiff.² It is, moreover, a general rule of very great antiquity, that no action will lie against a judge of record for any act done by him in the exercise of his judicial functions, provided such act, though done mistakenly, were within the scope of his jurisdiction.³

“The doctrine,” says Mr. Chancellor Kent,⁴ “which holds a judge exempt from a civil suit or indictment for any act done or omitted to be done by him, sitting as judge, has a deep root in the common [*62] law. It is to be found in the *earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions in the English courts, amidst every change of policy, and through every revolution of their government. A short view of the cases will teach us to admire the wisdom of our forefathers, and to revere a principle on which rests the independence of the administration of justice.”

This freedom from action and question at the suit of an individual, it has likewise been observed, is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that, being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be; and it is not to be supposed beforehand, that those who are selected for the administration of justice will make an ill use of the authority vested in them. Even inferior justices, and those not of record, cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction. In the imperfection of human nature, it is better even that an individual should occasionally suffer a wrong, than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are

¹ Bac. Max., reg. 17; *Bushell's case*, Vaugh. R. 138, 139; 12 Rep. 25.

² Bac. Max., reg. 17; per Holt, C. J., *Groenvelt v. Burwell*, 1 Lord Raym. 468; S. C. 1 Salk. 397; 12 Rep. 24, 25.

³ *Smith v. Boucher*, Cas. Temp. Hardw. 69. See the cases collected, *Broom's Parties to Actions*, 2d ed., pp. 268-273.

⁴ *Yates v. Lansing*, 5 Johnson, R. (U. S.) 291, and authorities there cited; S. C. in error, 9 Johnson, R. 396.

to administer it. Corruption is quite another matter; so also are neglect of duty and misconduct. For these there is, and always will be, some due course of punishment by public prosecution.¹

*An action then does not lie against a judge, civil² or ec- [*63]
clesiastical,³ acting judicially in a matter within the scope of his jurisdiction.⁴ Nor can an action be maintained against persons having a more limited authority, as commissioners of bankrupt,⁵ the steward of a court baron,⁶ or commissioners of a court of request.⁷ In like manner, the sheriff is a judicial and not a mere ministerial officer, when acting in the county court, and will not therefore be liable for the misfeasance of his officer in executing process issuing thereout; and, as already observed, magistrates, where acting in discharge of their duty, and within the bounds of their jurisdiction, are irresponsible even where the circumstances under which they are called upon to act, would not have supported the complaint, provided that such circumstances were not disclosed to them at the time of their adjudication.⁸

“If,” said Tindal, C. J., in a recent case, “a magistrate commit a party charged before him in a case where he has no jurisdiction, he is liable to an action of trespass. But if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate’s jurisdiction cannot be made

¹ Judgment, *Garnett v. Ferrand*, 6 B. & C. 625, 626; *Vaugh. R.* 388. See *Rex v. Johnson*, 6 East, 588; *S. C.* 7 East, 65, in which case one of the judges of the Court of Common Pleas in Ireland was convicted of a libel. As to the principles which guide the Court of Queen’s Bench in interfering by criminal information in the case of justices, see *Reg. v. Badger*, 4 Q. B. 468, 474. The judges are not liable to removal, except upon address of both houses of Parliament. Statute 18 Will. 3, c. 2, and 1 Geo. 3, c. 28.

² *Dicas v. Lord Brougham*, 6 C. & P. 249; *Tinsley v. Nassau, Mo. & Mal.* 52; *Johnstone v. Sutton*, 1 T. R. 518; per *Holt, C. J.*, 1 *Lord Raym.* 468; *Garnett v. Ferrand*, 6 B. & C. 611.

³ *Ackerley v. Parkinson*, 8 M. & S. 411, 425; *Beaurain v. Scott*, 3 Camp. 388.

⁴ *Ib.* See *Wingate v. Waite*, 6 M. & W. 739, 746.

⁵ Per *Abbott, C. J.*, *Doswell v. Impey*, 1 B. & C. 169, 170.

⁶ *Holroyd v. Breare*, 2 B. & Ald. 473. See the judgment in *Bradley v. Carr*, 3 Scott, N. R. 521, 528.

⁷ *Carratt v. Morley*, 1 Q. B. 18; *Andrews v. Marris*, *Id.* 3, and cases there cited. See *Morris v. Parkinson*, 1 Cr. M. & R. 163.

⁸ *Pike v. Carter*, 3 Bing. 78; *Lowther v. Earl of Radnor*, 8 East, 118; *Brown v. Copley*, 8 Sc. N. R. 350; *Pitcher v. King*, 9 A. & E. 288; 2 *Roll. Abr.* 552, pl. 10.

[*64] to depend upon the *truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation."¹

And where the authority is given to justices by statute, and they appear to have acted within the jurisdiction so given, and to have done all that the particular statute required them to do, in order to originate their jurisdiction, their conviction, drawn up in due form, and remaining in force, is a protection and conclusive evidence for them in any action which may be brought against them for the act so done.²

Having thus briefly stated the general rule applicable with respect to the right of action against persons invested with judicial functions, we may remark, that there is one very extensive class of cases which may, on a cursory observation, appear to fall within its operation, but which is, in fact, governed by a different although not less important principle. We refer to cases in which the performance of some public duty is imposed by law upon an individual, who, by neglecting or refusing to perform it, causes an injury to some other party: here the injury occasioned by the breach of duty lays the foundation for an action for recovery of damages by way of compensation to the party injured.³ This principle, moreover, applies where persons [*65] *required to perform ministerial acts are at the same time invested with the judicial character; and in accordance therewith, in the celebrated *Auchterarder* case,⁴ the members of the presbytery were held liable collectively and individually to make compensation in damages, for refusing to take the presentee to a church on trial, which they were bound to do, according to the law of Scotland. The legislature, observed Lord Brougham, in the case referred to, can, of course, do no wrong, and its branches are equally placed beyond all control of the law. So, "the courts of justice, that is, the superior courts, courts of general jurisdiction, are not

¹ Per Tindal, C. J., *Cave v. Mountain*, 1 M. & Gr. 257, 261, recognised Reg. v. Bolton, 1 Q. B. 66, 75. See Reg. v. Inhabitants of Hickling, 7 Q. B. 880, following *Brittain v. Kinnaird*, 1 B. & B. 482.

² Per Abbott, C. J., *Basten v. Carew*, 5 B. & C. 652, 658, S. C. 5 D. & R. 558; *Baylis v. Strickland*, 1 Scott, N. R. 540; *Fernley v. Worthington*, 1 Scott, N. R. 432; *Painter v. The Liverpool Gas Company*, 8 A. & E. 433; *Webb v. Bachelour*, Ventr. 278; *Tarry v. Newman*, 15 M. & W. 645; *Stamp v. Sweetland*, 8 Q. B. 13. See also *Haseldine v. Grove*, 8 Q. B. 997, 1006, which was an action against a police magistrate.

³ See *Barry v. Arnaud*, 10 A. & E. 646; cited *Mayor of Litchfield v. Simpson*, 8 Q. B. 65.

⁴ *Ferguson v. Earl of Kinnoull*, 9 Cl. & Fin. 261.

answerable, either as bodies or by their individual members, for acts done within the limits of their jurisdiction. Even inferior courts, provided the law has clothed them with judicial functions, are not answerable for errors in judgment; and where they may not act as judges, but only have a discretion confided to them, an erroneous exercise of that discretion, however plain the miscarriage may be, and however injurious its consequences, they shall not answer for. This follows from the very nature of the thing. It is implied in the nature of judicial authority, and in the nature of discretion where there is no such judicial authority. But where the law neither confers judicial power nor any discretion at all, but requires certain things to be done, everybody, whatever be its name, and whatever other functions of a judicial or of a discretionary nature it may have, is bound to obey; and, with the exception of the legislature and its branches, everybody is liable for the consequences of disobedience; that is, its members are liable, through whose failure or con- [*66] tumacy *the disobedience has arisen, and the consequent injury to the parties interested in the duty being performed."¹

But although the honesty and integrity of a judge acting in his judicial capacity cannot be questioned,² the law affords abundant means for obtaining redress, if any error³ be committed by him arising either from ignorance of law, or from a misconception of his judicial duties. If such an error be committed by him whilst sitting at *Nisi Prius*, the Court in banc will, on motion, interfere to rectify it, either by granting a new trial, by directing the verdict to be entered *non obstante veredicto*, or by arresting the judgment, if the cause of action be defectively set forth on the record. Where the alleged error consists in a misdirection by the judge, a bill of exceptions may also be tendered to his direction, and upon such bill brought before the superior court by writ of error, the Court of Exchequer Chamber is bound to decide on the validity of the exceptions, and to allow or disallow them, to correct any errors in the

¹ Per Lord Brougham, 9 Cl. & Fin. 289, 290, whose entire judgment is well worthy of perusal, having throughout an especial reference to the subject of judicial liability.

² As to libels upon public functionaries generally, see *Gathercole v. Mial*, 15 M. & W. 319, 332, 338.

³ As to whether the Court will grant a new trial for a mistake of the judge in determining the right to begin, see *Edwards v. Matthews*, 16 L. J., Exch. 291; *Mercer v. Whall*, 5 Q. B. 447; *Ashby v. Bates*, 15 M. & W. 589; *Booth v. Millns*, 15 M. & W. 669.

record to which the bill of exceptions is annexed, and to affirm or reverse the judgment of the Court below according to law.¹

With respect to the mode of proceeding by writ of error, where an erroneous judgment has been given by one of the three superior courts at Westminster, it may be observed, that this is an original [*67] writ issuing out of the *Court of Chancery in the nature as well of a *certiorari* to remove a record from an inferior to a superior court (except in the case of error *coram nobis* or *vobis*), as of a commission to the judges of such superior court to examine the record, and to affirm or reverse the judgment according to law. The writ is grantable *ex debito justitiæ* in all cases except in treason or felony,² and lies where a person is aggrieved by an error in the foundation, proceeding, judgment, or execution of a suit, provided it be an error in substance not aided at common law or by some of the statutes of jeofail.³

If, upon a judgment in the Court of Queen's Bench or Common Pleas, there be error in the process, or through the default of the clerks, and not of the Court, or where the error is in fact, and not in law,—as, where the plaintiff or defendant was a married woman at the commencement of the suit,—in these cases, the judgment shall be reversed by a writ of error returnable in the same court, and hence called a writ of error *coram nobis* in the Queen's Bench, and *coram vobis* in the Common Pleas.⁴

Where, however, the error is in the judgment itself, and not in the process, a writ of error does not lie in the same court, but must be brought in another and superior court.⁵

*Errors in law are common or special. The *common errors* [*68] are, that the declaration is insufficient in law to maintain the action, and that the judgment was given for the plaintiff instead of the defendant, or for the defendant instead of the plaintiff, in the original action. *Special errors* are any matter appearing on the

¹ Roe d. Lord Trimlestown v. Kemmis, 9 Cl. & Fin. 749.

² After judgment given against a defendant either at sessions or the assizes in a criminal case, if there be a substantial defect in the indictment, or error apparent on the record, such judgment may be reversed by the Court of Queen's Bench. Before, however, this writ can be sued out, it is necessary to obtain the Attorney-General's fiat, which in misdemeanours on sufficient cause shown is granted as a matter of course; but in felonies it is granted only *ex gratiâ*. Warren's Law Studies, 2d ed. 608, 604. It seems probable that before long a court of appeal will be established by the legislature, and that an appeal will lie *ex debito justitiæ* in all criminal cases.

³ 2 Wms. Saund. 101 (1).

⁴ Id. 101 a.

⁵ 1 Chit. Arch. Pr., 8th ed. 481.

face of the record which shows the judgment to have been erroneous.¹ But the plaintiff cannot assign error in fact and error in law together; for these are distinct things, and require different trials.² The party may, however, have the benefit of this indirectly; for the Court ought to give judgment of reversal, if there be error in law, notwithstanding no error in law is assigned.³ It is also a general rule, that nothing can be assigned for error which contradicts the record.⁴

Lastly, with respect to an award, which, when made in pursuance of a submission to arbitration in the usual manner, is equivalent to a judicial decision upon the points at issue between the parties, the general rule, we may observe, is, that, if an arbitrator makes a mistake, which is not apparent on the face of his award, the party injured has no redress, nor is there in this respect any difference between a mistake in the law of evidence, and in other matters. If no corruption be shown, the Court will decline to interfere.⁵

*QUI JUSSU JUDICIS ALIQUOD FECERIT NON VIDETUR DOLO [*69]
MALO FECISSE, QUIA PARERE NECESSE EST.
(10 Rep. 76.)

*Where a person does an act by command of one exercising judicial authority, the law will not suppose that he acted from any wrongful or improper motive, because it was his bounden duty to obey.*⁶

Where a Court has jurisdiction of the cause, and proceeds *inverso ordine*, or erroneously, then the party who sues, or the officer or minister of the Court who executes the precept or process of the Court, will not be liable to an action.⁷ But when the Court has not jurisdiction of the cause, then the whole proceeding is *coram non judice*,⁸ and actions will lie against the above-mentioned parties with-

¹ 2 Wms. Saund. 101 a. q.

² Id. 101 q.

³ 1 Chit. Arch. Pr., 8th ed. 501. See Gregory v. Duke of Brunswick, 3 C. B. 481, 54 E. C. L. R.

⁴ Bac. Max., reg. 17; 2 Wms. Saund. 101 q; Yelv. 33.

⁵ See per Pollock, C. B., Hagger v. Baker, 14 M. & W. 10; Phillips v. Evans, 12 M. & W. 309; Fuller v. Fenwick, 16 L. J., C. P., 79. See also Rees v. Waters, 16 M. & W. 263.

⁶ This maxim, which should be read in connexion with that immediately preceding, is derived from the Roman law, see D. 50, 17, 176, s. 1.

⁷ See Prentice v. Harrison, 4 Q. B. 852; 45 E. C. L. R.; Brown v. Jones, 15 M. & W. 191.

⁸ See Tinniswood v. Pattison, 3 C. B. 248, 54 E. C. L. R.; *Factum a judice quod ad officium ejus non pertinet ratum non est*: D. 50, 17, 170.

out any regard to the precept or process; and in this case it is not necessary to obey one who is not judge of the cause, any more than it is to obey a mere stranger, for the rule is, *judicium à non suo judice datum nullius est momenti*.¹

Accordingly, in *Watson v. Bodell*,² it was held that the messenger of a district court of bankruptcy, acting under an order, which the commissioner of that court had no jurisdiction to make, was liable in trespass; and in *Van Sandau v. Turner*,³ the principle above laid down was applied to the case of parties justifying under a warrant

*issued by the Judge of the Court of Review in Bankruptcy. [*70] In *Thomas v. Hudson*,⁴ which was an action against the keeper of the Queen's prison for an escape, it was held that the defendant, who had discharged the prisoner from custody, under an order of one of the Commissioners of the Court of Bankruptcy, acting judicially, in a matter over which he had jurisdiction, was protected by such order; and, in the great case of *Gosset v. Howard*,⁵ before the Court of Exchequer Chamber, in which all the authorities relating to justification under warrants will be found collected, it was held, that the warrant of the Speaker of the House of Commons, having issued in a matter over which the House had jurisdiction, was to be construed on the same principle as a mandate or writ issuing out of a superior court acting according to the course of common law, and that it afforded a valid defence to an action for assault and false imprisonment brought against the Serjeant-at-Arms, who acted in obedience to such warrant.

In the last-mentioned case it will be observed that the matter in respect of which the warrant issued was admitted to be within the jurisdiction of the House, and it is peculiarly necessary to notice this, because it will be remembered that, in the previous case of *Stockdale v. Hansard*,⁶ it was held to be no defence in law to an action for publishing a libel, that the defamatory matter was part of a document, which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of

¹ *Marshalsea case*, 10 Rep. 70; *Taylor v. Clemson*, 2 Q. B. 1014, 1015, 42 E. C. L. R.; S. C., 11 Cl. & F. 610; *Morrell v. Martin*, 4 Scott, N. R. 813, 814; 36 E. C. L. R.; *Jones v. Chapman*, 14 M. & W. 124; *Baylis v. Strickland*, 1 Scott, N. R. 540; 36 E. C. L. R.; *Marshall v. Lamb*, 5 Q. B. 115; 48 E. C. L. R.

² 14 M. & W. 57. See also *In re Lord*, 16 L. J., Exch., 118.

³ 6 Q. B. 778; 51 E. C. L. R. See also *Ex parte Van Sandau*, 1 Phil. 445, 605.

⁴ 14 M. & W. 358, since affirmed in error; *Savory v. Chapman*, 11 A. & E. 829; 39 E. C. L. R.

⁵ 16 L. J., Q. B. 345, reversing the judgment in the Court below.

⁶ 9 A. & E. 1, 36 E. C. L. R.

the House, and which was afterwards, by order of the House, printed and published by the defendant. The decision in this case resulted from the opinion entertained *by the Court being adverse to the existence of the privilege under which the defendant [*71] sought to justify the alleged wrongful act, and, in consequence of this decision, the stat. 3 & 4 Vict. c. 9, was passed, which enacts, that all proceedings, whether by action or criminal prosecution, similar to the above, shall be stayed by bringing before the Court or judge a certificate, under the hand of the Chancellor or of the Speaker of the House of Commons, to the effect, that the publication in question is by order of either House of Parliament, together with an affidavit verifying such certificate.

Where an action is brought in a court of limited jurisdiction, and the defendant pleads to the jurisdiction, the Court must necessarily decide, in the first instance, whether they have jurisdiction or not; and, if they decide that they have jurisdiction in a case where they clearly have no pretence for it, and give judgment against the defendant, and act on that decision, they will render themselves liable to an action.¹

A very recent case² will serve to illustrate the above general and very important doctrine:—The commissioners of a court of requests ordered a debt claimed by the plaintiff to be paid by certain instalments, “or execution to issue.” The clerk of the court, on default of payment, and on application made to him by the plaintiff, issued a precept for execution without further intervention of the Court. It was held, that the commissioners were required, when acting on such default, to execute judicial powers, which could not be delegated; and, therefore, that the clerk who *made such precept was liable in trespass for its execution, though the proceeding [*72] was conformable to the practice of the court, inasmuch as the court could not institute such a practice; but it was further held, that the serjeant who executed the precept, and who was the ministerial officer of the commissioners, bound to execute their warrants, having no means whatever of ascertaining whether they issued upon valid judgments, or were otherwise sustainable or not, was well defended by it,

¹ Per Lord Abinger, C. B., *Wingate v. Waite*, 6 M. & W. 746.

² *Andrews v. Marris*, 1 Q. B. 3, 16, 17; 41 E. C. L. R., recognised *Carratt v. Morley*, Id. 29. As to the liability of the party at whose suit execution issued, see *Carratt v. Morley*, *supra*. *Coomer v. Latham*, 16 L. J., Exch. 175; *Ewart v. Jones*, 14 M. & W. 774; *Green v. Elgie*, 5 Q. B. 99; 48 E. C. L. R.

because the subject-matter of the suit was within the general jurisdiction of the commissioners, and the warrant appeared to have been regularly issued. The Court observed, that his situation was exactly analogous to that of the sheriff in respect of process from a superior court; and that it is the well-known distinction between the cases of the party and of the sheriff or his officer, that the former, to justify his taking body or goods under process, must show the judgment in pleading as well as the writ, but for the latter it is enough to show the writ only.¹

The case of a justification at common law by a constable under the warrant of a justice of the peace offers a further illustration of the rule now under consideration; for if the warrant issued by the justice of the peace, in the shape in which it is given to the officer, is such that the party may lawfully resist it,² or, if taken upon it, may be released upon habeas corpus, it is a warrant which, in that shape, the magistrate had no jurisdiction to issue, and which, therefore, the officer need not have obeyed, and which, at common law, on the principle laid down, will not protect him against the action of the party injured. Where the cause is expressed but imperfectly, [*73] the officer may not be expected *to judge as to the sufficiency of the statement; and, therefore, if the subject-matter be within the jurisdiction of the magistrate, he may be bound to execute it, and as a consequence, be entitled to protection; but where no cause is expressed, there is no question as to the want of jurisdiction.³

In accordance with these remarks, a plea of justification⁴ will be bad, if it does not show that the justice had jurisdiction over the subject-matter upon which the warrant is granted; and, generally, when a limited authority is given, if the party to whom such authority is given extends the exercise of his jurisdiction to objects not within it, his warrant will be no protection to the officer who acts under it; and, by necessary consequence, where the officer justifies under a warrant so granted by a court of limited jurisdiction, he must show that the warrant was granted in a case which fell within

¹ See *Cotes v. Michill*, 3 Lev. 20; *Moravia v. Sloper*, Willes, 80, 84.

² *Reg. v. Tooley*, 2 Lord Raym. 1296, 1802.

³ Per Coleridge, J., 14 L. J., Q. B. 378.

⁴ See a plea of justification under stat. 1 & 2 Vict. c. 74; *Edmunds v. Pinneger*, 7 Q. B. 558; 58 E. C. L. R.

such limited jurisdiction.¹ It must be observed, moreover, that, where an officer, for whom the writ or warrant of the Court alone would have been a sufficient justification, joins in pleading with the party for whom it would not, and who can only defend himself on the validity of the judgment or proceeding, he, by so doing, foregoes the benefit of the warrant ;² and that, where in so pleading he unnecessarily sets out the whole proceeding, he will be bound by any defects which may be apparent on the plea.³

By stat. 24 Geo. 2, c. 44, s. 6, it is enacted, that no *action shall be brought against any constable, headborough, or other [*74] officer, or against any person or persons acting by his order or in his aid, for anything done in obedience to any warrant under the hand or seal of any justice of the peace until demand shall have been made of the perusal and copy of such warrant, and the same refused or neglected for the space of six days after such demand ; that in case, after such demand and compliance therewith, any action shall be brought against such constable, &c., for any such cause as aforesaid, without making the justice or justices who signed or sealed the said warrant defendant or defendants, then, on producing or proving such warrant at the trial, the jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction in such justice or justices ; and if such action be brought against the justice and constable jointly, then, on proof of such warrant, the jury shall find for such constable, notwithstanding such defect of jurisdiction as aforesaid : and this statute extends as well to cases in which the justice has acted without jurisdiction, as where the warrant which he has granted is improper.⁴

It should be observed, however, that the officer must show that he acted in obedience to the warrant,⁵ and can only justify that which he *lawfully* did under it ;⁶ and where the justice cannot be liable, the officer is not entitled to the protection of the statute ; for the act was intended to make the justice liable instead of the officer : where,

¹ Morrell v. Martin, 4 Scott, N. R. 813, 816. See Taylor v. Clemson (in error), 2 Q. B. 978 ; 42 E. C. L. R., ante, p. 69.

² Phillips v. Biorn, 1 Stra. 509 ; Smith v. Bouchier, 2 Stra. 993, cited 1 Q. B. 17 ; 41 E. C. L. R.

³ Morse v. James, Willis, 122, cited 1 Q. B. 17.

⁴ Per Lord Eldon, C. J., Price v. Messenger, 2 B. & P. 158 ; Atkins v. Kilby, 11 A. & E. 777 ; 89 E. C. L. R.

⁵ See Hoye v. Bush, 2 Scott, N. R. 86.

⁶ Peppercorn v. Hofman, 9 M. & W. 618, 628.

therefore, the officer makes such a mistake as will not make the justice liable, the officer cannot be excused.¹

[*75] *Besides the statute 24 Geo. 2, c. 44, above mentioned, there are many other enactments, which on grounds of public policy, specially extend protection to persons who act bona fide, though mistakenly, in pursuance of their provisions; and we may here properly direct attention to one very recent and important case, a perusal of which will serve to throw much light upon this question, whether with reference to persons exercising judicial or discharging merely ministerial functions. In *Hughes v. Buckland*,² the action was one of trespass against the defendants, being servants of A. B., for apprehending the plaintiff while fishing in the night-time near the mouth of a river in which A. B. had a several fishery; at the trial, much evidence was given to show that A. B.'s fishery included the place where the plaintiff was apprehended; the jury, however, defined the limits of the fishery so as to exclude that place by a few yards, but they also found that A. B. and the defendants "bona fide and reasonably" believed that the fishery extended over that spot: it was held, that the defendants were entitled to the protection of the stat. 7 & 8 Geo. 4, c. 29, s. 75, which is framed for the protection "of persons acting in the execution" of that act, and doing anything in pursuance thereof. "The object of the clause in question," observed Pollock, C. B., in the course of his judgment, "was to give protection to all parties who honestly pursued the statute. Now, every act consists of *time*, *place*, and *circumstance*. With regard to *circumstance*, it is admitted, that, if one magistrate acts where two are required, or imposes twelve months' imprisonment where he ought only to impose six, he is protected if he has a general [*76] jurisdiction over the subject-matter, or has reason to think *he has. With respect to *time*, the case of *Cann v. Clipperton*³ shows, that a party may be protected although he arrests another after the time when the statute authorizes the arrest. *Place* is another ingredient; and I am unable to distinguish the present case from that of a magistrate who is protected, although he acts out of his jurisdiction. A party is protected if he acts bona fide, and in the reasonable belief that he is pursuing the act of Parliament." It will be evident, that the principle as to statutory protection, here so

¹ 1 Chit. Stats. 649 (y). As to the operation of sect. 1, Id. 645 (l).

² 15 M. & W. 846, where the cases upon this subject are cited.

³ 10 A. & E. 188; 37 E. C. L. R.

clearly stated, is one of very general application; and it has, in fact, been fully recognised and applied in several cases which have been decided subsequently to that of *Hughes v. Buckland*, above cited.¹ It seems, therefore, merely necessary to call attention to the fact, that the jury there found that the defendants not only bona fide believed, but had reasonable grounds for the belief, that they were acting in pursuance of the particular statute; proof of the bona fides will not, in the class of cases alluded to, be found to have been held sufficient to entitle a party who has acted mistakenly to protection, unless accompanied by proof that he had reasonable grounds for the belief that he was in that position which would have justified the act complained of.²

Lastly, we may observe, that when considered with reference to foreign communities, the jurisdiction of every court, whether in personam, or in rem, must necessarily be bounded by the limits of the kingdom in which it is established, and unless, by virtue of international treaties, such *jurisdiction has been extended, it clearly cannot enforce process beyond those natural limits, [*77] according to the maxim, *Extra territorium jus dicenti impune non paretur*.³

AD QUÆSTIONEM FACTI NON RESPONDENT JUDICES, AD QUÆSTIONEM
LEGIS NON RESPONDENT JURATORES.

(8 Rep. 808.)

*It is the office of the judge to instruct the jury in points of law—of the jury to decide on matters of fact.*⁴

The object in view on the trial of a cause is to find out, by due examination, the truth of the point in issue between the parties, in order that judgment may thereupon be given, and therefore the facts of the case must, in the first instance, be ascertained through the intervention of the jury, for *ex facto jus oritur*—the law arises out of the fact. If the fact be perverted or misrepresented, the law which arises thence will unavoidably be unjust or partial; and in

¹ *Higgins v. Waydey*, 15 M. & W. 357; *Braham v. Watkins*, 16 M. & W. 77.

² *Kine v. Evershed*, 16 L. J., Q. B. 271; citing *Cann v. Clipperton*, and *Hughes v. Buckland*; *Smith v. Hopper*, 16 L. J., Q. B. 93.

³ *Story*, Conf. Laws, s. 539. See *Whitmore v. Ryan*, 15 L. J., Chan. 282; D. 2, 1, 20.

⁴ *Co. Litt.* 295, b; 9 Rep. 13; *Bishop of Meath v. Marquis of Winchester*, 3 Bing. N. C. 217; 82 E. C. L. R.; S. C. 4 Cl. & Fin. 557; *Bushell's case*, *Vaugh. R.* 149.

order to prevent this, it is necessary to set right the fact and establish the truth contended for, by appealing to some mode of probation or trial which the law of the country has ordained for a criterion of truth and falsehood.¹

Where, then, the question at issue between the litigating parties is one of fact merely, *quæstio facti*—such issue must be determined [*78] by the jury; but if, as frequently *happens, it is *quæstio juris*, this may either be decided by the judge at Nisi Prius, or may be raised and argued before the court in banc on demurrer, special verdict, or special case, or in a court of error on bill of exceptions.²

A few instances must suffice to show the application of the above rule. Thus, there are two requisites to the validity of a deed: 1st, that it be sufficient in law, on which the Court shall decide; 2dly, that certain matters of fact, as sealing and delivery, be duly proved, on which it is the province of the jury to determine;³ and where interlineations or erasures are apparent on the face of a deed, it is now the practice to leave it to the jury to decide whether the rasing or interlining was before the delivery.⁴

Again, it is the duty of the Court to construe all written instruments, as soon as the true meaning of the words in which they are [*79] couched, and the surrounding circumstances, *if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the Court either absolutely,

¹ 2 Inst. 49; 3 Bla. Com. 329, 330.

² Abbott of Strata Marcella's case, 9 Rep. 18, 25; Co. Litt. 125, a; Bushell's case, Vaugh. R. 143, 144. If facts are stated by the jury to raise a question of law on the record, that is a special verdict; but it does not follow, merely because a jury choose to return their verdict only in particular words, instead of saying aye or no, that the verdict is a special one. Per Patteson, J., Scales v. Key, 11 A. & E. 825; 39 E. C. L. R. Nor will the court of error, upon a special verdict, draw *inferences* of facts necessary for the determination of the case from other statements contained therein. (Tancred v. Christy, 12 M. & W. 316.) Per Willes, C. J., 1 Wils. 55, citing Hobart, 262. As to the inferences which may be drawn by a jury, see per Pollock, C. B., Cooke v. Stratford, 13 M. & W. 384.

³ Co. Litt. 255, a; Altham's case, 8 Rep. 308; Dr. Leyfield's case, 10 Rep. 92, cited Jenkin v. Peace, 6 M. & W. 728.

⁴ Co. Litt. 225, b. See Doe d. Fryer v. Coombs, 3 Q. B. 687; 43 E. C. L. R.; Alsager v. Close, 10 M. & W. 576. It is incumbent on the plaintiff to give some evidence of the circumstances under which the alteration of a bill of exchange took place. See Clifford v. Lady Parker, 3 Scott, N. R. 233, and cases there cited; Cariss v. Tattersall, Id. 257. And see the maxim, *ubi eadem ratio ibi idem jus*, where additional cases on this subject are cited.

if there be no words to be construed, as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained, or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the Court is the proper subject, by means of a bill of exceptions, of redress in a court of error, but a misconstruction by the jury cannot be set right at all effectually.¹ Accordingly, the construction of a doubtful document given in evidence to defeat the Statute of Limitations is for the Court and not for the jury: but if it be explained by extrinsic facts, from which the intention of the parties may be collected, they are for the consideration of the jury,² it may indeed be laid down generally, that although it is the province of the Court to construe a written instrument, yet where its effect depends not merely on the construction and meaning of the instrument, but upon collateral facts and extrinsic circumstances, the inferences to be drawn from them are to be left to the jury.³

Again, in an action for indicting maliciously and without probable cause, the question of probable cause⁴ is a mixed proposition of law and fact; whether the circumstances *alleged to show it probable or not probable are true and existed, is a matter of fact; [*80] but whether, supposing them true, they may amount to a probable cause, is a question of law.⁵ It therefore falls within the legitimate province of the jury to investigate the truth of the facts offered in evidence, and the justness of the inferences to be drawn from such facts; whilst, at the same time, they receive the law from the judge, viz., that, according as they find the facts⁶ proved or not proved,

¹ Judgment, *Neilson v. Harford*, 8 M. & W. 828. Per Erskine, J., *Shore v. Wilson*, 5 Scott, N. R. 988.

² *Morrell v. Frith*, 8 M. & W. 402; *Doe d. Curzon v. Edmonds*, 6 M. & W. 295. See *Worthington v. Grimsditch*, 7 Q. B. 479; 58 E. C. L. R.

³ *Etting v. U. S. Bank*, 11 Wheaton, R. (U. S.) 59.

⁴ See per Wilde, C. J., *Pater v. Baker*, 16 L. J., C. P. 127. A private person is not justified in arresting or giving in charge of a policeman, without a warrant, a party who has been engaged in an affray, unless the affray is still continuing, or there is a reasonable ground for apprehending that he intends to renew it: *Price v. Seely*, 10 Cl. & Fin. 28.

⁵ *Johnstone v. Sutton* (in error), 1 T. R. 544, 545, 547. Per Alderson, B., *Hinton v. Heather*, 14 M. & W. 184. See also *Gibbons v. Alison*, 8 C. B. 181; *Blanchford v. Dod*, 2 B. & Ad. 179; 22 E. C. L. R.; *Reynolds v. Kennedy*, 1 Wils. 282; *James v. Phelps*, 11 A. & E. 483; 89 E. C. L. R.

⁶ Among the facts to be ascertained is the belief, or absence of belief, by defendant that he had reasonable and probable cause; *Turner v. Ambler*, 16 L. J., Q.

and the inferences warranted or not, there was reasonable and probable ground for the prosecution, or the reverse; and this rule holds, however complicated and numerous the facts may be.¹

In cases of libel,² also, it has been the course for a long time for the judge, first to give a legal definition of the offence, and then to leave it to the jury to say, whether the facts necessary to constitute that offence are proved to their satisfaction; and this course is adopted, whether the libel is the subject of a criminal prosecution or of a civil action; and although the judge *may*, as a matter of advice to them in deciding that question, give his own opinion as to the nature of the publication, yet he is not bound to do so as a matter of law.³

[*81] *Again, the *amount* of costs is a matter wholly within the province of the Court to determine in those cases where a party is entitled to them, but the *right* to costs is given by the statute law. Now, where the *amount* merely depends on a fact which it is unnecessary to notice on the record,—as, for instance, where a successful plaintiff or defendant is entitled to double costs,—the Court may award them on the taxation; but where the right to *any* costs is in question, and depends upon a fact the determination of which is not by the statute law vested in the Court, and which must be stated on the record to justify the award of costs contrary to the usual course, the fact, if the opposite party insists upon it, ought to be tried by a jury.⁴

The maxim under consideration may be further illustrated by the ordinary case of an action, for the price of goods supplied to the defendant's wife. Here the real question is, whether the wife was or was not authorized by the husband to order the goods in question, and it is general for the jury to say whether the wife had any such authority, and whether the plaintiff, who supplied the goods, must not have known that the wife was exceeding the authority given her in pledging the husband's credit.⁵ So, in an action against an attorney, B. 158; *James v. Phelps*, 11 A. L. E. 483; 39 E. C. L. R.; *Delegal v. Highley*, 3 Bing., N. C. 950.

¹ *Panton v. Williams*, 2 Q. B. 169, 194; 42 E. C. L. R.; cited argument, *Peck v. Boys*, 7 Scott, N. R. 441; *Michell v. Williams*, 11 M. & W. 205. See *Bushell's case*, Vaugh. R. 147; *Ewart v. Jones*, 14 M. & W. 774.

² See particularly *Gathercole v. Miall*, 15 M. & W. 319.

³ *Parmiter v. Coupland*, 6 M. & W. 105. See also *Padmore v. Lawrence*, 11 A. & E. 380; 39 E. C. L. R.

⁴ *Judgment, Watson v. Quilter*, 11 M. & W. 767.

⁵ *Per Parke, B., Lane v. Ironmonger*, 13 M. & W. 370.

ney, for negligence, the question of negligence is one of fact for the jury;¹ and, although whether there is any evidence is a question for the judge, yet whether the evidence is sufficient is a question for the jury;² and very many other instances will readily suggest *themselves to the reader, in which the same comprehensive [*82] and fundamental principle is equally applicable.³

But, although the general principle is as above laid down, there are many exceptions to it.⁴ Thus, all questions of reasonableness—reasonable cause, reasonable time, and the like—are, strictly speaking, matters of fact, even where it falls within the province of the judge or the Court to decide them.⁵

So, where a question arises as to the admissibility of evidence, the facts upon which its admissibility depends are to be determined by the judge, and not by the jury. If the opposite course were adopted, it would be equivalent to leaving it to the jury to say whether a particular thing were evidence or not.⁶

There are also certain statutes which give to the Court in particular cases cognizance of certain facts;⁷ and there is another and distinct class of cases, in which the Court, having a discretionary power over its own process, is called upon to depart from the usual course, upon the suggestion of some matter which renders such departure expedient or essential for the purposes of justice; as where a venue is to be changed because an impartial trial cannot be had, or where the sheriff is a party. In such a case it is manifest *that the suggestion cannot be traversed, for to whom should [*83] the writ be directed for trial of the fact? Surely not to the sheriff of the county, to be tried by a jury of that county whether

¹ *Hunter v. Caldwell*, 16 L. J., Q. B. 274; *Hayne v. Rhodes*, 15 Id. 137.

² *Per Buller, J., Carpenters' Company v. Hayward*, Dougl. 375. It is also for the jury and not for the Court to determine the amount of damage occasioned by a tort, and the Court will not interfere unless they are grossly disproportioned to the injury sustained, see *Thompson v. Gordon*, 15 M. & W. 610; *Williams v. Currie*, 1 C. B. 841; 50 E. C. L. R.; *Armytage v. Haley*, 4 Q. B. 917; 45 E. C. L. R.; *Lowe v. Steele*, 15 M. & W. 380; *Strutt v. Falar*, 16 M. & W. 249.

³ See the *Law Review*, vol. I. No. 1. The assent of an executor to a bequest, is not a matter of law but a question of fact for the jury; *Mason v. Farnell*, 12 M. & W. 674.

⁴ *Judgment, Watson v. Quilter*, 11 M. & W. 767.

⁵ See *per Lord Abinger, C. B., Startup v. Macdonald*, 7 Scott, N. B. 280; Co. Litt. 566; *Barton v. Griffiths*, 11 M. & W. 817.

⁶ *Per Alderson, B., Bartlett v. Smith*, 11 M. & W. 486. See 1 Phil. Ev. 9th ed. 2.

⁷ See some instances mentioned, *Judgment, Watson v. Quilter*, 11 M. & W. 768.

they are impartial, or to be tried by a jury of his own selection whether he be a party? These cases, therefore, imply the necessity of a preliminary determination by the Court itself to whom the process should be directed.¹

It remains to add, that, where the judge misconceives his duty, and presents the question at issue to the jury in too limited and restrained a manner, and where, consequently, that which ought to have been put to them for the exercise of their judgment upon it as a matter of fact or of inference, is rather left to them as matter of law, to which they feel bound to defer, the Court in banco will remedy the possible effect of such misdirection by granting a new trial.²

So, likewise, in a penal action, the Court will grant a new trial when they are satisfied that the verdict is in contravention of law, whether the error has arisen from the misdirection of the judge or from a misapprehension of the law by the jury, or from a desire on their part to take the exposition of the law into their own hands.³

And we may observe, in conclusion, that the Court in banco always shows its anxiety to correct any miscarriage which may have been occasioned by an infraction of either branch of the maxim, *ad questionem legis respondent iudices ad questionem facti respondent juratores*, acting in accordance with the principle emphatically laid down by Lord Hardwicke, *in these words: "It is of the [*84] greatest consequence to the law of England and to the subject, that these powers of the judge and jury be kept distinct, that the judge determine the law, and the jury the fact; and if ever they come to be confounded it will prove the confusion and destruction of the law of England."⁴

§ II.—THE MODE OF ADMINISTERING JUSTICE.

Having in the last section considered some maxims relating peculiarly to the judicial office, the reader is here presented with a few which have been selected in order to show the mode in which justice

¹ Judgment, *Watson v. Quilter*, 11 M. & W. 768, 769.

² See *Edwards v. Scott*, 2 Scott, N. R. 266, 271; per Lord Kenyon, C. J., *Wilson v. Rastall*, 4 T. R. 758.

³ *Attorney-General v. Rogers*, 11 M. & W. 670.

⁴ *Rex v. Poole*, Cas. temp. Hardw. 28.

is administered in our courts, and which relate rather to the rules of practice than to the legal principles observed there.

NEMO DEBET ESSE JUDEX IN PROPRIA SUA CAUSA.

(12 Rep. 118.)

No man can be judge in his own cause.

It is a fundamental rule in the administration of justice, that a person cannot be judge in a cause wherein he is interested: ¹ *nemo sibi esse judex vel suis jus dicere debet*; ² and, therefore, in the reign of James I., it was solemnly adjudged that the king cannot take any cause, whether civil or criminal, out of any of his courts, and give judgment upon it himself; but it must be determined and adjudged in some court of justice according to the law and custom of England; and in the case referred to, "the judges *informed the king that no king, after the conquest, assumed [*85] to himself to give any judgment in any cause whatsoever which concerned the administration of justice; but these were solely determined in the courts of justice;" ³ and *Rex non debet esse sub homine sed sub Deo et lege*.⁴

It is, then, a rule always observed in practice, and of the application of which instances not unfrequently occur, that, where a judge is interested in the result of a cause, he cannot, either personally or by deputy, sit in judgment upon it.⁵ If, for instance, a plea allege a prescriptive right vested in the lord of the manor to seize cattle damage feasant, and to detain the distress until fine paid for the damages, at the lord's will, this prescription will be void, and the plea consequently bad; "because it is against reason, if wrong be done any man, that he thereof should be his own judge;"⁶ and it is a maxim of law, that *aliquis non debet esse judex in propria causa quia non potest esse judex et pars*.⁷

Neither can a justice of the peace, who is interested in a matter pending before the Court of Quarter Sessions, take any part in the proceedings, unless indeed all parties know that he is interested, and

¹ Per Cur. 2 Stra. 1178.

² C. 8, 5, 1.

³ Prohibitions del Roy, 12 Rep. 63, cited *Bridgman v. Holt*, 2 Show. P. Ca. 126.

⁴ *Fleta*, fo. 2, c. 5.

⁵ *Brooks v. Earl of Rivers*, Hardr. 508; *Earl of Derby's case*, 12 Rep. 114; per *Holt, C. J.*, Anon. 1 Salk. 396; *Chitt. Gen. Pr.*, vol. 3, p. 9.

⁶ *Litt. s.* 212.

⁷ *Co. Litt.* 141, a.

consent, either tacitly or expressly, to his presence or interference.¹ In such a case, it has been recently held that the presence of one interested magistrate will render the court improperly constituted, and vitiate the proceedings; it being no answer *to the objection, that there was a majority in favour of the decision, without reckoning the vote of the interested party.² And, on the same principle, where a bill was preferred before the grand jury at the assizes against a parish for non-repair of a road, the liability to repair which was denied by the parish, the Court of Queen's Bench granted a criminal information against the parish, on the ground that two members of the grand jury were large landed proprietors therein, took part in the proceedings on the bill, and put questions to the witnesses examined before them; one of them, moreover, having stated to the foreman that the road in question was useless, and the bill having been thrown out by the grand jury.³

ACTUS CURIÆ NEMINEM GRAVABIT.

(Jenk. Cent. 118.)

An act of the Court shall prejudice no man.

Where a case stands over for argument from term to term, on account of the multiplicity of business in the court, or for judgment from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively to meet the justice of the case;⁴ and, therefore, if one party to an action die during *curia advisari vult*, judgment may be entered *nunc pro tunc*, for the delay is the act of the Court, and therefore neither party should suffer for it.⁵

[*87] *In a recent case, involving issues both of law and fact, the issues of fact were tried in the month of August, 1843; a

¹ Reg. v. The Cheltenham Commissioners, 1 Q. B. 467; 50 E. C. L. R., and cases there cited.

² Reg. v. Justices of Hertfordshire, 6 Q. B. 758; 60 E. C. L. R.

³ Reg. v. Upton, St. Leonard's, 16 L. J., M. C., 84. See *Esdaille v. Lund*, 12 M. & W. 784. As to the validity of an award made by an interested party, see *Watson, Arbitr.* 3d ed. 85.

⁴ Per Garrow, B., 1 Y. & J. 872.

⁵ *Cumber v. Wane*, 1 Stra. 425; per Tindal, C. J., *Harrison v. Heathorn*, 6 Scott, N. R. 797; *Toulmin v. Anderson*, 1 Taunt. 384; Jenk. Cent. 180. Secus, where the delay is that of the party, *Fishmongers' Company v. Robertson*, 16 L. J., C. P., 118.

verdict was found for the plaintiff, and a rule for a new trial was discharged Trinity Term, 1844; in the same term the demurrers were set down in the special paper but did not come on for argument until May, 1845, when judgment was given upon them for the plaintiff. The plaintiff having died in March, 1845, the Court made absolute a rule to enter judgment as of Trinity Term, 1844.¹ It being in accordance with the principles of the common law, irrespective of the stat. 17 Car. 2, c. 8, that, wherever, in such cases as the above, the delay is the act of the Court and not that of the party, the judgment may be entered *nunc pro tunc*, unless, indeed, it can be shown that the other party would be prejudiced by entering the judgment as prayed, which would, no doubt, be a sufficient ground to justify the Court in refusing to interfere.²

Again, a peremptory undertaking to proceed to trial is not an undertaking to try at all events; and where the plaintiff having peremptorily undertaken to try at a particular sittings, gave notice of trial and entered the cause as a special jury cause, on the last day, and, there being only two days' sittings, it was made a remanet; the Court held that the plaintiff was not in default, so as to entitle the defendant to judgment as in case of a nonsuit, for not proceeding to trial pursuant to the undertaking.³

*The preceding examples will probably be sufficient to illustrate the general doctrine, which is equally founded on common sense and on authority, that the act of a Court of law shall prejudice no man. We may, however, refer the reader to another very recent case in confirmation of this doctrine, in which it was observed, that, as long as there remains a necessity in any stage of the proceedings in an action, for an appeal to the authority of the Court, or any occasion to call upon it to exercise its jurisdiction, the Court has, even if there has been some express arrangement between the parties, an undoubted right, and is, moreover, bound to inter-

[*88]

¹ Miles v. Bough, 15 L. J., Q. B. 80, recognising Lawrence v. Hodson, 1 Yo. & J. 368, and Brydges v. Smith, 8 Bing. 29; 21 E. C. L. R.; Miles v. Williams, 16 L. J., Q. B., 56.

² Miles v. Bough, supra, and cases there cited; Vaughan v. Wilson, 4 B. N. C. 116; 43 E. C. L. R.; Green v. Cobden, 4 Scott, 486; Evans v. Rees, 12 A. L. E. 167; 40 E. C. L. R.

³ Lumley v. Dubourg, 14 L. J., Exch. 334 (reviewing Petrie v. Cullen, 8 Scott, N. R., 705; and Ward v. Turner, 5 Dowl. P. C. 22); Rogers v. Vanderboom, 15 L. J., Q. B. 813; Rose v. The Port Talbot Company, Id. 818; Beasley v. Bailey, 16 M. & W. 59.

fere, if it perceive that its own process or jurisdiction is about to be used for purposes which are not consistent with justice.¹

Cases do however occur, in which injury is caused by the act of a legal tribunal, as by the laches or mistake of its officer; and where, notwithstanding the maxim as to *actus curiæ*, the injured party is altogether without redress.² Thus it is the duty of a judge to try the causes set down for trial before him, and yet if he refuse to hold his court, although there might be a complaint in Parliament respecting his conduct, no action would lie against him.³ So, in the case of a petition to the Crown to establish a peerage, if, in consequence of the absence of peers, a committee for privileges could not be held, the claimant, although necessarily put to great expense, and perhaps exposed to the loss of his peerage by death of witnesses, would be wholly without *redress.⁴ In the above and [*89] other similar cases, therefore, there is a wrong inflicted by a judicial tribunal, for which the law supplies no remedy.

ACTUS LEGIS NEMINI EST DAMNOSUS.

(2 Inst. 287.)

*An act in law shall prejudice no man.*⁵

Thus, the general principle is, that, if a man marry his debtor, the debt is thereby extinguished;⁶ but still a case may be so circumstanced as not to come within that rule; for instance, a bond conditioned for the payment of money after the obligor's death, made to a woman in contemplation of the obligor's marrying her, and intended for her benefit if she should survive, is not released by the marriage, but an action will lie at her suit against the executor; and this results from the principle that the law will not work a wrong, for the bond was given for the purpose of making a provision for the wife in the event of her surviving the obligor, and it would be iniquitous to set it aside on account of the marriage, since it was for that very event the bond was meant to provide.⁷

¹ Wade v. Simeon, 13 M. & W. 647.

² See Grace v. Clinch, 4 Q. B. 606; 45 E. C. L. R. In re Llandebllig v. Llandy-frydog, 15 L. J., M. C. 92.

³ Ante, p. 61.

⁴ Argument, 9 Cl. & F. 276.

⁶ 6 Rep. 68.

⁵ 1 Inst. 264, b.

⁷ Milbourn v. Ewart, 5 T. R. 881, 885; Cage v. Acton, 1 Lord Raym. 515; Smith v. Stafford, Hobart, 216. See another instance of rule, Calland v. Troward, 2 H. Bla. 324, 334; and see Nadin v. Battie, 5 East, 147; 1 Prest. Abs. of Tit. 346.

So, where an authority given by law has been abused, the law places the party so abusing it in the same situation as if he had, in the first instance, acted wholly without authority;¹ *and [*90] this, it has been observed,² is a salutary and just principle, founded on the maxim, that the law wrongs no man: *actus legis nemini facit injuriam*.

IN FICTIONE JURIS SEMPER ÆQUITAS EXISTIT.

(11 Rep. 51.)

A legal fiction is always consistent with equity.

According to a commentator on the Roman law, *Fictio nihil aliud est quam legis adversus veritatem in re possibili ex justâ causâ dispositio*;³ and *fictio juris* is defined to be a legal assumption that a thing is true which is either not true, or which is as probably false as true;⁴ the rule on this subject being, that the Court will not endure that a mere form or fiction of law, introduced for the sake of justice, should work a wrong contrary to the real truth and substance of the thing.⁵ No fiction, says Mr. Justice Blackstone, shall extend to work an injury, its proper operation being to prevent a mischief or remedy an inconvenience which might result from the general rule of law.⁶ Hence, if a man disseises me, and during the disseisin cuts down the trees or grass or the corn growing upon the land, and afterwards I re-enter, I shall have an action of trespass against him *vi et armis*, for after my regress the law as to the disseisor and his servants supposes the freehold always *to have continued in [*91] me; but if my disseisor makes a feoffment in fee, gift in tail, or lease for life or years, and afterwards I re-enter, I shall not have trespass *vi et armis* against those who came in by title; for this fiction of the law, that the freehold always continued in me, is moulded to meet the ends of justice, and shall not, therefore, have relation to make him who comes in by title a wrongdoer *vi et armis*, but in this case I shall recover all the mesne profits against my dis-

¹ 6 Bac. Ab. 559, Trespass (B), post. ² Argument, 11 Johnson, R. (U. S.) 380.

³ Gothofred. ad. D. 22, 3, s. 3. See Spence, Chan. Jurisd. 213, 214.

⁴ Bell's Dict. and Dig. of Scotch Law, p. 427; Finch Law, 66.

⁵ Per Lord Mansfield, C. J., Johnson v. Smith, 2 Burr. 962. See 10 Rep. 40; Id. 89. As to fictions in pleading, see Steph. Plead. 5th ed. 489, 490.

⁶ 3 Bla. Com. 48.

seisor.¹ So, the relation back to any antecedent period to make an act of bankruptcy has been said to be a case *strictissimi juris*, and ought not to prevail, except where the words of the statute upon which that construction is to be framed are clear and without doubt.² So, by fiction of law, all judgments were formerly³ supposed to be recovered in term, and to relate to the first day of the term, but in practice judgments were frequently signed in vacation; and it was held, that, where the purposes of justice required that the true time when the judgment was obtained should be made apparent, a party might show it by averment in pleading; and it was observed generally, that, wherever a fiction of law works injustice, and the facts, which by fiction are supposed to exist, are inconsistent with the real facts, a Court of law ought to look to the real facts.⁴ Nor will a legal fiction be raised so as to operate to the detriment of any person, [*92] *as in destruction of a lawful vested estate, for *fictio legis inique operatur alicui damnum vel injuriam*.⁵ The law does not love that rights should be destroyed, but, on the contrary, for supporting them invents notions and fictions.⁶ And the maxim *in fitione juris subsistit æquitas* is often applied by our courts for the attainment of substantial justice, and to prevent the failure of right.⁷ "Fictions of law," as observed by Lord Mansfield, "hold only in respect of the ends and purposes for which they were invented. When they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth."⁸

However, an extraordinary instance of the doctrine of relation (which is a legal fiction)⁹ working gross injustice, may be mentioned in a rule which formerly existed, that when the commencement of an act of Parliament was not directed to be from any particular time,

¹ Liford's case, 11 Rep. 51; Hobart, 98, cited per Coleridge, J., Garland v. Carlisle, 4 Cl. & Fin. 710.

² Higgins v. M'Adam, 8 Yo. & J., adopted Belcher v. Gummow, 16 L. J., Q. B. 155.

³ But now, by Reg. H. T., 4 Will. 4, s. 3, "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day." See Jarvis v. South, 18 M. & W. 152.

⁴ Lyttleton v. Cross, 8 B. & C. 317, 325. See Saunders v. M'Gowran, 18 L. J., Exch. 12; Robinson v. Tonge, 3 P. Wms. 398.

⁵ 3 Rep. 36; per Cur., Waring v. Dewbury, Gilb. Eq. R. 228.

⁶ Per Gould, J., Cage v. Acton, 1 Lord Raym. 516, 517.

⁷ Low v. Little, 17 Johnson, R. (U. S.) 348. ⁸ Morris v. Pugh, 3 Burr. 1248.

⁹ 3 Rep. 28.

it should take effect from the first day of the session in which the act was passed, which might be weeks, if not months, before the act received the royal sanction, or even before the bill was brought into Parliament;¹ but this rule was abolished by stat. 33 Geo. 3, c. 13, which enacted that the time when an act receives the royal assent shall be the date of its commencement, where no other period is provided.²

Again, the state of the law prior to the recent stat. 2 & 3 Vict. c. 29, seems to offer another exception to the above rule. For previously to the last-mentioned statute, a sheriff was held liable in trover, who seized and sold the goods of *a bankrupt under [*fi. fa.*] a *fi. fa.* before commission issued, but after an act of bankruptcy of which he had no notice;³ and the decisions establishing this position, and proceeding on the well-known doctrine by which the title of the assignees is held to relate back to the act of bankruptcy, were unquestionably productive of great hardship to individuals. Even under the law as it formerly existed, it was, however, established, that *trespass* would not lie under the above circumstances; and the principle on which this distinction proceeded was, that the quality of an act is not to be altered by a mere fiction of law, and that the taking of the goods by the sheriff, which was lawful at the time, should not be made a trespass by relation; but that, by disposing of the goods, which, by reason of subsequent events, had ceased to be the goods of the debtor, and had become the property of the assignees, he committed a conversion for which he was liable in trover.⁴

In attempting, however, to establish an analogy between cases apparently founded on the above doctrine, that a party is not to be made a trespasser by relation, considerable caution is necessary; for instance, in a very recent case, the question arose, whether or not trespass was maintainable by an administrator for an act done between the death of the intestate and the grant of the letters of administration; and reliance was placed upon a supposed analogy

¹ See an instance of the application of this rule, *Attorney-General v. Panter*, 6 Bro. P. C. 486.

² *Ante*, p. 27.

³ *Carlisle v. Garland*, 7 Bing. 298; 20 E. C. L. R.; S. C. (in error), 2 Cr. & M. 81; 4 Cl. & Fin. 698; *Balme v. Hutton*, 9 Bing. 471; 23 E. C. L. R.; S. C. (in error), 1 Cr. & M. 262; *Cooper v. Chitty*, 1 Burr. 20.

⁴ *Supra*, n. 3. As to the operation of 2 & 3 Vict. c. 29, see *Nelstrop v. Scarisbrick*, 6 M. & W. 684; *Belcher v. Magnay*, 12 M. & W. 102; *Cheston v. Gibbs*, Id. 111; *Unwin v. St. Quintin*, 11 M. & W. 277; *Whitmore v. Greene*, 13 M. & W. 104.

between such a case and that above considered, where the action was brought by the assignees of a bankrupt *against the sheriff. [^{*94}] But the Court held, that trespass would well lie, and that the principle of the two cases was essentially different; for, in the one case the sheriff did what was justifiable and lawful in itself at the time; whereas, in the other, the defendants were guilty of an act having the quality of a trespass at the very time when it was committed.¹

In addition to those doctrines which are founded on legal fictions,² there are some forms of action, as ejectment, trover, and detinue,³ in which the law allows, and even requires, statements to be made in the written pleadings which are at variance with the real facts of the case, and which must be regarded as mere forms which were originally intended to subserve the purposes of justice, and which are retained in conformity with ancient usage and precedent. It must be observed, moreover, that legal fictions, when sanctioned by our courts, are under their immediate control, and will be moulded by them according to reason, and in furtherance of those equitable objects, to promote which they were originally designed.⁴ The introduction, however, of fictions into the law must be considered as [^{*95}] detrimental to it, whether regarded as a practical or as an *abstract science, and the propriety of retaining those fictitious forms and modes of pleading which originated in the subtlety of our ancestors, and are yet tolerated, may well be questioned.⁵

¹ Tharpe v. Stallwood, 6 Scott, N. R. 715. See also Foster v. Bates, 12 M. & W. 226; Waring v. Dewbury, Gilb. Eq. R. 228, cited 6 Scott, N. R. 725.

² The doctrine, that a deed executing a power refers back to the instrument creating the power, so that the party is deemed to take under the deed from the grantor by whom the power was created, and not from the power, is a fiction of law; and so it was considered in Bartlett v. Ramsden, 1 Keb. 570. See also per Lord Hardwicke, C., Duke of Marlborough v. Lord Godolphin, 2 Ves. sen. 78.

³ Clements v. Flight, 16 M. & W. 42. The legal fiction of damage by loss of service in the action for seduction, seems to be an exception to the above maxim as to *factio juris*. See Eager v. Grimwood, 16 L. J., Exch. 286; Grinnell v. Wells, 8 Scott, N. B. 741; Davies v. Williams, 16 L. J., Q. B. 869.

⁴ As to the proceedings in ejectment, see 8 Burr. 1294, 1295.

⁵ As to fictions in the Roman law, see Spence, Chan. Jurisd. 218, 214.

EXECUTIO JURIS NON HABET INJURIAM.

(2 Inst. 482.)

The law will not in its executive capacity work a wrong.

It was one of the rules of the Roman, as it is of our own law, that if an action be brought in a court which has jurisdiction, upon insufficient grounds or against the wrong party, no injury is thereby done for which an action can be maintained—*Is qui jure publico utitur non videtur injuriæ faciendæ causâ hoc facere, juris enim executio non habet injuriam*;¹ and *Nullus videtur dolo facere qui suâ jure utitur*,² he is not to be esteemed a wrongdoer who merely avails himself of his legal rights. On the other hand, if an individual, under colour of the law, does an illegal act, or if he abuses the process of the court to make it an instrument of oppression or extortion, this is a fraud upon the law, by the commission of which liability will be incurred.³

In a leading case,⁴ illustrative of this latter proposition, the facts were as follows:—A *ca. sa.* having been sued out against the Countess of Rutland, and the officers entrusted with the execution of the sheriff's warrant being *apprehensive of a rescue, the plaintiff was advised to enter a feigned action in London, according [*96] to the custom, against the said countess, to arrest her thereupon, and then to take her body in execution on the *ca. sa.* In pursuance of this advice, the countess was arrested and taken to the Compter, "and at the door thereof the sheriff came, and carried the countess to his house, where she remained seven or eight days, till she paid the debt." It was, however, held, that the said arrest was not made by the force of the writ of execution, and was, therefore, illegal; "and the entering of such feigned action was utterly condemned by the whole Court, for, by colour of law and justice, they, by such feigned means, do against law and justice, and so make law and justice the author and cause of wrong and injustice."

We shall hereafter⁵ have occasion to consider the general doctrine respecting the right to recover money paid under compulsion. We may, however, take this opportunity of observing, that, where such compulsion consists in an illegal restraint of liberty, a contract entered into by reason thereof will be void; if, for instance, a man is under duress of imprisonment, or if, the imprisonment being law-

¹ D. 47, 10, 13, s. 1; Hobart, 266.² D. 50, 17, 55.³ See, per Pollock, C. B., *Smith v. Monteith*, 13 M. & W. 430.⁴ *Countess of Rutland's case*, 6 Rep. 58.⁵ See the maxim, *Volenti non fit injuria*, post.

ful, he is subjected to undue and illegal force and privation, and, in order to obtain his liberty, or to avoid such illegal hardship, he enters into a contract, he may allege this duress in avoidance of the contract so entered into; but an imprisonment is not deemed sufficient duress to avoid a contract obtained through the medium of its coercion, if the party was in proper custody under the regular process of a court of competent jurisdiction; and this distinction results from the above rule of law, *executio juris non habet injuriam*.¹

[*97] * In *assumpsit* to recover a sum of money, which the defendant promised to pay, in the consideration of the discharge of a third party (D.), who was in custody under a *capias*, duly issued, in an action depending against him, the plea, which averred, in substance, that there was not at the time of commencing such action, nor subsequently thereto, any cause of action against D., and that the writ, arrest, and detaining in custody, and the proceeding in the said action were, on the plaintiffs' part, colourable only, and not had with intent to try any doubtful question of law or fact—was held bad, since it did not show that the action against D. was wrongfully commenced—that the *capias* was irregularly or unduly obtained—that the plaintiffs acted illegally or fraudulently in making the arrest, or from malicious motives, or that the arrest was made without reasonable or probable cause; on the ground, therefore, that D. must be taken to have been in custody under regular and legal process, and that the discharge from such custody was a sufficient consideration, judgment was given for the plaintiffs.²

But although, as already stated, an action will not lie to recover damages for the inconvenience occasioned to a party who has been sued by another without reasonable or sufficient cause,³ yet, if the proceedings in the action were against A., and a writ of execution is issued by mistake against the goods of B., trespass will clearly lie, at suit of the latter, against the execution creditor,⁴ or against his [*98] attorney, who issued execution;⁵ and where an attorney liberately directs the execution of a warrant, he, by so doing,

¹ 2 Inst. 482; 1 Bla. Com. 186, 187; *Stepney v. Lloyd*, Cro. Eliz. 646; *Anon.*, 1 Lev. 68; *Waterer v. Freeman*, Hobart, 266; *R. v. Southerton*, 6 East, 140; *Anon.*, Aleyn, R. 92; 2 Roll. R. 301.

² *Smith v. Monteith*, 13 M. & W. 427.

³ Per Rolfe, B., 11 M. & W. 756, ante, p. 71, (1), 80, and cases cited under the maxim, *ubi jus, ibi remedium*, post.

⁴ *Jarmain v. Hooper*, 7 Scott, N. R. 668. As to liability of execution creditor under 8 Anne, c. 14, s. 1, see *Riseley v. Ryle*, 11 M. & W. 16.

⁵ *Davies v. Jenkins*, 11 M. & W. 745; *Rowles v. Senior*, 15 L. J., Q. B. 281, and cases there cited.

takes upon himself the chance of all consequences, and will be liable in trespass, if it prove bad.¹ In cases similar to the above, however, the maxim as to *executio juris* is not in truth strictly applicable, because the proceedings actually taken are *not* sanctioned by the law, and therefore the party taking them, although acting under the colour of legal process, is not protected.

CURSUS CURLÆ EST LEX CURLÆ.

(3 Bulst. 58.)

The practice of the Court is the law of the Court.

Every court is the guardian of its own records and master of its own practice:² and where a practice has existed it is convenient to adhere to it, because it is the practice, even though no reason can be assigned for it;³ for an inveterate practice in the law generally stands upon principles *that are founded in justice and convenience.⁴ Hence, if any necessary proceedings in an action [*99] be informal, or be not done within the time limited for it, or in the manner prescribed by the practice of the court, it may be set aside for irregularity. Where a defendant, in the Court of Common Pleas, applied on motion to enter satisfaction on the roll, without producing a warrant of attorney from the plaintiff, the Court refused the motion, observing, that the course in that court from time out of mind had been to require the production of the warrant; and that, getting rid of a judgment of the Court (by such entry) was so solemn a thing, that the usual course ought to be pursued, for *via trita via tuta*;⁵ and the courts of law will not sanction a speculative novelty without the warrant of any principle, precedent, or authority.⁶

¹ Green v. Elgie, 5 Q. B. 99; 48 E. C. L. R.

² Per Tindal, C. J., Scales v. Cheese, 12 M. & W. 687, where it was held that a court of error cannot review the propriety of amendments made in the court below; S. P., Mellish v. Richardson, 1 Cl. & Fin. 221; Jackson v. Galloway, 1 C. B. 280; 50 E. C. L. R.; Reg. v. Justices of Denbighshire, 15 L. J., Q. B. 335; per Lord Wynford, Ferrier v. Howden, 4 Cl. & Fin. 32. But see Fleming v. Dunlop, 7 Cl. & Fin. 48.

³ Per Lord Ellenborough, C. J., Bovill v. Wood, 2 M. & S. 25; 15 East, 226. "The question of costs is dependent on the practice of the courts, which in this respect is arbitrary and varying;" per Parke, B., Earl of Stamford v. Dunbar, 14 M. & W. 152.

⁴ Per Lord Eldon, C., Buck, 279. See per Lord Abinger, C. B., Jacobs v. Layborn, 11 M. & W. 690.

⁵ Wood v. Hurd, 3 B. N. C. 45; 32 E. C. L. R.; 10 Rep. 142.

⁶ See judgment, Ex parte Overseers of Tollerton, 3 Q. B. 799; 48 E. C. L. R.

It has been remarked, moreover, that there is a material distinction between those things which are required to be done by the common or statute law of the land, and things required to be done by the rules and practice of the court. Anything required to be done by the law of the land must be noticed by a court of error, but a court of error cannot notice the practice of another court.¹ Moreover, "where, by an act of Parliament, power is given to a single judge to decide a matter, his decision is not absolutely final; but the Court adopt the same rule as where he acts in the exercise of his ordinary jurisdiction; and though the legislature says that he shall have power *finally* to determine a *matter, that does not mean that the practice of [*100] the Court shall be departed from."²

In a court of equity, as in a court of law, the maxim, *cursus curiæ est lex curiæ*, is frequently recognised and applied. The Court will, however, as remarked in several recent cases,³ adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules established under different circumstances, decline to administer justice and to enforce rights for which there is no other remedy.

Lastly, with respect to criminal justice, it was forcibly and truly remarked by a learned judge in a recent case, that even where the course of practice in criminal law has been unfavourable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of the Parliament.⁴

CONSENSUS TOLLIT ERROREM.

(2 Inst. 128.)

The acquiescence of a party who might take advantage of an error obviates its effect.

In accordance with this rule, if the venue in an action is laid in the wrong place, and this is done *per assensum partium*, with the

¹ Per Holroyd, J., *Sandon v. Proctor*, 7 B. & C. 806; 14 E. C. L. R.; cited argument, *Bradley v. Warburg*, 11 M. & W. 455.

² Per Rolfe, B., *Shortridge v. Young*, 12 M. & W. 7.

³ Per Lord Cottenham, C., *Wallworth v. Holt*, 4 My. & Cr. 635; *Taylor v. Salmon*, Id. 141, 142; *Mare v. Malachy*, 1 My. & Cr. 559.

⁴ Per Maule, J., 8 Scott, N. R. 599, 600.

consent of both parties, and so entered of *record, it shall stand;¹ and where, by consent of both plaintiff and defend- [*101] ant, the venue was laid in London, it was held, that no objection could afterwards be taken to the venue, notwithstanding it ought, under a particular act of Parliament, to have been laid in Surrey, for *per Curiam—Consensus tollit errorem.*²

On the maxim under consideration depends also the important doctrine of waiver, that is, the passing by of a thing;³ a doctrine which is of very general application both in the science of pleading and in those practical proceedings which are to be observed in the progress of a cause from the first issuing of process to the ultimate signing of judgment and execution.

With reference to pleading, however, the rule, that an error will be cured by the consent or waiver of the opposite party, must be taken with considerable limitation; for, although faults in pleading are in some cases aided by pleading over, yet it frequently happens that a party who has pleaded over, without demurring, may nevertheless afterwards avail himself of an insufficiency in the pleading of his adversary; and the reason is, that, although the effect of a demurrer is to admit the truth of all matters of fact sufficiently pleaded on the other side, yet, by pleading, a party does not admit the sufficiency in law of the facts adversely alleged;⁴ for, when judgment is to be given, whether the issue be in law or fact, and whether the cause *have proceeded to issue or not, the Court is in general [*102] bound to examine the whole record, and adjudge according to the legal right as it may on the whole appear; so that, if, after pleading over, a demurrer arise at some subsequent stage, the Court will take into consideration retrospectively the sufficiency in law of matters to which an answer in fact has been given; and hence it follows, that an advantage may often be taken by either party of a legal insufficiency in the pleading on the other side, either by motion in arrest of judgment, or motion for judgment *non obstante veredicto*, or writ of error, according to the circumstances of the case.⁵

¹ *Fineux v. Hovendon*, Cro. Eliz. 664; Co. Litt. 126, a., and Mr. Hargrave's note (1); 5 Rep. 37; Dyer, 367; *Watkins v. Weaver*, 10 Johnson, R. (U. S.) 108. See *Crow v. Edwards*, Hob. 5.

² *Furnival v. Stringer*, 1 B. N. C. 68; 27 E. C. L. R.

³ Toml. Law Dict., tit. Waiver.

⁴ Steph. Pl. 5th ed. 167. The subject of waiver, which is of necessity only alluded to very briefly in the text, is treated of at length, Id. 155 et seq. See *Brooke v. Brooke*, Sid. 184.

⁵ Steph. Pl., 5th ed. 181, 180.

These remarks are confined, however, to defects in matter of *substance*; for, with respect to all objections of mere *form*, it is laid down as a general principle, that, if a man pleads over, he shall never take advantage of any slip committed in the pleading of the other side, which he could not take advantage of upon a general demurrer.¹

When applied to the proceedings in an action, waiver may be defined to be the doing something after an irregularity committed, and with a knowledge of such irregularity, where the irregularity might have been corrected before the act was done; and it is essential to distinguish a proceeding which is merely irregular from one which is completely defective and void. In the latter case the proceeding is a nullity, which cannot be waived by any laches or subsequent proceedings of the opposite party.²

Where, however, an irregularity has been committed, and where the opposite party knows of the irregularity, it *is a fixed [*103] rule observed as well by courts of equity as of common law, that he should come in the first instance to avail himself of it, and not allow the other party to proceed to incur expense. "It is not reasonable afterwards to allow the party to complain of that irregularity, of which, if he had availed himself in the first instance, all that expense would have been rendered unnecessary;"³ and, therefore, if a party after such an irregularity has taken place consents to a proceeding which, by insisting on the irregularity, he might have prevented, he waives all exceptions to the irregularity. This is a doctrine long established and well known. *Consensus tollit errorem* is a maxim of the common law, and the dictate of common sense.⁴

It may appear in some measure superfluous to add, that the consent which cures error in legal proceedings, may be implied as well as expressed; for instance—where, at the trial of a cause, a proposal was made by the judge in the presence of the counsel on both sides, who made no objection, that the jury should assess the damages contingently, with leave to the plaintiff to move to enter a verdict for the amount found by the jury, it was held that both parties were

¹ Per Holt, C. J., *Anon.*, 2 Salk. 519.

² See *Ricketts v. Bowhay*, 16 L. J., C. P. 158; *Stopford v. Fitzgerald*, Id., Q. B. 810; *Charlesworth v. Ellis*, 7 Q. B. 678; 58 E. C. L. R.

³ Per Lord Lyndhurst, C., *St. Victor v. Devereux*, 14 L. J., Chan. 246. Obtaining time to reply is a waiver of defendant's undertaking to plead issuably, *Stead v. Carey*, 8 Scott, N. R. 364.

⁴ See 7 Johnson, R. (U. S.) 611.

bound by the proposal, and that the plaintiff's counsel was not therefore at liberty to move for a new trial on the ground of misdirection,¹ for *qui tacet consentire videtur*,² the silence of counsel implied their consent to the course adopted by the judge.

*COMMUNIS ERROR FACIT JUS.

[*104]

(4 Inst. 240.)

Common error sometimes passes current as law.

The law so favours the public good, that it will in some cases permit a common error to pass for right;³ as an instance of which may be mentioned the case of common recoveries, which were fictitious proceedings introduced by a kind of *pia fraus* to elude the statute *de Donis*, and which were at length allowed by the courts to be a bar to an estate tail, so that these recoveries, however clandestinely introduced, became, by long use and acquiescence, a most common assurance of lands, and were looked upon as the legal mode of conveyance whereby tenant in tail might dispose of his lands and tenements.⁴

However, the above maxim, although well known, and therefore here inserted, must be received and applied with very great caution.

"It has been sometimes said," observed Lord Ellenborough, "*communis error facit jus*; but I say, *communis opinio* is evidence of what the law is—not where it is an opinion merely speculative and theoretical, floating in the minds of persons; but where it has been made the groundwork and substratum of practice."⁵ So it was remarked by another learned and distinguished judge,⁶ that he *hoped never to hear this rule insisted upon, because it would [*105] be to set up a misconception of the law in destruction of the

¹ *Morrish v. Murrey*, 13 M. & W. 52. See also *Harrison v. Wright*, 13 M. & W. 816.

² *Jenk. Cent.* 32. See *Judgment, Gosling v. Voley*, 7 Q. B. 455; 53 E. C. L. R.

³ *Noy, Max.*, 9th ed. p. 37; 4 Inst. 240; *Waltham v. Sparkes*, 1 Lord Raym. 42. See also the remarks of Lord Brougham in *Phipps v. Ackers*, 9 Cl. & Fin. 598 (referring to *Cadell v. Palmer*, 10 Bing. 140), 25 E. C. L. R.; and in the Earl of Waterford's Peerage claim, 6 Cl. & Fin. 172; also in *Devaynes v. Noble*, 2 Russ. & M. 506.

⁴ *Noy, Max.*, 9th ed. pp. 37, 38; 2 Bla. Com. 117; *Plowd.* 33 b.

⁵ *Isherwood v. Oldknow*, 3 M. & S. 396, 397; per Vaughan, B., *Garland v. Carlisle*, 2 Cr. & M. 95; *Co. Litt.* 186, a.

⁶ Mr. Justice Foster, cited per Lord Kenyon, C. J., *Rex v. Eriswell*, 3 T. R. 725; argument, *Smith v. Edge*, 6 T. R. 563.

law; and, in another case, it was observed that "even *communis error*, and a long course of local irregularity, have been found to afford no protection to one *qui spondet peritiam artis*."¹

And, lastly, some useful and stringent remarks on the practical application and value of the above maxim were made by Lord Denman, C. J., delivering judgment in the House of Lords, in a very recent case, involving some most important legal and constitutional doctrines; in the course of which judgment, which is well worthy of careful perusal, his lordship took occasion to remark, that a large portion of that *legal opinion* which has passed current for law falls within the description of "law taken for granted;" and that, "when, in the pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."²

DE MINIMIS NON CURAT LEX.

(Cro. Eliz. 353.)

The law does not concern itself about trifles.

Courts of justice do not, in general, take trifling and immaterial [*106] matters into account;³ they will not, for instance, *take notice of the fraction of a day, except in those cases where there are conflicting rights, for the determination of which it is necessary they should do so.⁴

A familiar instance of the application of this maxim occurs likewise in the rule, observed by the courts at Westminster, that new trials shall not be granted, at the instance either of plaintiff or defendant, on the ground of the verdict being against evidence, where the damages are less than 20*l*.⁵

¹ 6 Cl. & Fin. 199.

² Lord Denman's judgment in *O'Connell v. Reg.*, edited by Mr. Leahy, p. 28. See also the allusions to *Hutton v. Balme*, and *Reg. v. Millis*, Id. pp. 23, 24.

³ Bell, Dict. and Dig. of Scotch Law, 284; per Sir W. Scott, 2 Dods. Adm. R. 168.

⁴ Judgment, 14 M. & W. 582; per Holt, C. J., 2 Lord. Raym. 1095.

⁵ *Branson v. Didsbury*, 12 A. & E. 681; 40 E. C. L. R.; *Manton v. Bales*, 1 C. B. 444; 50 E. C. L. R.; *Macrow v. Hull*, 1 Burr. 11; *Burton v. Thompson*, 2 Burr. 664.

“In ordinary,” as remarked by Lord Kenyon, C. J.,¹ “where the damages are small, and the question too inconsiderable to be retried, the Court have frequently refused to send the case back to another jury. But, wherever a mistake of the judge has crept in and swayed the opinion of the jury, I do not recollect a single case in which the Court have ever refused to grant a new trial.”

In cases tried before the sheriff, the amount requisite in order to obtain a new trial is 5*l.*, unless indeed the verdict involves some particular right, independent of the damages;² and, in a recent case, on an application to stay judgment and execution in a cause tried before the under-sheriff, the Court observed, that the object of the statute³ which gave the judges power to direct writs of trial to inferior courts, was to render the proceedings in *actions of [*107] small amount less expensive and more speedy, which would be altogether defeated if they were to be carried to a court of error;⁴ and the same consideration seems to have influenced the legislature in denying the right of appeal to suitors in the recently-established county courts.⁵

In further illustration of the maxim—*de minimis non curat lex*, we may observe, that there are some injuries of so small and little consideration in the law that no action will lie for them;⁶ for instance, in respect to payment of tithe, the principle which may be extracted from the cases appears to be, that for small quantities of corn, involuntarily left in the process of raking, tithe shall not be payable, unless there be any particular fraud or intention to deprive the parson of his full right. Where, however, a farmer pursued such a mode of harvesting barley, that a considerable quantity of rakings was left scattered after the barley was bound into sheaves, the Court

¹ *Wilson v. Rastall*, 4 T. R. 758. See *Vaughan v. Watt*, 6 M. & W. 496, 497; per Parke, B., *Twigg v. Potts*, 1 Cr., M. & R. 98. In *Haine v. Davey*, 4 A. & E. 892, 81 E. C. L. R., a new trial was granted for misdirection, though the amount in question was less than 1*l.*

² *Watts v. Judd*, 6 Scott, N. R. 630.

³ 3 & 4 Will. 4 c. 42, s. 17. See 4 & 5 Will. 4, c. 62, s. 20.

⁴ *White v. Hialop*, 4 M. & W. 73.

⁵ See 9 & 10 Vict. c. 95, s. 108. A prohibition will not be granted against the judge of a county court under this act, where, having jurisdiction, he has wrongly decided a point of law, *Ex parte Rayner* (C. P.), 11 Jur. 1018.

⁶ See per Powys, J., *Ashby v. White*, 2 Lord Raym. 944, answered by Holt, C. J., *Id.* 953; *Whitaker v. Hall*, 5 B. & C. 269, 277; 11 E. C. L. R.; 2 Bla. Com. 262, where the rule respecting land gained by alluvion is referred to the maxim treated of in the text.

held, that tithe was payable in respect of these rakings, although no actual fraud was imputed to the farmer, and although he and his servants were careful to leave as little rakings as possible in that mode of harvesting the crop.¹

It may be observed, however, that for an injury to real property incorporeal an action may be supported, however small the damage, [*108] and therefore a commoner may maintain *an action on the case for an injury done to the common, though his proportion of the damage be found to amount only to a farthing;² and generally the superior courts of law have jurisdiction to hear and determine all suits, without any reference to the magnitude of the amount claimed or demanded, or to the extent of the injury complained of, subject, however, to the power of the judge to certify under stat. 43 Eliz. c. 6, where the damages recovered are less than 40*s.*, and thereby deprive the plaintiff of his costs; and subject likewise to the provisions as to costs and jurisdiction, contained in the recent stat. 8 & 9 Vict. c. 95.³

Not only in cases analogous to those above mentioned, but in others of a different description, viz., where trifling irregularities or even infractions of the strict letter of the law, are brought under the notice of the Court, the maxim *de minimis non curat lex* is of frequent practical application. It has, for instance, been applied to support a rate, in the assessment of which there were some comparatively trifling omissions of established forms.⁴ So, with reference to proceedings for an infringement of the revenue laws,⁵ Sir W. Scott observed—"The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim, *de minimis non curat lex*. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked."

[*109] *Lastly, in an indictment against several for a trespass, all are principals, because the law does not descend to distinguish the different shades of guilt in petty misdemeanours.⁶

¹ *Glanvill v. Stacey*, 6 B. & C. 543; 13 E. C. L. R.

² *Pindar v. Wadsworth*, 2 East, 154. See 22 Vin. Abr. "Waste," (N).

³ Sects. 128, 129.

⁴ *White v. Beard*, 2 Curt. 493.

⁵ *The Reward*, 2 Dods. Adm. R. 269, 270.

⁶ 4 Bla. Com. 36.

OMNIS INNOVATIO PLUS NOVITATE PERTURBAT QUAM UTILITATE
PRODEST.

(2 Bulstr. 338.)

Every innovation occasions more harm and derangement of order by its novelty, than benefit by its abstract utility.

It has been an ancient observation in the laws of England, that, whenever a standing rule of law, of which the reason, perhaps, could not be remembered or discerned, has been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule has in the end appeared from the inconveniences that have followed the innovation ;¹ and the judges and sages of the law have therefore always suppressed new and subtle inventions in derogation of the common law.²

It is, then, an established rule to abide by former precedents, *stare decisis*, where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to [*110] *determine, not according to his own private judgment,³ but according to the known laws and customs of the land,—not delegated to pronounce a new law, but to maintain and expound the old one,⁴ *jus dicere et non jus dare*.⁵

And here we may observe the important distinction which exists between the legislative and the judicial functions. To legislate *jus facere* or *jus dare*, is to exercise the will in establishing a rule of action. To administer the law—*jus dicere*, is to exercise the judgment in expounding and applying that rule according to legal principles. "The province of the legislature is not to construe but to enact, and their opinion, not expressed in the form of law as a declaratory pro-

¹ 1 Bla. Com. 70. See Ram's Science of Legal Judgment, 112 et seq.

² Co. Litt. 282, b, 379. b; per Grose, J., 1 M. & S. 394.

³ See per Lord Camden, 19 Howell, St. T. 1071; per Williams, J., 4 Cl. & Fin. 729.

⁴ 1 Bla. Com. 69. Per Lord Kenyon, C. J., 5 T. R. 682; 6 Id. 605; and 8 Id. 239; per Grose, J., 18 East, 321; 9 Johnson, R. (U. S.) 428; per Lord Hardwicke, C., Ellis v. Smith, 1 Ves. jun. 16.

⁵ 7 T. R. 696; 1 B. & B. 583; 5 E. C. L. R.; Ram's Science of Legal Judgment, p. 2; argument, 10 Johnson, R. (U. S.) 566.

vision would be, is not binding on courts whose duty is to expound the statutes they have enacted.¹

Our common law system, as remarked by a learned judge, consists in the applying to new combinations of circumstances, those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules where they are not plainly unreasonable and inconvenient to all cases which arise, and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the [*111] rules are not as convenient and reasonable as we ourselves could have devised. **"It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science."*²

Accordingly, where a rule has become settled law, it is to be followed, although some possible inconvenience may grow from a strict observance of it, or although a satisfactory reason for it is wanted, or although the principle and the policy of the rule may be questioned.³ If, as has been observed, there is a general hardship affecting a general class of cases, it is a consideration for the legislature, not for a court of justice. If there is a particular hardship from the particular circumstances of the case, nothing can be more dangerous or mischievous than upon those particular circumstances to deviate from a general rule of law; *"hard cases,"* it has repeatedly been said, *"are apt to make bad law,"*⁴ and *miserable est servitus ubi jus est vagum aut incertum*⁵—obedience to law becomes a hardship when that law is unsettled or doubtful; which maxim applies with peculiar force to questions respecting real property; as, for instance, to family settlements, by which provision is made for unborn generations; and if, in consequence of new lights occurring to

¹ Judgment, 14 M. & W. 589.

² Per Parke, J., *Mirehouse v. Rennell*, 1 Cl. & Fin. 546.

³ Per Tindal, C. J., *Mirehouse v. Rennell*, 8 Bing. 557; 21 E. C. L. R. See the authorities cited, *Ram's Science of Legal Judgment*, 38–35.

⁴ Per Lord Loughborough, 2 Ves. jun. 426, 427; per Tindal, C. J., *Doe d. Clarke v. Ludlam*, 7 Bing. 180; 20 E. C. L. R.; per Pollock, C. B., *Reg. v. Woodrow*, 15 M. & W. 412; per Wilde, C. J., *Kepp v. Wiggett*, 16 L. J., C. P. 237.

⁵ See 4 Cl. & Fin. 378.

⁶ 4 Inst. 246; *Shepherd v. Shepherd*, 5 T. R. 51, n. (a); 2 Darr. Stats. 785; *Bac. Aphorisms*, vol. 7, p. 148; argument, 9 Johnson, R. (U. S.) 427, and 11 Peters, R. (U. S.) 286.

new judges, all that which was supposed to be law by the wisdom of our ancestors were to be swept away at a time when the particular limitations are to take *effect, mischievous indeed would be [*112] the consequence to the public.¹

So, likewise, with respect to matters which do not affect existing rights or properties to any great degree, but tend principally to influence the *future* transactions of mankind, it is generally more important that the rule of law should be settled, than that it should be theoretically correct.²

The above remarks as to the necessity of observing established principles apply to rules acted upon in courts of equity, as well as in the tribunals of common law, it being a maxim that—*ius respicit æquitatem*,³ the law pays regard to equity. For, where a rule of property is settled in a court of equity, and is not repugnant to any legal principle, rule, or determination, there is a propriety in adopting it at law, since it would be absurd and injurious to the community that different rules should prevail in different courts on the same subject.⁴ And it was observed by Lord Eldon, while speaking of the practice of conveyancers in a case concerning a lease under a power, that courts of law should inquire of decisions in courts of equity, not for points founded on determinations merely equitable, but for legal judgments proceeding upon legal grounds, such as those courts of equity have for a long series of years been in the daily habit of pronouncing as the foundation of their decisions and decrees.⁵

The judicial rule—*stare decisis*—does, however, admit of exceptions, where the former determination is most evidently *con- [*113] trary to reason,—much more, if it be clearly contrary to the divine law. But, even in such cases, subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For, if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it was not the established custom of the realm, as has been erroneously determined.⁶

¹ Per Lord Kenyon, C. J., *Doe v. Allen*, 8 T. R. 504. See per Ashhurst, J., 7 T. R. 420.

² See per Lord Cottenham, C., *Loxon v. Pryse*, 4 My. & Craig, 617, 618.

³ Co. Litt. 24, b, a court of law will also, in some cases, notice equitable rights. See per Parke, B., 12 M. & W. 445, and in 16 L. J., Exch. 163.

⁴ *Farr v. Newman*, 4 T. R. 686.

⁵ *Smith v. Doe*, 7 Price, 509; S. C. 2 B. & B. 599; 6 E. C. L. R.

⁶ 1 Bla. Com. 69, 70.

We may appropriately conclude these remarks with observing, in the language used in a recent important judgment, that, although innovation on settled law is to be avoided, yet "the mere lateness of time at which a principle has become established is not a strong argument against its soundness, if nothing has been previously decided inconsistent with it, and it be in itself consistent with legal analogies."¹

[*114]

*CHAPTER IV.

RULES OF LOGIC.

THE maxims immediately following have been placed together, and entitled "Rules of Logic," because they result from a very simple process of reasoning. Some of them, indeed, may be considered as axioms, the truth of which is self-evident, and which consequently admit of illustration only. A few examples have in each case been given, showing how the particular rule has been held to apply, and other instances of a like nature will readily suggest themselves to the reader.²

UBI EADEM RATIO IBI IDEM JUS.

(Co. Litt. 10, a.)

*Like reason doth make like law.*³

The law consists, not in particular instances and precedents, but in the reason of the law;⁴ for reason is the life of the law,—nay, the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, acquired by long study, observation, and experience, and not of every man's natural reason.⁵

¹ Judgment, *Gosling v. Veley*, 7 Q. B. 441; 58 E. C. L. R.; per Lord Denman, C. J., 16 L. J., Q. B. 873.

² The title of this division of the subject has been adopted from Noy's Maxims, 9th ed. p. 5.

³ Co. Litt. 10, a.

⁴ *Ashby v. White*, 2 Lord Raym. 957; the entire judgment of Lord Holt in this celebrated case well illustrates the position in the text.

⁵ Co. Litt. 87 b.

*The following instances will serve to show in what manner [*115] the above maxim may be practically applied:—

When any deed, as a bond, is altered in a point material by the obligee, or by a stranger without his privity, the deed thereby becomes void. So, if the obligee himself alters the deed although in a point not material, yet the deed is void; though, if a stranger, without his privity, alters the deed in any point not material, it shall not be thereby avoided;¹ and the reason is, that the law will not permit a man to take the chance of committing a fraud, and, when that fraud is detected, of recovering on the instrument as it was originally made. In such a case the law intervenes, and says, that the deed thus altered no longer continues the same deed, and that no person can maintain an action upon it; and this principle of the law is calculated to prevent fraud and to prevent men from tampering with written securities.² The principle thus recognised with respect to deeds was in another important case³ established as to bills of exchange and promissory notes; and the ground of the decision in that case was, that in all such instruments a duty arises analogous to the duty arising on deeds. The law, having been long settled as to deeds, was held to be also applicable to those mercantile instruments, which, though not under seal, yet possess properties, the existence of which, in the case of deeds, was, it must be presumed, the foundation of the rule above stated,—*ubi eadem est ratio eadem est lex*; and, therefore, in the case alluded to, it was held, that an unauthorized alteration in the *date of a bill of exchange after acceptance, whereby the payment would be accelerated, even when made [*116] by a stranger, avoids the instrument, and that no action can be afterwards brought upon it by an innocent holder for a valuable consideration.⁴ By a yet more recent decision, the same doctrine was extended to the case of bought and sold notes; and it was held, that a vendor, who, after the bought and sold notes had been ex-

¹ Pigot's case, 11 Rep. 27, cited Davidson v. Cooper, 11 M. & W. 799; S. C., in error, 13 Id. 348.

² Master v. Miller, 4 T. R. 320; affirmed in error, 2 H. Bla. 140. See West v. Steward, 14 M. & W. 47; Hamelin v. Bruck, 15 L. J., Q. B. 343; Steele's Lessee v. Spencer, 1 Peters, R. (U. S.) 552. ³ Master v. Miller, 4 T. R. 320.

⁴ Master v. Miller, supra; Lord Falmouth v. Roberts, 9 M. & W. 471; Judgment, Davidson v. Cooper, 11 M. & W. 800; S. C. (in error), 13 M. & W. 348; Mason v. Bradley, 11 M. & W. 590; Parry v. Nicholson, 18 M. & W. 778; Gould v. Coombs, 1 C. B. 543; Bradley v. Bardsley, 14 M. & W. 373; Crotty v. Hodges, 5 Scott, N. R. 221; Bell v. Gardiner, 4 Scott, N. R. 621; Baker v. Jubber, 1 Id. 26. As to an alteration with consent of acceptor, see 4 Scott, N. R. 732, n. (29).

changed, prevailed on a broker, without the consent of the vendee, to add a term to the bought note, for his (the vendor's) benefit, thereby lost all title to recover against the vendee.¹ And the Court of Exchequer have since held that the same principle applies to a guarantee, and that it is a good ground of defence, that the instrument has, whilst in the plaintiff's hands, received a material alteration² from some person to the defendant unknown, and without his knowledge or consent.³

There are, however, some things, for which, as Lord Coke observes, no reason can be given:⁴ and with reference to which the words of the civil law hold true—*non omnium quæ à majoribus constituta sunt ratio reddi potest;*⁵ *and, therefore, we are compelled to admit, that, in the legal science, *qui rationem in omnibus quæerunt rationem subvertunt.*⁶ It is, indeed, sometimes dangerous to stretch the invention to find out legal reasons for what is undoubted law:⁷ and this observation applies peculiarly to the mode of construing an act of Parliament, in order to ascertain and carry out the intention of the legislature: in so doing, the judges will bend and conform their legal reason to the words of the act, and will rather construe them literally, than strain their meaning beyond the obvious intention of Parliament.⁸

Further, although it is laid down that the law is the perfection of reason, and that it always intends to conform thereto, and that what is not reason is not law, yet this must not be understood to mean, that the particular reason of every rule in the law can at the present day be always precisely assigned; it is sufficient if there be nothing in it flatly contradictory to reason, and then the law will presume that the rule in question is well founded,⁹ *multa in jure communi contra rationem disputandi pro communi utilitate introducta sunt*¹⁰—

¹ Powell v. Divett, 15 East, 29; Mollett v. Wackerbath, 11 Jur. 1065.

² See Sanderson v. Symonds, 1 B. & B. 426; 5 E. C. L. R.; 1 Smith, L. C. 490.

³ Davidson v. Cooper, 11 M. & W. 778, 800; S. C. 13 M. & W. 843; Parry v. Nicholson, 13 M. & W. 778; Mason v. Bradley, 11 M. & W. 590; Hemming v. Tre- nery, 9 A. & E. 926; 36 E. C. L. R.; Calvert v. Baker, 4 M. & W. 407.

⁴ Hix v. Gardiner, 2 Bulstr. 196; cited Argument, Leuchhart v. Cooper, 3 Bing., N. C. 104; 32 E. C. L. R. ⁵ D. 1, 3, 20.

⁶ 2 Rep. 75.

⁷ Per Alderson, B., Ellis v. Griffith, 16 M. & W. 110.

⁸ T. Raym. 355, 356; per Lord Brougham, C., Leith v. Irvine, 1 My. & K. 289.

⁹ 1 Bla. Com. 70.

¹⁰ Co. Litt. 70, b. *Multa autem jure civili contra rationem disputandi pro utilitate communi recepta esse innumerabilibus rebus probari potest: D. 9, 2, 51, § 2.*

many things have been introduced into the common law, with a view to the public good, which are inconsistent with sound reason.

The last-mentioned maxim is, indeed, peculiarly applicable when the reasonableness of an alleged custom has to be considered; in such a case, it does not follow, from their being at this time no apparent reason for such custom, that there never was.¹ If, however, it be in tendency contrary to *the public good, or injurious or prejudicial to the many, and beneficial only to some particular [*118] person, such custom is and must be repugnant to the law of reason, for it could not have a reasonable commencement.² We shall hereafter have occasion to refer at greater length to this subject, and may, therefore, conclude these remarks with calling to mind the well-known saying: *lex plus laudatur quando ratione probatur*³—then is the law most worthy of approval, when it is consonant to reason; and with Lord Coke we may hold it to be generally true, “that the law is unknown to him that knoweth not the reason thereof, and that the known certainty of the law is the safety of all.”⁴

CESSANTE RATIONE LEGIS CESSAT IPSA LEX.

(Co. Litt. 70, b.)

*Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself.*⁵

For instance, a member of Parliament is privileged from arrest during the session, in order that he may discharge his public duties, and the trust reposed in him; but the reason of this privilege ceases at a certain time after the termination of the parliamentary session, because the public has then no longer an immediate interest in the personal freedom of the individuals composing the representative body, and *cessante causâ cessat effectus*.⁶

*Again, where trees are excepted out of a demise, the soil itself is not excepted, but sufficient nutriment out of the land [*119] is reserved to sustain the vegetative life of the trees, for, without

¹ Argument, *Tyson v. Smith* (in error), 9 A. & E. 406, 416; 36 E. C. L. R.

² Judgment, 9 A. & E. 421, 422; 36 E. C. L. R.

³ 1 Inst. Epil., cited per Lord Kenyon, C. J., *Porter v. Bradley*, 8 T. R. 146; and *Dalmer v. Barnard*, 7 Id. 252; Argument, *Doe d. Cadogan v. Ewart*, 7 A. & E. 657; 34 E. C. L. R.

⁴ 1 Inst. Epil.

⁵ 7 Rep. 69.

⁶ See Argument, *Cas. temp. Hardw. 32*, *Gowdey v. Duncombe, Ex.*, M. T. 1847.

that, the trees which are excepted cannot subsist; but if, in such a case, the lessor fells the trees, or by the lessee's license grubs them up, then, according to the above rule, the lessee shall have the soil.¹ The same principle applies where the right exists of common *pur cause de vicinage*: a right depending upon a general custom and usage, which appears to have originated, not in any actual contract, but in a tacit acquiescence of all parties for their mutual benefit. This right does not, indeed, enable its possessor to put his cattle at once on the neighbouring waste, but only on the waste which is in the manor where his own lands are situated; and it seems that the right of common of vicinage should merely be considered as an excuse for the trespass caused by the straying of the cattle, which excuse the law allows by reason of the ancient usage, and in order to avoid the multiplicity of suits which might arise where there is no separation or inclosure of adjacent commons.² But the parties possessing the respective rights of common may, if they so please, inclose against each other, and, after having done so, the right of common *pur cause de vicinage* can no longer be pleaded as an excuse to an action of trespass if the cattle stray, for *cessante ratione legis cessat lex*.³

A further illustration may be taken from the law of principal and agent, in which it is an established rule,⁴ that where a [*120] contract not under seal is made with an agent in his own name for an undisclosed principal, and on which, therefore, either the agent or the principal may sue, the defendant as against the latter is entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent dealing in his own name had been in reality the principal; and this rule is to prevent the hardship under which a purchaser would labour, if, after having been induced by peculiar considerations,—such, for instance, as the consciousness of possessing a set-off,—to deal with one man, he could be turned over and made liable to another, to whom those considerations would not apply, and with whom he would not willingly have contracted. Where, however, the party contracting

¹ Liford's case, 11 Rep. 49.

² Jones v. Robin, 15 L. J., Q. B. 15. See also Clarke v. Tinker, Id. 19; Pritchard v. Powell, Id., 166, *infra*.

³ 4 Rep. 38; Co. Litt. 122, a; Finch, Law, 8; per Powell, J., Broomfield v. Kirber, 11 Mod. 72; 8 E. C. L. R.; Gullett v. Lopes, 13 East, 348; Judgment, Walls v. Percy, 1 Bing. N. C. 556, 566; Heath v. Elliott, 4 Bing. N. C. 388; 18 E. C. L. R.

⁴ Sims v. Bond, 5 B. & Ad. 393; 27 E. C. L. R.

either knew, had the means of knowing, or must, from the circumstances of the case, be presumed to have known, that he was dealing not with a principal but with an agent, the reason of the above rule ceases, and there the right of set-off cannot be maintained.¹

The law, proceeding on principles of public policy, has wisely said, that where a case amounts to felony, the party injured shall not recover against the felon in a civil action; and this rule has been laid down and acted upon in order to secure the punishment of offenders; after the trial, however, and after the prisoner has been either acquitted or convicted, the case no longer falls within the reason on which the rule is founded, and then an action for a civil injury resulting from the wrongful act is maintainable.²

*The science of pleading, also, will be found to present many apt illustrations of the axiom under consideration; ex. [*121] gr., the general rule respecting the allegation of title in pleading is, that it is not necessary to allege title more precisely than is sufficient to show a liability in the party charged, or to defeat his present claim; and, except so far as these objects may require, a party is not compellable to show the precise estate which his adversary holds, even in a case where, if the same person were pleading his own title, such precise allegation would be necessary; and the reason of this difference is, that a party must be presumed to be ignorant of his adversary's title, though he is bound to know his own.³

DE NON APPARENTIBUS ET NON EXISTENTIBUS EADEM EST RATIO.

(5 Rep. 6.)

*Where the Court cannot take judicial notice of a fact, it is the same as if the fact had not existed.*⁴

The above maxim is usually applied in law where reliance is placed by a party on deeds or writings which are not produced in court,

¹ Broom's Parties to Actions, 2d ed., 45, where the cases are collected; Smith's M. L., 2d ed. 115, and L. C., vol. 2, 79. See another instance of the application of this maxim, per Lord Ellenborough, C. J., Richards v. Heather, 1 B. & Ald. 33; 5 E. C. L. B.

² Stone v. Marsh, 6 B. & C. 557, 564; per Buller, J., 4 T. R. 332. See White v. Spettigue, 13 M. & W. 603. See another instance of the application of this maxim, 2 Bla. Com. 390, 391.

³ See the judgment, Heap v. Livingston, 11 M. & W. 900.

⁴ See per Buller, J., Rex v. Bishop of Chester, 1 T. R. 404.

and the loss of which cannot be accounted for or supplied in the manner which the law has prescribed, in which case they are to be treated precisely as if non-existent.¹ So, on writ of error for error in law, the court will not look out of the record;² and on a [*122] *special verdict they will neither assume a fact not stated therein, nor draw inferences of facts necessary for the determination of the case from other statements contained therein.³ In reading an affidavit also, the Court will look solely at the facts deposed to, and will not presume the existence of additional facts or circumstances in order to support the allegations contained in it. To the above, therefore, and similar cases, occurring not only in civil, but also in criminal proceedings, the maxim *quod non apparet non est*⁴—that which does not appear must be taken in law as if it were not,⁵ is emphatically applicable.⁶

As a further illustration of the rule, suppose that a verdict is found for the plaintiff with nominal damages, subject to the opinion of the Court on a special case to be drawn up by the plaintiff; if he refuse to prepare it, the case cannot, according to the above maxim, be set down for argument, nor can the plaintiff be compelled to complete it; and the only course open to the defendant is to apply to the Court to set aside the verdict and grant a new trial.⁷

In an action by two commissioners of taxes⁸ on a bond against the surety of a tax-collector, appointed under the provisions of stat. 43 Geo. 3, c. 99, it appeared, that the act contained a proviso that no such bond should be put in suit against the surety, for any deficiency, other than what should remain unsatisfied after sale of the lands, tenements, &c., of such collector, in pursuance of the powers given to [*123] *the commissioners by the act; it further appeared, that, at the time when the said bond was put in suit, the obligor had lands, &c., within the jurisdiction of the plaintiffs, but of which they had no notice or knowledge: it was held, that seizure and sale of lands and other property of the collector, of the existence of which

¹ Bell's Dict. of Scotch Law, 287.

² Steph. Plead., 5th ed. 128, 129.

³ Tanored v. Christy, 12 M. & W. 816; Caudrey's case, 5 Rep. 5, ante, p. 78 (2).

⁴ 2 Inst. 478; Jenk. Cent. 207.

⁵ Vaugh. R. 169.

⁶ The matter of an indictment ought to be full, express, and certain, and to import all the truth which is necessary by law; 4 Rep. 44, 47.

⁷ Medley v. Smith, 6 Moore, 58; 17 E. C. L. R.; Cottam v. Partridge, 3 Scott, N. R. 174.

⁸ Gwynne v. Burnell, 6 Bing. N. C. 453; 37 E. C. L. R.; S. C., 1 Scott, N. R. 711; 7 Cl. & Fin. 572.

the commissioners had no notice or knowledge, was not a condition precedent to their right to proceed against the surety, this conclusion resulting, as was observed, from the plain and sound principle contained in the above maxim.¹

So, where a notice of dishonour of a bill of exchange described the bill generally as "Your draft on A. B.," the Court held, on motion for a nonsuit, that if there were other bills or drafts to which the notice could refer, it was for the defendant to show such to be the fact; and as he has not done so, that the above maxim must be held to apply; for, inasmuch as it did not appear that there were other bills or notes, the Court could not presume that there were any.²

Again, the increase per alluvionem is described to be when the sea, by casting up sand and earth by degrees, increases the land, and shuts itself within its previous limits.³ In general, the land thus gained belongs to the crown, as having been a part of the very *fundus maris*; but if such alluvion be formed so imperceptibly and insensibly, that it cannot by any means be ascertained that the sea ever was there—*idem est non esse et non apparere*, and the land thus formed belongs as a perquisite to the owner of the land adjacent.⁴

*NON POTEST ADDUCI EXCEPTIO EJUSDEM REI CUJUS [*124]
PETITUR DISSOLUTIO.

(Bac. Max., reg. 2.)

A matter, the validity of which is at issue in legal proceedings, cannot be set up as a bar thereto.

The above maxim, which is in strict accordance with logical reasoning, may be thus more generally expressed—where the legality of some proceeding is the subject-matter in dispute between two parties, he who maintains its legality, and seeks to take advantage

¹ Per Vaughan, J., 6 Bing. N. C. 539; 37 E. C. L. R.; S. C. 1 Scott, N. R. 798. See argument, *Mather v. Thomas*, 10 Bing. 47; 25 E. C. L. R.

² *Shelton v. Braithwaite*, 7 M. & W. 486; *Bromage v. Vaughan*, 16 L. J., Q. B. 10.

³ See *Gifford v. Lord Yarborough*, 5 Bing. 168; 15 E. C. L. R.

⁴ *Hale, De Jure Maris*, pt. 1, c. 4, p. 14; *Rex v. Lord Yarborough*, 3 B. & C. 96, 106; 10 E. C. L. R.; S. C., 1 Dowl. N. S. 178. This right has also been referred to the principle, *de minimis non curat lex*. See 2 Bla. Com. 262; argument, 3 B. & C. 99; 10 E. C. L. R.

of it, cannot rely upon the proceeding itself as a bar to the adverse party; for otherwise the person aggrieved would be clearly without redress. "It were impertinent and contrary in itself," says Lord Bacon, "for the law to allow of a plea, in bar of such matter as is to be defeated by the same suit, for it is included; and otherwise a man could never arrive at the end and effect of his suit."¹

A few instances will be sufficient to show the application of this rule. Thus,² if a man be attainted and executed, and the heir bring error upon the attainder, it would be bad to plead corruption of blood by the same attainder; for otherwise the heir would be without remedy ever to reverse the attainder.³ In like manner, although a person attainted cannot be permitted to sue for any civil right in a court of law, yet he may take proceedings, and will be heard, for the purpose of reversing his attainder.⁴ And *if a writ of error be brought to reverse a judgment of outlawry obtained by A. against B., such outlawry cannot be pleaded by A., because this is the subject-matter of the proceedings in error, and the reversal of the judgment will put an end to the outlawry.⁵ In like manner, where judgment was given, in the Irish Court of King's Bench, that the parol should demur, and on that judgment a writ of error was brought, it was held that the nonage could not be again pleaded, for the consequence of allowing such plea might be to let the party have the entire benefit of an erroneous judgment till he came of age. "This case," it was remarked per Curiam, "seems to fall directly within that rule of *non debet adduci exceptio ejus rei cujus petitur dissolutio*, and the cases cited, which have been adjudged upon that principle."⁶

On the same principle, in a court of equity, although a party in contempt is not generally entitled to take any proceeding in the cause, he will nevertheless be heard if his object be to get rid of the

¹ Bac. Max., reg. 2. Pusey v. Desbouvrie, 3 P. Wms. 317.

² See 4 Bla. Com. 392.

³ Bac. Max., reg. 2. See Loukes v. Holbeach, 4 Bing. 420, 423; 18 E. C. L. R., cited and commented on, Byrne v. Manning, 7 Jurist, 88. ⁴ See 1 Taunt. 84, 93.

⁵ Jenk. Cent. 106; Finch, Law, 46. Reversal of outlawry by writ of error is, however, very seldom adopted in practice, as the Court will grant relief on motion, or a judge at chambers on summons. See 2 Chit. Arch. Pr., 8th ed. 1144. An outlaw may not only appear in Court for the purpose of reversing his outlawry, but he has a *locus standi* to protect himself from irregular proceedings: Davis v. Trevanion, 14 L. J., Q. B. 138; Walker v. Thellusson, 11 Id. 14, 15.

⁶ Aland v. Mason, 2 Lord Raym. 1433.

order or other proceeding which placed him in contempt, and he is also entitled to be heard for the purpose of resisting or setting aside for irregularity any proceeding subsequent to his contempt.¹ It was likewise recently observed, that, where a man does not appear on a vicious proceeding, he is not to be held to have *waived that very objection which is a legitimate cause of his non-appearance.² [*126]

Where the judge of an inferior court had illegally compelled a plaintiff to be nonsuited, and, upon a bill of exceptions being brought, the nonsuit was entered on the record, the defendant was not allowed to contend that the entry on record precluded the plaintiff from showing that he had refused to consent to the nonsuit, for that would have been setting up as a defence the thing itself which was the subject of complaint,—a course prohibited by the above maxim.³ So, where a writ of error is brought, the judgment or opinion of the court below cannot, with propriety, be cited as an authority on the argument, because such judgment and opinion are then under review.⁴

The same rule seems also to apply, when the matter of the plea is not to be avoided in the same but in a different suit; and, therefore, if a writ of error be brought to reverse an outlawry in any action, outlawry in another action shall not bar the plaintiff in error; for otherwise, if the outlawry was erroneous, it could never be reversed.⁵

*ALLEGANS CONTRARIA NON EST AUDIENDUS. [*127]
(Jenk. Cent. 16.)

He is not to be heard who alleges things contradictory to each other.

The above, which is obviously one of the elementary rules of logic, and not unfrequently applied in our courts of justice, will receive occasional illustration in the course of this work. As it would, however, be tedious to collect, in this place, the various instances of its application, which will hereafter, in connexion with different subjects

¹ Per Lord Cottenham, C., *Chuck v. Cremer*, 1 Coop. 205; *King v. Bryant*, 8 My. & Cr. 191.

² Per Knight Bruce, V. C., 15 L. J., Bkpty. 7.

³ *Strother v. Hutchinson*, 4 Bing. N. C. 83, 90; 10 E. C. L. R.; cited argument, *Penny v. Slade*, 5 Bing., N. C. 327; 11 E. C. L. R.

⁴ See per Alexander, C. B., *Rex v. Westwood*, 7 Bing. 88; 20 E. C. L. R. See also, in further illustration of the above maxim, *Masters v. Lewis*, 1 Lord Raym. 57.

⁵ *Jenk. Cent.* 37; *Gilb. For. Rom.* 54. See *Bac. Max.*, reg. 2.

of inquiry, present themselves to the reader,¹ we shall for the present merely observe that it expresses, in technical language, the trite saying of Lord Kenyon, that a man shall not be permitted to "blow hot and cold" with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest.

For instance, A., a bankrupt, presented a petition to the commissioners for protection from process, under the act 5 & 6 Vict. c. 116, s. 1, and was successfully opposed by B., on the ground that the bankrupt was a trader within the meaning of the statute relating to bankruptcy. A. subsequently caused a fiat to be issued against himself, on his own petition, under the 7 & 8 Vict. c. 96, s. 41; and on this occasion B. presented a petition that the fiat might be annulled, on the ground that A. was not a trader. The Court, however, held, that, under the circumstances, the above maxim was applicable, the [*128] petitioner urging, as a *reason for annulling the fiat, the contrary of that which, in another court, he had successfully used to obtain an advantage; and the petition was consequently dismissed with costs.²

On the same principle, the assignees of a bankrupt having once affirmed the acts of a person who has wrongfully sold the bankrupt's property, cannot afterwards treat him as a wrong-doer, and maintain trover for the goods.³ In such a case it is open to the assignees either to affirm or disaffirm the acts of the bankrupt or of the third party; but if they do affirm, they must act consistently throughout: they cannot, as has been already said, "blow hot and cold."⁴

In like manner, the maxim under consideration applies, in many cases, to prevent the assertion of titles inconsistent with each other, and which cannot contemporaneously take effect.⁵ It applies also in cases of estoppel,⁶ and whenever the equitable doctrine of election is

¹ See, amongst others, *Campbell v. Fleming*, 1 A. & E. 40; 28 E. C. L. R.; *Pickard v. Sears*, 6 A. & E. 469; the principle of which has been repeatedly affirmed; *Gordon v. Ellis*, 8 Scott, N. R. 290; 33 E. C. L. R.; S. C., 2 C. B. 821. See the maxim, *Nulles commodum capere potest de injuriâ suâ propriâ*, post.

² *Ex parte Mitchell*, 15 L. J., Bkpty. 8.

³ *Brewer v. Sparrow*, 7 B. & C. 310; 14 E. C. L. R.

⁴ *Smith v. Hodson*, 4 T. R. 211, 217.

⁵ See 1 *Swanst.* 427, note.

⁶ For instance, the owner of land cannot treat the occupier as tenant and trespasser at one and the same time. As to acts of estoppel between landlord and tenant, see *Lyon v. Reed*, 13 M. & W. 285; *Nicholls v. Atherstone*, 16 L. J., Q. B. 871. As to the operation of an admission by way of estoppel, see *Wilkes v. Hopkins*, 1 C. B. 787; 50 E. C. L. R.

called into requisition, to prevent a person from repudiating the onerous, whilst he accepts the beneficial, conditions attaching to the subject-matter of the legacy or devise.¹ So, where a witness in a court of justice makes contradictory statements relative to the same transaction, the rule applicable *in determining the degree of credibility to which he may be entitled obviously is, *allegans contraria non est audiendus*. [*129]

OMNE MAJUS CONTINET IN SE MINUS.

(5 Rep. 115.)

*The greater contains the less.*²

On this principle, if a man tender more than he ought to pay, it is good; and the other party ought to accept so much of the sum tendered as is due to him.³ But a tender by a debtor of a bank-note of a larger amount than the sum due, and out of which he requires change, is not a good tender, for the creditor may be unable to take what is due and return the difference;⁴ though if the creditor knows the amount due to him, and is offered a larger sum, and, without any objection on the ground of change, makes quite a collateral objection, that will be a good tender.⁵ Where, however, a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all, not distinguishing the claims against each, is not a valid tender, and will not support a plea by one of the debtors, that *his* debt was tendered.⁶

The above maxim admits, moreover, of familiar and obvious illus-

¹ As instances of this doctrine, see *Talbot v. Earl of Radnor*, 3 My. & K. 252; *Messenger v. Andrews*, 4 Russ. 478. On the same ground rests the Scotch doctrine of "approve and reprobate," as to which see *Kerr v. Wauchope*, 1 Bligh, 121.

² *Finch, Law*, 21; D. 50, 17, 113, 110, pr.

³ 3d Resolution in *Wade's case*, 5 Rep. 115; cited argument, *Rivers v. Griffiths*, 5 B. & Ald. 631, and recognised *Dean v. James*, 4 B. & Ad. 546; 24 E. C. L. R.; *Astley v. Reynolds*, 2 Stra. 916; *Wing. Max.* p. 208.

⁴ *Betterbee v. Davis*, 3 Camp. 70, cited 4 B. & Ad. 548; 24 E. C. L. R.; *Robinson v. Cook*, 6 Taunt. 386; *Blow v. Russell*, 1 C. & P. 365; 12 E. C. L. R.

⁵ Per Lord Abinger, *C. B.*, *Bevans v. Rees*, 5 M. & W. 308; *Black v. Smith, Peake*, N. P. C. 88; *Saunders v. Graham, Gow*, R. 121; *Douglas v. Patrick*, 3 T. R. 688.

⁶ *Strong v. Harvey*, 3 Bing. 304; 11 E. C. L. R. See also *Douglas v. Patrick*, 3 T. R. 688; tender of part of an entire debt is a bad tender; *Dixon v. Clarke*, 16 L. J., C. P. 287.

[*130] tration in the power which tenant in fee-simple *possesses over the estate held in fee; for he may either grant to another the whole of such estate, or charge it in any manner he thinks fit, or he may create out of it any less estate or interest; and to the estate or interest thus granted he may annex such conditions, provided they be not repugnant to the rules of law, as he pleases.¹ In like manner, a man having a power may do less than such power enables him to do; he may, for instance, lease for fourteen years, under a power to lease for twenty-one years;² or, if he have a license or authority to do any number of acts for his own benefit, he may do some of them, and need not do all.³ In these cases, the rule of the civil law applies—*Non debet cui plus licet quod minus est non licere*;⁴ or, as it is usually found expressed in our books, *cui licet quod majus non debet quod minus est non licere*⁵—he who has authority to do the more important act shall not be debarred from doing that of less importance; a doctrine founded on common sense, and of very general importance and application, not only with reference to the law of real property, but to that likewise of principal and agent, as we shall hereafter see. On this principle, moreover, if there be a custom within any manor, that copyhold lands may be granted in fee-simple, by the same custom they are grantable to one and the heirs of his body for life, for years, or in tail.⁶ So, if there be a custom that copyhold lands may be granted for life, by the same [*131] *custom they may be granted *durante viduitate*, but not *e converso*, because an estate during widowhood is less than an estate for life.⁷

Lastly, it is laid down as generally true, that, where more is done than ought to be done, that portion for which there was authority shall stand, and the act shall be void *quoad* the excess only,⁸ *quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est*.⁹ as in the instance of a power above referred to, if a man do more

¹ 1 Prest. Abstr. Tit. 316, 377.

² *Isherwood v. Oldknow*, 3 M. & S. 382. See an instance of syllogistic reasoning founded on the above maxim, *Johnstone v. Sutton* (in error), 1 T. R. 519.

³ Per Lord Ellenborough, C. J., *Isherwood v. Oldknow*, 3 M. & S. 392.

⁴ D. 50, 17, 21.

⁵ 4 Rep. 28; also *majus dignum trahit ad se minus dignum*; Co. Litt. 355, b; 2 Inst. 307; Noy, Max., 9th ed. p. 26; Finch, Law, 22.

⁶ 4 Rep. 28; Wing., Max., p. 206.

⁷ Co. Copyholder, s. 38; Noy, Max., 9th ed. p. 25. See another example, 9 Rep. 48.

⁸ Noy, Max., 9th ed. p. 25.

⁹ 5 Rep. 115.

than he is authorized to do under the power referred, it shall be good to the extent of his power. Thus, if he have power to lease for ten years, and he lease for twenty years, the lease for the twenty years shall in equity be good for ten years of the twenty.¹

So, if the grantor of land is entitled to certain shares only of the land granted; and if the grant import to pass more shares than the grantor has, it will nevertheless pass those shares of which he is the owner.² Lastly, where there is a custom that a man shall not devise any greater estate than for life, a devise in fee will be a good devise for life, if the devisee will claim it as such.³

*QUOD AB INITIO NON VALET IN TRACTU TEMPORIS NON
CONVALESCIT. [*132]

(Noy, Max., 9th ed. p. 16.)

That which was originally void does not by lapse of time become valid.

The above rule is one of very general importance in practice, in pleading, and in the application of legal principles to the occurrences of life.⁴ And accordingly, in that part of the Digest entitled "*De Regulis Juris*," we find it laid down in these words—*Quod initio vitiosum est non potest tractu temporis convalescere*.⁵

Instances in which the above rule applies will be found to occur in various parts of this work, particularly in that which treats of the law of contracts. The following cases have here been selected, in order to give a general view of its application in different and distinct branches of the law.

If a bishop makes a lease of lands for four lives, which is contrary to the stat. 13 Eliz. c. 10, s. 3, and one of the lives falls in, and then the bishop dies, yet this lease will not bind his successor, for those things which have a bad beginning cannot be brought to a good end.⁶ So, if a man seised of lands in fee makes a lease for twenty-

¹ See *Bartlett v. Bendle*, 3 M. & S. 99; *Doe d. Williams v. Matthews*, 5 B. & Ad. 298; 27 E. C. L. R.

² 3 Prest. Abstr. Tit. 35.

³ Gr. & Rud. of Law, p. 242.

⁴ See instances of the application of this rule in the case of the surrender of a copyhold, *Doe d. Tofield v. Tofield*, 11 East, 246; 2 Bla. Com. 368; of a parish certificate, *Rex v. Upton Gray*, 10 B. & C. 807; 21 E. C. L. R.; *Rex v. Whitechurch*, 7 B. & C. 578; 13 E. C. L. R.; of an order of removal, *Rex v. Chilverscoton*, 8 T. R. 178. As to this rule in equity see 1 Story, Eq. Jur. 4th ed. 325.

⁵ D. 50, 17, 29, 210.

⁶ Noy, Max., 9th ed. p. 16.

one year, rendering rent to begin presently, and the same day he make a lease to another for a like term, the second lease is void; and if the first lessee surrender his term to the lessor, or commit [*133] *any act of forfeiture of his lease, the second lessee shall not have his term, because the lessor at the making of the second lease had nothing in him but the reversion.¹

Again, in the case of a lease for years, there is a distinction between a clause by which, on a breach of covenant, the lease is made absolutely void, and a clause which merely gives the lessor power to re-enter. In the former case, if the lessor make a legal demand of the rent, and the lessee neglect or refuse to pay, or if the lessee be guilty of any breach of the condition of re-entry, the lease is *void* and absolutely determined, and cannot be set up again by acceptance of rent due after the breach of the condition or by any other act; but if, on the other hand, the clause be, that for non-payment of the rent it shall be lawful for the lessor to re-enter, the lease is only *voidable*, and may be affirmed by acceptance of rent accrued afterwards, or other act, provided the lessor had notice of the breach of condition at the time; and it is undoubted law, that, though an acceptance of rent or other act of waiver may make a *voidable* lease good, it cannot make valid a deed² or a lease which was void *ab initio*.³

Where a remainder is limited to A., the son of B., he having no such son, and afterwards a son is born to him, whose name is A., during the continuance of the particular estate, yet the remainder is void.⁴

So, where uses are raised by a deed which is itself void, as in the instance of a conveyance of a freehold *in futuro*, the uses mentioned [*134] in the deed cannot arise.⁵ When *the estate to which a warranty is annexed is defeated, the warranty is also defeated;⁶ and when a spiritual corporation to which a church is appropriate is dissolved, the church is disappropriated.⁷ Again, by the rule of law a remainder ought to have a preceding estate to support it; and where

¹ *Smith v. Stapleton*, Plowd. 432; *Noy, Max.*, 9th ed. p. 16; but see, post, p. 138.

² See *De Montmorency v. Devereux*, 7 Cl. & Fin. 188.

³ *Doe d. Bryan v. Banks*, 4 B. & Ald. 401; 6 E. C. L. R.; Co. Litt. 215, a; *Jones v. Carter*, 15 M. & W. 719.

⁴ *Noy, Max.*, 9th ed. p. 17; 2 Bla. Com. 167.

⁵ *Argument, Goodtitle v. Gibbs*, 5 B. & C. 714; 11 E. C. L. R.

⁶ Litt. s. 741, and *Butler's note*, (1); Co. Litt. 389, a; but this may with more propriety be referred to the maxim, *sublato principali tollitur adjunctum*. *Ib.*

⁷ *Noy, Max.*, 9th ed. p. 20.

the particular estate and the remainder depend upon one of the same title, there, if the particular estate fails, the remainder fails also.¹

In the ordinary case, also, of a will void by reason of its not being duly attested according to the provisions of the statute, or on account of the coverture of the testatrix at the time of making the will, all the dispositions and limitations of property contained therein are also necessarily void, nor can the original defect in the instrument be cured by lapse of time.²

The following recent instance will also serve to illustrate this rule. The appointment of a committee to try the merits of a return to Parliament under stat. 9 Geo. 4, c. 22, ss. 18, 30, cannot legally take place if the petitioner be not present in person, or by his attorney or agent, and if such committee nevertheless be formed, and proceed to declare the petition frivolous and vexatious, the costs of opposing the petition cannot legally be taxed under section 60 of that act; and if the Speaker, under such circumstances, directs a taxation, and certifies under the last-mentioned section, the Court, on application to put the certificate in force pursuant to section 63, will notice the irregularity of the proceedings on the petition, if brought before them on affidavit, *and will refuse to enter up [*135] judgment.³ For, in this case, the whole of the proceedings take place *coram non judice*, the jurisdiction fails altogether, and with the jurisdiction the whole of the superstructure built upon it by the statute falls to the ground.⁴ In this and similar cases, therefore, the maxim applies, *debile fundamentum fallit opus*⁵—where the foundation fails all goes to the ground.

So, where a living becomes vacant by resignation or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, the law requires him to give notice thereof to the patron; otherwise he can take no advantage by way of lapse; neither in this case shall any lapse accrue to the metropolitan or to the Crown, for the first step, or beginning, fails—*quod non habet principium non habet*

¹ Wing. Max., pp. 117, 125; 2 Bla. Com. 167. See 8 & 9 Vict. c. 106; 2 Crabb, Real Prop. 976.

² Gr. & Rud. of Law and Equity, p. 289; Noy, Max., 9th ed. 15 (d).

³ Bruyeres v. Halcomb, 8 Ad. & E. 381; 30 E. C. L. R.; cited 3 Bing. N. C. 160; 32 E. C. L. R.

⁴ Judgment, Ranson v. Dundas, 3 Bing. N. C. 160.

⁵ Noy, Max., 9th ed. p. 12.

finem,¹ it being universally true, that neither the archbishop nor the Crown shall ever present by lapse, but where the immediate ordinary might have collated by lapse within the six months, and has exceeded his time.²

In connexion with the practice of our courts, also, the above maxim admits of many important applications; when, for instance, any proceeding taken by one of the adverse parties is altogether unwarranted, and different from that which, if any, ought to have been taken, then the proceeding is a nullity, and cannot be waived by any of the party against whom it has been taken. So, it is equally clear, that pleading over cannot supply a defect in matter of substance,³ [*136] although in some cases an imperfection in *the pleading will be aided or cured by verdict; and with respect to this latter proposition, the rule is thus laid down, that, where a matter is so essentially necessary to be proved, that, had it not been in evidence, the jury could not have given such a verdict as that recorded, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in a fair and reasonable intendment, will be cured by the verdict; and where a general allegation must, in fair construction, so far require to be restricted that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after the verdict that it was so restrained at the trial.⁴

In every case, indeed, where an objection to the sufficiency of the cause of action apparent on the record, is sustained after verdict, the effect will be as fatal as if the objection had been taken at an earlier stage of the proceedings, in accordance with the obvious principle under consideration—*debile fundamentum fallit opus*.⁵

Notwithstanding the very general application of the maxim which we have above briefly considered, some few cases do occur where an act done contrary to the express direction or established practice of the law will not be found to invalidate the subsequent proceedings, and where, consequently, *quod fieri non debet factum valet*.⁶

¹ Wing. Max., p. 79; Co. Litt. 345, a.

² 2 Bla. Com. 278; Co. Litt. 345, a.

³ Ante, p. 101; Jackson v. Pesked, 1 M. & S. 234; Steph. Plead. 5th ed. 161.

⁴ Jackson v. Pesked, 1 M. & S. 234; 1 Wms. Saunds, 228 (l).

⁵ Finch, Law, 14, 36; Wing. Max. 113, 114. See, also, the judgment, Davies dem. Lowndes ten., 8 Scott, N. R. 567, where the above maxim is cited and applied. A writ of subpoena tested in vacation is void; Edgell v. Curling, 8 Scott, N. R. 663.

⁶ Gloss. in l. 5, Cod. l. 14. *Pro infectis*; Wood, Inst. 25; 5 Rep. 38. This maxim holds true likewise in certain cases hereafter noticed relative to contracts. See also Orgill v. Bell, 17 L. J., Ex. 52.

Thus, the death of either party is, generally speaking, a countermand of a warrant of attorney; and therefore, *upon motion [*137] to enter up judgment on an old warrant of attorney, if it appear to the court that either party is dead, they will not grant the motion.¹ Where, however, a motion in such a case was made after the death of the party, but on the day of the death, upon an affidavit of the preceding day, that the defendant was then alive, and judgment was entered up accordingly, the Court, on motion made to set aside such judgment, stated, that, if it had appeared at the time that the man was dead, they would not have granted the rule; but they held the above maxim to apply.² It seems, however, that this decision cannot be supported, and would not under similar circumstances be followed.³

Under the stat. 7 Geo. 2, c. 8, it was held, that an *executory contract* to transfer stock which the party was not possessed of, might be void and illegal, and yet that the actual transfer of the stock by such party, or on his procurement, might be legal; and that the apparent difficulty (which, in fact, arose from applying the principle, *quod ab initio non valet tractu temporis non conualescit*) disappeared on reference to the provisions of the act, which are framed with a view to secure in every case an actual transfer of all stock bargained to be sold, and within the mischief contemplated by which act the above case does not consequently fall.⁴

The maxim, *quod fieri non debet factum valet*, will be found, however, strictly to apply wherever a form has been omitted which ought to have been observed, but of which the omission is *ex post facto* immaterial.⁵ It frequently *happens, indeed, that a particular [*138] act is directed to be done by one clause of a statute, and that the omission of such act is, by a separate clause, declared immaterial with reference to the validity of proceedings subsequent thereto. In

¹ 1 Tidd, Pr. 9th ed. 551.

² *Chancy v. Needham*, 2 Stra. 1081.

³ See per Lord Denman, C. J., delivering judgment, *Heath v. Brindley*, 2 Ad. & E. 370; 29 E. C. L. R.

⁴ *M'Callan v. Mortimer* (in error), 9 M. & W. 636, 640; S. C. 7 M. & W. 20; 6 M. & W. 58.

⁵ Per Lord Brougham, 6 Cl. & Fin. 708; argument, 9 Wheaton, R. (U. S.) 478. "There is a known distinction between circumstances which are of the *essence* of a thing required to be done by an act of Parliament, and clauses *merely directory*." Per Lord Mansfield, C. J., *Rex v. Loxdale*, 1 Burr. 447, adopted per Tindal, C. J. *The Southampton Dock Company v. Richards*, 1 Scott, 289, and cited, argument, 7 Id. 695.

all such cases, it is true, that what ought not to have been done is valid when done. Thus, residence in the parish before proclamation if directed by the stat. 26 Geo. 2, c. 33, "For the better preventing of Clandestine Marriages," as a requisite preliminary to the celebration of a marriage by banns; but if this direction, although very material for carrying out the object of that act, be not complied with, the marriage will nevertheless be valid under the 10th section, for here the legislature has expressly declared, that non observance of this statutory direction shall, after the marriage has been solemnized, be immaterial.¹

Lastly, it is said that "void things" may nevertheless be "good to some purposes;"² as if A., by deed indented, let B. an acre of land in which A. has nothing, and A. purchase it afterwards, this will be a good lease;³ and the reason is, that what, in the first instance, was a lease by estoppel only, becomes subsequently a lease in interest, and the relation of landlord and tenant will then exist as perfectly as if the lessor had been actually seised of the land at the time when the lease was made.⁴

[*139] *ARGUMENTUM AB INCONVENIENTI PLURIMUM VALET IN LEGE.
(Co. Litt. 66 a.)

An argument drawn from inconvenience is forcible in law.⁵

In doubtful cases arguments drawn from inconvenience are of great weight.⁶ Thus, arguments of inconvenience are sometimes of great value upon the question of intention. If there be in any deed or instrument equivocal expressions, and great inconvenience must necessarily follow from one construction, it is strong to show that such construction is not according to the true intention of the grantor; but, where there is no equivocal expression in the instrument, and the words used admit only of one meaning, arguments of inconvenience prove only want of foresight in the grantor. But because he wanted

¹ See per Lord Brougham, 6 Cl. & Fin. 708 et seq.

² Finch, Law, 62.

³ Noy, Max. 9th ed. p. 17, and authorities cited, Id. n. (a).

⁴ Blake v. Foster, 8 T. R. 487; Stokes v. Russell, 8 T. R. 678; per Alderson, B., 6 M. & W. 662; Webb v. Austin, 8 Scott, N. R. 419; Pargeter v. Harris, 7 Q. B. 708; 53 E. C. L. R.; Co. Litt. 47, b.

⁵ Co. Litt. 97, 152, b. As to the argument *ab inconvenienti*, see per Sir W. Scott, 1 Dods. 402; per Lord Brougham, 6 Cl. & Fin. 671; 1 Mer. 420.

⁶ Per Heath, J., 1 H. Bla. 81; per Dallas, C. J., 7 Taunt. 527; 2 E. C. L. R.; 8 Id. 762.

foresight, courts of justice cannot make a new instrument for him; they must act upon the instrument as it is made;¹ and generally, if there be any doubts what is the law, judges solve such doubts by considering what will be the good or bad effects of their decision; but if the law is clear, inconveniences afford no argument of weight with the judge; the legislature only can remedy them.² And, again, "where the law is known and clear, though it be inequitable and inconvenient, the judges must determine as the *law is, without regarding [*140] the equitableness or inconvenience. These defects, if they happen in the law, can only be remedied by Parliament; therefore we find many statutes repealed and laws abrogated by Parliament as inconvenient, which before such repeal or abrogation were, in the courts of law, to be strictly observed. But where the law is doubtful and not clear, the judges ought to interpret the law to be as is most consonant to equity and least inconvenient."³ And hence, the doctrine, that *nihil quod est inconveniens est licitum*,⁴ which is frequently advanced by Sir E. Coke, must certainly be received with some qualification, and must be understood to mean, that against the introduction or establishing of a particular rule or precedent inconvenience is a forcible argument.⁵

This argument *ab inconvenienti*, moreover, is, under many circumstances, valid to this extent, that the law will sooner suffer a private mischief than a public inconvenience,—a principle which we have already had occasion to consider in its general application. It is better to suffer a mischief which is peculiar to one, than an inconvenience which may prejudice many.⁶

Lastly, in construing an act of Parliament, the same rule applies. If the words used by the legislature, in framing any particular clause, have a necessary meaning, it will be the duty of the Court to construe the clause accordingly, whatever may be the inconvenience of such a course.⁷ But, unless it is very clear that violence would be done to the language of the act by adopting any other

¹ Per Sir J. Leach, V. C., *Attorney-General v. Duke of Marlborough*, 8 Madd. 540; per Burrough, J., *Deane v. Clayton*, 7 Taunt. 496; 2 E. C. L. R.; per Best, C. J., *Fletcher v. Lord Sondes*, 8 Bing. 590; 11 E. C. L. R.

² Per Lord Northington, C., *Pike v. Hoare*, 2 Eden, 184; per Abbott, C. J., 8 B. & C. 471.

³ Vaugh. R. 87, 88.

⁴ Co. Litt. 66, a.

⁵ Ram, *Science of Legal Judgment*, 57.

⁶ Co. Litt. 97, b, 152, b; *Hobart*, 224; ante, p. 2.

⁷ Per Erle, J., *Wansey*, *appel.*, *Perkins*, *resp.*, 8 Sc. N. R. 969; per Parke, J., *Mirehouse v. Rennell*, 1 Cl. & Fin. 546.

construction, *any great inconvenience which might result [*141] from that suggested may certainly afford fair ground for supposing that it could not be what was contemplated by the legislature, and will warrant the Court in looking for some other interpretation.¹

NIMIA SUBTILITAS IN JURE REPROBATUR, ET TALIS CERTITUDO
CERTITUDINEM CONFUNDIT.

(4 Rep. 5.)

*The law does not allow of a captious and strained intendment, for such nice pretence of certainty confounds true and legal certainty.*²

A pleading is not objectionable as ambiguous or obscure, if it be certain to a common intent, that is, if it be clear enough, according to reasonable intendment or construction, though not worded with absolute precision.³ Thus, in debt on a bond conditioned to procure A. S. to surrender a copyhold to the use of the plaintiff, a plea that A. S. surrendered and released the copyhold to the plaintiff in full court, and that the plaintiff accepted it, without alleging that the surrender was to the plaintiff's use, is sufficient, for this shall be intended.⁴ So, in debt on a bond conditioned that the plaintiff shall enjoy certain land, &c., a plea, that, after the making of the bond, until the day of exhibiting the bill, the plaintiff did enjoy, is good [*142] though *it be not said that *always* after the making, until, &c., he enjoyed, for this shall be intended.⁵

It is said, however, that all pleadings in estoppel, and also the plea of alien enemy, must be certain in every particular, which seems to amount to this, that they must meet and remove by anticipation, every possible answer of the adversary.⁶ Thus, in a plea of alien enemy, the defendant must state, not only that the plaintiff was born in a foreign country now at enmity with the Crown, but that he came here without letters of safe-conduct from the Crown;⁷ whereas, according to the general rule, such safe-conduct, if granted,

¹ Judgment, *Doe d. Governors of Bristol Hospital v. Norton*, 11 M. & W. 928; judgment, *Turner v. Sheffield Railway Company*, 10 M. & W. 434.

² *Wing. Max.*, p. 26.

³ *Steph. Plead.* 5th ed. 417.

⁴ *Hammond v. Dod*, Cro. Car. 6.

⁵ *Harlow v. Wright*, Cro. Car. 105.

⁶ *Steph. Plead.* 5th ed. 380.

⁷ *Casseres v. Bell*, 8 T. R. 166; *Le Bret v. Papillon*, 4 East, 502; recognised *Allen v. Hopkins*, 18 M. & W. 101.

should be averred by the plaintiff in reply, and would not need in the first instance to be denied by the defendant. The reason of this exception is, that the above pleas are regarded unfavourably by the Courts, as having the effect of excluding the truth.¹

And here we may observe another maxim of law intimately connected with the one under consideration; viz., that *apices juris non sunt jura*,²—it is an excellent and profitable law which disallows curious and nice exceptions, tending to the overthrow or delay of justice.³ True it is, however, as was recently observed, that, by the ingenuity of special pleaders, the Courts are sometimes placed *in a difficulty in coming to a correct conclusion in the administration of justice; and where such is the case, they can [*143] only dispose of the matter in the way which seems to them to be most in accordance with the established rules of pleading. Whoever really understands the important objects of pleading will always appreciate it as a most valuable mode of furthering the administration of justice, though some cases are calculated to create in the minds of persons unacquainted with the science but a mean opinion of its value.⁴

“The object of having certain recognised forms of pleading, is to prevent the time of the Court from being occupied with vain and useless speculations as to the meaning of ambiguous terms;”⁵ and, therefore, as observed by Sir E. Coke, “the order of good pleading is to be observed, which, being inverted, great prejudice may grow to the party tending to the subversion of law—*Ordine placitandi servato servatur et jus*.”⁶

However, in some cases, the Court is bound to pronounce upon *apices juris*, and in doing so it has no pleasure in disappointing the expectations of parties suing; but the certainty of the law is of infinitely more importance than any consideration of individual incon-

¹ Steph. Plead. 5th ed. 380, 381.

² 10 Rep. 126.

³ Co. Litt. 304, b; Wing. Max., p. 19. See *Yonge v. Fisher*, 5 Scott, N. R. 898; per Erye, C. J., *Jones v. Chune*, 1 B. & P. 364; cited per Cresswell, J., *Wilson v. Nisbett*, 4 Scott, N. R. 778; *Newton v. Rowe*, 7 Id. 545. A grant from the Crown under the Great Seal shall not, propter *apices juris*, be made void and of no effect. (*Earl of Rutland's case*, 8 Rep. 112; cited, argument, *Rex v. Mayor of Dover*, 1 Cr. M. & R. 732.)

⁴ Per Lord Abinger, C. B., *Fraser v. Welch*, 8 M. & W. 684.

⁵ Per Pollock, C. B., *Williams v. Jarman*, 18 M. & W. 138.

⁶ Co. Litt. 308, a. As to the strictness required in equity pleadings, see *Hardman v. Ellames*, 2 My. & K. 742.

venience.¹ And this observation applies with peculiar force to a case of frequent occurrence, viz. where, owing to some objection to the pleadings of a purely technical nature, the plaintiff is deprived [*144] of the fruits of his action, to which he would be otherwise justly entitled; but it has been observed, that, much as the Court regrets such a circumstance, it would be a matter of still greater regret, if, in order to give effect to the supposed justice of the plaintiff's demand, and to remedy the particular mischief, it should do anything to unsettle the established rules of pleading, and to introduce laxity and uncertainty into this branch of the law.²

[*145]

*CHAPTER V.

FUNDAMENTAL LEGAL PRINCIPLES.

MANY of the principles set forth and illustrated in this chapter are of such general application that they may be considered as exhibiting the very grounds or foundations on which the legal science rests. To these established rules and maxims the remark of Mr. Justice Blackstone (Com., vol. 1, p. 68) is peculiarly applicable:—“Their authority rests entirely upon general reception and usage, and the only method of proving that this or that maxim is a rule of the common law, is by showing that it hath always been the custom to observe it.” It would, indeed, be highly interesting and useful to trace from a remote period, and through successive ages, the gradual development of these principles, to observe their primitive and more obvious meaning, and to show in what manner and under what circumstances they have been applied by the “living oracles” of the law to meet the increasing exigencies of society, and those complicated facts which are the result of increased commerce, civilization, and refinement. Such an inquiry would, however, be too extensive to be compatible with the plan of this work; and our

¹ Per Lord Ellenborough, C. J., *Bell v. Janson*, 1 M. & S. 204; and in *Robertson v. Hamilton*, 14 East, 582. In *Brancker v. Molyneux*, 4 Scott, N. R. 767, and in *Yonge v. Fisher*, 5 Id. 896, an objection is described as being *inter extremos apices juris*.

² Judgment, *Galloway v. Jackson*, 3 Scott, N. R. 778.

object, therefore, in the following pages, is limited to exhibiting a series of the elementary and fundamental rules of law, accompanied by a few observations, when necessary, with occasional references to the civil law, and a sufficient number of cases to *exemplify [*146] the meaning and qualifications of the maxims cited.

These will be found to comprise the following important principles : that where there is a right there is a remedy, and if there be no remedy by action, the law will in some cases give one in another way—that the law looks not at the remote, but at the immediate cause of damage—that the act of God shall not, by the instrumentality of the law, work an injury—that damages shall not in general be recovered for the non-performance of that which was impossible to be done—that ignorance of the law does not, although ignorance of facts does, afford an excuse—that a party shall not convert that which was done by himself, or with his assent, into a wrong—that a man shall not take advantage of his own tortious act—that the abuse of an authority given by law shall, in some cases, have a retrospective operation, with respect to the liability of the party abusing it—that the intention, and not the act, is regarded by the law, and that a man shall not be twice vexed in respect of the same cause of action.

UBI JUS IBI REMEDIUM.

(See 1 T. R. 512.)

*There is no wrong without a remedy.*¹

Jus, in the sense in which it is here used, signifies “the legal authority to do or to demand something.”² *or no law is without a remedy.*

Remedium may be defined to be the right of action, or the *means given by the law for the recovery of a right, and [*147] according to the above elementary maxim, whenever the law gives anything, it gives a remedy for the same: *lex semper dabit remedium.*³ If a man has a right, he must, it has been observed in a

¹ *Johnstone v. Sutton* (in error), 1 T. R. 512; Co. Litt. 197, b. See, also, Lord Camden's Judgment in *Entick v. Carrington*, 19 How. St. Trials, 1066.

² Mackeld. Civ. Law, 6.

³ Jacob, Law Dict., title “Remedy;” Bac. Abr., “Actions in General,” (B.) The reader is referred for general information on the subject of rights and remedies to Chit. Gen. Pr. of the Law, Part I. c. 1. “Upon principle, wherever the common law imposes a duty, and no other remedy can be shown to exist, or only one which has become obsolete or inoperative, the Court of Queen's Bench will interfere by *mandamus*.” Judgment, 12 Ad. & E. 266; E. C. L. R. 40. See also *Gosling v. Veley*, 7 Q. B. 461; E. C. L. R. 58.

celebrated case, have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal.¹

It appears, then, that *remedium*, although sometimes used as synonymous with *actio*, has, in the maxim which we now propose to consider, a more extended signification than the word "action" in its modern sense. An "*action*" is, in fact, the peculiar mode pointed out by the law for enforcing a remedy, or for prosecuting a claim or demand, in a court of justice—*action n'est autre chose que loyall demande de son droit*,² an action is merely the legitimate mode of enforcing a right, whereas *remedium* is rather the right of action, or *jus persequendi in judicio quod sibi debetur*,³ which is in terms the definition of the word *actio* in the Roman Law.

The maxim *ubi jus ibi remedium* has been considered so valuable, that it gave occasion to the first invention of that form of action called an action on the case; for the statute of Westminster 2 (13 Edw. 1, c. 24), which is only in affirmance *of the common [*148] law on this subject, and was passed to quicken the diligence of the clerks in the Chancery, who were too much attached to ancient precedents,⁴ enacts, that, whensoever from thenceforth a writ shall be found in the Chancery, and in a like case, falling under the same right and requiring like remedy, no precedent of a writ can be produced, the clerks in Chancery shall agree in forming a new one; and if they cannot agree, it shall be adjourned till the next Parliament, where a writ shall be formed by consent of the learned in the law, lest it happen for the future that the Court of our Lord the King be deficient in doing justice to the suitors.

The principle adopted by courts of law accordingly is, that the novelty of the particular complaint alleged in an action on the case is no objection, provided that an injury cognizable by law be shown to have been inflicted on the plaintiff;⁵ in which case, although there be no precedent, the common law will judge according to the law of nature and the public good.⁶

It is, however, important to observe this distinction, that, where

¹ Per Holt, C. J., *Ashby v. White*, 2 Lord Raym. 953; per Willes, C. J., *Winsmore v. Greenbank*, Willes, 577; *Vaugh. R.* 47, 258.

² Co. Litt. 285, a.

³ I. 4, 6, pr.

⁴ 1 Smith, L. C. 180.

⁵ 1 Smith, L. C. 180; per Pratt, C. J., *Chapman v. Pickersgill*, 2 Wils. 146.

⁶ *Jenk. Cent.* 117.

cases are new in principle, it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognised in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago.¹

*Accordingly, it was held, in the case which is usually cited [*149] to illustrate the principle under consideration, that a man who has a right to vote at an election for members of Parliament, may maintain an action against the returning officer for refusing to admit his vote, though his right was never determined in Parliament, and though the persons for whom he offered to vote were elected;² and in answer to the argument, that there was no precedent for such an action, and that establishing such a precedent would lead to multiplicity of actions, Lord Holt observed, that if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense.³

It is true, therefore, that, in trespass and for torts generally, new actions may be brought as often as new injuries and wrongs are repeated;⁴ "for," as remarked by Mr. J. Blackstone, "wherever the common law gives a right or prohibits an injury, it also gives a remedy by action, and, therefore, wherever a new injury is done a new method of remedy must be pursued."⁵

On the same principle, every statute made against an injury, mischief, or grievance, impliedly gives a remedy, for the party injured may, if no remedy be expressly given, have an action upon the statute; and if a penalty be given by the statute, but no action for the recovery thereof be named, an action of debt will lie for the penalty.⁶ So, where *a statute requires an act to be done for the benefit [*150] of another, or forbids the doing of an act which may be to

¹ Per Ashhurst, J., *Pasley v. Freeman*, 8 T. R. 63; per Parke, J., 7 Taunt. 515; E. C. L. R. 2; *Fletcher v. Lord Sondes*, 8 Bing. 550; E. C. L. R. 11.

² *Ashby v. White*, 2 Ld. Raym. 988; cited *Stockdale v. Hansard*, 9 A. & E. 185; E. C. L. R. 36. In connexion with *Ashby v. White*, see also the recent case of *Pryce v. Belcher*, 8 C. B. 58, where the maxim above illustrated was much considered. See also *Jenkins v. Waldron*, 11 Johns. R. (U. S.) 120.

³ 2 Ld. Raym. 955; *Millar v. Taylor*, 4 Burr. 2344.

⁴ *Hambleton v. Veere*, 2 Wms. Saund. 171, b (1); cited per Lord Denman, C. J., *Hodsoll v. Stallebrass*, 11 Ad. & E. 306; E. C. L. R. 39.

⁵ 3 Bla. Com. 123.

⁶ 2 Dwarr. Stats. 677.

his injury, though no action be given in express terms by the statute for the omission or commission, the general rule of law is, that the party injured shall have an action.¹ And, in like manner, when a person has an important public duty to perform, he is bound to perform that duty, and if he neglects or refuses so to do, and an individual in consequence sustains an injury, that lays the foundation for an action to recover damages by way of compensation for the injury that he has so sustained.²

There is, however, a class of cases, from which it is important to distinguish those above referred to, in which a damage is sustained by the plaintiff, but a damage not occasioned by anything which the law esteems an injury. This kind of damage is termed in law *damnum absque injuriâ*, and for it no action can be maintained.³ For instance, if a person build a house on the edge of his land, and the proprietor of the adjoining land, after twenty years have elapsed, digs so near it that it falls down, an action on the case will lie, because the plaintiff has by twenty years' use acquired a presumptive right to the support, and to infringe that right is an injury.⁴ But, if the owner of land adjoining a newly-built house dig in a similar manner, and produce similar results, in this case, though there is damage, yet, as there is no right to the support, no injury is, in legal contemplation, committed by withdrawing it, and consequently no action will be maintainable.⁵

[*151]. *Further, it frequently happens, in the ordinary proceedings of life, that a man may lawfully use his own property so as to cause damage to his neighbour, provided it be not *injuriousum*; or he may, whilst pursuing the reasonable exercise of an established right,⁶ casually cause an injury, which the law will regard as a misfortune merely, and for which the party from whose act it proceeds will be liable neither at law nor in the forum of conscience.

In cases of this nature a loss or damage is indeed sustained by the plaintiff, but it results from an act done by another free and respon-

¹ Ashby v. White, *supra*, cited argument, 9 Cl. & Fin. 274.

² Per Lord Lyndhurst, C., 9 Cl. & Fin. 279, citing Sutton v. Johnstone, 1 T. R. 498; Bartlett v. Crozier, 15 Johns. R. (U. S.) 254, 255.

³ 1 Smith, L. C. 131.

⁴ Stansell v. Jollard, Stark., N. P. C. 444; E. C. L. R.; Hide v. Thornborough, 2 Car. & K. 250; E. C. L. R. 61.

⁵ Wyatt v. Harrison, 3 B. & Ad. 876; E. C. L. R. 23.

⁶ The Eleanor, 2 Wheaton R. (U. S.) 358; Pantou v. Holland, 17 Johns. R. (U. S.) 100.

sible being, which is neither unjust nor illegal. Thus, the establishment of a rival school, which draws away the scholars from a school previously established, is illustrative of such a loss.¹ So, a man may lawfully build a wall on his own ground in such a manner as to obstruct the lights of his neighbour, who may not have acquired a right to them by grant or adverse user. He may build a mill near the mill of his neighbour, to the grievous damage of the latter by loss of custom. He may, by digging in his own land, intercept or drain off the water collected from underground springs in his neighbour's well. In these and similar cases, the inconvenience caused to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action.²

In the above and similar cases, it is no doubt a hardship upon the party injured to be without a remedy, but by that consideration courts of justice ought not to be influenced. Hard cases, it has been already observed, are apt to introduce bad law.³

*Again, where process is served by mistake on a wrong person, and all the proceedings in the action are taken [*152] against him, the defendant so wrongfully sued will undoubtedly have a good defence to the action, and will consequently recover his costs; but if it be asked what further remedy he has for the inconvenience and trouble he has been put to, the answer is, that, in point of law, if the proceedings have been adopted purely through mistake, though injury may have resulted to him, it is *damnum absque injuriâ*, and no action will lie. Indeed, every defendant against whom an action is unnecessarily brought, experiences some injury or inconvenience beyond what the costs will compensate him for.⁴

In the class of cases to which we have just been adverting, the party aggrieved has no remedy, because no right has, in contemplation of law, been invaded: Every injury, however, to a legal right necessarily imports a damage in the nature of it, though there be no pecuniary loss.⁵ Thus, where a prisoner is in execution on *final pro-*

¹ Bell, Dict. and Dig. of Scotch Law, 252; Bac. Abr., "Actions in General" (B).

² Acton v. Blundell, 12 M. & W. 341, 354; 3 Steph. Com. 465.

³ Ante, p. 111. Per Rolfe, B., Winterbottom v. Wright, 10 M. & W. 116. In Walker v. Hatton, 10 M. & W. 259, (*) Gurney, B., says, "The plaintiff may have been extremely ill-used, but I think he has no remedy."

⁴ Per Rolfe, B., Davies v. Jenkins, 11 M. & W. 755, 756; (*) Hobart, 266; Ewart v. Jones, 14 M. & W. 774; (*) Yearsley v. Heane, Id. 322; Daniels v. Fielding, 16 M. & W. 200; (*) De Medina v. Grove, 15 L. J., Q. B. 284. See also Fivas v. Nicholls, 2 C. B. 501; E. C. L. R. 52.

⁵ Per Lord Holt, C. J., Ashby v. White, supra.

cess, the creditor has a right to the body of his debtor every hour till the debt is paid; and an escape of the debtor, for ever so short a time, is necessarily a damage to him, and the action for an escape lies.¹ So, if the sheriff, having a writ of execution delivered to him, unnecessarily delay putting it in force, an action on the case lies against him at the suit of the execution creditor, though no actual pecuniary *damage has arisen from the default.² In like [*153] manner, if a banker has received sufficient funds from his customer, he is bound to honour his check; and if he make default in doing so, he will be liable, although no actual damage has been sustained by the customer in consequence of such default.³

The general principle laid down in the cases just cited seems to be quite in accordance with that set forth in the maxim now under consideration. We must, however, observe, that, in actions against the sheriff for breach of duty, a distinction has been taken between cases in which such breach occurred in the execution of *final*, and those in which it occurred in the execution of *mesne* process.⁴ In *Wylie v. Birch*,⁵ indeed, which was an action on the case for a false return to a writ of *fi. fa.*, pleas were sustained which showed that the plaintiff had, in fact, sustained no damage by the false return; and the Court of Queen's Bench there laid down without qualification, that an action on the case "cannot be maintained against the sheriff for breach of duty, unless damage accrues thereby to the plaintiff."⁶ It must, however, be remarked, that, in support of this position, they cited the case of *Williams v. Mostyn*, without adverting to the distinction between *mesne* and *final* process above mentioned, or to the fact that, in that case, the action was brought for a breach of duty in the execution of *mesne* process, and that the distinction alluded to was there expressly recognised. It is also worthy of remark, [*154] that, in the case of *Clifton v. Hooper*, *that of *Wylie v. Birch*, although apparently alluded to by Lord Denman, was not cited in the argument, nor mentioned in the judgment delivered by the Court.

¹ *Williams v. Mostyn*, 4 M. & W. 158; (*) recognised in *Wylie v. Birch*, 4 Q. B. 566, 577; E. C. L. R. 45; and *Clifton v. Hooper*, 6 Q. B. 468; E. C. L. R. 51.

² *Clifton v. Hooper*, 6 Q. B. 468; E. C. L. R. 51.

³ *Marzetti v. Williams*, 1 B. & Ad. 415; E. C. L. R. 20; recognised 6 Q. B. 475; E. C. L. R. 51; *Warwick v. Rogers*, 6 Scott, N. R. 1.

⁴ *Williams v. Mostyn*, 4 M. & W. 158; (*) *Clifton v. Hooper*, 6 Q. B. 474; E. C. L. R. 51. But see *Atk. Sher. L.* 2d ed. 524.

⁵ 4 Q. B. 566; E. C. L. R. 45. See also *Bales v. Wingfield*, Id. 580, (a).

⁶ 4 Q. B. 577; E. C. L. R. 45.

From the preceding examples it will be inferred, that an injury to a right may consist either in a *misfeasance* or a *non-feasance*; and it may not be improper here to remark, that there is in fact a large class of cases, in which the foundation of the action lies in a privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently either assumpsit or case. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render. Actions against common carriers, against ship-owners on bills of lading, against bailees of different descriptions, and numerous other instances, occur, in which the action is brought in tort or contract, at the election of the plaintiff. Nor is it true that this election is only given where the plaintiff sues for a *misfeasance* and not for a *non-feasance*, for the action of case upon tort very frequently occurs, where there is a simple non-performance of the particular contract, as in the ordinary instance of case against ship-owners for not safely and securely delivering goods according to the bill of lading; and, in a recent case, it was decided, that the plaintiff was entitled to nominal damages, without proof of any actual damage; the principle in all such cases being, that the contract creates a duty, and the neglect to perform that duty, or the non-feasance, is a ground of action upon tort.¹

*Having stated it as generally true, that, when a right has been invaded, an action for damages will lie, although no [*155] damage has been actually sustained, we may observe, that the principle on which many such cases proceed, is, that it is material to the establishment and preservation of the right itself, that its invasion should not pass with impunity; and in these cases, therefore, *nominal* damages only are usually awarded, because the recovery of such damages sufficiently vindicates the plaintiff's right: as, for instance, in trespass *qua. cl. fr.*, which is maintainable for an entry on the land of another, though there be no real damage, because repeated acts of going over the land might be used as evidence of a title to do so, and thereby the right of the plaintiff might be injured; or in

¹ Judgment, *Boorman v. Brown* (Exchequer Chamber), 8 Q. B. 525, 526; E. C. L. R. 43; S. C., affirmed 11 Cl. & Fin. 1; per Lord Abinger, C. B., *Winterbottom v. Wright*, 10 M. & W. 115; (*) *Marzetti v. Williams*, 1 B. & Ad. 415, 426; E. C. L. R. 20.

² 3 Steph. Com. 463, 464. See *Blofield v. Paine*, 4 B. & Ad. 410; E. C. L. R. 24; *Wells v. Watling*, 2 W. Bla. 1233; *Pindar v. Wadsworth*, 2 East, 154.

an action by a commoner for an injury done to his common, in which action evidence need not be given of the exercise of the right of common by the plaintiff.¹

It is not, indeed, by any means true, that the actual injury is, in every case, the proper measure of damages to be given; for instance, my neighbour may take from under my house coal, which I may have no means of getting at, and yet I may recover the value, notwithstanding I have sustained no real injury.²

The maxim, however, *ubi jus ibi remedium*, though generally, is not universally true, and a great variety of cases occur to which it does not apply, or at least in which the remedy cannot be in the shape of a civil action to recover *damages for the injury [156] sustained. Some of these are cases in which the act done is a grievance to the entire community, no one of whom is injured by it more than another. In such cases, the mode of punishing the wrongdoer is by indictment only;³ although, if any person has suffered a particular damage, beyond that suffered by the public, he may maintain an action in respect thereof; thus, if A. dig a trench across the highway, this is the subject of an indictment; but if B. fall into it and sustain a damage, then the particular damage thus sustained will support an action.⁴

Where, for instance, the Crown, by letters-patent, granted to a corporation the borough or town of L., together with the pier or quay belonging thereto, and it appeared from the whole instrument that the things granted were, in fact, the consideration for repairing certain buildings and erections, the Court held, that the corporation, by accepting the letters-patent, bound themselves to do the repairs; and that, this obligation being one which concerned the public, an indictment would lie, in case of non-repair, against the mayor and burgesses for their general default, and an action on the case for a direct and particular damage sustained in consequence by an indi-

¹ Per Taunton, J., 1 B. & Ad. 426; E. C. L. R. 20; *Wells v. Watling*, W. Bla. 1238; 1 Wms. Saunds. 846 a, note.

² See per Maule, J., *Clow v. Brogden*, 2 Scott, N. R. 315, 316; per Lord Denman, C. J., *Taylor v. Henniker*, 12 Ad. & E. 488, 492; E. C. L. R. 40; *Pontifex v. Big-nold*, 8 Scott, N. R. 390.

³ Co. Litt. 56, a.

⁴ Per Holt, C. J., 2 Ld. Raym. 955; *Wilkes v. Hungerford Market Company*, 2 Bing., N. C. 298; E. C. L. R. 29; see *Hart v. Bassett*, T. Jones, 156; *Chichester v. Lethbridge*, Willes, 78; *Rose v. Miles*, 4 M. & S. 101, and cases cited, *Rose v. Groves*, 6 Scott, N. R. 645; *Dobson v. Blackmore*, 16 L. J., Q. B. 233.

vidual.¹ So, in the ordinary case of a nuisance arising from the act or default of a person bound to repair *ratione tenuræ*, an indictment may be sustained for the general injury to the public, and *an action on the case for a special and particular injury to an individual.² It is indeed an important rule, that the law gives no private remedy for anything but a private wrong; and that, therefore, no action lies for a public or common nuisance: and the reason of this is, that the damage being common to all the subjects of the Crown, no one individual can ascertain his particular proportion of it, or, if he could, it would be extremely hard if every subject in the kingdom were allowed to harass the offender with separate actions.³

Again, where the damage resulting from the act of another is too remote,⁴ or, in other words, flows not naturally, legally, and directly from the alleged injury, the plaintiff will not be entitled to recover;⁵ for instance, in an action for slander, the special damage must be the legal and natural consequence of the words spoken, otherwise it will not sustain the declaration. It is not sufficient to prove a mere wrongful act of a third person induced by the slander, as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted; for this is an illegal act, which the law will not presume to be a natural result of the words spoken.⁶ So, where the *plaintiff, being director of certain musical performances, brought an action on the case against the defendant, for publishing a libel on a public singer, engaged by the plaintiff, alleging, that she was thereby debarred from performing in public through the apprehension of being ill received, so that the

¹ *The Mayor, &c. of Lyme Regis v. Henley* (in error), 3 B. & Ad. 77; E. C. L. R. 23; S. C. 2 Cl. & Fin. 331. See *Rex v. Ward*, 4 Ad. & E. 384; E. C. L. R. 81; overruling *Rex v. Russell*, 6 B. & C. 566; E. C. L. R. 13; 1 Chit., Gen. Pr. Law, 11.

² 3 B. & Ad. 98; E. C. L. R. 23; citing Year Book, 12 Hen. 7, fol. 18; Co. Litt. 56, a; *Rose v. Groves*, 6 Scott, N. R. 645, and the cases there cited. See also, as to the liability to repair, *Russell v. Men of Devon*, 2 T. R. 667, 671. As to the right to abate a nuisance, see *Perry v. Fitzhowe*, 15 L. J., Q. B. 239; Judgment, *Baker v. Greenhill*, 3 Q. B. 162; E. C. L. R. 43.

³ 3 Bla. Com. 219, 220; 4 Bla. Com. 167; Co. Litt. 56, a; 1 Chit. Gen. Pr. Law, 10.

⁴ Com. Dig. "Action upon the case for defamation," (F. 21.) See *Martinez v. Gerber*, 3 Scott, N. R. 386; *Dawson v. The Sheriffs of London*, 2 Vent. 84, 89.

⁵ 3 Steph. Com. 465; per *Patteson, J., Kelly v. Partington*, 5 B. & Ad. 651; E. C. L. R. 27; Bac. Abr., "Actions in general," (B.); *Butler v. Kent*, 19 Johns. R. (U. S.) 223. See also *Boyle v. Brandon*, 18 M. & W. 788. (*)

⁶ *Vicars v. Wilcocks*, 8 East, 1. See *Knight v. Gibbs*, 1 Ad. & E. 43; E. C. L. R. 23; *Ward v. Weeks*, 4 M. & P. 796.

plaintiff lost the profits which would otherwise have accrued to him as such director, it was held, that the damage was too remote, and the action not maintainable.¹

The above test, for determining whether any particular damage is too remote or not, although probably the most accurate which can be given, must, nevertheless, be applied with considerable caution; for an action is sometimes maintainable, where the damage does not, at first sight, appear to flow, either naturally or directly, from the alleged wrongful act; ex. gr., case was held to lie against the defendant for not repairing his fences, per quod the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a haystack; the Court being of opinion that the damage was not too remote.² And even in trespass, a person who sets in motion a dangerous thing, which occasions mischief, will be liable, if the circumstances show such mischief to have resulted from a continuation of the original force applied to the moving body by the defendant, or if he can be considered, in legal language, as the *causa causans*.³

There are also cases in which it has been adjudged that an action [*159] on the case for a malicious prosecution will not lie, though the act complained of be admitted to be malicious; as, at the suit of a subordinate against his commanding officer, for an act done in the course of discipline and under the powers legally incident to his situation, notwithstanding that the perversion of his authority is made the ground of the action; and the principle of all such cases is, that the law will rather suffer a private mischief than a public inconvenience.⁴ Again, no action at law lies to recover damages from an executor for not paying a legacy,⁵ nor by a cestui que trust against a trustee for breach of trust,⁶ nor for disturbance of a pew in the body of the church, unless attached to a house.⁷ In

¹ Ashley v. Harrison, 1 Esp. 48.

² Powell v. Salisbury, 2 Yo. & J. 391.

³ Scott v. Shepherd, 2 W. Bla. 892; S. C. 8 Wils. 403; per Lord Ellenborough, C. J., Leame v. Bray, 3 East, 596; Guille v. Swan, 19 Johns. R. (U. S.) 381; Piggott v. Eastern Counties Railway Company, 8 C. B. 229; E. C. L. R. 54; which was case for damage caused by a spark from an engine. See the maxim, *Sic utere tuo ut alienum non laedas*—post.

⁴ Johnstone v. Sutton (in error), 1 T. R. 512, 548.

⁵ Broom's Parties to Actions, 2d ed. 118; Barlow v. Browne, 16 M. & W. 126. (*) But a legacy may at law, as well as in equity, be a satisfaction of a debt, Stroud v. Stroud, 8 Scott, N. R. 166.

⁶ 1 Chit. Pl. 7th ed. 3.

⁷ Mainwaring v. Giles, 5 B. & Ald. 365; E. C. L. R. 7.

these cases, there are remedies, but not by actions in the courts of common law ;¹ and we have already seen, that, from motives of public policy, the sovereign is not personally answerable for negligence or misconduct ; and if such misconduct occurs in fact, the law affords no remedy. We may, moreover, add, that a *mandamus*, the object of which writ is to enforce a clear legal right where there is no other means of doing it, will not lie to the crown, or its servants strictly as such, to compel the payment of money alleged to be due from the Crown.²

Lastly, where the act of another, though productive of injury to an individual, amounts to a felony, the private *remedy* is suspended³ until justice shall have been satisfied ; for public [*160] policy requires that offenders against the law shall be brought to justice ; and, therefore, it is a rule of the law of England, that a man shall not be allowed to make a felony the foundation of a civil action, nor to waive the felony and go for damages ;⁴ but, for a mere misdemeanour, such as an assault, battery, or libel, the right of action is subject to no such impediment ;⁵ and even where a felony has been committed, it seems that the rule of public policy above mentioned applies only to proceedings between the plaintiff and the felon himself, or, at the most, the felon and those with whom he must be sued, and does not apply where the action is brought against a third party, who is innocent of the felonious transaction.⁶ Moreover, it is clear that the liability to an action cannot of itself furnish any answer to an indictment for fraud.⁷

¹ *Quære*, whether, under any circumstances, an action at law lies against a clergyman for refusing to perform the marriage ceremony ? *Davis v. Black*, 1 Q. B. 900 ; E. C. L. R. 35 ; cited, 1 *Roberts*, R. 183.

² *Ante*, p. 48 ; *Viscount Canterbury v. Reg.* 7 Jur. 224, 227 ; *In re Baron de Bode*, 6 Dowl. P. C. 776.

³ *Ante*, p. 120 ; *Crosby v. Leng*, 12 East, 409. As to the restitution of stolen property, see stat. 7 & 8 Geo. 4, c. 29, s. 57.

⁴ Judgment, *Stone v. Marsh*, 6 B. & C. 564 ; E. C. L. R. 13 ; *Crosby v. Leng*, 12 East, 409 ; per *Rolfe*, B. 13 M. & W. 608 ; (*) See also, per *Sir W. Scott*, *The Hercules*, 2 Dods. 375-6 ; 1 H. Bla. 588 ; *Higgins v. Butcher*, *Yelv.* 89.

⁵ 8 *Steph. Com.* 465.

⁶ *White v. Spettigue*, 13 M. & W. 603, 606 ; (*) *Stone v. Marsh*, 6 B. & C. 551 E. C. L. R. 27 ; *Marsh v. Keating*, 1 Bing., N. C. 198 ; E. C. L. R. 27.

⁷ Judgment, *Reg. v. Kenrick*, 5 Q. B. 64, 65 ; E. C. L. R. 48.

Remitter & Reverter

QUOD REMEDIO DESTITUITUR IPSA RE VALET SI CULPA ABSIT.

(Bac. Max., reg. 9.)

That which is without remedy, avails of itself if there be no fault in the party seeking to enforce it.

There are certain extra-judicial remedies as well for real as personal injuries, which are furnished or permitted by *the law, [*161] where the parties are so peculiarly circumstanced as not to make it possible to apply for redress in the usual and ordinary methods.¹

“The benignity of the law is such,” observes Lord Bacon, “that, when to preserve the principles and grounds of law, it deprives a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse; for if it disable him to pursue his action, or to make his claim, sometimes it will give him the thing itself by operation of law without any act of his own; sometimes it will give him a more beneficial remedy.”²

On this principle depended the doctrine of remitter, which, prior to the recent abolition of real actions, was applicable where one, who had the true property, or *jus proprietatis*, in lands, but was out of possession, and had no right to enter without recovering possession by real action, had afterwards the freehold cast upon him by some subsequent and, of course, defective title, in which case he was remitted or sent back by operation of law to his ancient and more certain title, and the right of entry which he had gained by a bad title was held to be, *ipso facto*, annexed to his own inherent good one, so that his defeasible estate was utterly defeated and annulled by the instantaneous act of the law, without his participation or consent.³ The reason of this was, because he who possessed the right would otherwise have been deprived of all remedy; for, as he himself was the person in possession of the freehold, there was no other person against whom he could bring an action to establish his prior right; [*162] and hence the law adjudged him to be in by remitter, *that is, in the like condition as if he had lawfully recovered the land by suit.⁴ There could, however, according to the above doctrine, be no remitter where issue in tail was barred by the fine of his

¹ 3 Steph. Com. 380; 3 Bla. Com. 18.² Bac. Max., reg. 9; 6 Rep. 68.³ 3 Bla. Com. 20. See this subject treated at length, Vin. Ab., “Remitter;” Shep. Touch., by Preston, 156, n. (82), 286.⁴ Finch. Law, 19; 3 Bla. Com. 20; Litt., s. 661.

ancestor, and the freehold was afterwards cast upon him; for he could not have recovered such estate by action, and, therefore, could not be remitted to it.¹ Neither will the law supply a title grounded upon matter of record; as if a man be entitled to a writ of error, and the land descend to him, he shall not be in by remitter.² And if land is expressly given to any person by act of Parliament, neither he nor his heirs shall be remitted, for he shall have no other title than is given by the act.³

The following instance is that usually given in order to show the operation and explain the meaning of the doctrine of remitter. Suppose that A. disseises B., that is, turns him out of possession, and afterwards demises the land to B. (without deed) for a term of years, by which B. enters, this entry is a remitter to B., who is in of his former and surer estate. Although if A. had demised to him by deed indented, or by matter of record, B. would not have been remitted; the reason being that, if a man by deed indented takes a lease of his own lands, it shall bind him to the rent and covenants, because a man can never be allowed to affirm that his own deed is ineffectual, since that is the greatest security on which men could rely in contracting; and the same doctrine of estoppel would apply, if the lease were by matter of record.⁴

*In a recent case⁵ which came by writ of error before the Court of Exchequer Chamber, the law of remitter was much [*163] considered, and several important points were decided, which we have thought it desirable to state shortly for the consideration of the reader. The facts of this case were as follows:—

H. W. being tenant in tail in possession of certain lands, with the reversion to the heirs of her late husband, executed a deed-poll in 1735, which operated as a covenant to stand seized to the use of her only son, G. W., in fee. G. W. afterwards, and during the lifetime of his mother, suffered a recovery of the same lands to the use of himself in fee. He died in 1779, without issue, having by his will devised the lands to trustees and their heirs, in trust to pay an annuity to his nephew, and subject thereto to his great nephew, W. B., for life with certain remainders over. The trustees entered into and continued in possession, until the death of the annuitant in

¹ 3 Bla. Com. 16th ed. 21, n. (1). See also Bac. Max., vol. 4, p. 40.

² Bac. Max., reg. 9 ad finem.

³ 1 Rep. 48.

⁴ 3 Steph. Com. 379, 380; Finch, Law, 61.

⁵ Woodroffe v. Doe d. Daniel, 15 M. & W. 769. (*)

1790, when they gave possession to W. B., who continued in possession of the rents and profits of the entirety, up to the time of his death in 1824; and did various acts, showing that he claimed and held under the will. Upon the facts thus shortly stated, the Court decided, 1st, that the base fee created by the deed-poll did not, upon H. W.'s death, become merged in the reversion in fee in G. W.; as the estate tail still subsisted as an intermediate estate; 2dly, that G. W. was not remitted to his title under the estate tail, the recovery suffered by him having estopped him; 3dly, that W. B., although taking by the Statute of Uses, was capable of being remitted, as the estate tail had not been discontinued: 4thly, that the [*164] acts done by W. B. did *not amount to a disclaimer by him of the estate tail, as a party cannot waive an estate to which he would be remitted, where the remitter would enure to the benefit of others as well as himself: 5thly, that the right of entry first accrued on the death of G. W. in 1779, when there was first an available right of entry; and, consequently, that the entry by W. B. in 1790, was not too late; and, 6thly, it was held, reversing the judgment given in the court below, that the entry and remitter of W. B., in 1790, did not operate to remit A. W., his coparcener, to the other moiety of the estate; the Court observing, with reference to the last of the above points, that possession of land by one parcener cannot, since the passing of the statutes 3 & 4 Will. 4, c. 27, be considered as the possession of a coparcener, and, consequently that the entry of one cannot have the effect of vesting the possession in the other.¹

The principle embodied in the above maxim likewise applies in the case of *retainer*,² that is, where a creditor is made executor or administrator to his debtor. If a person indebted to another makes his creditor his executor, or if such creditor obtains letters of administration to his debtor, in these cases the law gives him a remedy for his debt, by allowing him to *retain* so much as will pay himself before any other creditor whose debts are of *equal* degree. This, be it observed, is a remedy by the mere act of law, and grounded upon this reason, that the executor cannot, without an evident absurdity commence a suit against himself as a representative of the

¹ Judgment, 15 L. J., Exch. 367; S. C. 15 M. & W. 769. (*)

² Bac. Max., reg. 9; Argument, Thomson v. Grant, 1 Russ. 540 (a). But the principle of retainer is by some writers referred to the maxim *potior est conditio possidentis*. See 2 Wms. Exors., 3d ed. 836 (2); 2 Fonblan. Eq., 5th ed. 406 (m).

deceased to recover that which is due to him in his own private capacity; but having the *whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose:¹ and, in this case, the law, according to the observation of Lord Bacon above given, rather puts him in a better degree and condition than in a worse, because it enables him to obtain payment before any other creditor of equal degree has had time to commence an action.² An executor *de son tort* is not, however, allowed to retain, for that would be contrary to another rule of law, which will be hereafter considered—that a man shall not take advantage of his own wrong.³

IN JURE NON REMOTA CAUSA SED PROXIMA SPECTATUR.

(Bac. Max., reg. 1.)

In law the immediate and not the remote cause of any event is regarded.

“It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.”⁴ The above maxim thus explained, or rather paraphrased, by Lord Bacon, although of general application, is, in practice, usually cited with reference to that peculiar branch of the law which concerns marine insurance; and we shall, therefore, in the first place, illustrate it by briefly adverting to some cases connected with that subject.⁵

*It is, then, a well-known and established rule, that, in order to entitle the assured to recover upon his policy, the [*166] loss must be a direct and not a remote consequence of the peril insured against;⁶ and that, if the proximate cause of the loss or injury sustained be not reducible to some one of the perils mentioned in the policy, the underwriter will not be liable. If, for instance, a merchant vessel is taken in tow by a ship of war, and thus exposed to a tempestuous sea, the loss thence arising is properly ascribable to the

¹ 3 Bla. Com. 18; 2 Wms. Exors., 3d ed. 835.

² 3 Steph. Com. 379.

³ 2 Bla. Com. 511; 2 Steph. Com. 247; 2 Wms. Exors., 3d ed. 842.

⁴ Bac. Max., reg. 1.

⁵ As to remote damage and the liability of one who is the *causa causans*, ante p. 158. See per Lord Mansfield, C. J., *Wadham v. Marlow*, 1 H. Bla. 439, note.

⁶ *Park, Mar. Insur.*, 8th ed. 131.

perils of the sea.¹ And where a ship meets with sea damage, which checks her rate of sailing, so that she is taken by an enemy, from whom she would otherwise have escaped, the loss is to be ascribed to the capture, not to the sea damage.² So, the underwriters are liable for a loss arising immediately from a peril of the sea, or from fire, but remotely from the negligence of the master and mariners;³ and, where a ship, insured against the perils of the sea, was injured by the negligent loading of her cargo by the natives on the coast of Africa, and being pronounced unseaworthy was run ashore in order to prevent her from sinking and to save the cargo, the Court held, that the rule *causa proxima non remota spectatur* must be applied; and that the immediate cause of loss, viz., the stranding, was a peril of the sea.⁴

* A policy of insurance contained the following clause: that [*167] "the assurers took no risk in port but sea risk." It appeared that the ship was driven from her moorings, and stranded within the port of Cadiz; and that while she lay on dry land, and above high water mark, she was forcibly taken possession of and burnt by the French troops. It further appeared, that the cargo was not injured by the stranding, and that no effort was made to unload the ship after she was stranded: it was held, that the loss of the cargo must be attributed to the act of the French, which was a peril not insured against, and not to the stranding of the vessel, which was within the words of the policy; that although the stranding of the vessel led to her subsequent destruction by the enemy, yet the latter was the immediate cause of the loss, according to the maxim, *causa proxima et non remota spectatur*.⁵ So, where the ship, being delayed by the perils of the sea from pursuing her voyage, was obliged to put into port to repair, and, in order to defray the expenses of such repairs, the master having no other means of raising money, sold part

¹ Hagedorn v. Whitmore, 1 Stark., N. P. C. 157; E. C. L. R. 2.

² Judgment, Livie v. Janson, 12 East, 658; citing Green v. Elmslie, Peake, N. P. C. 212; Hahn v. Corbett, 2 Bing. 205; E. C. L. R. 9.

³ Walker v. Maitland, 5 B. & Ald. 171; E. C. L. R. 7; Busk v. R. E. A. Company, 2 B. & Ald. 78; E. C. L. R. 6; per Bayley, J., Bishop v. Pentland, 7 B. & C. 223; E. C. L. R. 14. See Hodgson v. Malcolm, 2 N. R. 336; Judgment, Waters v. Louisville Insurance Company, 11 Peters, R. (U. S.) 220, 222, 223; Columb. Insurance Company v. Lawrence, 10 Peters, R. (U. S.) 517; The Patapsco Insurance Company, v. Coulter, 8 Peters, R. (U. S.) 222.

⁴ Redman v. Wilson, 14 M. & W. 476; (*) Laurie v. Douglas, 15 Id. 746.

⁵ Patrick v. The Commercial Insurance Company, 11 Johns. R. (U. S.) 14.

of the goods and applied the proceeds in payment of those expenses, the Court held, that the underwriter was not answerable for this loss, for the damage was to be considered, according to the above rule, as not arising *immediately* from, although in a 'remote sense it might be said to have been brought about by, a peril of the sea.¹

The preceding cases will sufficiently establish the general proposition, that, in order to recover for a loss on a maritime policy, the loss must be shown to have been *directly occasioned by some peril insured against;² but this rule, although generally and sub-[*168]stantially true, must not be applied in all cases literally and without qualification.³ Thus, where a loss by fire was one of the perils insured against, and the loss resulted from fire occasioned by the barratrous act of the master and crew, it was held, that the loss by fire so caused was not within the policy.⁴ So, where salvage is decreed by a Court of Admiralty, for services rendered to a vessel in distress, the vessel having been long before dismasted, or otherwise injured or abandoned by her crew, in consequence of the perils of the sea, the salvage decreed might, at first sight, seem far removed from, and unconnected with, the original peril, and yet, in the law of insurance, it is constantly attributed to it as the direct and proximate cause; and the underwriters are held responsible for the loss incurred, although salvage be not specifically and in terms insured against.⁵

Again, it may, in general, be said, that everything which happens to a ship in the course of her voyage by the immediate act of God, without the intervention of human agency, is a peril of the sea;⁶ for instance, if the ship insured is driven against another by stress of weather, the injury which she thus sustained is admitted to be direct, and the insurers are liable for it; but if the collision causes the ship injured to do some damage to the other vessel, both vessels, being in

¹ Powell v. Gudgeon, 5 M. & S. 431, 438; (*) recognised Sarquy v. Hobson, 4 Bing. 131; E. C. L. R. 18-15; Gregson v. Gilbert, cited Park. Mar. Insur., 8th ed. 138. See also Bradlie v. The Maryland Insurance Company, 12 Peters, R. (U. S.) 404, 406.

² See also, per Story, J., Smith v. The Universal Insurance Company, 6 Wheaton, R. (U. S.) 185; per Lord Alvanley, C. J., Hadkinson v. Robinson, 3 B. & P. 388; Phillips v. Nairne, 16 L. J., C. P. 194.

³ See 14 Peters, R. (U. S.) 108, 110, where several instances are given, showing how the rule must be modified.

⁴ Per Story, J., Waters v. Louisville Insurance Company, 11 Peters, R. (U. S.) 219, 220.

⁵ See 14 Peters, R. (U. S.) 108, 110.

⁶ Park. Mar. Insur. 8th ed. 136.

fault, a positive rule of the Court of *Admiralty requires that [*169] the damage done to both ships be added together, and the combined amount be equally divided between the owners of the two ; and in such a case, if the ship insured has done more damage than she has received, and is consequently obliged to pay the balance, this loss can neither be considered a necessary nor a proximate effect of the perils of the sea. It grows out of a provision of the law of nations, and cannot be charged upon the underwriters.¹

The same principle, that the law looks to the immediate and not to the remote cause of damage, is likewise applicable in some cases where the liability of carriers comes under consideration. Thus, an action was brought against the defendants as carriers by water, for damage done to the cargo by water escaping through the pipe of a steam-boiler, in consequence of the pipe having been cracked by frost ; and the Court held that the plaintiff was entitled to recover, because the damage resulted from the negligence of the captain in filling his boiler before the proper time had arrived for so doing, although it was urged in argument, that the above maxim applied, and that the immediate cause of the damage was the act of God.²

In another recent case, the facts were, that the plaintiff put on board defendant's barge a quantity of lime to be conveyed from the Medway to London ; the master of the barge deviated unnecessarily from the usual course, and, during the deviation, a tempest wetted the lime, and the barge taking fire in consequence thereof, the whole [*170] was lost. It was held, that the defendant was liable, and that the cause of loss was sufficiently proximate to entitle plaintiff to recover under a declaration alleging the defendant's duty to carry the lime without unnecessary deviation, and averring a loss by unnecessary deviation, a duty being implied on the owner of a vessel, whether a general ship, or hired for the express purpose of the voyage, to proceed without unnecessary deviation in the usual course.³

The maxim, *in jure non remota causa sed proxima spectatur*, does not, however, apply to any transaction originally founded in fraud or covin ; for the law will look to the corrupt beginning, and consider it as one entire act, according to the principle, *dolus circuitu non*

¹ De Vaux v. Salvador, 4 Ad. & E. 420, 431 ; E. C. L. R. 31 ; the decision in which case is controverted, 14 Peters, R. (U. S.) 111. See per W. Scott, 2 Dods. 85, and the maxim, *sic utere tuo ut alienum non laedas*—post.

² Siordet v. Hall, 4 Bing. 607 ; E. C. L. R. 31 ; post, p. 171.

³ Davis v. Garrett, 6 Bing, 716 ; E. C. L. R. 19.

purgatur—fraud is not purged by circuitry.¹ But if A., for an usurious consideration, give his promissory note to B., who transfers it to C. for a valuable consideration, without notice of the usury, and afterwards, A. gives to C. a bond for the amount, the bond is good, the notes being destroyed after they got into the plaintiff's hands, and the bond in question being given to the plaintiff, without knowledge on his part of the usury between defendant and B.²

Neither does the above rule hold in criminal cases, because in them the intention is matter of substance, and, therefore, the first motive, as showing the intention, must be principally regarded.³ As, if A., of malice prepense, discharge a pistol at B., and miss him, whereupon he throws down his pistol and flies, and B. pursues A. to kill him, on which he turns and kills B. with a dagger; in this case, if the law considered the immediate cause of death, A. would be justified as having acted in his own defence; but, looking *back, as [*171] the law does, to the remote cause, the offence will amount to murder, because committed in pursuance and execution of the first murderous intent.⁴

ACTUS DEI NEMINI FACIT INJURIAM.

(2 Bla. Com. 122.)

The act of God is so treated by the law as to affect no one injuriously.

The act of God signifies, in legal phraseology, any inevitable accident occurring without the intervention of man, and may, indeed, be considered to mean something in opposition to the act of man, as storms, tempests, and lightning.⁵ The above maxim may, therefore, be paraphrased and explained as follows: it would be unreasonable that those things, which are inevitable by the act of God, which no industry can avoid, nor policy prevent, should be construed to the prejudice of any person in whom there has been no laches.⁶

Thus, if a sea-bank or wall, which the owners of particular lands are bound to repair, be destroyed by tempest, without any default in such owners, the commissioners of sewers may order a new wall to

¹ Bac. Max., reg. 1; Noy. Max., 9th ed., p. 12; Tomlin's Law Dict., tit. "Fraud."

² Cuthbert v. Haley, 8 T. R. 390. See stat. 8 & 9 Vict. c. 102.

³ Bac. Max., vol. 4, p. 17.

⁴ Bac. Max., reg. 1.

⁵ Per Lord Mansfield, C. J., *Forward v. Pittard*, 1 T. R. 33; *Bell. Dict. & Dig. of Scotch Law*, p. 11; *Trent Navigation v. Wood*, 3 Esp. 181.

⁶ 1 Rep. 97.

be erected at the expense of the whole level ;¹ and the reason of this is, that although, by the law, an individual be bound to keep the wall in repair, yet that which comes by the act of God, and is so inevitable that it can by no foresight or industry of him *that [*172] is bound be prevented, shall not charge such party.² But there must be no default in the owner ; for, where the owner of marsh lands was bound by the custom of the level to repair the sea-walls abutting on his own land, and by an extraordinary flood-tide the wall was damaged, the Court refused to grant a mandamus to the commissioners of sewers to reimburse him the expense of the repairs, it appearing, by affidavit, that the wall had been previously presented for being in bad repair, and was out of repair at the time the accident happened.³

In another more recent case, it was held, that a land-owner may be liable, by prescription, to repair sea-walls, although destroyed by extraordinary tempest ; and, therefore, on presentment against such owner for suffering the walls to be out of repair, it ought not, in point of law, to be left as the sole question for the jury, whether the walls were in a condition to resist *ordinary* weather and tides ; - but it is a question to be determined on the evidence, whether the proprietor was bound to provide against the effects of ordinary tempests only, or of extraordinary ones also.⁴

On the same principle, where part of land demised to a tenant is lost to him by any casualty, as the overflowing of the sea, this appears to be a case of eviction, in which the tenant may claim an apportionment⁵ of the rent, provided that the loss be total ; for, if there be merely a partial irruption of water, the exclusive right of fishing, which the lessee would thereupon have, would be such a perception of the profits of the land as to annul his claim to an apportionment.⁶ *Where, also, land is surrounded suddenly by [*173] the rage or violence of the sea, without any default of the tenant, or if the surface of a meadow be destroyed by the eruption

¹ Rex v. Somerset (Commissioners of Sewers), 8 T. R. 312 ; Wing. Max., p. 610.

² Keighley's case, 10 Rep. 139 ; Reg. v. Bamber, 5 Q. B. 279 ; E. C. L. R. 48.

³ Rex v. Essex (Commissioners of Sewers), 1 B. & C. 477 ; E. C. L. R. 9.

⁴ Reg. v. Leigh, 10 Ad. & E. 398 ; E. C. L. R. 37.

⁵ The doctrine of apportionment does not apply where a party having granted a lease of premises, afterwards dispossesses himself of a portion of them ; per Tindal, C. J., Boodle v. Cambell, 8 Scott, N. R. 114.

⁶ Woodf., L. & T., 5th ed. 308 ; 1 Roll. Abr. 236, 1, 40 ; Bac. Abr., "Rent." (M. 2.) See Dyer, 56.

of a moss, this is no waste (if the injury be repaired in a convenient time), but the act of God, that *vis major* for which the tenant is not responsible.¹

With respect to the liability of either landlord or tenant, where premises under demise are destroyed by fire, the rule is, that, in the absence of any special contract between the parties, the landlord is never liable to rebuild, even if he has received the value from an insurance office;² neither is the tenant, since the stat. 6 Anne, c. 31, s. 6; but the latter is liable to the payment of rent until the tenancy is determined.³

In *Izon v. Gorton*, the defendants were tenants from year to year to the plaintiff, of the upper floors of a warehouse, at a rent payable quarterly; the premises were destroyed by an accidental fire in the middle of a quarter, and were wholly untenanted until rebuilt about seven months after: and it was held that the relation of landlord and tenant was not determined by the destruction of the premises, but that the defendants remained liable for the rent until the tenancy should be in the usual way put an end to, and that such rent was recoverable in *assumpsit* for use and occupation.⁴

*Where there is a general covenant by the lessee to repair and leave repaired at the end of the term, the lessee is [*174] clearly liable to rebuild in case of the destruction of the premises by accidental fire, or by any other unavoidable contingency, as lightning, or an extraordinary flood. And the principle on which this rule depends is, that, if a party, by his own contract, creates a duty or a charge upon himself, he is bound to make it good, if he can, notwithstanding any accident by inevitable necessity; for, if he had chosen to guard against any loss of this kind, he should have introduced it into the contract by way of exception;⁵ and, accordingly, an

¹ Per Tindal, C. J., *Simmons v. Norton*, 7 Bing. 647, 648; E. C. L. R. 20; Com. Dig., "Waste," (E. 5); Woodf., L. & T., 5th ed. 442.

² *Pindar v. Ainsley*, cited per Buller, J., *Belfour v. Weston*, 1 T. R. 312; *Bayne v. Walker*, 3 Dow, R. 238.

³ *Paradine v. Jane*, Ayleyn. R. 27; Woodf., L. & T., 5th ed. 306, 413. As to the stat. 6 Anne, c. 31, see Lord Lyndhurst's judgment in *Viscount Canterbury v. Reg.*, 1 Phill. 306.

⁴ *Izon v. Gorton*, 5 Bing., N. C. 591; E. C. L. R. 35; recognised *Surplice v. Farnsworth*, 8 Scott, N. R. 307. See *Packer v. Gibbons*, 1 Q. B. 421; E. C. L. R. 35.

⁵ *Paradine v. Jane*, Ayleyn. R. 27; cited per Lord Ellenborough, C. J., 10 East, 533, and adopted *Spence v. Chadwick*, 16 L. J., Q. B. 313, 319; *Argument, Brecknock Company v. Pritchard*, 6 T. R. 751; recognised per Lord Kenyon, C. J., *Id.* 752; Finch, Law, 64.

exception of accidents by fire and tempest is now usually introduced into leases, in order to protect the lessee.¹

Where the lessee covenants to pay rent, he is, in accordance with the above principle, bound to pay it, whatever injury may happen to the demised premises;² and it seems, that the best plan for the tenant to adopt, in order to free himself from liability in such a case, would be to tender to his landlord an abandonment of his lease, upon either the refusal or the neglect of the latter to rebuild.³

The principle under consideration is likewise applicable in other contracts than those between landlord and tenant. Thus, if the condition of a bond was possible at the time of making it, and afterwards becomes impossible by the act of God, the obligor [*175] shall be excused;⁴ and, it is said, that, if the condition be in the disjunctive, with liberty to the obligor to do either of two things, at his election, and both are possible at the time of making the bond, and afterwards one of them becomes impossible by the act of God, the obligor shall not be bound to perform the other.⁵ So, if a lessee covenants to leave a wood in as good a plight as the wood was at the time of making the lease, and afterwards the trees are blown down by tempests, he is discharged from his covenant.⁶ Further, it is laid down, that, where the law prescribes a means to perfect or settle any right or estate, if, by the act of God, which no industry can avoid, nor policy prevent, this means becomes impossible in any circumstances, no one who was to have been benefited, if the means had been with all circumstances executed, shall be prejudiced for not executing it in that which has thus become impracticable, unless he has been guilty of some laches, and has neglected something possible for him to perform.⁷

In a devise or conveyance of lands, on a condition annexed to the estate conveyed, which is possible at the time of making it, but afterwards becomes impossible, by the act of God, there, if the con-

¹ Woodf., L. & T., 5th ed. 417.

² In an action of debt for rent due under a lease, held, that the destruction of the premises by fire would not excuse the lessee from payment of the rent according to his covenant. *Hallett v. Wyle*, 3 Johnson, R. (U. S.) 44.

³ Woodf., L. & T., 5th ed. 418.

⁴ Com. Dig., "Condition," L. 12, D. 1; 2 Bla. Com. 340, 341; Co. Litt. 206, a. *Williams v. Hide*, Palm. R. 548. See Roll. Abr. 450, 1, 20, 451, 1, 40.

⁵ Com. Dig., "Condition," D. 1; *Laughter's case*, 5 Rep. 22; *Wing. Max.*, p. 610. See this subject discussed at length, *Law Magazine*, No. 58, p. 349.

⁶ 1 Rep. 98.

⁷ *Shelley's case*, 1 Rep. 97 b.

dition is *precedent*, no estate vests at law or equity, because the condition cannot be performed; but, if *subsequent*, the estate becomes absolute in the grantee, for the condition is not broken.¹ Thus, *where a man enfeoffed another, on the condition subsequent [*176] of re-entry, if the feoffer should, within a year, go to Paris about the feoffee's affairs, but feoffer died before the year elapsed, the estate was held to be absolute in the feoffee.² So, where a man devised his estate to his eldest daughter, on condition that she should marry his nephew on or before her attaining twenty-one years; but the nephew died young, and the daughter was never required, and never refused to marry him, but, after his death, and before attaining twenty-one years, married, it was held, that the condition was unbroken, having become impossible by the act of God.³

By the custom of the realm, common carriers are bound to receive and carry the goods of a subject for a reasonable hire or reward, to take due care of them in their passage, to deliver them safely and in the same condition as when they were received, or in default thereof to make compensation to the owner for any loss or damage which happens while the goods are in their custody. Where, however, such loss or damage arises from the act of God, as storms, tempests, and the like, the maxim under consideration applies, and the loss must fall upon the owner, and not upon the carrier:⁴ in this case, *res perit suo domino*.⁵ For damages occasioned by accidental fire, resulting neither from the act of God nor the king's enemies, a common carrier, being an insurer, is responsible.⁶ *Where, however, an injury is sustained by a passenger, [*177] from an inevitable accident, as from the upsetting of the coach in consequence of the horses taking fright, the coach-owner is not liable, provided there were no negligence in the driver.⁷

¹ Com. Dig., "Condition," D. 1; Co. Litt. 206, a; and Mr. Butler's note (1); Id. 218, a; 219, a. ² Co. Litt. 206, a.

³ Thomas v. Howell, 1 Salk. 170; Aislable v. Rice, 8 Taunt. 459; E. C. L. R. 4.

⁴ Amies v. Stevens, Stra. 128; Trent Navigation v. Wood, 8 Esp. 227; per Powell, J., Coggs v. Bernard, 2 Lord Raym. 910, 911; per Tindal, C. J., Ross v. Hill, 2 C. B. 890; E. C. L. R. 52; where the liability of carriers was much considered.

⁵ As to this maxim, see Bell, Dict. & Dig. of Scotch Law, 857; Bayne v. Walker, 3 Dow, R. 238; Paine v. Meller, 6 Ves. 349; Bryant v. Busk, 4 Russ. 1.

⁶ 1 Selw., N. P., 10th ed. 397.

⁷ Aston v. Heaven, 2 Esp. 533; per Parke, J., Crofts v. Waterhouse, 3 Bing. 321; E. C. L. R. 11.

Death, we may further remark, is one of those dispensations of Providence which, in very many cases, occasions the application of the rule as to *actus Dei*; one familiar instance of such application occurs where rent is apportioned, under stat. 11 Geo. 2, c. 19, s. 15 (the provisions of which are extended by 4 & 5 Will. 4, c. 22), on the death of a lessor who has only a life estate, and who happens to die before or on the day on which rent is reserved or made payable. The right to emblements, also, is referable to the same principle; for those only are entitled to emblements who have an uncertain estate or interest in land, which is determined either by the act of God or of the law, between the period of sowing and the severance of the crop; and the object of the rule respecting emblements is to compensate for the labour and expense of tilling, sowing, and manuring the land, to encourage husbandry, and to promote the public good, lest, in the absence of some special protection, the ground should remain uncultivated.¹ Without entering minutely into this subject, the law respecting it, which will, however, be again adverted to,² may be thus stated: where the right to occupy land depends on the continuance of the life of the occupier or some other person, and is determined by the death of either after the land has been sown, but before severance of the crop, the occupier, or his [*178] *personal representatives, as the case may be, shall be entitled to one crop of that species only which ordinarily repays the labour by which it is produced within the year within which that labour is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period.³

In addition to the above instances, the two following cases may be noticed as applicable to the present subject, and as showing that death, which is the act of God, shall not be allowed to prejudice an innocent party, if such a result can be avoided:—Lessor and lessee, in the presence of lessor's attorney, signed an agreement that a lease should be prepared by lessor's attorney, and paid for by lessee. The lease was prepared accordingly, but the lessor, who had only a life estate in the property to be demised, died, and the lease, consequently, was never executed. It was held, that the lessor's attorney was entitled to recover of lessee the charge for drawing the lease,

¹ Co. Litt. 55 a; 2 Bla. Com. 122.

² See the maxim, *Quicquid plantatur solo, solo cedit*—post.

³ Judgment, *Graves v. Weld*, 5 B. & Ad. 117, 118; E. C. L. R. 27; citing *Kingsbury v. Collins*, 4 Bing. 202. See also *Latham v. Atwood*, Cro. Car. 515.

for it was known to all the parties that the proposed lessor had only a life estate; and the non-execution of the lease was owing to no fault of the attorney, who ought not, therefore, to remain unpaid.¹ So, in an action against a surety on a replevin bond, conditioned, that the distrainee should appear at the next county court, and then and there prosecute his action with effect, and should make return, &c.; and the breach assigned was, that the distrainee did appear at the said court and levied his plaint, which plaint was afterwards removed into the Court of C. P. by *re. fa. lo.*, at the instance of the distrainer, but that the distrainee did not appear in the C. P. at the return of the *re. fa. lo.*, &c. The defendant pleaded, *that, [*179] after removal of the suit, and before the *re. fa. lo.* was returnable, the distrainee died, whereby the suit abated. The Court held, that the record disclosed no cause of action; that the plaintiff in replevin did prosecute his suit with effect, for he took the proper steps to try his right, but was interrupted by death; and that the act of God could not place the sureties in a worse position than they would otherwise have been placed in.²

In considering the rule, *actus Dei nemini facit injuriam*, reference should also be made to one class of cases not hitherto mentioned, viz., where the death of a party to the suit occurs pending the proceedings, which event is frequently productive of delay and additional expense.³ Thus, if a sole plaintiff or defendant die before verdict or judgment by default, the action abates, and the plaintiff or his executor is obliged to commence a new action against the defendant or his executor, provided the cause of action survive to or against the executor. So, in action by husband and wife for money lent by the wife before marriage, the death of the wife before trial was held to abate the suit. Where, however, a sole plaintiff or defendant⁴ dies after verdict, or even after the assizes have commenced, or after the first day of the sittings, though before the trial and before final judgment, the action is not thereby abated. Where, moreover, a sole plaintiff or defendant dies after judgment by default

¹ Webb v. Rhodes, 3 Bing., N. C. 732; E. C. L. R. 11.

² Morris v. Matthews, 2 Q. B. 293; E. C. L. R. 42. See also, per Best, C. J., Tooth v. Bagwell, 3 Bing. 375; E. C. L. R. 11.

³ Cases in which a right of action is altogether lost by the death of either plaintiff or defendant are considered under the maxim *actio personalis moritur cum persona*.

⁴ Where a party dies after verdict and before judgment, his lands are bound in the hands of his heir by a judgment entered up within two terms after verdict, under stat. 17 Car. 2, c. 8, s. 1. Saunders v. M'Gowran, 12 M. & W. 221.(*)

and before final *judgment, the cause of action being such as [*180] might originally have been prosecuted by or against the executors, or if either party die after final judgment, and before execution, in these cases the action does not abate, but the judgment may be revived by *sci. fa.* by or against the executors. Again, the death of a plaintiff in error before errors assigned abates the writ; but, if it happen after the assignment of errors, it does not: and the death of a defendant in error, in no case abates the writ:¹ and, where a bill of exceptions had been tendered, and before it was sealed the judge died, the Court allowed a motion for a new trial, although more than a year had elapsed from the time of the trial.²

There are, however, some exceptions to the above general rule:³ *ex. gr.*, notice of appeal having been given from the decision of a revising barrister, a case was thereupon drawn up by the barrister, and approved and signed by the attorneys of the respective parties; the revising barrister shortly afterwards died, and the case approved and signed by the two attorneys was found amongst his papers, but was *not signed by him*. The Court of Common Pleas held, that, under the stat. 6 & 7 Vict. c. 18, s. 42, they had no jurisdiction to hear the appeal, and that the case did not fall within the operation of the general maxim under consideration.⁴

Lastly, where, after indictment—arraignment—the jury charged—and evidence given on a capital offence, one of the jurymen became incapable, through illness, of proceeding to *verdict, [*181] the court of oyer and terminer discharged the jury, charged a fresh jury with the prisoner, and convicted him, although it was argued that *actus Dei nemini nocet*, and that a sudden illness was a Godsend, of which the prisoner ought to have the benefit.⁵

LEX NON COGIT AD IMPOSSIBILIA.

(Co. Litt. 281, b.)

The law does not seek to compel a man to do that which he cannot possibly perform.

This maxim, or, as it is also expressed, *impotentia excusat legem*,⁶

¹ The reader is referred to 2 Chit. Arch. Pr., 7th ed. 1178; where writ of error abates by death of the Chief Justice, 1 Id. 355. See also James v. Crane, 15 M. & W. (*) 379. ² Newton v. Boodle, 16 L. J., C. P. 135.

³ Lord Raym. 433.

⁴ Nettleton, app., Burrell, resp., 8 Scott, N. R. 738, 740; cited per Maule, J., Pring. app., Estcourt, resp., 4 C. B. 72; E. C. L. R. 56.

⁵ Rex v. Edwards, 4 Taunt. 309, 312.

⁶ Co. Litt. 29, a. Also, *lex neminem cogit ad vena seu inutilia*,—the law will not

is intimately connected with that last considered, and must be understood in this qualified sense, that *impotentia* excuses when there is a necessary or invincible disability to perform the mandatory part of the law, or to forbear the prohibitory.¹

“The law itself and the administration of it,” said Sir W. Scott, with reference to an alleged infraction of the revenue laws, “must yield to that to which everything must bend—to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling them to impossibilities, and the administration of laws must adopt that general exception in the consideration of *all particular cases. In the performance of that duty, it has three [*182] points to which its attention must be directed. In the first place, it must see that the nature of the necessity pleaded be such as the law itself would respect, for there may be a necessity which it would not. A necessity created by a man’s own act, with a fair previous knowledge of the consequences that would follow, and under circumstances which he had then a power of controlling, is of that nature. Secondly, that the party who was so placed, used all practicable endeavours to surmount the difficulties which already formed that necessity, and which, on fair trial, he found insurmountable. I do not mean all the endeavours which the wit of man, as it exists in the acutest understanding, might suggest, but such as may reasonably be expected from a fair degree of discretion and an ordinary knowledge of business. Thirdly, that all this shall appear by distinct and unsuspected testimony, for the positive injunctions of the law, if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation.”²

It is, then, a general rule which admits of ample practical illustration, that *impotentia excusat legem*; where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over, there the law will in general excuse him.³

enforce any one to do a thing which will be vain and fruitless—a maxim, the authorities for which are collected at the end of the remarks upon the more general principle above considered; post, p. 189.

¹ Hobart, 96. This maxim is also applicable to the law respecting the liability of bailees and carriers, which will be treated of more conveniently hereafter.

² The Generous, 2 Dods. 323-4.

³ Paradine v. Jane, Ayley. 27; cited, per Lawrence, J., 8 T. R. 267. See Evans v. Hutton, 5 Scott, M. R. 670, and cases cited, Id. 681.

Hence, we find it laid down, that, "where H. covenants not to do an act or thing which was lawful to do, and an act of Parliament comes after and compels him to do it, the statute repeals the covenant. So, if H. covenants to do a thing which is lawful, and an act [*183] of Parliament comes in and hinders *him from doing it, the covenant is repealed. But, if a man covenants not to do a thing which then was unlawful, and an act comes and makes it lawful to do it, such act of Parliament does not repeal the covenant."¹

If, however, a person by his own contract, absolutely engages to do an act, it is deemed to be his own fault and folly that he did not thereby *expressly* provide against contingencies, and exempt himself from responsibility in certain events; in such case, therefore, that is, in the instance of an absolute and general contract, the performance is not excused by an inevitable accident or other contingency, although not foreseen by, nor within the control of, the party.² It would seem, also, that, if a person covenants to perform an act, which, at the time of covenanting, is impossible of performance, he is nevertheless liable in damages for his breach of covenant;³ and, if the condition of a bond be impossible at the time of making it, the condition alone is void, and the bond shall stand single and unconditional.⁴

Prior to the stat. 6 Geo. 4, c. 16, s. 75,⁵ a remarkable case occurred, in which it was established, that a man was liable to his lessor on his covenant to pay rent, notwithstanding he was, by the [*184] operation of the bankrupt laws, *divested of his property;⁶ and this case certainly afforded an instance in which the maxim, *lex non cogit ad impossibilia*, did not hold, and, in fact, this very maxim was cited to support the argument in favour of the

¹ Brewster v. Kitchell, 1 Salk. 198; Doe d. Lord Anglesea v. Churchwarden of Rugeley, 6 Q. B. 107, 114; E. C. L. R. 51. See also Doe d. Lord Grantley v. Butcher, Id. 115 (b).

² Per Lawrence, J., Hadley v. Clarke, 8 T. R. 267; per Lord Ellenborough, C. J., Atkinson v. Ritchie, 18 East, 533, 544; Marquis of Bute v. Thompson, 13 M. & W. 487; (*) recognised Hills v. Sughrue, 15 M. & W. 253, 262; (*) Spence v. Chadwick, 16 L. J., Q. B. 818, 819, recognising Atkinson v. Ritchie, *supra*.

³ See per Littledale, J., Tufnell v. Constable, 7 Ad. & E. 805; E. C. L. R. 84.

⁴ 2 Bla. Com. 340; Co. Litt. 206, a; Sanders v. Coward, 15 M. & W. 48; (*) Judgment, Duvergier v. Fellows, 5 Bing. 265; E. C. L. R. 15. See also Dodd, Eng. Lawy. 100.

⁵ Which statute extends the relief afforded by 49 Geo. 3, c. 121, s. 19.

⁶ Mills v. Auriol, 1 H. Bla. 488; S. C., affirmed in error, 4 T. R. 94.

bankrupt lessee; and it was urged, that, as the bankrupt was divested of his whole estate, and thus rendered incapable of performing the covenants which he had entered into, it would be a hardship upon him, if he should still remain liable to be sued on them when he was disabled by act of Parliament from performing them. The law, however, on this subject has been materially altered by the statute above cited, by which relief is extended to a bankrupt entitled to any lease or agreement for a lease, and which discharges him from liability to pay rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements in such instrument contained, if the assignee accept the lease or agreement, or if the bankrupt, on their refusal so to do, deliver up such lease or agreement to the lessor within twenty-four days after notice that the assignees have declined the same.¹

When performance of the condition of a bond becomes impossible by the act of the obligor, such impossibility forms no answer to an action on the bond.² But the performance of a condition shall be excused by the default of the obligee, as, by his absence, when his presence was necessary for the performance,³ or if he do any act which renders it impossible for the obligor to perform his engagement.⁴ *And, indeed, it may be laid down generally, as clear law, that, if there is an obligation defeasible on performance [*185] of a certain condition, and the performance of the condition becomes impossible by the act of the obligee, the obligor shall be excused from the performance of it.⁵

It seems, however, that the performance of a condition precedent, on which a duty attaches, is not excused, where the prevention arises from the act or conduct of a mere stranger. If a man, for instance, covenant that his son shall marry the covenantee's daughter, a refusal by her will not discharge the covenantor from making pecuniary satisfaction.⁶ So, if A. covenant with C. to en-

¹ See the observations as to the operation of this statute, and as to the cases in which it is applicable, 1 Smith, L. C. 456.

² Judgment, *Beswick v. Swindells*, 3 Ad. & E. 883; E. C. L. R. 30.

³ Com. Dig., "Condition," L. 4, 5; cited, per Tindal, C. J., *Bryant v. Beattie*, 4 Bing. N. C. 263; E. C. L. R. 38.

⁴ Com. Dig., "Condition," L. 6; per Parke, B., *Holme v. Guppy*, 3 M. & W. 389.

⁵ Judgment, *Hayward v. Bennett*, 3 C. B. 417, 418; citing Co. Litt. 206, a.

⁶ *Perkins*, s. 756.

feoff B., A. is not released from his covenant by B.'s refusal to accept livery of seisin.¹

Where an estate is conveyed on condition expressed in the grant, and such condition is impossible at the time of its creation, it is void; and, if it be a condition subsequent, that is to be performed after the estate is vested, the estate shall become absolute in the tenant; as, if a feoffment be made to a man in fee-simple, on condition that, unless he goes to Rome in twenty-four hours, the estate shall determine; here the condition is void, and the estate made absolute in the feoffee;² but if such condition be precedent, the grantee shall take nothing by the grant, for he has no estate until the condition be performed.³

[*186] *Further, where the consideration for a promise is such, that its performance is utterly and naturally impossible, such consideration is insufficient, for no benefit can, by any implication, be conferred on the promiser,⁴ and the law will not notice an act, the completion of which is obviously ridiculous and impracticable. In this case, therefore, the maxim of the Roman law applies—*Impossibile nulla obligatio est.*⁵ Moreover, a promise is not binding, if the consideration for making it be of such a nature, that it was not in fact or law in the power of the promisee, from whom it moved, to complete such consideration and to confer on the promiser the full benefit meant to be derived therefrom.⁶ Thus, if a man contract to pay a sum of money in consideration that another has contracted to do certain things, and it should turn out before anything is done under the contract, that the latter party was incapable of doing what he engaged to do, the contract is at an end: the party contracting to pay his money is under no obligation to pay for a less consideration than that for which he has stipulated.⁷ But if a party by his contract lay a charge upon himself, he is bound to perform

¹ Co. Litt. 209, a; per Lord Kenyon, C. J., *Cook v. Jennings*, 7 T. R. 884; per Id., *Blight v. Page*, 8 B. & P. 296, n. See *Lloyd v. Crispe*, 5 Taunt. 249; E. C. L. R. 1; Bac. Abr., "Conditions," Q. 4; cited *Thornton v. Jenyns*, 1 Scott, N. R. 66.

² 2 Bla. Com. 156, 157; Co. Litt. 206, a; Com. Dig., "Condition," D. 1; 1 Fonbl. Eq. 5th ed. 212.

³ *Ib.*

⁴ *Chanter v. Lessee*, 4 M. & W. 295; (*) per Holt, C. J., *Courtenay v. Strong*, 2 Lord Raym. 1219.

⁵ D. 50, 17, 185; 1 Pothier, *Oblig.* pt. 1, c. 1, s. 4, § 3; 2 Story, *Eq. Jurisp.*, 4th ed. 786.

⁶ *Harvey v. Gibbons*, 2 Lev. 161; *Nerot v. Wallace*, 3 T. R. 17.

⁷ Per Lord Abinger, C. B., 4 M. & W. 311. (*)

the stipulated act, or to pay damages for the non-completion,¹ unless the subject-matter of the contract were at the time manifestly and essentially impracticable; for the *improbability* of the performance does not render the promise void, because the contracting party is presumed to know whether the completion of the duty he undertakes be within his power; and, therefore, an engagement upon a sufficient *consideration for the performance of an act, even by a third person, is binding, although the performance of such act depends entirely on the will of the latter.² Neither will the promisor be excused, if the performance of his promise be rendered impossible by the act of a third party.³

And, if a party, by his own act, disables himself from fulfilling his contract, he thereby makes himself at once liable for a breach of it, and dispenses with the necessity of any request to perform it by the party with whom the contract has been made;⁴ and this is in accordance with an important rule of law, which we shall presently consider; viz., that a man shall not take advantage of his own wrong.

From the practice and proceedings of our courts of justice, additional illustration of the maxim *lex non cogit ad impossibilia*, may be drawn. Where, for instance, a deed has been lost by time or accident, or where it remains in another court, it may be pleaded without profert.⁵ And where documents are stated in the answer to a bill in equity to be in the possession of A., B., and C., the Court will not order that A. shall produce them, and that, as observed by Lord Cottenham, for the best possible reason, viz., that he could not produce them.⁶ So, in other cases of a different description, the same principle applies. Thus, to render a man tenant by the curtesy of land, it is necessary that the wife should have actual seisin or *possession of the land,⁷ and not merely a bare right to possess; and, therefore, a man cannot be tenant by the

¹ See *Thornborow v. Whitacre*, 2 Lord Raym. 1164.

² 1 Pothier, Oblig., pt. 1, c. 1, s. 4, § 2; *M'Neill v. Reid*, 9 Bing. 68; E. C. L. R. 23.

³ *Thurnell v. Balbirmie*, 2 M. & W. 786; (*) *Brogden v. Marriott*, 2 Bing. N. C. 473; E. C. L. R. 32.

⁴ *Lovelock v. Franklin*, 15 L. J., Q. B. 146.

⁵ *Reed v. Brookman*, 3 T. R. 151, 153; Co. Litt. 231. b; 5 Rep. 75; Wing. Max., p. 609; *Dr. Leyfield's case*, 10 Rep. 92. See *Hill v. Marsden*, 6 M. & W. 718. (*)

⁶ *Murray v. Walter*, 1 Cr. & Ph. 124. See *Taylor v. Rundell*, 1 Cr. & Ph. 111.

⁷ The *possession of a tenant for years is sufficient, 2 Bla. Com. 16th ed. 127, n. (6).

curtesy of a remainder or reversion. There are, however, some incorporeal hereditaments of which a man may be tenant by the curtesy, though there be no actual seisin of the wife; as, in the case of an advowson, where the church has not become void in the lifetime of the wife, yet the baron may hold the advowson by the curtesy, because he could by no industry have attained to any other seisin of it, that is, he could not bring about a vacancy at any time that he pleased, and *impotentia excusat legem*.¹

Before dismissing our present subject, we may properly direct attention to one case which cannot, under the present law, recur, and in which the application of the above maxim would have prevented very manifest hardship, and even injustice:—as already stated,² it was formerly held that an act of Parliament which was to take effect “from and after the passing of the act,” operated by legal relation from the first day of the session; and, according to this doctrine, grounded on a legal fiction, it was held that an annuity deed executed in January, 1777, was rendered void by the operation of the act 17 Geo. 3, c. 26, requiring the inrolment of such a deed within twenty days after its execution; this act having received the royal assent in May, 1777, *after* the execution of the deed, but relating back to the 31st of October, 1776, which was the first day of the session.³ In this case, the time for doing the act required, viz., the inrolling a memorial of the deed within twenty days from its *date, had actually passed, and the requisition been rendered impossible to be complied with before the command was given to do it.⁴

In conclusion, we may observe, that there are several maxims which are, in some measure, connected with that above considered, and to which, therefore, it may here be proper briefly to advert. First, it is a rule, that *lex spectat naturæ ordinem*,⁵ the law respects the order and course of nature, and will not force a man to demand that which he cannot recover.⁶ Thus, where the thing sued for by tenants in common is in its nature entire, as in a *quare impedit*, or in detinue for a chattel, they must of necessity join in the action, contrary to the rule which in other cases obtains, and according to which they

¹ 2 Bla. Com. 16th ed. 127, n. (6); Co. Litt. 20, a.

² Ante, p. 92.

⁴ Argument, 4 T. R. 661.

⁶ Litt. s. 129; Co. Litt. 197, B.

⁵ Latless v. Holmes, 4 T. R. 660.

⁶ Co. Litt. 197, b.

must sue separately.¹ Secondly, it is a maxim of our legal authors, as well as a dictate of common sense, that the law will not itself attempt to do an act which would be vain, *lex nil frustra facit*, nor to enforce one which would be frivolous—*lex neminem cogit ad vana seu inutilia*,—the law will not, in the language of the old reports, enforce any one to do a thing which will be vain and fruitless.²

*IGNORANTIA FACTI EXCUSAT,—IGNORANTIA JURIS NON [*190]
EXCUSAT.

(Gr. and Rud. of Law, 410, 141.) *Story 59 Sav.*

Ignorance of the fact excuses—ignorance of the law does not excuse.

Ignorance may be either of law or of fact—for instance, if the heir is ignorant of the death of his ancestor, he is ignorant of a fact; but, if being aware of his death, and of his own relationship, he is nevertheless ignorant that certain rights have thereby become vested in himself, he is ignorant of the law.³ Such is the example given to illustrate the distinction between *ignorantia juris* and *ignorantia facti* in the Civil Law, where the general rule upon this subject is thus laid down: *Regula est juris quidem ignorantiam cuique nocere facti vero ignorantiam non nocere*,⁴—ignorance of a material fact may excuse a party from the legal consequence of his conduct; but ignorance of the law, which every man is presumed to know, does not afford excuse—*ignorantia juris, quod quisque scire tenetur, neminem excusat*.⁵ With respect to the “presumption of legal knowledge” here spoken of, we may observe, that, although ignorance of the law does not excuse persons, so as to exempt them from the consequences of their acts, as, for example, from punishment for a criminal offence, or damages for breach of contract, the law nevertheless takes notice that there may be a doubtful point of law, and that a person may be ignorant of the law, and it is quite evident that

¹ Litt., s. 814; cited, *Marson v. Short*, 2 Bing. N. C. 120; E. C. L. R. 29; Co. Litt. 197, b.

² Per Kent, C. J., 8 Johnson, R. (U. S.) 598; 5 Rep. 21; Co. Litt. 197, b, cited, 2 Bing., N. C. 121; E. C. L. R. 29; Wing. Max., p. 600; *Rex v. Bishop of London*, 18 East, 420 (a).

³ D. 22, 6, 1. The doctrines of the Roman Law upon the subject treated in the text are shortly stated in 1 Spence's Chan. Juris. 682–3.

⁴ D. 22, 6, 9 pr.; Cod. 1, 18, 10. The same rule is likewise laid down in the *Basilica*, 2, 4, 9. See Irving's Civil Law, 4th ed, 74.

⁵ 2 Rep. 8 b; 1 Plowd. 848; 4 Bla. Com. 27.

ignorance of the law does in reality exist. It would, for instance, [*191] *be contrary to common sense to assert, that every person is acquainted with the practice of the Courts; although, in such a case, there is a presumption of knowledge to this extent, that *ignorantia juris non excusat*, the rules of practice must be observed, and any deviation from them will entail consequences detrimental to the suitor.¹ It is, therefore, in the above qualified sense alone that the saying, that "all men are presumed cognisant of the law,"² must be understood. The following case, recently decided by the House of Lords, will illustrate the above general rule, and will likewise show that our courts must necessarily recognise the existence of doubtful points of law, since the compromise of claims involving them is allowed to be a good consideration for a promise,³ and to sustain an agreement between the litigating parties.

The widow, brother, and sister, of an American who died in Italy, leaving considerable personal estate in the hands of trustees in Scotland, agreed, by advice of their law agent, to compromise their respective claims to the succession, by taking equal shares. The widow, after receiving her share, brought an action in Scotland to rescind the agreement, on the ground of having thereby sustained injury, through ignorance of her legal rights and the erroneous advice of the law agent: there was, however, no allegation of fraud against him or against the parties to the agreement. It was held, that, although the fair inference from the evidence was, that she was ignorant of her legal rights, and would not have entered into the agreement had she known them, yet, as the extent of her ignorance and of the injury sustained was doubtful, and [*192] *there was no proof of fraud or improper conduct on the part of the agent, she was bound by his acts, and affected by the knowledge which he was presumed to have of her rights, and was therefore not entitled to disturb the arrangement which had been effected.⁴

"If," remarked Lord Cottenham, C., in the above case, "it were necessary to show knowledge in the principal, and a distinct understanding of all the rights and interests affected by the complicated

¹ See per Maule, J., *Martindale v. Falkner*, 2 C. B. 719, 720; E. Q. L. R. 52.

² *Ground and Rudiments of the Law*, 141.

³ Per Maule, J., 2 C. B. 720; E. C. L. R. 52. See *Wade v. Simeon*, 1 C. B. 610; E. C. L. R. 50.

⁴ *Stewart v. Stewart*, 6 Cl. & Fin. 911; *Clifton v. Cockburn*, 8 My. & K. 99; vide *Cod.* 1, 18, 2.

arrangements which are constantly taking place in families, very few, if any, could be supported."

It is, then, a true rule, if understood in the sense above assigned to it, that every man must be taken to be cognisant of the law; for otherwise, as observed by Lord Ellenborough, C. J., there is no saying to what extent the excuse of ignorance might not be carried; it would be urged in almost every case;¹ and, from this rule, coupled with that as to ignorance of fact, are derived the two following important propositions:—1st, that money paid with full knowledge of the facts, but through ignorance of the law, is not recoverable, if there be nothing unconscientious in the retainer of it; and, 2dly, that money paid in ignorance of the facts is recoverable, provided there have been no laches in the party paying it, and there was no ground to claim it in conscience.²

In a leading case on the first of the above rules, the facts were these:—the captain of a king's ship brought home in her public treasure upon the public service, and *treasure of individuals for his own emolument. He received freight for both, and paid [*193] over one-third of it, according to an established usage in the navy, to the admiral under whose command he sailed. Discovering, however, that the law did not compel captains to pay to admirals one-third of the freight, the captain brought an action for money had and received, to recover it back from the admiral's executrix; and it was held, that he could not recover back the private freight, because the whole of that transaction was illegal; nor the public freight, because he had paid it with full knowledge of the facts, although in ignorance of the law, and because it was not against conscience for the executrix to retain it.³

In another important case, involving the application of the same

¹ *Bilbie v. Lumley*, 2 East, 469; Preface to Co. Litt.; *Gomery v. Bond*, 3 M. & S. 378; 1 Story, Eq. Juris., 4th ed. 125.

² 2 Smith, L. C. 244; *Wilkinson v. Johnson*, 3 B. & C. 429; E. C. L. R. 10; per Lord Mansfield, C. J., *Bize v. Dickson*, 1 T. R. 286, 287. See *Lee v. Merrett*, 15 L. J., Q. B. 289.

³ *Brisbane v. Dacres*, 5 Taunt. 143; E. C. L. R. 1; per Lord Ellenborough, C. J., *Bilbie v. Lumley*, 2 East, 470; *Cumming v. Bedborough*, 15 M. & W. 438; (*) *Bramston v. Robins*, 4 Bing. 11; E. C. L. R. 18; *Stevens v. Lynch*, 12 East, 38; per Lord Eldon, C., *Broomley v. Holland*, 7 Ves. jun. 28; *Lowry v. Bourdieu*, Dougl. 468; E. C. L. R. 26; *Gomery v. Bond*, 3 M. & S. 378; *Lothian v. Henderson*, 3 B. & P. 420; *Dew v. Parsons*, 2 B. & Ald. 562; E. C. L. R. 26. See the argument in *Gibson v. Bruce*, 6 Scott, N. R. 309; *Smith v. Bromley*, cited 2 Dougl. 696, and 6 Scott, N. R. 318.

principle, the plaintiff, being about to compound with his creditors, defendant, a creditor, refused to subscribe the deed unless he were paid in full; and the plaintiff, to obtain his signature, gave a bill, payable to defendant's agent for the difference between 20*s.* in the pound and 8*s.* the proportion compounded for, whereupon defendant signed the deed. Plaintiff did not, however, honour the bill when due, but, on subsequent application, he paid it some months after the dishonour of the payee, and defendant received the money, the other creditors being paid according to the deed. The Court of Queen's Bench held, that plaintiff could not recover back the amount [*194] so *paid to defendant above 8*s.* in the pound; for that the transaction had been closed by a voluntary payment, with full knowledge of the facts, and ought not to be re-opened; and that it did not make any difference that the sum in question had not been recovered by action.¹

So, where there is *bona fides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back;² as, where an underwriter having paid the loss, sought to recover the amount paid, on the ground that a material circumstance had been concealed. It appearing, however, that he knew of this at the time of the adjustment, it was held that he could not recover.³ And the same principle has been held to extend to an allowance on account, as being equivalent for this purpose to the payment of money.⁴

Secondly, money paid by the plaintiff to the defendant under a *bonâ fide* forgetfulness or ignorance⁵ of facts, which disentitled the defendant to receive it, may be recovered back as money had and received;⁶ and in the case deciding this it was observed, that, where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money

¹ *Wilson v. Ray*, 10 Ad. & E. 82; E. C. L. R. 37; on which case, see the observations of Tindal, C. J., in *Gibson v. Bruce*, 6 Scott, N. R. 325, 326.

² Per Patteson, J., *Duke de Cadaval v. Collins*, 4 Ad. & E. 866; E. C. L. R. 31. See the maxim, *volenti non fit injuria*, post, 201.

³ *Bilbie v. Lumley*, 2 East, 469; *Gomery v. Bond*, 3 M. & S. 378; *Lothian v. Henderson*, 3 B. & P. 420, supra 1.

⁴ *Skyring v. Greenwood*, 4 B. & C. 281; E. C. L. R. 10; cited and recognised *Bate v. Lawrence*, 8 Scott, N. R. 181; per Best, C. J., *Bramston v. Robins*, 4 Bing. 15; E. C. L. R. 13; *Shaw v. Picton*, 4 B. & C. 715; E. C. L. R. 6.

⁵ D. 12, 6, 1.

⁶ *Kelly v. Solari*, 9 M. & W. 54; (*) *Lucas v. Worswick*, 1 Moo. & Rob. 298.

would not have been paid if it had *been known to the payer [*195] that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it,¹ though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of a fact which is untrue, it may, generally speaking, be recovered back, however, careless the party paying may have been in omitting to use due diligence, or to inquire into the fact;² and, therefore, it does not seem to be a true position in point of law, that a person so paying is precluded from recovering by laches in not availing himself of the means of knowledge in his power,³ though, if there be evidence of means of knowledge, the jury will very readily infer actual knowledge.⁴

In an action on a policy of insurance, the question was, whether the captain of a vessel which sailed to a blockaded port knew of the blockade at a particular period; and it was observed by Lord Tenterden, that, if the possibility or even probability of actual knowledge should be considered *as legal proof of the fact of actual [*196] knowledge, as a *presumptio juris et de jure*, the presumption might, in some cases, be contrary to the fact, and such a rule might work injustice; and that the question, as to the knowledge possessed by a person of a given fact, was for the decision and judgment of the jury. It was also remarked, in the same case, that the probability of actual knowledge upon consideration of time, place, the opportunities of testimony, and other circumstances, may in some instances be so strong and cogent, as to cast the proof of ignorance on the other side in the opinion of the jury, and, in the absence of

¹ See *Milnes v. Duncan*, 6 B. & C. 671; E. C. L. R. 13; *Bize v. Dickson*, 1 T. R. 285; cited, per Mansfield, C., J., *Brisbane v. Dacres*, 5 Taunt. 162; E. C. L. R. 1; *Harris v. Lloyd*, 5 M. & W. 432. (*)

² Per Parke, B., *Kelly v. Solari*, 9 M. & W. 58, 59, (*) recognised *Bell v. Gardiner*, 4 Scott, N. R. 621, 633, 634; per Ashhurst, J., *Chatfield v. Paxton*, cited 2 East, 471, n. (a). See D. 22, 6, 9, § 2.

³ Per Parke, B. 9 M. & W. 58, 59, (*) controverting the dictum of Bayley, J., in *Milnes v. Duncan*, 6 B. & C. 671; E. C. L. R. 13; *Lucas v. Worswick*, 1 Moo. & Rob. 298; *Bell v. Gardiner*, 4 Scott, N. R. 621, 635. See per Dallas, C. J., *Martin v. Morgan*, 1 B. & B. 291; E. C. L. R. 3.

⁴ Per Coltman, J. 4 Scott, N. R. 633.

such proof of ignorance, to lead them to infer knowledge; but that such inference properly belonged to them.¹

In ejectment by A., claiming title under a second mortgage, it was held, that a tenant, who had paid rent to the lessor of the plaintiff under a mistake of the facts, although estopped from disputing A.'s title at the time of the demise, might nevertheless show in defence a prior mortgage to B., together with notice from, and payment of rent to, B.; and that he was not precluded from this defence by having paid rent to A. under a mistake.²

In some cases, also, where at the time of applying to a court of justice, the applicant is ignorant of circumstances material to the subject-matter of his motion, he may be permitted to open the proceedings afresh; for instance, under very peculiar circumstances, the Court re-opened a rule for a criminal information, it appearing that the affidavits on which the rule had been discharged were false.³

[*197] *In courts of equity, as well as of law, the twofold maxim under consideration is admitted to hold true; for on the one hand it is a general rule, in accordance with the maxim of the civil law, *non videntur quæ errant consentire*,⁴ that equity will relieve where an act has been done, or contract made, under a mistake, or ignorance of a material fact;⁵ and, on the other hand, it is laid down as a general proposition, that in courts of equity ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular acts,⁶ and this rule, as observed by Mr. J. Story, is fully borne out by the authorities.⁷ For instance, a bill was filed to redeem an annuity, suggesting that it was part of the agreement, that it should be redeemable, but that the clause for redemption was left out of the annuity deed, under the idea that, if inserted, the transaction would be usurious, the Court refused relief, no case of fraud being established by the evidence.⁸ Where a deed of appoint-

¹ Harratt v. Wise, 9 B. & C. 712, 717; E. C. L. R. 17.

² Doe d. Higginbotham v. Barton, 11 Ad. & E. 307; E. C. L. R. 37. See also Perrott v. Perrott, 14 East, 422, which was a case as to the cancellation of a will.

³ Rex v. Eve, 5 Ad. & E. 780; E. C. L. R. 81; Bodfield v. Padmore, Id. 785, n.

⁴ D. 50, 17, 116, § 2.

⁵ 1 Story, Eq. Jurisp., 4th ed. 161.

⁶ 1 Fonbl. Eq., 5th ed. 119, note.

⁷ 1 Story, Eq. Jurisp., 4th ed. 126.

⁸ Lord Irnham v. Child, 1 Brown, C. C. 92; cited and distinguished per Lord Eldon, C., Marquis Townshend v. Strangroom, 6 Ves. jun. 332; per Lord Hardwicke, C., Pullen v. Ready, 2 Atk. 591; Mildmay v. Hungerford, 2 Vern. 248. See the Judgment, Hunt v. Rousmaniere's Administrators, 1 Peters, R. (U. S.) 1, 15; commenting on Lansdowne v. Lansdowne, 2 Jac. & W. 205.

ment was executed absolutely, without introducing a power of revocation, which was contained in the deed creating the power, and this omission was made through a mistake in law, and on the supposition that the deed of appointment, being a voluntary deed, was therefore revocable, relief was likewise refused by the Court.¹ So, where two are jointly bound by a bond, and the obligee releases *one, [*198] supposing, erroneously, that the other will remain bound, the obligee will not be relieved in equity upon the mere ground of his mistake of the law, for *ignorantia juris non excusat*.² Nor will a court of equity direct payments, made under a mistaken construction of a doubtful clause in a settlement, to be refunded after many years of acquiescence by all parties, and after the death of one of the authors of the settlement, especially where subsequent family arrangements have proceeded on the footing of that construction.³ It is, however, well settled that a court of equity will relieve against a mistake or ignorance of fact, and in several cases, which are sometimes cited as exceptions to the general rule, as to *ignorantia juris*, it will be found that there was a mistake or misrepresentation of fact sufficient to justify a court of equity in interfering to give relief.⁴ In a leading case,⁵ illustrative of this remark, the testator being a freeman of the city of London, left to his daughter a legacy of £10,000, upon condition that she should release her orphanage part together with all her claim or right to his personal estate, by virtue of the custom,⁶ of the city of London or otherwise. Upon her father's death his daughter accepted the legacy, and executed the release, and, before executing it, her brother informed her that she had it in her election either to have an account of her father's personal estate, or to claim her orphanage part. Upon a bill afterwards filed by the husband of the daughter, in her right against the brother, who was *executor under the will, Lord Talbot, C., [*199] expressed an opinion⁷ that the release should be set aside, and

¹ *Worrall v. Jacob*, 8 Meriv. 256, 271.

² *Harman v. Cam*, 4 Vin. Abr. 387, pl. 3; 1 Fonbl. Eq., 5th ed. 119, note.

³ *Clifton v. Cockburn*, 3 My. & K. 76. *Attorney-General v. Mayor of Exeter*, 3 Russ. 395.

⁴ The reader is referred to 1 Story, Eq. Jurisp., 4th ed., ch. v., where the cases are considered:

⁵ *Pusey v. Desbouvrie*, 3 P. Wms. 315. See also *M'Carthy v. Decaix*, 2 R. & M. 614.

⁶ See Palling, *Laws and Customs of London*, 180 et seq.

⁷ The suit was compromised.

the daughter be restored to her orphanage share, which amounted to upwards of £40,000. The decision thus expressed seems, in part, to have rested on the ground, that the daughter had not been informed of the actual amount to which she would be entitled under the custom, and did not appear to have known that she was entitled to have an account taken of the personal estate of her father, and that when she should be fully apprised of this, and not till then, she was to make her election; and it is a rule that a party is always entitled to a clear knowledge of the funds between which he is to elect before he is put to his election.¹ In like manner, it has been held, in a recent case, which is frequently cited, with reference to this subject, that, where a person agrees to give up his claim to property in favour of another, such renunciation will not be supported, if, at the time of making it, he was ignorant of his legal rights and of the value of the property renounced, especially if the party with whom he dealt possessed, and kept back from him, better information on the subject.²

Upon an examination, then, of the cases which have been relied upon as exceptions to the general rule observed by courts of equity, some, as in the instances above mentioned, may be supported upon the ground that the circumstances disclosed an ignorance of fact as well as of law, and in others there will be found to have existed either actual misrepresentation, undue influence, mental imbecility, [*200] or that sort of surprise which equity regards as a *just foundation for relief. It is, indeed laid down broadly that, if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his property to another, under the name of a compromise, a court of equity will grant relief; and this proposition may be illustrated by the case of an heir-at-law, who, knowing that he is the eldest son, nevertheless agrees through ignorance of the law, to divide undeviseed fee-simple estates of his ancestor with a younger brother, such an agreement being one which would be held invalid by a court of equity. Even in so simple a case, however, there may be important ingredients, independent of the mere ignorance of law, and this very ignorance may well give rise to a presumption of imposition, weakness, or abuse of confidence, which will give a title to relief; at all events, in cases similar to the above,

¹ 8 P. Wms. 821 (z).

² M'Carthy v. Decaix, 2 B. & M. 614; considered in Warrender v. Warrender, 2 Cl. & Fin. 488.

it seems clear that the mistake of law, is not *per se*, the foundation of relief, but is only the medium of proof by which some other ground of relief may be established, and, on the whole, it may be safely affirmed that a mere naked mistake of law, unattended by special circumstances, will furnish no ground for the interposition of a court of equity, and that the present disposition of such a court is rather to narrow than to enlarge the operation of exceptions to the above rule.¹

In criminal cases the above maxim also applies when a man intending to do a lawful act, does that which is unlawful. In this case there is not that conjunction between the deed and the will which is necessary to form a criminal act; but in order that he may stand excused, there must be an ignorance or mistake of fact, and not an error in *point of law; as, if a man intending to kill a thief [*201] or house-breaker in his own house, and under circumstances which would justify him in so doing, by mistake kills one of his own family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him and does so, this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is, in criminal cases, no sort of defence.² *Ignorantia eorum quæ quis scire tenetur non excusat.*³

Lastly, every man is presumed to be cognizant of the statute law of this realm, and to construe it aright; and if any individual should infringe it through ignorance, he must, nevertheless, abide by the consequences of his error. It will not be competent to him to aver, in a court of justice, that he has mistaken the law, this being a plea which no court of justice is at liberty to receive.⁴

VOLENTI NON FIT INJURIA.

(Wing. Mat. 482.)

That to which a person assents is not esteemed in law an injury.

It is a general rule of the English law, that no one can maintain an action for a wrong where he has consented or contributed to the

¹ 1 Story, Eq. Jurisp., 4th ed. 123-160; per Lord Cottenham, *C. Stewart v. Stewart*, 5 Cl. & Fin. 964-971. See also Spence, *Chanc. Juris.* 683 et seq.

² 4 Bla. Com. 27; *Doct. and Stud.*, Dial. ii. c. 46.

³ Hale, Pl. Cr. 42.

⁴ Per Sir W. Scott, *The Charlotta*, 1 Dods. R. 392; per Lord Hardwicke, *Middleton v. Creft*, Stra. 1056.

act which occasions his loss;¹ and in accordance with this maxim, when an action is brought for criminal conversation, the law is now [*202] clearly settled to be, that *if the husband consents to his wife's adultery, it goes in bar of his action: if he be guilty of negligence, or even of loose or improper conduct not amounting to a consent, it only goes in reduction of damages.² So, if a person says, generally, "There are spring-guns in this wood," and if another then takes upon himself to go into the wood, knowing that he is in hazard of meeting with the injury which the guns are calculated to produce, he does so at his own peril, and must take the consequences of his own act.³ So, although the deck of a vessel is prima facie an improper place for the stowage of a cargo, or any part of it, yet, when the loading on the deck has taken place with the consent of the merchant, it is obvious that no remedy against the ship-owner or master for a wrongful loading of the goods on deck can exist.⁴ So, if a man passing in the dark along a footpath, should happen to fall into a pit, dug in the adjoining field by the owner of it, in such a case the party digging the pit would be responsible for the injury if the pit were dug across the road; but, if it were only in an adjacent field, the case would be very different, for the falling into it would then be the act of the injured party *himself.⁵ In addition to the [*203] above and similar decisions, there is also an extensive class of cases to which the maxim *volenti non fit injuria* may be applied, but which will be more conveniently referred to another and more general principle of law; we allude to those cases in which redress

¹ Per Tindal, C. J., cited *Gould v. Oliver*, 2 Scott, N. R. 257. See *Bird v. Holbrook*, 4 Bing. 628, 639, 640; E. C. L. R. 18, 15; *Plowd.* 501; D. 50, 17, 203.

² Per Buller, J., *Duberley v. Gunning*, 4 T. R. 657; per De Grey, C. J., *Howard v. Burtonwood*, cited 1 Selw., N. P. 10th ed. 8, n. (8); Id. 10, n. (6); per Alderson, J., *Winter v. Henn*, 4 C. & P. 498; E. C. L. R. 19. As to the effect of a separation between husband and wife, or of the wife's death, on the maintenance of this action, see *Weedon v. Timbrell*, 5 T. R. 357; *Harvey v. Watson*, 8 Scott, N. R. 379; *Chambers v. Caulfield*, 6 East, 244; per Coleridge J., *Wilton v. Webster*, 7 C. & P. 198; E. C. L. R. 82; *Calcraft v. Earl of Harborough*, 4 C. & P. 499; E. C. L. R. 19. As to the application and meaning of the maxim in the ecclesiastical courts, see per Sir J. Nicholl, *Rogers v. Rogers*, 3 Hagg. 57; Eng. Eccles. R. 6; cited *Phillips v. Phillips*, 1 Robertson, 158; per Sir W. Scott, *Forster v. Forster*, 1 Consist. R. 146; *Stone v. Stone*, 1 Robertson, 99; *Judgment, Cocksedge v. Cocksedge*, Id. 92; 2 Curt. 213; Eng. Eccles. R. 7.

³ Per Bayley, J., *Ilott v. Wilkes*, 3 B. & Ald. 311; E. C. L. R. 5.

⁴ *Gould v. Oliver*, 2 Scott, N. R. 257, 264.

⁵ *Judgment, Jordin v. Crump*, 8 M. & W. 787, 788. (*) See also *Horne v. Widlake*, *Yelv.* 141.

is sought for an injury which has resulted from the negligence of both plaintiff and defendant, and in many of which it has been held that the former is precluded from recovering damages.¹

The most important application, however, of the maxim *volenti non fit injuria*, is to cases in which money which has been voluntarily paid is sought to be recovered, on the ground that it was not in fact, due.

The first rule which we shall notice in reference to cases of this description, is that where a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought to have paid, he cannot recover it back again in an action for money had and received. Thus, if a man pay a debt, which would have been barred by pleading the statute of limitations, or one contracted during infancy, which, in justice, he ought to discharge, in these cases, though the law would not have compelled payment, yet, the money being paid, it will not oblige the payee to refund it.²

There is also a large class of cases in which it has been held, that money paid voluntarily cannot be recovered, although the original payment was not required by any equitable consideration; and these cases are very nearly allied *in principle to those which [*204] have been considered in treating of a payment made in ignorance of the law.

Thus, an occupier of lands, during a course of twelve years, paid the property tax to the collector, under stat. 46 Geo. 3, c. 65, and likewise the full rent as it became due to the landlord, without claiming, as he might have done, any deduction on account of the tax so paid; and it was held, that the occupier could not maintain an action for money had and received against the landlord, for any part of the tax so paid, on the ground that the payment being voluntary, could not, according to the principle above stated, be recovered.³ So, where a tenant pays property tax assessed on the premises, and omits to deduct it in his next payment of rent, he cannot

¹ See remarks on the maxim, *sic utere tuo ut alienum non laedas*, post.

² Per Lord Mansfield, C. J., *Bize v. Dickson*, 1 T. R. 286, 287; *Farmer v. Arundel*, 2 W. Bl. 824.

³ *Denby v. Moore*, 1 B. & Ald. 128; cited per Bayley, J., *Stubbs v. Parsons*, 3 B. & Ald. 518; E. C. L. R. 5. See also *Cartwright v. Rowley*, 2 Esp. 728; *Fulham v. Down*, 6 Esp. 26, note; Bull., N. P., 181 cited, 8 T. R. 576; *Spragg v. Hammond*, 2 B. & B. 59; E. C. L. R. 6; per Dallas, C. J., *Andrew v. Hancock*, 1 B. & B. 43; E. C. L. R. 5. See *Hall v. Shultz*, 4 Johnson, R. (U. S.) 240.

afterwards recover the amount as money paid to the use of the landlord.¹

The maxim under consideration holds, however, in those cases only where the party has a freedom of exercising his will;² and therefore, where a debtor from mere necessity, occasioned, for instance, by a wrongful detainer of goods, pays more than the creditor can in justice demand, he shall not be said to pay it willingly, and has a right to recover the surplus so paid.³

All the cases, indeed, upon this subject, show, that where a party [*205] is in, claiming under legal process, the owner *of the goods, contending that the possession is illegal, and paying money to avert the evil and inconvenience of a sale, may recover it back in an action for money had and received, if the claim turns out to have been unfounded.

Where, on the contrary, money is voluntarily paid, with full knowledge of all the circumstances, *the party intending to give up his right*, he cannot afterwards bring an action for money had and received; though it is otherwise where, at the time of paying the money, the party gives notice that he intends to resist the claim, and that he yields to it merely for the purpose of relieving himself from the inconvenience of having his goods sold.⁴

In *Close v. Phipps*⁵ the attorney for a mortgagee, who had advertised a sale of the mortgaged property, under the power reserved to him for non-payment of interest, having extorted from the administratrix of the mortgagor money exceeding the sum really due for principal, interest, and costs, under a threat that he would proceed with the sale unless his demands were complied with, it was held that the administratrix might recover back the money so paid as money had and received to her use. "The interest of the plaintiff," observed Tindal, C. J., "to prevent the sale, by submitting to the demand, was so great, that it may well be said, the payment was made under what the law calls a species of duress."

¹ *Cumming v. Bedborough*, 15 M. & W. 438. (*) See *Payne v. Burrigge*, 12 M. & W. 727. (*)

² 1 *Seiw.* N. P. 10th ed. 84.

³ See per Lord Mansfield, C. J., *Smith v. Bromley*, cited, Dougl. 696, commenting on *Tomkins v. Bernet*, 1 Salk. 22; cited, *Argument*, 6 Scott, N. R. 318; per *Patteson, J.*, and *Coleridge, J.*, *Ashmole v. Wainwright*, 2 Q. B. 845, 846; E. C. L. R. 42.

⁴ Per Tindal, C. J., *Valpy v. Manley*, 1 C. B. 602, 603; E. C. L. R. 50.

⁵ 8 Scott, N. R. 381; recognising *Parker v. The Great Western Railway Company*, 7 Scott, N. R. 835. See 1 C. B. 788, 798; E. C. L. R. 52.

The plaintiff having, in the month of August, pawned some goods with the defendant for 20*l.*, without making any agreement for interest, went in the October following to redeem them, when the defendant insisted on having *10*l.* as interest for the 20*l.* The plaintiff tendering him 20*l.* and 4*l.* for interest, knowing the same to be more than the legal interest amounted to, the defendant still insisted on having 10*l.* as interest; whereupon the plaintiff, finding that he could not otherwise get his goods back, paid defendant the sum which he demanded, and brought an action for the surplus beyond the legal interest as money had and received to his use. The Court held, that the action would well lie, for it was a payment by compulsion.¹

Where an action was brought to recover back money paid to the steward of a manor for producing, at a trial, some deeds and court-rolls, for which he had charged extravagantly, the objection was taken that the money had been voluntarily paid, and therefore could not be recovered back again; but, it appearing that the money was paid through necessity, and the urgency of the case, it was held to be recoverable.² On the same principle, where a railway company, by a general arrangement with carriers, in consideration of such carriers loading, unloading, and weighing the goods forwarded by them, made a deduction in their favour of 10*l.* per cent. from the charges made to the public at large for the carriage of goods, it was decided that the plaintiff, a carrier, who, although willing to perform the above duties, was excluded from participating in the said arrangement, was entitled to recover from the company the above percentage, as well as other sums improperly exacted from him by the company, such payments not having been made voluntarily, but in order to induce the company to do that which they were bound to do without *them, and for the refusal to do which an action on the case,³ might have been maintained against them.⁴

In another class of cases which necessarily fall under our present consideration, it has been decided, that money may be recovered

¹ *Astley v. Reynolds*, *Str.* 915; *Hills v. Street*, 5 *Bing.* 37; *E. C. L. R.* 15; *Bosanquet v. Dashwood*, *Cas. temp. Talbot*, 38.

² *Anon v. Pigott*, cited, 2 *Esp.* 723.

³ *Pickford v. The Grand Junction Railway Company*, 10 *M. & W.* 899. (*) See *Kent v. The Great Western Railway Company*, 16 *L. J.*, *C. P.* 72.

⁴ *Parker v. The Great Western Railway Company*, 7 *Scott, N. R.* 835.

back if paid under compulsion of law, imposed upon defendant by the fraudulent practices of the plaintiff in the original proceedings, or if the payment be made under the compulsion of colourable legal process. For instance, plaintiff, being a foreigner, ignorant of the English language, was arrested by the defendant for a fictitious debt of 10,000*l.* upon a writ, which was afterwards set aside for irregularity. Plaintiff, in order to obtain his release, agreed in writing to pay 500*l.*, and to give bail for the remainder of the sum. The 500*l.* was to be as a payment in part of the writ, and both parties were to abide the event of the action, the agreement containing no provision for refunding the money if the action should fail. The 500*l.* was accordingly paid, and an action having been brought to recover it back, the jury found for the plaintiff, and that the defendant knew that he had no claim upon the plaintiff. The Court of Queen's Bench discharged a rule for a new trial or to enter a nonsuit, on the ground, that the arrest, according to the finding of the jury, was fraudulent, and that the money was parted with under the arrest, to get rid of the pressure:¹ it being a true position, that, "if an undue advantage be taken of a person's situation, and money be [*208] obtained from him by compulsion, such *money may be recovered in an action for money had and received."²

The authorities above cited will sufficiently establish the position, that money paid under compulsion of fraudulent legal process, or of wrongful pressure exercised upon the party paying it, may, in general, be recovered back, as money had and received to his use; and it therefore only remains to add, that, *à fortiori*, money will be recoverable which is paid, and that an instrument may be avoided which is executed, under threats of personal violence, duress, or illegal restraint of liberty; and this is in strict accordance with the maxims laid down by Lord Bacon: *Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit*,³ and *corporalis injuria non recipit æstimationem de futuro*.⁴

¹ *Duke de Cadaval v. Collins*, 4 Ad. & E. 868; E. C. L. R. 24. See *Smith v. Monteith*, 18 M. & W. 427; *De Medina v. Grove*, 15 L. J., Q. B. 287.

² 1 Selw., N. P. 10th ed. 83; cited and adopted by Coleridge, J., 4 Ad. & E. 867; E. C. L. R. 24; *Pitt v. Combes*, 2 Ad. & E. 469; E. C. L. R. 29; per Gibbs, J., *Brisbane v. Dacres*, 5 Taunt. 156; E. C. L. R. 1; *Jendwine v. Slade*, 2 Esp. 573; *Follett v. Hoppe*, C. P. 11 Jur. 974.

³ Bac. Max., reg. 22; post. *Nil consensui tam contrarium est quam vis atque metus*, D. 50, 17, 116; 1 Story, Eq. Jurisp. 4th ed. 261.

⁴ Bac. Max., reg. 6.

Lastly, it is worthy of observation, that there are cases where an intentional wrong-doer will be, to a certain extent, protected by the law through motives of public policy. Thus, a horse with a rider on him cannot be distrained damage feasant, on the ground of the danger to the peace which might result if such a distress were levied; and therefore, to a plea in trespass, justifying the taking of a horse, cart, and other chattels, damage feasant, it is a good replication that the horse, cart, and chattels were, at the time of the distress, in the actual possession and under the personal care of, and then being used by, the plaintiff.¹

*NULLUS COMMODUM CAPERE POTEST DE INJURIA SUA [*209]
 PROPRIA.

(Co. Litt. 148, b.)

No man shall take advantage of his own wrong.

It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong;² and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure. The reasonableness and necessity of the rule being manifest, we shall proceed at once to show its practical application by reference to decided cases; and, in the first place, we may observe, that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law³—*frustra legis auxilium quaerit qui in legem committit*;⁴—and, therefore, A. shall not have an action of trespass against B., who lawfully enters to abate a nuisance caused by A.'s wrongful act,⁵ nor shall an executor, *de son tort*, obtain that assistance which the law affords to a rightful executor.⁶

¹ Field v. Adames, 12 Ad. & E. 649; E. C. L. R. 40, and cases there cited; Storey v. Robinson, 6 T. R. 188; Bunch v. Kennington, 1 Q. B. 679; E. C. L. R. 85, where Lord Denman, C. J., observes, that "perhaps the replication in Field v. Adames was rather loose." See Perry v. Fitzhove, 15 L. J., Q. B. 239, 243.

² Per Lord Abinger, C. B., Findon v. Parker, 11 M. & W. 680; (*) Daly v. Thompson, 10 M. & W. 809; (*) Malins v. Freeman, 4 Bing., N. C. 395, 399; E. C. L. R. 83; per Best, J., Doe d. Bryan v. Bancks, 4 B. & Ald. 409; E. C. L. R. 6; Co. Litt. 148, b; Jenk. Cent. 209; 2 Inst. 713; D. 50, 17, 134, § 1.

³ 1 Hale, P. C. 482.

⁴ 2 Hale, P. C. 386.

⁵ Dodd. 220, 221. See Perry v. Fitzhove, 15 L. J., Q. B., 239.

⁶ See Carmichael v. Carmichael, 2 Phill. 101; Paull v. Simpson, 15 L. J., Q. B. 882.

If a man be bound to appear on a certain day, and before that day the obligee put him in prison, the bond is void.¹ It will be observed, however, that an agreement, whether *by specialty [*210] or by simple contract, is not void, when made under duress of goods merely; for duress to the person is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy: and a man, consequently, is not bound by the agreement which he enters into under such circumstances; but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert;² and hence, in the latter case, the agreement must be taken to have been entered into voluntarily: there is, therefore, an obvious distinction between such a case and those which have been already adverted to, and in which it has been held that money paid to redeem goods wrongfully seized, or to prevent their wrongful seizure, may be recovered back in an action for money had and received.³

We may, in the next place, refer to the case of *Hyde v. Watts*,⁴ as strikingly illustrative of the maxim, that a man shall not be permitted to take advantage of his own wrong. That was an action of debt for work and labour, to which the defendant pleaded a release under an indenture or trust deed for the benefit of such of his creditors as should execute the same. The replication set out the indenture, not on oyer, but in *hæc verba*, by which it appeared that the defendant covenanted, *inter alia*, to insure his life for 1500*l.*, and to continue the same so insured during a period of three years; and, in case of his neglect or refusal to effect or to keep on foot this [*211] insurance, the *indenture was to be utterly void to all intents and purposes whatsoever:—breach, that the defendant did not insure his life, whereby the said indenture became utterly void. The material question in the above case was, whether the deed, in case of a neglect on the part of the defendant to effect or keep alive the policy for 1500*l.*, was absolutely void, and incapable of being confirmed as to *all* parties, or only void as against the plaintiff, who was a party to the deed, if he should so elect; and the latter was

¹ Noy, Max. 9th ed., p. 45.

² *Vani timoris justa excusatio non est*, D. 50, 17, 184.

³ Judgment, *Skeate v. Beale*, 11 Ad. & E. 990; E. C. L. R. 39, and cases there cited; 2 Inst. 488; ante, p. 205.

⁴ 12 M. & W. 254, and see the cases cited, Id. 262, 263.

held by the Court of Exchequer to be the true construction, by reason of the absurd consequences which would follow, if the defendant, against the consent of all other parties interested in the validity of the indenture, could avail himself of his own wrong, and thus absolve himself and the trustees from liability on their respective covenants.

In another recent case, the defendants, who were merchants, employed a person licensed to act as agent at the Custom-house in London, under the stat. 3 & 4 Will. 4, c. 2, s. 144, to pay the duty on goods, and to procure their delivery from the warehouse for home consumption. The defendants, in fact, paid the amount of duty to the person thus employed by them; and he having subsequently represented to them that he had duly paid the duty upon certain goods, they sent for and obtained such goods from the warehouseman upon presentment of the usual merchant's order. The duty, however, not having really been paid, the merchants were held liable to an information in respect of such non-payment, it not being competent to them to set up the default of their own agent by way of defeasance, and thus to take advantage of their own wrong.¹

*The following instances, which will be familiar to the reader, may also be mentioned in further illustration of the same general principle:—If tenant for life or years fell timber-trees, they will belong to the lessor; for the tenant cannot, by his own wrongful act, acquire a greater property in them than he would otherwise have had.² Where the lessee is evicted from part of the lands demised, by title paramount, he will have to pay a rateable proportion for the remainder;³ whereas, if he be evicted from parts of the lands by his landlord, no apportionment, but a suspension of the whole rent, takes place, except in the case of the king; and there is no suspension, if the eviction has followed upon the lessee's own wrongful act, as for a forfeiture, but an apportionment only.⁴ And, it is a well-known principle, that a lessor or grantor cannot dispute,

¹ Attorney-General v. Ansted, 12 M. & W. 520, 529. (*) See Reg. v. Dean, Id. 89.

² Wing. Max., p. 574. See also ante, p. 187.

³ Smith v. Malings, Cro. J. 160. See The Mayor of Poole v. Whitt, 15 M. & W. 571; (*) Selby v. Browne, 7 Q. B. 632; E. C. L. R. 53.

⁴ Walker's case, 3 Rep. 22; Wing. Max., p. 569. See Boodle v. Cambell, 8 Scott, N. R. 104.

with his lessee or grantee, his own title to the land which he has assumed to demise or convey.¹

It is moreover a sound principle, that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned. Hence, in an action for breach of covenant in not insuring, the tenant may defend himself by showing that the landlord prevented him from insuring, by representing that he had himself insured, and that, in fact, the covenant had not been broken if such representation were true.² If a man make a feoffment in fee upon condition that the feoffee shall reinfoff him before a certain day, [*213] and before that day the feoffor disseise *the feoffee, and hold him out by force until the day be past; in this case the estate of the feoffee is absolute, because the feoffor shall not take advantage of his own wrongful act, which occasioned the non-performance of the condition.³ And, generally⁴, where the condition of a bond was possible at the time of making it, and afterwards becomes impossible by the act of the obligee himself, as in the case of imprisonment of the obligor above mentioned, the obligation shall be saved.⁴ So, where by the terms of a contract, a service to be performed by A. for B. is to be paid for in goods, A. cannot declare in debt for the value of the service, but must sue on the special contract. But if B., by his own act, render the delivery of the goods impossible, A. may sue in debt for the value of the service.⁵ And where a creditor refuses a tender sufficient in amount, and duly made, he cannot afterwards, for purposes of oppression or extortion, avail himself of such refusal; for, although the debtor still remains able to pay whenever required so to do, yet the tender operates in bar of any claim for damages and interest for not paying or for detaining the debt, and also of the costs of an action brought to recover the demand.

According to the same principle, if articles of unequal value are mixed together, producing an article of a different value from that of either separately, and through the fault of the person mixing them the other party cannot tell what was the original value of his pro-

¹ Judgment, *Doe d. Levy v. Horne*, 3 Q. B. 766; E. C. L. R. 48; cited, per Alderson, B., 15 M. & W. 576. (*)

² See Judgment, *Doe d. Muston v. Gladwin*, 6 Q. B. 963; E. C. L. R. 48.

³ Co. Litt. 206, b.

⁴ Com. Dig., "Condition," (D. 1); ante, p. 184. See *Hayward v. Bennett*, 3 C. B. 404; E. C. L. R. 45.

⁵ *Keys v. Harwood*, 2 C. B. 905; E. C. L. R. 52; *Short v. Stone*, 15 L. J., Q. B. 148.

party, he must have the whole.¹ So, where the plaintiff, pretending *title to hay standing in defendant's land, mixed some of [*214] his own with it, it was held that the defendant thereby became entitled to the hay.² In general, the act of the officer is, in point of law, the act of the sheriff, yet where the officer is guilty of misconduct, and that misconduct is produced by the act of the execution creditor, it is not competent to the latter to say that the act of the officer, done in breach of his duty to the sheriff, and induced by the execution creditor himself, is the act of the sheriff.³ Also, if a man employs an attorney to defend an action in which he has no interest, and the attorney defends the action accordingly, it does not lie in the mouth of the person who employs him to say that he was guilty of maintenance in employing him.⁴

Again, where a party is sued by a wrong name, and suffers judgment to go against him, without attempting to rectify the mistake, he cannot afterwards in an action against the sheriff for false imprisonment complain of an execution issued against him by that name;⁵ and, if a bond or any other instrument is executed under an assumed name, the obligor, or party executing it, is bound thereby in the same manner as if he had executed it in his true name.⁶ So, "if a man, having an opportunity of seeing what he is served with, wilfully abstains from looking at it, that is virtually a personal service;"⁷ and, where one of the litigating parties takes a step after having *had notice that a rule had been obtained to set aside [*215] the proceedings, he does so in his own wrong, and the step taken subsequently to notice will be set aside.⁸

The foregoing examples have been selected, in order to show in what manner the rule, which they will serve to illustrate, has been applied to promote the ends of justice, in various and totally dissimilar circumstances. It will, however, be proper to observe that

¹ Per Lord Eldon, C., *Lupton v. White*, 15 Ves. 442. See 2 Bla. Com. 404, 405; *Colwill v. Reeves*, 2 Camp. 575; *Warde v. Eyre*, 2 Bulstr. 328.

² *Popham*, 38, pl. 2.

³ Per Bayley, J., *Crowder v. Long*, 8 B. & C. 608, 604; E. C. L. R. 15. See another instance of the application of the same rule, per Bayley, J., *R. v. Great Salkeld*, 6 M. & S. 410.

⁴ Per Lord Abinger, C. B., 11 M. & W. 681.(*)

⁵ *Fisher v. Magnay*, 6 Scott, N. R. 588; *Morgans v. Bridges*, 1 B. & Ald. 647; E. C. L. R. 5. See *Smith v. Patten*, 6 Taunt. 115; E. C. L. R. 1.

⁶ 13 *Peters*, R. (U. S.) 428.

⁷ Per Tindal, C. J., *Emerson v. Brown*, 8 Scott, N. R. 222.

⁸ Per Pollock, C. B., *Tilling v. Hodgson*, 13 M. & W. 638.(*)

the maxim under review applies with peculiar force to that very extensive class of cases in which fraud is alleged to have been committed by one of the parties to a transaction, and is relied upon as a defence by the other. Both courts of equity and courts of law have, it has been observed by Lord Mansfield, a concurrent jurisdiction to suppress and relieve against fraud, although the interposition of the former is often necessary for the better investigation of the truth, and in order to give more complete redress.¹ We do not, in this treatise, propose to consider in what manner a court of equity will deal with fraud, nor how, if fraud be proved, it will interfere to give relief; but we shall here merely state the principle which is by that court invariably acted upon, to be—that the author of wrong, who has put a person in a position in which he had no right to put him, shall not take advantage of his own illegal act, or, in other words, shall not avail himself of his own wrong.² But although it is peculiarly, and often exclusively, the province of a court of equity to relieve against fraud, there are very many cases in which a court of law will render void a transaction on the ground of fraud or covin, and will expressly *refuse to sanction dishonest views and [*216] practices, by enabling an individual to acquire through the medium of his deception any right or interest.

In a leading case on this subject,³ the facts were, that A. was indebted to B. in 400*l.*, and was indebted also to C. in 200*l.*; C. brought an action of debt against A., and pending the writ, A., being possessed of goods and chattels of the value of 300*l.*, in secret made a general deed of gift of all his goods and chattels, real and personal, whatsoever, to B., in satisfaction of his debt, but nevertheless remained in possession of the said goods, some of which he sold; he also shorn the sheep, and marked them with his own mark. Afterwards C. obtained judgment, and issued a *fi. fa.* against A.,

¹ Bright v. Enon, 1 Burr. 396.

² Per Lord Cottenham, C., Hawkins v. Hall, 4 My. & Cr. 281.

³ Twyne's case, 3 Rep. 80; Fermor's case (3 Rep. 77), is also a leading case to show that the Courts will not sustain or sanction a fraudulent transaction. In that case it was held that a fine fraudulently levied by lessee for years should not bar the lessor; and see the law on this subject clearly stated per Tindal, C. J., in Davis v. Lowndes, 5 Bing., N. C. 172; E. C. L. R. 33. See also Wood v. Dixie, 7 Q. B. 892; E. C. L. R. 53. The doctrine of reputed ownership, and the cases decided with reference to stat. 6 Geo. 4, c. 16, s. 72, can only here be alluded to generally as illustrating the legal principle above considered. See Whitfield v. Brand, 16 M. & W. 282; Belcher v. Campbell, 8 Q. B. 1; E. C. L. R. 55; Load v. Green, 15 M. & W. 216.

and the question arose, whether the above gift was, under the circumstances, fraudulent and of no effect, by virtue of the statute 13 Eliz. c. 5; and it was determined, for the following reasons, that the gift was fraudulent within the statute:—1st, this gift has the signs and marks of fraud, because it is general, without excepting the wearing-apparel, or other necessaries, of the party making it; and it is commonly said, that *dolus versatur in generalibus*,¹—a person intending to deceive deals in general terms; a maxim, *we may observe, which has been adopted from the civil law, and is frequently cited and applied in our courts;² 2dly, the [^{*217}] donor continued in possession and used the goods as his own, and by reason thereof he traded and trafficked with others, and defrauded and deceived them; 3dly, the gift was made in secret, and *dona clandestina sunt semper suspiciosa*³—clandestine gifts are always open to suspicion; 4thly, it was made pending the writ; 5thly, in this case, there was a trust between the parties, for the donor possessed the goods and used them as his own, and fraud is always appavelled and clad with a trust, and a trust is the cover of fraud; and, 6thly, the deed states, that the gift was made honestly, truly and *bona fide*, and *clausulæ inconsuetæ semper inducunt suspicionem*—unusual clauses always excite suspicion.

In the foregoing case, it will be observed, that the principal transaction was invalidated on the ground of fraud, according to the principle, that a wrongful or fraudulent act shall not be allowed to conduce to the advantage of the party who committed it: *nul prendra advantage de son tort demesne*.⁵ And this principle further extends so as to preclude a party to a fraud from setting it up as a defence, subject, however, to one qualification, for where the plaintiff himself alleges the fraud, and proves it, as a part of his own case, there is no rule of law which can prevent the defendant from taking

¹ Wing. Max. 636; 2 Rep. 34; 2 Bulstr. 226; 1 Roll. R. 157; Moor, 821; Mace v. Cammel, Lofft, 782.

² Presbytery of Auchterarder v. Earl of Kinnoull, 6 Cl. & Fin. 698, 699; Spicot's case, 5 Rep. 58.

³ Cited per Lord Mansfield, C. J., *Worseley v. Demattos*, 1 Burr. 482; *Martindale v. Booth*, 3 B. & Ad. 498; E. C. L. R. 28. See this subject considered in the note to *Twyne's case*, 1 Smith, L. C. 1; *Argument, Wheeler v. Montefiore*, 2 Q. B. 138; E. C. L. R. 52.

⁴ *Noy, Max.* 9th ed., p. 152; *Latimer v. Batson*, 4 B. & C. 652; E. C. L. R. 18; per Lord Ellenborough, C. J., *Leonard v. Baker*, 1 M. & S. 253.

⁵ 2 Inst. 718; Branch, Max. 5th ed. p. 141.

[*218] all the benefit, as well as incurring all *the disadvantage, which may result from such a state of things. For instance, it is a true proposition, that money paid by a bankrupt to a creditor to induce him to sign the certificate, may be recovered back in an action for money had and received;¹ but, in answer to this case, it is a good defence, that the money had been demanded by, and paid to the assignees before the commencement of the action; for here, upon his own showing, the plaintiff's certificate was obtained by fraud, and the *jus tertii*, or right of the assignees, having intervened, the plaintiff could not be in a situation to maintain the action.²

In an action of trover, it appeared that the goods in question were seized while in the actual possession of a third party, under an execution against such third party, and sold to the defendant. It further appeared that no claim had been made by the plaintiff after the seizure, and that the plaintiff had consulted with the execution creditor as to the disposal of the property, without mentioning his own claim, after he knew of the seizure, and of the intention to sell the goods: it was held, that a jury might properly infer, from the plaintiff's conduct, that he had authorized the sale, and had, in point of fact, ceased to be the owner; and Lord Denman, C. J., in delivering the judgment of the Court, laid down the following principle, which will be found applicable to a large class of cases, and results directly from the maxim that *no man shall take advantage of his own wrong*. "The rule of law," said his lordship, "is clear, that, where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as *to alter his own previous position, [*219] the former is concluded from averring against the latter a different state of things as existing at the same time."³ So, in *Gregg v. Wells*,⁴ it was held, that the owner of goods, who stands by, and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them bona fide, cannot recover them from the vendee. "A party," said the Lord Chief Justice, "who negligently or culpably stands by and allows another to con-

¹ See *Lowry v. Bourdieu*, 2 Dougl. 472; *Smith v. Bromley*, Id. 697, n. (8); *Clarke v. Shee*, Cowp. 200; *Browning v. Morris*, Id. 792.

² *Sievers v. Boswell*, 4 Scott, N. R. 165.

³ *Pickard v. Sears*, 6 Ad. & E. 469; E. C. L. R. 88. See *Campbell v. Fleming*, 1 Ad. & E. 40; E. C. L. R. 28; cited 16 L. J., C. P. 158.

⁴ 10 Ad. & E. 90, 98; E. C. L. R. 86. See *Doe d. Groves v. Groves*, 16 L. J., Q. B. 297; *Nicholls v. Atherstone*, Id. 873.

tract, on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

The above and similar cases are evidently in principle identical with those in which it has been held that a person, who has expressly made a representation on the faith of which another has acted, shall not afterwards be allowed to contradict his former statement, in order to profit by that conduct which it has induced. Whenever such an attempt is made in the course of legal proceedings, the law replies, in the words of a maxim which we have already cited,¹ *allegans contraria non est audiendus*, and, by applying the doctrine of estoppel therein contained, prevents the unjust consequences which would otherwise ensue.² We may, therefore, lay it down as a general rule, applicable alike in law and equity, that a party shall not entitle himself to substantiate a claim, or to enforce a defence, by reason of acts or misrepresentations which proceeded from himself, or were *adopted or acquiesced in by him after full knowledge of [*220] their nature and quality;³ and further, that where misrepresentations have been made by one of two litigating parties, in his dealings with the other, a court of law will either decline to interfere, or will so adjust the equities between the plaintiff and defendant, as to prevent an undue advantage from accruing to that party who is unfairly endeavouring to take advantage of his own wrong.⁴

If, therefore, the acceptor of a bill of exchange at the time of acceptance *knew* the payee to be a fictitious person, he shall not take advantage of his own fraud; but a *bona fide* holder may recover against him on the bill, and declare on it as payable to bearer:⁵ and, generally, a person will not be allowed as plaintiff in a court of law to rescind his own act, on the ground that such act was a fraud on

¹ Ante, p. 127.

² Price v. Carter, 7 Q. B. 888; E. C. L. R. 58.; Mayor of Sandwich v. Reg. (in error), 16 L. J., Q. B. 482; Banks v. Newton, Id. 142; Petch v. Lyon, 15 L. J., Q. B. 398, and cases there cited; Braithwaite v. Gardiner, Id. 187.

³ Vigers v. Pike, 8 Cl. & Fin. 562.

⁴ See Harrison v. Ruscoe, 15 M. & W. 281, where an unintentional misrepresentation was made in giving notice of the dishonour of a bill; Rayner v. Grote, Id. 359, where an agent represented himself as principal; (citing, Beckerton v. Burrell, 5 M. & S. 383.)

⁵ Gibson v. Minet (in error), 1 H. Bla. 569; Byles on Bills, 5th ed. 58 (k).

another person, whether the party seeking to do this has sued in his own name, or jointly with such other person.¹

In conclusion, we may remark that the rule above illustrated is, in principle, very closely allied to the maxim, *ex dolo malo non oritur actio*, which is likewise of very general application, and will be treated of more conveniently hereafter in the Chapter upon Contracts. The latter maxim is, indeed, included in that already noticed; for it is clear, that, since a man cannot be permitted to take advantage of [*221] his own wrong, he will not be allowed to found any claim upon his own iniquity—*Nemo ex proprio dolo consequitur actionem*; and, as we commenced with observing, *frustra legis auxilium quaerit qui in legem committit*.

ACTA EXTERIORA INDICANT INTERIORA SECRETA.

(8 Rep. 291.)

Acts indicate the intention.

The law, in some cases, judges of a man's previous intentions by his subsequent acts; and, on this principle, it was decided in a well-known case, that, if a man abuse an authority given him *by the law* he becomes a trespasser *ab initio*; but that, where he abuses an authority given him *by the party*, he shall not be a trespasser *ab initio*. The reason assigned for this distinction being, that, where a general authority or license is given by the law, the law judges by the subsequent act, *quo animo*, or to what intent the original act was done; but, when the party himself gives an authority or license to do anything, as to enter upon land, he cannot for any subsequent cause convert that which was originally done under the sanction of his own authority or license into a trespass, *ab initio*; and, in this latter case, therefore, the subsequent acts only will amount to trespasses.²

For instance, the law gives authority to enter into a common inn or tavern, in like manner to the owner of the ground to distrain

¹ Per Lord Tenterden, C. J., *Jones v. Yates*, 9 B. & C. 538; E. C. L. R. 17; *Sparrow v. Ohisman*, Id. 241; *Wallace v. Kelsall*, 7 M. & W. 264, (*) which cases are recognised, *Gordon v. Ellis*, 8 Scott, N. R. 305.

² The Six Carpenters' case, 8 Rep. 290; *Van Brunt v. Schenck*, 13 Johnson, R. (U. S.) 414. See *Jacobsohn v. Blake*, 7 Scott, N. R. 772; *Peters v. Clarson*, 8 Scott, N. R. 334; *Wing. Max.*, p. 108.

damage feasant,¹ and to the commoner *to enter upon the land to see his cattle. But, if he who enters into the inn or [*222] tavern commits a trespass, or if the owner who distrains a beast damage feasant works or kills the distress, or if the commoner cuts down a tree, in these and similar cases the law adjudges that the party entered for the specific purpose of committing the particular injury, and, because the act which demonstrates the intention is a trespass, he shall be adjudged a trespasser *ab initio*;² or, in other words, the subsequent illegality shows the party to have contemplated an illegality all along, so that the whole becomes a trespass.³ For the same reason, if a sheriff continues in possession after the return day of the writ, this irregularity makes him a trespasser *ab initio*, though it will not support the allegation of a new trespass committed by him after the acts which he justifies under the execution.

One consequence of the above doctrine, as to the abuse of an authority given by law, was, that, if a party entering lawfully to make a distress, committed any subsequent abuse, he became a trespasser *ab initio*; and as this was found to bear extremely hard on landlords,⁴ it was enacted by stat. 11 Geo. 2, c. 19, s. 19,⁵ that, where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*, *but the party grieved may recover satisfaction for the damage in a special action of [*223] trespass, or on the case,⁷ at the election of the plaintiff, and if he recover he shall have full costs. Where, in a very recent case, a

¹ See *Layton v. Hurry*, 15 L. J., Q. B. 244. As to pleading a tender of amends, where cattle are distrained damage feasant, see *Gulliver v. Cosens*, 1 C. B. 788; E. C. L. R. 50.

² 8 Rep. 291; *Wing. Max.*, p. 109; *Oxley v. Watts*, 1 T. R. 12; *Bagshaw v. Goward*, Cro. Jac. 147; *Aitkenhead v. Blades*, 5 Taunt. 198; E. C. L. R. 1.

³ Per Littledale, J., *Smith v. Egginton*, 7 Ad. & E. 176; E. C. L. R. 88; which was trespass against a sheriff for assault and false imprisonment.

⁴ *Aitkenhead v. Blades*, 5 Taunt. 198; E. C. L. R. 1.

⁵ 1 Smith, L. C. 65.

⁶ See also stat. 2 W. & M. c. 5; *Judgment*, *Thompson v. Wood*, 4 Q. B. 498; E. C. L. R. 45. As to what things may be distrained, see *Parsons v. Gingell*, 16 L. J., C. P. 227.

⁷ That is to say, the nature of the irregularity, and the peculiar circumstances of the case, must determine whether the proper form of action be trespass or case. *Winterbourne v. Morgan*, 11 East, 895, 401; *Etherton v. Popplewell*, 1 East, 189.

landlord distrained for rent, amongst other things, goods which were not distrainable in law, he was held to be a trespasser *ab initio* as to those particular goods only.¹

Also, by stat. 17 Geo. 2, c. 38, s. 8, where any distress shall be made for money justly due for the relief of the poor, the party distraining shall not be deemed a trespasser *ab initio*, on account of any act subsequently done by him; but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case, with full costs, unless tender of amends is made before action brought.

With respect to the second proposition laid down in the Six Carpenters' case, viz., that the abuse of authority or license given by the party will not make a person a trespasser *ab initio*, it should be observed, that such a license to do an act which *per se* would be a trespass, is, in some cases, implied by law. Thus, all the old authorities say, that, where a party places upon his own close the goods of another, he, by so doing, gives to the owner of them an implied license to enter for the purpose of recaption;² if a man takes my [*224] goods and carries them into his own land, *I may justify my entry into the said land to take my goods again, for they came there by his own act.³ So, a man may sometimes justify an entry on his neighbour's land to retake his own property, which has by accident been removed thither; as in the instance of fruit falling into the ground of another, or in that of a tree which is blown down, or, through decay, falls into the ground of a neighbour: in these cases, the owner of the fruit or of the tree may, by his plea, show the nature of the accident, and that he was not responsible for it, and thus justify the entry.⁴ This distinction must, however, be remarked, that, if the fruit or tree had fallen in the particular direction in consequence of the owner's act or negligence, he could not justify the entry.⁵

Another case also occurs, in which the law presumes a license. Thus, if A. wrongfully place goods in B.'s building, B. may lawfully go upon A.'s close adjoining the building, for the purpose of re-

¹ Harvey v. Pockock, 11 M. & W. 740. As to the effect of ratification by the landlord of the act of the bailiff, see Lewis v. Read, 13 M. & W. 884.

² Per Parke, B., Patrick v. Colerick, 3 M. & W. 485; 2 Roll. R. 565, pl. 54.

³ Vin. Abr., "Trespass," (1), a; cited 3 M. & W. 485.

⁴ Per Tindal, C. J., Anthony v. Haney, 8 Bing. 192; E. C. L. R. 21.

⁵ Millen v. Hawery, Latch. 13; Vin. Abr., "Trespass," H. a. 2, L. a; per Tindal, C. J., 8 Bing. 192; E. C. L. R. 21.

moving and depositing the goods there for A.'s use, that is to say, the law allows a person to enter into a plaintiff's own close, for the purpose of depositing there the plaintiff's own goods, which he had wrongfully placed on the premises of the defendant.¹ So, also, if a man finds cattle trespassing on his land; he may chase them out, and is not bound to distrain them damage feasant.²

Where, however, the goods are placed on the ground or *pre-mises of a third party, the law is different; for, if individuals [*225] were allowed to use private force as a remedy for private injuries, the public peace would be endangered, and, therefore, the right of recaption shall never be exerted where such exertion must occasion strife and bodily contention. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, unless he be feloniously stolen, but must have recourse to an action at law.³

Lastly, it was resolved in the principal case, that a mere *non-feasance* will not make a man a trespasser *ab initio*,⁴ and, with respect to the mode of pleading, it was held, that, if in an action of trespass authority be pleaded, the abuse of that authority, where it is such as to render the defendant a trespasser *ab initio*, may be replied.⁵ The proper course, therefore, is to reply the abuse specially, as the replication *de injuriâ* would, in such a case, be bad.⁶

*ACTUS NON FACIT REUM NISI MENS SIT REA. [*226]
(3 Inst. 107.)

The act itself does not make a man guilty unless his intention were so.

Having just seen that the law will, in some cases, imply the nature of a previous intention from a subsequent act, we propose to con-

¹ Vin. Abr., "Trespass," 516, pl. 17 (I. a); Roll. Abr. I., pl. 17, pl. 566; cited, Judgment, *Rea v. Sheward*, 2 M. & W. 426. (*)

² *Tyringham's case*, 4 Rep. 38, cited 2 M. & W. 426. (*)

³ 3 Bla. Com. 4; per Parke, B., 3 M. & W. 485; (*) per Tindal, C. J., and Park, J., 8 Bing. 192, 198; E. C. L. R. 21; 3 Steph. Com. 359; 2 Rolle, R. 55, 56, 208. It does not seem to be justifiable to enter on the land of another to search for goods stolen, without reason to suspect that they are there, 2 Roll. R. 565, pl. 15. See *Webb v. Beavan*, 7 Scott, N. R. 936.

⁴ 8 Rep. 290. See *Gardner v. Campbell*, 15 Johnson, R. (U. S.) 401.

⁵ 8 Rep. 290; *Gargrave v. Smith*, Salk. 221; *Bovey's case*, 1 Vent. 217; *Taylor v. Cole*, 3 T. R. 292.

⁶ 1 Smith, L. C. 66. See *Price v. Peek*, 1 Bing. N. C. 380; E. C. L. R. 27.

sider the maxim, *actus non facit reum nisi mens sit rea*, with reference principally to penal statutes, to the criminal law generally, and to civil proceedings for slander and libel; for, although the principle involved in it applies also in some cases to personal actions,¹ and has been much examined and illustrated on several recent occasions, yet we think it better to defer for the present all consideration of its meaning when so applied, and to restrict our remarks in this place to an examination of the important doctrine of *criminal intention*.

"It is," says Lord Kenyon, C. J.,² "a principle of natural justice and of our law, that the intention and the act must both concur to constitute the crime;" and the first observation which suggests itself in limitation of this principle is, that, whenever the law positively forbids a thing to be done, it becomes thereupon *ipso facto* illegal to do it wilfully, or, in some cases, even ignorantly, and consequently the doing it will be the subject-matter of an indictment, information, or other penal proceeding, *simpliciter*, and without the addition of any corrupt motive.³ For instance, it was recently held,⁴ that a dealer in *tobacco having in his possession adulterated tobacco, [*227] although ignorant of the adulteration, is liable under the stat. 5 & 6 Vict., c. 93, s. 3, to the penalties therein mentioned, and this decision merely affirms the principle established in previous cases,⁵ and shows that penalties may be incurred under a prohibitory statute, without any intention on the part of the individual offending against the statute law, to infringe its provisions.

In like manner, in an action against the defendant, for penalties under the stat. 3 & 4 Will. 4, c. 15, s. 2, "for representing a pantomime of which the plaintiff was the author, without his license, at a place of dramatic entertainment," it was held unnecessary to prove that the defendant knew that the plaintiff was the author; inasmuch as he had infringed property of the plaintiff protected by the act, he was, consequently, an offender within its terms.⁶

In general, however, the intention of the party at the time of com-

¹ See the maxim, *caveat emptor*, post.

² 7 T. R. 514.

³ Per Ashhurst, J., *Rex v. Sainsbury*, 4 T. R. 457; cited 2 Ad. & E. 612; E. C. L. R. 29; *Rex v. Jones*, Stra. 1146; per Lord Mansfield, C. J., *Rex v. Woodfall*, 5 Burr. 2667.

⁴ *Reg. v. Woodrow*, 15 M. & W. 404. (*)

⁵ *Attorney-General v. Lockwood*, 9 M. & W. 378, 401; (*) *Rex v. Marsh*, 4 D. & Ry. 261; E. C. L. R. 16.

⁶ *Lee v. Simpson*, 16 L. J., C. P. 105.

mitting an act charged as an offence is as necessary to be proved as any other fact laid in the indictment, though it may happen that the proof of intention consists in showing overt acts only, the reason in such cases being, that every man is *primâ facie* supposed to intend the necessary consequences of his own acts.¹ Thus, a prisoner was indicted for setting fire to a mill, with intent to injure and defraud the occupiers; and it was held, that, as such injury was a necessary consequence of setting fire to the mill, the *intent* to injure might be inferred.² So, in *order to constitute the crime of murder, [*228] which is always stated in the indictment to be committed with malice aforethought, it is not necessary to show that the prisoner had any enmity to the deceased; nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justification or excusable cause.³ And it is, as a general proposition, true, that if any act manifestly unlawful and dangerous be done deliberately, the mischievous intent will be presumed, unless the contrary be shown.⁴

It is also a rule laid down by Lord Mansfield, and which has been said to comprise all the principles of previous decisions,⁵ that, so long as an act rests in bare intention, it is not punishable by our law; but when an act is done, the law judges not only of the act itself, but of the intent with which it was done; and if the act be coupled with an unlawful and malicious intent, though in itself the act would otherwise have been innocent, yet, the intent being criminal, the act likewise becomes criminal and punishable.⁶

The first part of the above rule, we may remark, agrees with that laid down by Ulpian;⁷ *Cogitationis pœnam nemo patitur*; and by Montesquieu,⁸ who says, *Les lois ne se chargent de punir que les actions extérieures*, and must evidently be recognised, unless where the worst form of tyranny prevails. In the case of treason, however, the old maxim, *voluntas reputatur pro facto*⁹—the will is taken for the deed,—is said to apply to its full extent, by which, *how- [*229] ever, we must understand, that, if a treasonable design be entertained, and if any open or overt act be done towards effectu-

¹ Per Lord Campbell, 9 Cl. & Fin. 321.

² Rex v. Farrington, Russ. & Ry., Cr. Cas. 207; per Bayley, J., Rex v. Harvey, 2 B. & C. 264; E. C. L. R. 9.

³ Per Best, J., 2 B. & C. 268; E. C. L. R. 9.

⁴ 1 East, P. C. 281.

⁵ Per Lawrence, J., Rex v. Higgins, 2 East, 21.

⁶ Rex v. Scofield, cited 2 East, P. C. 1028.

⁷ D. 48, 19, 18.

⁸ Esp. des Lois, Bk. 12, c. 11.

⁹ 8 Inst. 5, 69.

ating such design; then, the mere imagination of the heart is, in contemplation of law, as guilty as it would have been if carried into actual execution; even in this case, however, the mere treasonable intention, to wit, the compassing and imagining the death of the sovereign, although strictly charged in the indictment as the substantive treason, cannot be brought within legal cognizance, unless accompanied by overt acts, which furnish the means and evidence whereby the intention may be made manifest.¹ For instance, although mere words spoken by an individual not relating to any treasonable act or design then in agitation, do not amount to treason, since nothing can be more equivocal and ambiguous than words,² yet words of advice and persuasion, and all consultations for the furtherance of traitorous plans, are certainly overt acts of treason; and if the words be set down in writing, this writing, as arguing more deliberate intention, has been held to be an overt act of treason, on the principle that *scribere est agere*,³ but even in this case the bare words are not the treason, but the deliberate act of writing them: the compassing and imagination, which is the purpose and intent of the heart, is manifest by the specific overt act.⁴

Likewise, with respect to misdemeanours, the rule is, that a bare criminal intent is not in itself indictable if merely expressed in words, gestures, or otherwise, without further proceeding to the crime to which it points.⁵ In *conspiracy, however, the conspiracy [*230] itself is the offence; and, provided the indictment show either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means, this will be sufficient, and whether anything has been done in pursuance of it or not is immaterial. In this case, moreover, although usual, it is not essentially necessary to set out the overt acts, that is to say, those acts which may have been done by any one or more of the conspirators, in order to effect the common purposes of the conspiracy; and proof of words used will support this charge, since they are *per se* an overt act sufficient to prove the conspiring.⁶

¹ 1 East, P. C. 58; stat. 7 & 8 Will. 3, c. 3, s. 8.

² 4 Bla. Com., by Stewart, 80; 1 Hawk., P. C., by Curwood, p. 14, n. (6).

³ 2 Rolle, R. 89.

⁴ *Supra*, (2).

⁵ Dick. Quart. Sess., by Serjt. Talfourd, 5th ed. 286. See per Lord Abinger, C. B., *Rex v. Meredith*, 8 C. & P. 590; E. C. L. R. 34.

⁶ Per Lord Denman, C. J., *Rex v. Seward*, 1 Ad. & E. 718; E. C. L. R. 28; per Bayley, J., *Rex v. Gill*, 2 B. & Ald. 205; E. C. L. R. 28; Dick. Quart. Sess., 5th ed. 384, 386; 9 Rep. 56, 57. See also *King v. Reg.*, 14 L. J., M. C. 172; S. C., 7

Having thus briefly observed, that, with some few peculiar exceptions, in order to constitute an offence punishable by law, a criminal intention must either be presumable, as where an unlawful act is done wilfully, or must be proved to have existed from the surrounding circumstances of the case, it remains to add, that, since the guilt of offending against any law whatsoever necessarily supposes wilful disobedience, such guilt can never justly be imputed to those who are either incapable of understanding the law, or of conforming themselves to it, and, consequently, that persons labouring under a natural disability of distinguishing between good and evil, by reason of their immature years, or of mental imbecility, are not punishable by any criminal proceeding for an act done during the season of incapacity;¹ the maxims of our own, as of the civil law, upon *this subject being, *In omnibus poenalibus judiciis et etati et imprudentia* [*231] *succurritur,*² and *Furiosi nulla voluntas est.*³ With regard to acts in violation of the law, an allowance is made in respect of immaturity of years and judgment; and one who is devoid of reason is not punishable, because he can have no criminal intention.

In two recent cases, which were actions upon policies of life insurance, the doctrine relative to criminal intention was much considered. In the first of these, a proviso in the policy declared, that the same should be void, *inter alia*, in case the assured "should die by his own hands;" and the learned judge, who presided at the trial of the cause, left it to the jury to say, whether, at the time of committing the act which immediately occasioned death, the deceased was so far deprived of his reason as to be incapable of judging between right and wrong; and this question was answered by the jury in the negative, a further question being, by assent of parties, reserved for the Court, viz., whether the proviso included only *criminal* self-destruction. After argument in banco, three judges of the Court of Common Pleas held, in opposition to the opinion of the Chief Justice, that the words of the proviso above stated were large enough, according to their ordinary acceptation, to include *intentional* acts of self-destruction, whether criminal or not, if the deceased was labouring under no delusion as to the physical conse-

Q. B. 782; E. C. L. R. 58. Lord Denman's judgment in *O'Connell v. Reg.*, by Leahy, p. 19; *Gregory v. Duke of Brunswick*, 6 M. & Gr. 205, 953; E. C. L. R. 46; S. C. (in error), 16 L. J., C. P. 85.

¹ Hawk., P. C., by Curwood, Book 1, c. 1; 4 Bla. Com. 24; ante, p. 11.

² D. 50, 17, 108.

³ D. 50, 17, 5; D. 1, 18, 13, § 1; ante, p. 13.

quences of the act which he was committing, and if the act itself was a voluntary and wilful act; and they thought that the question, "whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose," was not relevant [*232] to the inquiry, further than as it might *help to illustrate the extent of his capacity to understand the physical character of the act itself.¹ In a subsequent case,² which came, by bill of exceptions, before the Court of Exchequer Chamber, the proviso was, that the policy should be void if the insured should "commit suicide, or die by duelling or the hands of justice;" and the majority of the Court held that the word "suicide" must be interpreted in accordance with its ordinary meaning, and must be taken to include every act of self-destruction, provided it were the intentional act of the party, knowing at the time the probable consequences of what he was about to do. The above decisions are obviously of much importance with reference to the law of life insurance, and show in what manner and in what qualified sense the maxim, *actus non facit reum nisi mens sit rea*, must be understood when applied to this branch of the law.

With regard to persons of immature years, the rule is, that no infant within the age of seven years can be guilty of felony, or be punished for any capital offence; for within that age an infant is, by presumption of law, *doli incapax*, and cannot be endowed with any discretion, and against this presumption no averment shall be received.³ This legal incapacity, however, ceases when the infant attains the age of fourteen years, after which period his act becomes subject to the same rule of construction as that of any other person.⁴

Between the ages of seven and fourteen years, an infant is deemed *prima facie* to be *doli incapax*; but in this case the maxim applies, [*233] *malitia supplet etatem*⁵—malice *(which is here used in its legal sense, and means the doing of a wrongful act intentionally, without just cause or excuse,⁶) supplies the want of mature

¹ *Borradaile v. Hunter*, 5 Scott, N. R. 418; *Dormay v. Borradaile*, 16 L. J., Chanc. 387.

² *Clift v. Schwabe*, 8 C. B. 437; E. C. L. R. 54.

³ 4 Bla. Com. 23; 1 Russ. on Crimes, c. 1.

⁴ Arch. Cr. Pl., 8th ed. 11.

⁵ *Dyer*, 104, b.

⁶ *Argument, Mitchell v. Jenkins*, 5 B. & Ad. 590; E. C. L. R. 27. "Malice, in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another;" per Lord Campbell, 9 Cl. & Fin. 321. See also, per Pollock, C. B., *Sherwin v. Swindall*, 12 M. & W. 787, 788. (*)

years. Accordingly, at the age above mentioned, the ordinary legal presumption may be rebutted by strong and pregnant evidence of a mischievous discretion; for the capacity of doing ill or contracting guilt is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. In all such cases, however, the evidence of malice ought to be strong and clear beyond all doubt and contradiction.¹ And two questions ought, moreover, to be left for the consideration of the jury: first, whether the accused committed the offence; and secondly, whether, at the time, he had a guilty knowledge that he was doing wrong.² In the case of rape, we may add, it is a presumption of law not admitting of proof to the contrary, that within the age of fourteen years this particular offence cannot, by reason of physical inability, be committed.³

A libel may be properly defined to be "that which is printed *and published, calculated to injure the character of another, by bringing him into hatred, ridicule, or contempt."⁴ And [^{*234}] again, "everything printed or written, which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been; and, under the general issue, the defendant may deny the publication of the alleged libel, or show that it was not of an injurious nature, or show that it was published on some lawful occasion."⁵

With respect to libel and slander, the rule, as deduced from an extensive class of cases, is, that, where an occasion exists, which, if fairly acted upon, furnishes a legal protection to the party who

¹ 4 Bla. Com. 24; Arch., Cr. Pl., 8th ed. 11.

² Rex v. Owen, 4 C. & P. 236; E. C. L. R. 19. An infant, or one *non compos*, is liable *civily* for a tortious act, as a trespass; see per Lord Kenyon, C. J., Jennings v. Rundall, 8 T. R. 837; Johnson v. Pye, 1 Lev. 169; per Curiam, Weaver v. Ward, Hobart, 184; Bac. Max., reg. 7, *ad finem*.

³ 4 Bla. Com. 212; Reg. v. Philips, 8 C. & P. 786; E. C. L. R. 34; Reg. v. Jordan, 9 C. & P. 118; E. C. L. R. 38; Reg. v. Brimilow, Id. 366. And this presumption is not affected by stat. 9 Geo. 4, c. 31, ss. 16, 17. But an infant under fourteen years of age may be a principal in the second degree. (R. v. Eldershaw, 8 C. & P. 396); E. C. L. R. 14.

⁴ Per Parke, B., Gathercole v. Miall, 15 L. J., Exch. 191; Digby v. Thompson, 4 B. & Ad. 821; E. C. L. R. 24; Bloodworth v. Gray, 8 Scott, N. B. 9; Pemberton v. Colls, 16 L. J., Q. B. 408.

⁵ Per Parke, B., O'Brien v. Clement, 15 M. & W. 437; (*) O'Brien v. Bryant, 15 M. & W. 168. (*) As to pleadings under the stat. 6 & 7 Vict. c. 96, see O'Brien v. Clement, *supra*; Chadwick v. Herapath, 16 L. J., C. P. 104.

makes the communication complained of, the *actual intention* of the party affords a boundary of legal liability. If he had that legitimate object in view which the occasion supplies, he is neither civilly nor criminally amenable; if, on the contrary, he used the occasion as a cloak for maliciousness, it can afford him no protection.¹ It must however be observed, that, as the honesty and integrity with which a communication of hurtful tendency is made cannot exempt from civil liability, unless it be coupled with an occasion recognised by the law, so responsibility will immediately attach, if the mode or nature of the communication in any respect exceeds that which the legal occasion warrants.

If, for instance, a man received a letter, informing him that his neighbour's *house would be plundered or burnt on the night [*235] following by A. and B., which he himself believed, and had reason to believe, to be true, he would be justified in showing that letter to the owner of the house, though it should turn out to be a false accusation of A. and B.² So, if A. knew that B. was about to employ an agent, whom he (A.) suspected to be a man of unprincipled character, A. would be justified in communicating his knowledge to B., although he was in fact mistaken, but he would not be justified in doing so in the hearing of other persons who were not interested in the fact, for the occasion warrants a communication to B. only, and, as to the rest, it is mere excess not warranted by the occasion.³ In like manner, a character of a servant bona fide given is a privileged communication,⁴ and in giving it, bona fides is to be presumed, and, even though the statement be untrue in fact the master will be held justified by the occasion in making that statement, unless it can be shown to have proceeded from a malicious mind, one proof of which may be, that it is false to the knowledge of the party making it.⁵ So, a comment upon a literary production,

¹ 1 Stark., Sland. and Lib., 2d ed., Prel. Dis., p. lxxxvi. See per Parke, B., *Parmiter v. Coupland*, 6 M. & W. 108. (*)

² Per Tindal, C. J., 2 C. B. 596; E. C. L. R. 52.

³ 1 Stark., Sland. and Lib. 2d ed., Prel. Dis., p. lxxxvii. See *Padmore v. Lawrence*, 11 Ad. & E. 380; E. C. L. R. 39; *Toogood v. Spyring*, 1 Cr., M. & R. 181; adopted by *Coltman, J.*, 2 C. B. 599; E. C. L. R. 52; and *Creswell, J.*, Id. 603; *Kine v. Sewell*, 8 M. & W. 297; (*) *Goslin v. Corry*, 8 Scott, N. R. 21.

⁴ See *Affleck v. Child*, 9 B. & C. 403, 406; E. C. L. R. 17, recognising the rule laid down by Lord Mansfield, C. J., in *Edmunston v. Stevenson*, cited Bull., N. P. 8; *Pattison v. Jones*, 8 B. & C. 578; E. C. L. R. 15.

⁵ *Judgment, Fountain v. Boodle*, 8 Q. B. 11, 12; E. C. L. R. 43; *Blagg v. Sturt*, 16 L. J., Q. B. 39. The subject of privileged communications was much considered

exposing its follies *and errors, and holding up the author to ridicule, will not be deemed a libel, provided such comment [*236] does not exceed the limits of fair and candid criticism, by attacking the character of the writer unconnected with his publication; and a comment of this description, subject to the above proviso, every one has a right to publish, although the author may suffer a loss for it. But, if a person, under the pretence of criticising a literary work, defames the private character of the author, and, instead of writing in the spirit and for the purpose of fair and candid discussion, travels into collateral matter, and introduces facts not stated in the work, accompanied with injurious comments upon them, such person is a libeller, and liable to an action.¹

In the case of an author just supposed, or of an actor, whose performances are, by the acknowledged usages of society, held out to public criticism, and likewise in that of a minister of the Crown, or a judge, or any other public functionary, it seems clear that comments, bona fide and honestly made upon the conduct of the individual thus before the public, are perfectly justifiable; and if an injury be sustained in consequence of such criticism, it is an injury for which the law affords no redress by damages. It is, indeed, not unfrequently difficult to say how far the criticism in question may apply to the *public*, and how far to the *private* conduct of the individual, and yet this distinction is highly important, since much greater latitude is allowed to comments upon the former than upon the latter, and since remarks perfectly unobjectionable in the one case might be unjustifiable and libellous in the other. Of course no general rule upon such a subject can *be stated, nor can a difference of opinion amongst the highest authorities, with [*237] respect to a distinction so subtle, excite surprise.²

With respect to the evidence of intention in an action for libel, the rule is, that a mere wicked and mischievous intention cannot

in *Coxhead v. Richards*, 2 C. B. 569; *E. C. L. R.* 52; *Blackham v. Pugh*, 2 C. B. 611; and *Bennett v. Deacon*, *Id.* 628; where the Court of Common Pleas were divided in opinion upon the question whether bona fides and the absence of malice affords a sufficient justification for making a false statement to the prejudice of another party. See also *Griffiths v. Lewis*, 7 Q. B. 61; *E. C. L. R.* 58.

¹ *Carr v. Hood*, 1 Camp. 355, n., recognised *Green v. Chapman*, 4 Bing. N. C. 92; *E. C. L. R.* 33; *Thompson v. Shackell*, M. & M. 187; *E. C. L. R.* 22; *Soane v. Knight*, M. & M. 74; *E. C. L. R.* 22.

² See the opinions of the Court of Exchequer in *Gathercole v. Miall*, 15 L. J., Exch. 179; *James v. Brook*, 16 L. J., Q. B. 17.

make matter libellous which does not come within the definition of a libel already given; but, if libellous matter be published under circumstances which do not constitute a legal justification, and injury ensue, the malicious intention to injure will be presumed, according to the principle stated at the commencement of these remarks, that every man must be presumed to intend the natural and ordinary consequences of his own act.¹ In such a case, however, the spirit and *quo animo* of the party publishing the libel are fit to be considered by the jury in estimating the amount of injury inflicted on the plaintiff.*

So, in ordinary actions for slander, malice in law may be inferred from the act of publishing the slanderous matter, such act itself being wrong and intentional, and without just cause or excuse, but in actions for slander *prima facie* excusable, on account of the cause of publishing the slanderous matter, malice in fact must be proved;² and, in an action for slander of title, the plaintiff must give evidence both that the statement was false and that it was malicious, [*238] *and although want of probable cause may justify a jury in inferring malice, yet, it is clear that the Court will not draw such an inference from the fact, that defendant has put a wrong construction on a complicated act of Parliament.⁴

We shall conclude this subject of criminal intention by referring briefly to two rules relative thereto, which are laid down by Lord Bacon in his collection of maxims. The first is—*In criminalibus sufficit generalis malitia intentionis cum facto parvis gradibus*. “All crimes,” he remarks, “have their conception in a corrupt intent, and have their consummation and issuing in some particular fact, which, though it be not the fact at which the intention of the malefactor levelled, yet the law giveth him no advantage of the error, if another particular ensue of as high a nature.” Thus, if a poisoned apple be

¹ Fisher v. Clement, 10 B. & C. 472; E. C. L. R. 21; Haire v. Wilson, 9 B. & C. 648; E. C. L. R. 17; Parmiter v. Coupland, 6 M. & W. 105; (*) recognised Baylis v. Lawrence, 8 P. & D. 526; per Best, C. J., Levi v. Milne, 4 Bing. 199; E. C. L. R. 18-15. See also Hearne v. Stowell, 6 Jur. 458; Heming v. Power, Id. 858.

² 1 Stark., Sland. and Lib., 2d ed., Prel. Dis. p. cxxxviii., cxxxix.; 2 Id. 242, n. (b) 322, 323. See Pearson v. Lemaitre, 6 Scott, N. R. 607; Wilson v. Robinson, 7 Q. B. 68; E. C. L. R. 58.

³ Padmore v. Lawrence, 11 Ad. & E. 380; E. C. L. R. 39; Toogood v. Spyring, 1 Cr., M. & R. 181; (*) Kine v. Sewell, 3 M. & W. 297; (*) Griffiths v. Lewis, 7 Q. B. 61; E. C. L. R. 58. See Coxhead v. Richards, ante, 285 (5).

⁴ Pater v. Baker, 16 L. J., C. P. 124, recognising Pitt v. Donovan, 1 M. & S. 689; E. C. L. R. 28.

laid in a certain place, with a view to poison A., and B. comes by chance and eats it, this amounts nevertheless to murder, although the malicious intention of the person who placed the apple, was directed against A., and not against B.¹

The second of Lord Bacon's rules above adverted to is as follows:—*Excusat aut extenuat delictum in capitalibus quod non operatur idem in civilibus.* "In capital cases, *in favorum vitæ*, the law will not punish in so high a degree, except the malice of the will and intention appear; but in civil trespasses, and injuries that are of an inferior nature, the law doth rather consider the damage of the party wronged than the malice of him that was the wrong-doer."² For instance, the law makes a difference between *killing a man upon malice aforethought, and upon present heat and provocation [^{*239}] *in malificiis voluntas spectatur non exitus*;³ but, if I slander a man, and thereby damnify him in his name and credit, it is not material whether I do so upon sudden cholera, or of set malice; but I shall be, in either case, answerable for damages in an action on the case.⁴ For there is a distinction in this respect, which will be further illustrated hereafter, between answering *civiliter et criminaliter* for acts injurious to others: in the latter case, the maxim applies, *actus non facit reum nisi mens sit rea*; but it is otherwise in civil actions, where the intent is immaterial,⁵ if the act done be injurious to another; of which rule a familiar instance occurs in the liability of a sheriff, who, by mistake, seizes the goods of the wrong party under a writ of *fi. fa.*⁶

One instance, in which this principle *in favorum vitæ* was recently considered, may be here noticed, since it involves a point of considerable importance, and has attracted a corresponding degree of

¹ Bac. Max., reg. 15; D. 47, 10, 18, § 3; Wood, Inst. 307; Rex v. Oneby, 2 L. Raym. 1489.

² D. 48, 8, 14.

³ Bac. Max., reg. 7.

⁴ Bac. Max., reg. 7.

⁵ As in trespass for false arrest; for in this form of action, if the act of arrest is in itself illegal, no averment of malice is necessary; but in case for suing out a writ for more than is due, according to the precedents and to the principles of distinction between actions of trespass and on the case, malice must be alleged; per Littledale, J., Saxon v. Castle, 6 Ad. & E. 352; E. C. L. B. 83; adopted De Medina v. Grove, 15 L. J., Q. B. 287; as to a malicious arrest under stat. 1 & 2 Vict. c. 110, see Daniels v. Fielding, 16 M. & W. 200; (*) Bryant v. Bobbett, Exch., 11 Jur. 1021.

⁶ Per Lord Kenyon, C. J., Haycraft v. Creasy, 2 East, 104. As to the liability of the sheriff, see Jarman v. Hooper, 7 Scott, N. R. 668; Sanderson v. Baker, 2 W. Bla. 382; Ackworth v. Kemp, 1 Dougl. 41; Magnay v. Burt (in error), 5 Q. B. 381; E. C. L. B. 48.

So for as to sustain the action, but damages will be increased for the malice.

attention. It was decided by the House of Lords, on writ of error from the Court of Queen's Bench in Ireland, that the privilege of peremptory challenge on the part of the prisoner extends to all felonies, whether capital or not; and it was observed by *Mr. [*240] J. Wightman (delivering his opinion on a question proposed for the consideration of the judges, and commenting on the position, that the privilege referred to was allowed only *in favorum vitæ*, and did not extend to cases in which the punishment is not capital), that it would seem that the origin of the privilege in felony may have been the capital punishment usually incident to that quality of crime; but that the privilege was, at all events, annexed to the quality of crime called felony, and continued so annexed in practice in England (at least down to the time when the question was raised), in all cases of felony, whether the punishment was capital or not.¹

As a fitting conclusion to our remarks upon the subject of criminal intention, and the maxim of Lord Bacon lastly above mentioned, we may observe, in the words of a distinguished judge, that, in criminal cases generally, and especially in cases of larceny, "the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary, but the same must be left to the due and attentive consideration of the judge and jury, wherein the best rule is, *in dubiis* rather to incline to acquittal than to conviction."²

*Tutius semper est errare in acquietando quam in puniendo ex parte misericordie quam ex parte justitie.*³

[*241] *NEMO DEBET BIS VEXARI PRO UNA ET EADEM CAUSA.

(5 Rep. 61.)

*It is a rule of law, that a man shall not be twice vexed for one and the same cause.*⁴

According to the Roman law as administered by the prætors, an action might be defended in any of the following modes:⁵ 1. By a simple denial or traverse of the facts alleged as the ground of action; 2. By pleading new facts which constituted *ipso jure* a bar to the plaintiff's claim, although such claim might, in the first instance, have

¹ Gray v. Reg., 11 Cl. & Fin. 427.

² 1 Hale, P. C. 509; *Quod dubitas ne feceris*, especially in cases of life, 1 Hale, P. C. 300.

³ 2 Hale, P. C. 290.

⁴ 5 Rep. 61.

⁵ Mackeld., Civ. Law, 207.

been well founded, as payment or a release; 3. By showing such facts as might induce the prætor, on equitable grounds, to declare certain defences admissible, the effect of which, if established, would be not, indeed, to destroy the action *ipso jure*, but to render it ineffectual by means of the exception thus specially prescribed by the prætor for the consideration of the judge, to whose final decision the action might be referred. *Exceptio* is, therefore, defined to be, *quasi quædam exclusio quæ opponi actioni cujusque rei solet ad elidendum id quod in intentionem consentionemve deductum est,*¹ and, according to Paulus, "*Exceptio*" *est conditio quæ modo eximit reum damnatione modo minuit condemnationem.*²

In the class of exceptions just adverted to, was included the *exceptio rei judicatæ*, from which the plea of judgment recovered in our own law may be presumed to have derived its origin.³ The *res judicata* was, in fact, a result of the definitive sentence, or decree of the judge, and was binding upon, and in general unimpeachable by, the litigating parties;⁴ *and this was expressed by the well-known [*242] *maxim, res judicata pro veritate accipitur,*⁵ which must, however, be understood to apply only when the same question, which has been once judicially decided, was again raised between the same parties, the rule being, *exceptionem rei judicatæ obstare quoties eadem questio inter easdem personas revocatur.*⁶ The mode in which this particular exception was, in practice, made available under the Roman law may thus be illustrated. A. having purchased a chattel from B., who had, in fact, no title to it, on being sued by the rightful owner, obtains a judicial decision in his favour. A., however, subsequently loses the chattel, which comes into the hands of the true owner, against whom he, therefore, brings his action; and to a plea denying A.'s title, may be successfully replied the *res judicata*, or prior judgment, between the same parties.⁷ The *exceptiones*, then, which were unknown to the old Roman law, were originally introduced in order to mitigate its rigour by letting in defences which were not admissible or valid *stricti juris*; by long usage, however, these exceptions became established in such a manner as to be recognised by the *jus civile*, and, ceasing to depend merely upon the will of the prætor, became in some measure compulsory upon him; there

¹ Brisson. (*ed. curâ Heinec.*) ad verb. Res.

² D. 44, 1, 22, pr.

⁴ Brisson. ad verb. Res. Pothier, ad D. 42, 1, pr.

⁶ D. 44, 2, 8. Pothier, ad D. 44, 1; 1, pr.

³ See 1 Cl. & Fin. 435.

⁵ D. 50, 17, 207.

⁷ D. 44, 2, 24.

is, therefore, a wide distinction between the meaning of the word "*exceptio*," as used in the prætorian and in the civil law; and by modern writers an "exception" is often employed as synonymous with "defence," and is made to include any matter which can be set up by the defendant in opposition to the plaintiff's claim.¹

[*243] *In our own law, the plea of judgment recovered at once suggests itself as analogous to the "*exceptio rei judicatæ*" above mentioned, and we shall now briefly consider under what circumstances, and to what extent, the general rule applies, that "a man shall not be twice vexed for the same cause;" and first, we may remark, in the words of Lord Kenyon, that, "if an action be brought, and the merits of the question be discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although, perhaps, some objection or argument might have been urged upon the first trial which would have led to a different judgment." In such a case, the matter in dispute having passed *in rem judicatam*, the former decision is conclusive between the parties, if either attempts, by commencing another action, to reopen the question.²

"After a recovery by process of law," says the same learned judge, "there must be an end of litigation; if it were otherwise there would be no security for any person,"³ and great oppression might be done under colour and pretence of law.⁴ To unravel the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which the law has referred it, would be extremely dangerous; it is better for the general administration of justice that an inconvenience should sometimes fall upon an individual, than that the whole system of law should be overturned and endless uncertainty be introduced.⁵

[*244] *The general rule, then, both at law and in equity, is to refuse a second trial where the propriety of the verdict in the former is not impeached as against law or evidence, though there be material evidence for the party against whom the verdict has passed which was not adduced, unless it be shown to have been discovered after the trial, or unless the verdict has been obtained by fraud or

¹ Mackeld., Civ. Law, 209, note.

² Per Lord Kenyon, C. J., *Greathead v. Bromley*, 7 T. R. 456; Lord Bagot v. Williams, 3 B. & C. 235; E. C. L. R. 10.

³ 7 T. R. 269; Co. Litt. 303, b.

⁴ 6 Rep. 9.

⁵ *Judgment, Reg. v. Justices of West Riding*, 1 Q. B. 631; *Sohumann v. Weatherhead*, 1 East, 541; Vin. Abr., "Judgment," (M. a.)

surprise.¹ If mistake in practice or inadvertence furnished reasons for a new trial, it would encourage litigation and reward ignorance and carelessness at the expense of the other party;² and, therefore, our law in such cases wisely acts upon the maxim, *interest reipublice ut sit finis litium*³—it is for the public good that there be an end to litigation; and if there be any one principle of law settled beyond all question, it is this, that whensoever a cause of action, in the language of the law, *transit in rem judicatam*, and the judgment thereupon remains in full force and unreversed, the original cause of action is merged, and gone for ever.⁴

In *Marriott v. Hampton*,⁵ which is strikingly illustrative of the preceding remarks, the facts were as under: A. sued B. for the price of goods sold, for which B. had before paid and obtained a receipt. Not being able to find the receipt, and having no other proof of the payment, B. was obliged to submit to pay the money again; but having afterwards found the missing document,⁶ he thereupon brought an action against A. for money had and received, to recover back the amount of the sum the payment of which had been thus wrongfully enforced. But Lord Kenyon was of opinion *at the trial, that, after the money had been paid under legal process, it could not be recovered back again; and this opinion [*245] was fully confirmed by the court in banc.⁷ The same principle has likewise been held to apply where the payment was made without knowledge, or reasonable means of knowledge, of the facts on which the original demand proceeded;⁸ and it may be laid down as a general rule, that, where money has been paid by one party to the other after bona fide legal proceedings have been actually commenced, which money is afterwards discovered not to have been really due, the party who has paid will nevertheless be precluded from recovering it as money had and received to his use.⁹ In accordance, also, with

¹ See 1 Ves. jun. 134.

² See per Spencer, J., 1 Johnson, R. (U. S.) 555.

³ 6 Rep. 9.

3 Gratton.

⁴ 11 Peters, R. (U. S.) 100, 101. See also 18 Johns. R. (U. S.) 463.

⁵ 7 T. R. 269. See *Smith v. Monteith*, 13 M. & W. 427. (*) ⁶ See D. 44, 2, 27.

⁷ *Marriott v. Hampton*, supra.

⁸ *Hamlet v. Richardson*, 9 Bing. 644, 645; E. C. L. R. 23.

⁹ *Marriott v. Hampton*, 7 T. R. 269; per Patteson, J., *Duke de Cadaval v. Collins*, 4 Ad. & E. 866; E. C. L. R. 81; *Judgment, Wilson v. Ray*, 10 Ad. & E. 88; E. C. L. R. 37; *Brown v. M'Kinally*, 1 Esp. 279; per Holroyd, J., *Milnes v. Duncan*, 6 B. & C. 679; E. C. L. R. 13; *Moses v. Macfarlane*, 2 Burr. 1009, must be considered as overruled, see per Eyre, C. J., *Phillips v. Hunter*, 2 H. Bla. 414; per

the same principle, it has been held that *assumpsit* will not lie by the party against whom a *fi. fa.* has issued on a subsisting judgment to recover the sum levied under it, on the ground that such judgment was signed on a warrant of attorney, which was obtained by fraud or duress.¹

Having thus premised that a court of law will not, except under peculiar circumstances, reopen a question which has once been judicially decided between the parties,² *we may remark that the [*246] maxim of the civil law already cited—*res judicata pro veritate accipitur*—is generally recognised and applied by our own.³ “The authorities,” as observed by Lord Tenterden, C. J.,⁴ “are clear, that a party cannot be received to aver as error in fact a matter contrary to the record,” and “a record imports such absolute verity that no person against whom it is admissible shall be allowed to aver against it,”⁵ and this principle is invariably acted upon by our courts.⁶ It is necessary, however, in order to comprehend the full bearing and importance of the above rule, that we should consider more particularly in what manner, and between what parties, a judgment recovered may be rendered operative as a bar to legal proceedings; and upon this subject the Duchess of Kingston’s case⁷ is usually cited as the leading authority. “From the variety of cases,” there says Lord Chief Justice De Grey, “relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter directly in question in another court. Secondly, that the judgment of a court of exclusive jurisdiction directly upon the point is, in like manner, conclusive, upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent

Heath, J., *Brisbane v. Dacres*, 5 Taunt. 160; E. C. L. R. 1. *Cobden v. Kendrick*, 4 T. R. 482, if it can be supported at all, can only be so on the ground of fraud in the defendant; see judgment, 9 Bing. 647; E. C. L. R. 23; 2 Smith, L. C. 240.

¹ *De Medina v. Grove*, 15 L. J., Q. B. 287.

² It must be taken as a positive rule, that when parties consent to withdraw a juror, no future action can be brought for the same cause: per Pollock, C. B., *Gibbs v. Ralph*, 14 M. & W. 805. (*)

³ See per Knight Bruce, V. C., 1 Y. & Coll. 588, 589.

⁴ *Judgment, Rex v. Carlile*, 2 B. & Ad. 867; E. C. L. R. 22. ⁵ *Ib.* 1 Inst. 260.

⁶ *Reed v. Jackson*, 1 East, 855.

⁷ 20 Howell, St. Tr. 538.

nor exclusive jurisdiction is evidence of any matter which came collaterally *in question, though within their jurisdiction, nor [*247] of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

In connexion with the above passage, and with the subject now under consideration, we may observe, 1st, that, although a judgment recovered, if for the same cause of action, and between parties substantially, the same, will be admissible in evidence, yet, in order to render it *conclusive* as an estoppel, it must be so pleaded.¹

In the recent case of *Stewart v. Todd*,² the effect of a plea of judgment recovered for a less sum than that sued for in the action then before the Court, was much considered. That was an action of debt on simple contract for 400*l.*; the defendants pleaded as to 43*l.* 6*s.* 9*d.* payment, and as to the residue that plaintiffs impleaded defendant for the same in an action on promises, and recovered 314*l.* 8*s.*, as well for their damages in the said action as for their costs. The replication alleged that the residue of the said causes of action in the declaration mentioned, were not the causes of action in respect of which the judgment was recovered; and on the issue thus raised the jury found for the defendants. It was held by the Court of Exchequer Chamber that the above plea was good after verdict, and that it amounted to an ordinary plea of judgment recovered.

*2dly. We may remark, that a judgment recovered will be admissible as evidence, not only between the same parties, if [*248] suing in the same right,³ but likewise between their privies, whether in blood, law, or estate;⁴ and that a judgment will, moreover, be

¹ *Doe v. Huddart*, 2 Cr., M. & R. 316; (*) per Parke, B., *Doe d. Strode v. Seaton*, Id. 731; *Doe v. Wright*, 10 Ad. & E. 768; E. C. L. R. 37. The proper requisites to a plea of judgment recovered are thus set forth by Vinnius, lib. 4, title 18, s. 5:—*Hæc autem exceptio (rei judicatæ) non aliter genti obstat quam si eadem quæstio inter easdem personas revocetur; itaque ita demum nocet si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa petendi, eademque conditio personarum*; cited, argument, *Ricardo v. Garcias*, 12 Cl. & Fin. 368, where a foreign judgment was pleaded in answer to a bill in equity.

² (In error), 16 L. J., Q. B. 327.

³ *Outram v. Morewood*, 3 East, 346, 365; Com. Dig., Estoppel (C.), 5 Rep. 32 b.

⁴ *Trevivan v. Lawrence*, Selk. 276. As to this subject the reader is referred to 2 Phill. Evid. 9th ed. 9 et seq.; 2 Smith, L. C. 2d ed. 442; *Earl of Carnarvon v. Villebois*, 13 M. & W. 318; (*) *Dawson v. Gregory*, 7 Q. B. 756; E. C. L. R. 53.

evidence between those who, although not nominally, are really and substantially the same parties.¹

In the recent case of *King v. Hoare*,² it was held, that a judgment, without satisfaction recovered against one of the two joint debtors, may be pleaded in bar of an action against the other contracting party, and the Court observed, that, "If there be a breach of contract or wrong done, or any other cause of action, by one against another, and judgment recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage, and it would be useless and vexatious to subject the defendant to another suit, for the purpose of obtaining the same result. Hence the legal maxim *transit in rem judicatam*—the cause of action is changed into matter of record,—which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but *one* [*249] *cause of action*, whether it be against a single person *or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action being single, cannot afterwards be divided into two." This rule, however, does not apply in the case of a joint and several contract, for there the instrument sued on comprises the joint contract of all and the several contracts of each of the contracting parties, and gives different remedies to the person with whom the contract has been entered into.³ Moreover, a plea in abatement has been held bad, which stated, that the debt sued for was contracted by the defendant jointly with one A. B., and that an action for recovery of the same debt was pending against the said A. B.⁴

3dly. We may observe, that a judgment recovered will be evidence whenever the cause of action is the same,⁵ although the form of the

¹ *Kinnersley v. Cope*, 2 Dougl. 517, commented on, 3 East, 366, and recognised *Simpson v. Pickering*, 1 Cr., M. & R. 529; (*) *Strutt v. Bovington*, 5 Esp. 56; *Hancock v. Welsh*, 1 Stark., N. P. C. 347; E. C. L. R. 2.

² 18 M. & W. 494. (*) See *Holmes v. Newlands*, 5 Q. B. 634; E. C. L. R. 48.

³ Judgment, 18 M. & W. 504, 505, (*) citing *Ward v. Johnson*, 18 Mass. Rep. (U. S.) 148.

⁴ *Henry v. Goldney*, 15 M. & W. 494. (*) See *Gell v. Viscount Curzon*, 16 L. J., C. P. 172.

⁵ Per cur. *Williams v. Thacker*, 1 B. & B. 514; E. C. L. R. 5; cited, argument, *Hopkins v. Freeman*, 18 M. & W. 372. (*)

second action be different from that of the first;¹ and, therefore, a recovery of damages in trover will vest the property in the chattels sued for in the defendant, and will be a bar to an action of trespass for the same thing.² And, as observed in a recent case, the plaintiff in trover, where no special damage is alleged, is not entitled to damages beyond the value of the chattel he has lost; and after he has once received the full value, he is not entitled to further compensation in respect of the *same loss; and by a former recovery in trover, and payment of the damages, the plaintiff's right [*250] of property is barred, and the property becomes vested in the defendant in that action as against the plaintiff.³ In like manner, if A. in trespass against B. for taking a horse recovers damages, by this recovery and execution done thereon, the property in the horse is vested in B.; according to the maxim, *solutio pretii emptionis loco habetur*.⁴

If, however, it be doubtful whether the second action is brought *pro eadem causa*, it is a proper test to consider whether the same evidence would sustain both actions,⁵ and what was the particular point or matter determined in the former action; for a judgment in each species of action is final only for its own purpose and object, and *quoad* the subject-matter adjudicated upon, and no further; for instance, a judgment for the plaintiff in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed, but, in a subsequent ejectment between the same parties, would not be conclusive with respect to the general right of property in the *locus in quo*.⁶

To a declaration in debt on an indenture, whereby the defendant covenanted to pay the plaintiff £600, with interest, on a certain day, the defendant pleaded, by way of estoppel, that the plaintiff had impleaded him in a former action of debt on bond conditioned in the penal sum of £1200 for payment of £600 and interest, being the same principal sum and interest as were secured to the plaintiff

¹ See per Buller, J., *Foster v. Allanson*, 2 T. R. 483. *Bona fides non patitur ut bis idem exigatur*, D. 50, 17, 57.

² Per Lord Hardwicke, C. J., *Smith v. Gibson*, Cas. temp. Hardw. 819; *Moor v. Watts*, 1 Lord Raym. 614; 2 Kent. Com. 4th ed. 388 (b).

³ *Cooper v. Shepherd*, 3 C. B. 266; E. C. L. R. 54.

⁴ *Adams v. Broughton*, Andr. 18; Jenk. Cent. 4th cent. cas. 88; judgment, 3 C. B. 272; E. C. L. R. 54.

⁵ See *Hadley v. Green*, 2 Tyrw. 890, and the cases 2 Phill. Ev. 9th ed. 18 et seq.; *Wiat v. Essington*, 2 Lord Raym. 1410.

⁶ See the judgment, 3 East, 357.

[*251] *by an indenture of even date with the bond, in which action the defendant pleaded an usurious agreement made between the plaintiff and himself, and averred that the bond was given in pursuance of such agreement. The plea then averred that the issue raised by a traverse of this last-mentioned allegation was found for the defendant, and alleged the identity of the indenture in the present and in the former action, as well as of the £600 and interest so sought to be recovered. The Court, on demurrer, held the plea to be no estoppel, on the ground that the point in issue before them was not raised at all in the former action, wherein the fact of usury had been *incidentally* taken for granted, and that otherwise the plaintiff would be deemed to be estopped by the finding of a matter which he never disputed, and on which the jury gave no verdict, and the Court no judgment.¹ Where, in an action for the stipulated price of a specific chattel, the defendant pleaded payment into court of a sum, which the plaintiffs took out in satisfaction of the cause of action: it was held, that the defendant in that action was not thereby estopped from suing the plaintiffs for negligence in the construction of the chattel.²

With respect to the action of ejectment, we may further specially remark, that by the judgment in this action the lessor of the plaintiff obtains possession of the lands recovered by the verdict, but does not acquire any title thereto, except such as he previously had; if, therefore, he had previously a freehold interest in them, he is in as a freeholder; if he had a chattel interest, he is in as a termor; [*252] *and if he had no title at all, he is in as a trespasser, and will be liable to account for the profits to the legal owner, without any re-entry on his part. Moreover, although it has recently been decided that a judgment in ejectment is admissible in evidence in another ejectment between the same parties;³ yet it is not conclusive evidence, because a party may have a title to possession and to grant a lease at one time, and not at another. Neither can a judgment in ejectment be pleaded by way of estoppel, because the defendant is bound, by the terms of the consent rule, to plead not

¹ *Carter v. James*, 18 M. & W. 137.(*). See *Wade v. Simeon*, 1 C. B. 610; E. C. L. R. 50; *Haigh v. Paris*, 16 M. & W. 144.(*).

² *Rigge v. Burbidge*, 15 M. & W. 598.(*); recognising *Mondel v. Steele*, 8 M. & W. 858.(*).

³ *Doe d. Strode v. Seaton*, 2 Cr., M. & B. 728, and next note.

guilty;¹ and hence there is a remarkable difference between ejectment and other actions with regard to the application of the maxim under consideration. The courts of common law will, however, sometimes interfere to stay proceedings in ejectment, either in order to compel payment of the costs in a former action, or where such proceedings are manifestly vexatious and oppressive. Thus, on a rule to show cause why the proceedings in thirty-seven actions of ejectment, brought against the occupiers of so many houses situated in the same street, should not be stayed and abide the event of a special verdict in another action upon the same title, Lord Kenyon said, "it was a scandalous proceeding; that all the cases depended on the same title, and ought to be tried by the same record;" and the rule was made absolute.² Besides the summary and wholesome jurisdiction thus exercised in certain cases *by the courts of common law, it seems also that equity will, under peculiar circumstances, [*253] likewise interfere and grant perpetual injunctions when the ejectments have been commenced in the usual way at common law.³

Upon the whole, it seems that we may fitly sum up these remarks upon the conclusiveness of a judgment of a court of competent authority quoad the subject-matter, in respect whereof such judgment is relied upon as a bar to future litigation, in the words of the Vice-Chancellor Knight Bruce, who in a recent case thus expresses himself: "It is, I think, to be collected that the rule against reagitating matter adjudicated is subject generally to this restriction—that, however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as

¹ 2 Cr., M. & R. 732; 4 Bac. Abr., "Evidence," (F.) See *Wright v. Doe d. Tatham*, 1 Ad. & E. 19; E. C. L. R. 28; S. C. 5 Cl. & Fin. 670; Bull., N. P. 232; *Adams on Ejectment*, 3d ed. 351.

² *Doe d. Pultney v. Freeman*, cited, 2 Sellon, Pract., 144. See *Adams on Ejectment*, ch. 12; 2 Selw., N. P. 10th ed. 768; (*) *Doe d. Henry v. Gustard*, 5 Scott, N. B. 818; *Thrustout d. Park v. Troublesome*, Andr. 297, recognised *Haigh v. Paris*, 16 M. & W. 144.

³ *Barefoot v. Fry*, Bumb. 158; *Leighton v. Leighton*, 1 P. Wms. 671; *Earl of Bath v. Sherwin*, Bro. Par. Cas. 270.

to defeat its direct object. This limitation to the rule appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority."¹

4thly. But although the judgment of a court of competent jurisdiction upon the same matter will, in general, be conclusive [*254] between the same parties, yet such a judgment may be impeached on the ground of fraud; for "fraud," in the language of De Grey, C. J.,² "is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal." And in a recent case³ before the House of Lords, it was observed, that the validity of a decree of a Court of competent jurisdiction upon parties legally before it may be questioned, on the ground that "it was pronounced through fraud, contrivance, or covin of any description, or not in a real suit, or, if pronounced in a real substantial suit, between parties who were really not in contest with each other." We may add, that, if a judgment be obtained in a superior court clandestinely, by abuse of its forms, and by deceiving its officers, the defendant against whom it is sought to enforce such judgment may obtain a speedy remedy by applying to have it set aside, and the offender punished by attachment.⁴

We have in the preceding remarks endeavoured to point out the most direct application in civil proceedings of the rule that a man shall not be *bis vexatus*, which rule is in fact included in the general maxim — *interest republicæ ut sit finis litium*: and as we have thought it most convenient to include both the maxims above mentioned under the same head, we may observe that the latter, in fact, [*255] *embraces the whole doctrine of estoppels, which is obviously founded in common sense and sound policy, since, if

¹ Per Knight Bruce, V. C., *Barrs v. Jackson*, 1 Yo. & Coll. 597-8; where, however, the rule was wrongly *applied*. See S. C., 1 Phill. 582.

² *Duchess of Kingston's case*, supra, p. 246.

³ *Earl of Bandon v. Becher*, 3 Cl. & Fin. 510; per Lord Eldon, C., *Gore v. Stackpoole*, 1 Dow, 18; per Wedderburn, S. G., *Argument*, 20 Howell, St. Trials, 478, 479.

⁴ See 2 Smith, L. C., 436, 449, where the subject of estoppel, by matter of record, is considered at much length; as to the conclusiveness of a judgment in rem, see also *Aoyt v. Gelston*, 13 Johns. R. (U. S.) 153, where the maxim above considered is applied. For the same rule in equity the reader is referred to Story, *Eq. Plead.*, 8d ed., s. 782; 2 Story, *Eq. Jurisp.*, 4th ed., s. 1623; 1 Spence, *Chan. Jurisd.* 420; *Allen v. M'Pherson*, 11 Jur. 786.

facts once solemnly affirmed to be true were to be again denied, whenever the affirmant saw his opportunity, there would never be an end to litigation and confusion.¹ To the same maxim may likewise be referred the principle of the limitation of actions, which we shall treat of hereafter,² the statutes of set-off, which were enacted to prevent the necessity of cross-actions,³ and the rule which forbids circuity in legal proceedings—*circuitus est evitandus*;⁴ and according to which a court of law will endeavour to prevent circuity and multiplicity of suits, where the circumstances of the litigant parties are such, that, on changing their relative positions of plaintiff and defendant, the recovery by each would be equal in amount.⁵

So where two or more actions are brought by the same plaintiff at the same time against the same defendant, for causes of action which might have been joined in the same action, the Court, or a judge at chambers, if they deem the proceedings oppressive, will, in general compel the plaintiff to consolidate them, and to pay the costs of the application.⁶ Thus, where several actions are brought upon the same policy of insurance, the Court, or a judge, upon application of the defendants, will grant a rule or order to stay the proceedings in all the actions but one, the defendants undertaking to be bound by the verdict in such action, *and to pay the [*256] amount of their several subscriptions and costs, if the plaintiff should recover, together with such other terms as the Court or judge may think proper to impose upon them.⁷ It should, however, be observed, that it is purely a matter of discretion with the Court to allow actions to be consolidated; they will, in general, consolidate them, if they can be joined, and if it appear that they were brought separately for the purpose of vexation or oppression.⁸ *as to get more*

cost

¹ 2 Smith, L. C. 437.

² See maxim, *vigilantibus et non dormientibus jura subveniunt*.

³ Judgment, Hill v. Smith, 12 M. & W. 631. (*)

⁴ 5 Rep. 31; Co. Litt. 848, a; 2 Saund. R. 150.

⁵ See Carr v. Stephens, 9 B. & C. 758; E. C. L. R. 17; per Parke, B., Penny v. Innes, 1 Cr., M. & R. 442; (*) 2 Wms. Saund. 150 (2); Argument, Hall v. Bainbridge, 5 Q. B. 242; E. C. L. R. 48; Simpson v. Swan, 3 Camp. 291.

⁶ Cecil v. Brigges, 2 T. R. 689; 2 Sellon, Pract. 144. See Covington v. Hogarth, 8 Scott, N. R. 725.

⁷ Doyle v. Anderson, 1 Ad. & E. 635; E. C. L. R. 28.

⁸ Where separate actions are brought against several joint contractors for the same debt, the Court, upon payment of the debt and costs in one action, will stay proceedings in the other actions without costs: Newton v. Blunt, 16 L. J., C. P. 121; Bendel v. Malleon, 16 L. J., Exch. 168.

We may add, that the maxim in the more limited form above given was often applied in practice prior to the recent act abolishing arrest on mesne process; for, if a defendant had been once arrested, he could not, in general, be arrested again at the suit of the same plaintiff, for the same cause of action, unless, perhaps, where the whole proceedings had been set aside for irregularity, or unless by a rule of court or a judge's order, which was, in some instances, allowed upon the terms of the plaintiff's discontinuing and paying the defendant his costs; and it would seem that a defendant, if about to quit England, may now be arrested a second time on obtaining an order under 1 & 2 Vic. c. 110, s. 3, in all cases in which he might have been arrested before that act, "whether upon the order of a judge, or without such order."¹

The most important application, however, of the general principle now under consideration, occurs in criminal law, *for there it [*257] is a well-established rule, that, when a man has once been indicted for an offence, and acquitted, he cannot afterwards be indicted for the same offence, provided that the first indictment were such that he could have been lawfully convicted upon it by proof of the facts contained in the second indictment; and if he be thus indicted a second time, he may plead *autrefois acquit*, and it will be a good bar to the indictment;² and this plea is clearly founded on the principle, that no man shall be placed in peril of legal penalties more than once upon the same accusation—*nemo debet bis puniri pro uno delicto*.³ Thus, an acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter; and an acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for the larceny of the same goods; because, in either of these cases, the prisoner might on the former trial, have been convicted of the offence charged against him in the second indictment.⁴ On the other hand, an acquittal upon an indictment for a felony is no bar to an indictment for a misdemeanour, and this holds *è con-*

¹ 1 Chit. Arch. Pr., 8th ed. 643, 646. See *Hamilton v. Pitt*, 7 Bing. 230; *E. C. L. R.* 20; *Wedlake v. Hurley*, 1 C. & J. 83; *Talbot v. Bulkeley*, 16 M. & W. 196, (*) where the maxim commented on in the text is cited and applied.

² Arch. Cr. Plead, 9th ed. 88; *Rex v. Vandercomb*, 2 East, P. C. 519; cited, per Gurney, B., *Rex v. Birchenough*, 1 Moo., Cr. Cas. 479. As to the meaning of the words "conviction" and "acquittal," see per Tindal, C. J., *Burgess v. Boetefeur*, 8 Scott, N. R. 211, 212.

³ 4 Rep. 40, 43; 4 Bla. Com. 335; 1 Chit. Crim. Law, 452.

⁴ 2 Hale, P. C. 246.

verso. Nor is an acquittal on an indictment for larceny any bar to an indictment for the same offence charged as a false pretence; though, on account of the proviso in stat. 7 & 8 Geo. 4, c. 29, s. 53, an acquittal for the latter offence is a bar to an indictment for the same act charged as a larceny. An acquittal on an indictment for having been present, aiding and abetting in a felony, is no bar to an indictment charging the party as an accessory before the fact, because *the offences described in the two indictments are [*258] distinct in their nature.¹

The true test by which to decide whether a plea of *autrefois acquit* is a sufficient bar in any particular case is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.²

Another case may be supposed in further illustration of the principal rule, viz., if there be a *general* judgment on an indictment containing several counts, and this judgment is subsequently reversed in error, on the ground that *one* of the counts is bad,³ the party convicted might be again indicted for the offence insufficiently alleged in such bad count, provided it was a different offence from those charged against him in the good counts; the reason being, that in contemplation of law, he had never been indicted, and therefore never tried nor acquitted for that specific offence.

In conclusion, we may mention one remarkable exception which formerly existed to the principle above stated and illustrated. This occurred in the proceedings in case of appeal of death, which might be instituted against a supposed offender after trial and acquittal, and by which punishment for some heinous crime was demanded, on account of the particular injury suffered by an individual, rather than for the offence against the public;⁴ but this method of prosecution, having attracted the attention of the legislature in the celebrated case of *Ashford v. Thornton*,⁵ was abolished by stat. 59 Geo. 3, c. 46.

¹ 2 Phil. Ev., 9th ed. 26; *Rex v. Birchenough*, 1 Moo. Cr. Cass. 477.

² See further as to this, *Aroh.*, Cr. Plead., 9th ed. 88, 89.

³ See Lord Denman's judgment, *O'Connell v. Reg.*, by Mr. Leahy, pp. 19 et seq., and p. 44; *Reg. v. Gompertz*, 16 L. J., Q. B. 121.

⁴ 4 Bla. Com. 314; 1 Chit., Crim. Law, 452.

⁵ 1 B. & Ald. 405.

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*CHAPTER VI.

§ 1.—THE MODE OF ACQUIRING PROPERTY.

IN the present chapter are contained three sections, which treat respectively of the acquisition, enjoyment, and transfer of property. In connexion with the first-mentioned of these subjects, one maxim only has been considered, which sets forth the general principle, that title is acquired by priority of occupation; a principle of such extensive application, and embracing so wide a field of inquiry, that the following pages will be found to present to the reader little more than a mere outline of a course of investigation, which, if pursued in detail, would prove alike interesting and instructive. It is, indeed, only proper to observe *in limine*,—since, from the titles which have been selected with a view to showing clearly the mode of treatment adopted, much more might reasonably be expected in the ensuing pages than has been attempted,—that the object here sought to be attained is a succinct statement of the more important only of the rights, liabilities, and incidents annexed to property; so that a perusal of the contents of this chapter may prove serviceable in recalling the attention of the practitioner to the application and illustration of principles with which he must necessarily have been previously familiar, and may, without wearying his attention, direct the student to those sources of information from whence may be derived more [*260] copious and more accurate *supplies of knowledge, and which he will probably find it requisite before entering upon his professional career to consult.

QUI PRIOR EST TEMPORE, POTIOR EST JURE.

(Co. Litt. 14, a.)

He has the better title who was first in point of time.

The title of the finder to unappropriated land or chattels must evidently depend either upon the law of nature, upon international law, or upon the laws of that particular community to which he belongs. According to the law of nature, there can be no doubt

that priority of occupancy alone constitutes a valid title, *quod nullus est id ratione naturali occupanti conceditur*;¹ but this rule has been so much restricted by the advance of civilization, by international law, and by the civil and exclusive ordinances of each separate state, that it has comparatively little practical application at the present day. It is, indeed, true, according to the rule recognised amongst nations, that an unappropriated tract of land, or a desert island, may be seized and reduced into possession by the first occupant, and, consequently, that the title to colonial possessions may, and in some cases does, in fact, depend upon priority of occupation. But within the limits of this country, and between subjects, it is apprehended that the maxim which we here propose to consider, has no longer any direct application as regards the acquisition of title to realty by entry and occupation. It was, indeed, formerly held, that where a tenant *pur autre vie* died, living the *cestui que vie*, the party who first *entered upon the land became entitled to the residue of the estate therein; but the law upon this subject has been [*261] altered by a recent statute, which, under the circumstances supposed, vests such interest in the personal representatives of the deceased; and, moreover, it is a general rule, that, whenever the owner or person actually seized of land dies intestate, and without heir, the law vests the ownership of such land either in the Crown,² or in the subordinate lord of the fee by escheat;³ and this is in accordance with the spirit of the ancient feudal doctrine expressed in the maxim, *quod nullius est, est domini regis*.⁴

On the maxim, *prior tempore potior jure*, depends, however, the right of property in treasure trove, in wreck,⁵ derelicts,⁶ waifs, and estrays, which, being *bona vacantia*, belong, by the law of nature, to the first occupant or finder, but which have, in some cases, been

¹ D. 41, 1, 8; I. 2, 1, 12.

² So, "there is no doubt that, by the law of the land, the Crown is entitled to the undisposed of personal estate of any person who happens to die without next kin:" 14 Sim. 18; *Robson v. Attorney-General*, 10 Cl. & Fin. 497.

³ 2 Bla. Com. 261.

⁴ *Fleta*, lib. 3; *Bac. Abr.*, "Prerogative," (B.); 2 Bla. Com. 261.

⁵ As to the property in wreck, see *Legge v. Boyd*, 1 C. B. 92; E. C. L. R. 50, and the recent stat. 9 & 10 Vict. c. 99.

⁶ Goods are "'derelict' which have been voluntarily abandoned and given up as worthless, the mind of the owner being alive to the circumstances at the time," per *Tindal, C. J.*, *Legge v. Boyd*, 1 C. B. 112; E. C. L. R. 50.

annexed to the supreme power by the positive laws of the state.¹ "There are," moreover, "some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had, and therefore they still belong to the first occupant *during the time he holds [*262] possession of them, and no longer; such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences. Such, also, are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition, which any man may seize upon, and keep for his own use or pleasure. All these things, as long as they remain in possession, every man has a right to enjoy without disturbance; but, if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards."²

In accordance with the above maxim, the rule in descents is, that, amongst males of equal degree, the eldest shall always inherit land in preference to the others, unless, indeed, there is a particular custom to the contrary; as in the case of gavelkind, by which land descends to all the males in equal degree together; or borough English, according to which, the youngest son, and not the eldest, succeeds on the death of a father.³ Where A. had three sons, B., C., and D., and D., the youngest, died, leaving a daughter E., and then A. purchased lands in borough English, and died, it was held, in accordance with the custom, that the lands should go to E.⁴ The right of primogeniture above mentioned does not, however, exist amongst females, and, therefore, if a person dies possessed of land, leaving daughters only, they will take jointly as coparceners.⁵

[*263] *Further, it is a general rule, that, whenever there are two conflicting titles, the elder shall be preferred, and of this

¹ The reader is referred for information on these subjects to 1 Bla. Com. 291 et seq. The finder of a jewel has such a property as will enable him to retain it against all but the rightful owner: *Armory v. Delamirie*, 1 Stra. 504. See *Mortimer v. Cradock*, 7 Jur. 45.

² 2 Bla. Com. 14; *Wood, Civ. L.*, 8d ed. 82; *Holden v. Smallbrooke*, Vaugh. 187. See *Acton v. Blundell*, 12 M. & W. 324, 333. (*)

³ 2 Bla. Com. 83, 84.

⁴ *Clements v. Scudamore*, 2 Lord Raym. 1024.

⁵ 2 Bla. Com. 187. In *Godfrey v. Bullock*, 1 Roll. 623, n. (8); cited 2 Ld. Raym. 1027, the custom was, that in default of issue male, the eldest daughter should have the land.

one instance has already been noticed in considering the law of remitter; for, if a disseisor lets the land to the disseisee for years, or at will, and the latter enters, the law will say that he is in on his ancient and better title.¹ So, where there are conflicting rights as to real property, courts of equity will inquire, not which party was first in possession, but under what instrument he was in possession, and when his right is dated in point of time; or, if there be no instrument, they will ask, when did the right arise—who had the prior right?² It forms, moreover, the general rule between incumbrancers and purchasers, that he whose assignment of an equitable interest in a fund is first in order of time, has, by virtue of that circumstance alone, the better right to call for the possession of the fund. This rule prevails amongst mortgagees, who are considered purchasers *pro tanto*; and where, therefore, of three mortgages, the first is bought in by the owner of the third, such third mortgagee thereby acquires the legal title, and, having thus got the law on his side, with equal equity, will be permitted to tack the first and third mortgages together to the exclusion of the second;³ and thus the priority of equitable titles may be changed by the diligence of one of the claimants, in obtaining the legal estate to himself, or to a trustee, for the protection of his equitable interest.⁴ *Changed by our laws of land?*

It will, however, be borne in mind that the doctrine of [*264] *tacking only applies where the legal has been annexed to the equitable estate in the manner above indicated; where, therefore, the legal estate is outstanding, the several incumbrancers will be paid off according to their actual priority in point of time, and in strict accordance with the maxim, *prior tempore potior jure*.⁵ Indeed, it may be laid down, as a general rule, that, as between mere equitable claims, equity will give no preference, and mortgages, judgments, statutes, and recognisances, will be alike payable, according to their respective priority of date.⁶ We may add, also, that a

B. T.

¹ Noy, Max., 9th ed., p. 58; Co. Litt. 347, b; Wing. Max., p. 159; ante, p. 262. /

² Argument of Sir E. Sugden in Cholmondeley v. Clinton, 2 Meriv. 289.

³ Willoughby v. Willoughby, 1 T. R. 778, 774; Robinson v. Davison, 1 Bro. C. C., 5th ed. 61; Brace v. Duchess of Marlborough, 2 P. Wms. 491; 1 My. & K. 297; 2 Sim. 257; Law Magazine, No. 62, p. 326.

⁴ 3 Prest. Abs., tit. 274, 275.

⁵ Brace v. Duchess of Marlborough, 2 P. Wms. 491, 495; cited, per Lord Hardwicke, C., Willoughby v. Willoughby, 1 T. R. 778.

⁶ Coote, Mort. 507. Prior registration of deed, see M'Neil v. Cahill, 2 Bligh, 228; Trull v. Bigelow, 16 Mass. R. (U. S.) 406.

prior lien gives a prior claim, which is entitled to prior satisfaction out of the fund upon which it attaches, unless such lien either be intrinsically defective, or be displaced by some act of the party holding it, which may operate in a court of law or equity to postpone his right to that of a subsequent claimant.¹

In the case of hypothecation bonds, however, we may remark, the last executed must be first paid. "According to the rule of law applicable to instruments of this description," as observed by Lord Stowell, "that which is last in point of time must, in respect to payment, supersede and take precedence of the others."²

On the same principle, a mortgagee may recover in ejectment without previously giving notice to quit, against a tenant who claims under a lease from the mortgagor, granted *after* the mortgage, and without the privity of the mortgagee; for the tenant stands exactly in the place of the mortgagor, and the possession of the mortgagor [*265] cannot *be considered as holding out a false appearance, since it is of the very nature of the transaction that the mortgagor should continue in possession; and whenever one of two innocent parties must be a loser, then the rule applies, *qui prior est tempore, potior est jure*. If, in the instance just given, one party must suffer, it is he who has not used due diligence in looking into the title.³

It may, in pursuance of these remarks, be almost unnecessary to call to mind, that, in very many cases where a question arises as to the title to goods, it does, in fact, resolve itself into this consideration,—in whom did the title first become vested? Thus, it is a general rule of the law of England, that a man who has no authority to sell cannot, by making a sale, transfer the property to another;⁴ that is to say, he cannot, in this manner, divest of his property the party previously entitled. To this rule there is, indeed, one exception, viz., the case of a sale of goods in market overt;⁵ but this is an exception, originating in the manifest injustice and impolicy of permitting sales of a public description to be impeached by a party who

¹ See the judgment, *Rankin v. Scott*, 12 Wheat. R. (U. S.) 179.

² 2 Dods. Adm. R. 2.

³ *Keech v. Hall*, Dougl. 21; see judgment, *Dearl v. Hall*, 3 Russ. R. 20. See *Coke v. Moylon*, 16 L. J., Exch. 258. As to the legal right where two presentations are made to the same benefice, see *Winch*, R. 95; 1 Burn., Ecc. Law, 9th ed. 150.

⁴ Per *Abbott, C. J.*, *Dyer v. Pearson*, 3 B. & C. 42; E. C. L. R. 10.

⁵ 3 B. & C. 42; E. C. L. R. 10; *Peer v. Humphrey*, 2 Ad. & E. 496; E. C. L. R. 29.

could not by due diligence be discovered.¹ The law relating to the sale of goods and market overt will, however, be again adverted to under the maxim *caveat emptor*, to which very comprehensive principle it is usually referred.²

We may, moreover, take this opportunity of observing, that the respective rights of the execution creditor and the assignees of a bankrupt, as also of execution creditors *inter se*, *may, in very [*266] many cases, be accurately determined by the simple application of the maxim as to priority which we have been considering. For instance, we have already stated, that, in general, the law will not notice the fraction of a day, inasmuch as *de minimis non curat lex*;³ where, however, a *fi. fa.* was sued out on a judgment entered up under a warrant of attorney, and the sheriff seized the goods before ten o'clock in the forenoon of the 13th of August, and sold the same ten days afterwards; and on the 13th of October following, about noon, a commission of bankrupt issued against the defendant, under which he was declared a bankrupt: it was held, that more than two calendar months had elapsed between the execution and the issuing of the commission, and that the former was, therefore, protected by the 81st section of the stat. 6 Geo. 4, c. 16: in this case it was evidently necessary, in order to determine which of the two conflicting claims should prevail, to ascertain the precise time when the execution was executed, and also the precise time at which the commission was issued, and then to apply the legal maxim under consideration.⁴

By the recent stat. 2 & 3 Vict. c. 29, it is, amongst other things, enacted, "that all executions against the goods and chattels of a bankrupt, bona fide executed or levied before the date and issuing of the fiat, shall be deemed valid, notwithstanding any prior act of bankruptcy, provided the person at whose suit such execution shall have issued had not, at the time of executing or levying such execution, notice of any prior act of bankruptcy; provided, also, that nothing therein shall be deemed or *taken to give validity to [*267] any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of fraudulent prefe-

¹ Chit., Contr., 3d ed. 385.

² Post, chap. 9.

³ Ante, p. 105.

⁴ Godson v. Sanctuary, 4 B. & Ad. 255; E. C. L. R. 24; Thomas v. Desanges, 2 B. & Ald. 586; Sadler v. Leigh, 4 Camp. 197; Saunderson v. Gregg, 3 Stark. 72; E. C. L. R. 14.

rence;" and, according to a recent decision,¹ the effect of this statute is to substitute its enactments for the 81st as well as the 82d section of the statute 6 Geo. 4, above mentioned; and the result of reading the two statutes together, therefore, is, that "*all* executions—whether on judgments on warrants of attorney² or confessions, or not—executed by seizure after an act of bankruptcy, but without notice to the execution creditor, are rendered valid," so far as regards any act of bankruptcy committed before seizure; and the effect of the priority of the act of bankruptcy is done away with, although that act is still operative to support the commission. Under the above statute, then, it is clear that if execution be issued bona fide, and without notice of an act of bankruptcy, upon a judgment obtained in an adverse action against the bankrupt, the writ, if executed by seizure of the goods prior to the date of the fiat, will protect both sheriff and execution creditor as against the assignees.³

With respect to a judgment founded upon a warrant of attorney, it has been held that the effect of the 108th section of the stat. 6 Geo. 4, c. 16 (which section is still operative), is to vary the legal operation of the writ of execution levied thereon, and to prevent such an execution from being carried into effect, for the benefit of creditors generally.⁴ In such *a case, therefore, the writ of execution [*268] is rendered *de facto*, void, by the issuing of a fiat against the debtor before the sale; and, consequently, it has been held, that the execution creditor, under a judgment in an adverse action—the writ having been lodged with the sheriff and the goods seized before the issuing of the fiat—will be entitled to priority, not only over an execution creditor claiming under a writ previously issued on a judgment founded upon a warrant of attorney, but likewise as against the assignees of the bankrupt debtor.⁵

In *Whitmore v. Greene*,⁶ the writ was sued out in pursuance of a judgment entered up on a warrant of attorney; both the seizure and sale were *before* the fiat, and the Court of Exchequer held that the

¹ *Whitmore v. Green*, 13 M. & W. 104, (*) and cases there cited. See also *Lackington v. Elliott*, 8 Scott, N. R. 275; *Belcher v. Gummow*, 16 L. J., Q. B. 155.

² See *Bittleston v. Cooper*, 14 M. & W. 399. (*)

³ *Belcher v. Magnay*, 12 M. & W. 102; (*) *Graham v. Witherby*, 7 Q. B. 491; E. C. L. R. 58.

⁴ *Cheston v. Gibbs*, 12 M. & W. 111; (*) *Skey v. Carter* (in error), 11 M. & W. 571; (*) *Whitmore v. Robertson*, 8 M. & W. 463; (*) *Whitmore v. Black*, 13 M. & W. 507. (*)

⁵ *Graham v. Witherby*, 7 Q. B. 491; E. C. L. R. 58.

⁶ 13 M. & W. 104. (*)

sheriff was not liable at the suit of the assignees, although, before the sale, the execution creditor had notice of the act of bankruptcy; for, "the enactment of the statute of Victoria is, that an act of bankruptcy prior to *the executing and levying*, that is, *the seizure*, shall have no effect, provided the execution plaintiff had not notice at the time of the seizure;" and with reference to the case before them, viz.: of an execution under a warrant of attorney, they made these remarks, which have an important bearing upon our present subject, and are quite in accordance with the authorities to which we have referred in connexion therewith:—"If the fiat intervenes *before* a sale the execution plaintiff is not entitled, because he was still a creditor of the bankrupt at the time of the fiat (which must now be considered as identical with the time of the bankruptcy, the priority of the act of bankruptcy to the seizure being done away with), and consequently is within the proviso of the 108th section,¹ and *is only to be relieved rateably. If the fiat is *after* the sale, [*269] the execution creditor is not a creditor of the bankrupt at the time of the bankruptcy, that is, the fiat, and is entitled to the preference which his execution gives him."²

The distinction taken in the preceding cases between the effect of executions founded on judgments obtained in adverse proceedings and in other specified cases, shows that it is always necessary, when a question arises between the assignees of a bankrupt and the execution creditor, to consider, in the first place, whether, with reference to the 108th section of the stat. 6 Geo. 4, c. 16, "the particular execution is one which, but for a prior act of bankruptcy, would have entitled the execution creditor to a preference;"³ and if this question be resolved in the affirmative, then the general maxim as to priority, which we have heretofore been considering, must be applied.

In other cases than those in which the title to goods is disputed, as between the assignees of a bankrupt and the execution creditor, the maxim, *prior tempore potior jure*, is often applicable; it is so, indeed, wherever two writs of execution against the same person are delivered to the sheriff, for in this case he is bound to execute that writ first which was first delivered to him;⁴ unless, indeed, the first

¹ 6 Geo. 4, c. 16.

² Judgment, 13 M. & W. 111, 112; (*) Linnitt v. Chaffers, 4 Q. B. 762; E. C. L. R. 45.

³ Per Tindal, C. J., 11 M. & W. 575, (*) adopted 13 M. & W. 111. (*)

⁴ Per Ashhurst, J., Hutchinson v. Johnson, 1 T. R. 131; Jones v. Atherton, 7 Taunt. 56; E. C. L. R. 2; 29 Car. 2, c. 3, s. 16. See Aldred v. Constable, 6 Q. B. 370; E. C. L. R. 51.

writ, or the possession held under it, were fraudulent, in which case the goods seized cannot be considered as in the custody of the law at the date of the delivery of the second writ, which latter, therefore, shall have priority; moreover, where the party is in possession of [*270] goods apparently the property *of a debtor, the sheriff who has a *fi. fa.* to execute is bound to inquire, whether the party in possession is so *bona fide*, and, if he find that the possession is held under a fraudulent bill of sale, he is bound to treat it as null and void, and levy under the writ.¹ It is necessary also to observe the meaning of the words of the stat. 29 Car. 2, c. 3, s. 16, viz., “no writ of *fi. fa.*, or other writ of execution, shall bind the property of the goods of the party against whom such writ of execution issued forth, but from the time that such writ shall be delivered to the sheriff.” Their signification is, that, if, after the writ is so delivered, the defendant make an assignment of the goods, except in market overt, the sheriff may take them in execution. But neither before this statute, nor since, would the property in the goods be altered: it continues in the defendant until execution executed;² the goods are bound by the delivery of the writ to the sheriff as against the party himself, and all claiming by assignment from, or representation through or under, him.³

It has been held, that, if a writ of *fi. fa.* be delivered to the sheriff, and notice be subsequently given to restrain execution, the writ cannot be considered as in the hands of the sheriff, to be executed within [*271] the meaning of the section *of the statute just cited, and in this case, therefore, the sheriff will be bound to execute a subsequent writ of *fi. fa.* which may be issued during such stay of execution, and before order given to proceed with the execution of the first-mentioned writ.⁴

¹ *Lovick v. Crowder*, 8 B. & C. 185, 187; *E. C. L. R.* 15; *Warmoll v. Young*, 5 B. & C. 660, 666; *E. C. L. R.* 11. See also the cases cited, *Argument*, *Hunt v. Hooper*, 12 M. & W. 664. (*) As to *Interpleader*, ante, p. 10, n. (7).

² Per Lord Hardwicke, C., *Lowthal v. Tonkins*, 2 Eq. Cas. Abr. 381, cited 4 East, 539. “That the general property in goods, even after seizure, remains in the debtor, is clear from this, that the debtor may, after seizure, by payment, suspend the sale and stay the execution;” per Pattenon, J., *Giles v. Grover*, 9 Bing. 188; *E. C. L. R.* 23; adopted per Alderson, B., *Playfair v. Musgrove*, 14 M. & W. 246, (*) which case is illustrative of the proposition in the text.

³ Per Lord Ellenborough, C. J., 4 East, 588. See also *Briggs v. Sowry*, 8 M. & W. 729, 739; *E. C. L. R.* 23; *Giles v. Grover*, 9 Bing. 128. (*)

⁴ *Hunt v. Hooper*, 12 M. & W. 664. (*) See also *Barker v. St. Quintin*, Id. 441, which was an action of trespass for executing a writ of *ca. sa.* after countermand.

We may, in the next place, observe, that the law relative to patents and to copyright is altogether referable to the above maxim as to priority; for, with respect to patents, the general rule is, that the original inventor of a machine, who has first brought his invention into actual use, is entitled to priority as patentee, and that consequently a subsequent original inventor will be unable to avail himself of his invention; and this is evidently in accordance with the strict rule, *qui prior est tempore potior est jure*.¹ If, therefore, several persons simultaneously discover the same thing, the party first communicating it to the public under the protection of the patent becomes the legal inventor, and is entitled to the benefit of it.²

A person, however, to be entitled to a patent for an invention, must be *the first and true inventor*; so that, if there be any public user thereof by himself or others prior to the granting of the patent,³ or if the invention has been previously made public in this country by a description contained in a work, whether written or printed, which has been publicly circulated, one who afterwards takes out a patent for it will not be considered as the true and first inventor within the meaning of the stat. 21 Jac. 1, c. 3, *even though, in the latter case, he has not borrowed his invention from such [*272] publication.⁴ Although, moreover, it is generally true that a new principle, or *modus operandi*, carried into practical and useful effect by the use of new instruments, or by a new combination of old ones, is an original invention, for which a patent may be supported;⁵ yet, if a person merely substitutes, for part of a patented invention, some well-known equivalent, whether chemical or mechanical, this being merely a colourable variation, will amount to an infringement of the patent;⁶ and where letters patent were granted for improvements in apparatus, for the manufacture of certain chemical substances, and the jury found that the apparatus was not new, but that the patentee's mode of connecting the parts of that apparatus was new, the Court, in an action for an alleged infringement of the patent, directed the

¹ See 3 Wheaton, R. (U. S.) Appendix, 24.

² Per Abbott, C. J., *Forsyth v. Riviere*, Webs. Pat. Cas. 97, note; *Jones's Patent*, Id. 125.

³ *The Househill Coal and Iron Company v. Neilson*, 9 Cl. & Fin. 788. See *Brown v. Annandale*, Webs. Pat. Cas. 438.

⁴ *Stead v. Williams*, 8 Scott, N. R. 449; *Stead v. Anderson*, 16 L. J., C. P. 250.

⁵ *Boulton v. Bull*, 2 H. Bla. 463; S. C., 8 T. R. 95; *Hall's case*, Webs. Pat. Cas. 98; cited per Lord Abinger, C. B., *Losh v. Hague*, Id. 207, 208.

⁶ *Heath v. Unwin*, 13 M. & W. 583; (*) S. C. 16 L. J. Chanc. 283.

verdict to be entered for the defendant, upon an issue taken as to the novelty of the invention.¹

It has recently been held, that a patent granted to a British subject in his own name for an invention communicated to him by a foreigner, the subject of a state in amity with this country, is not void, although such patent be, in truth, taken out and held by the grantee in trust for such foreigner; and in such a case this grantee is the true and first inventor within the realm, within the stat. 21 Jac. 1, c. 3.²

*“A copyright is the exclusive right of multiplying copies [*273] of an original work or composition, and consequently preventing others from so doing;”³ and it has been decided, in a celebrated case,⁴ that such right vested in the author by the common law; although it has likewise been held⁵ to have been taken away by the stat. 8 Anne, c. 19, the first section of which act gave to the author and his assigns an exclusive property in the work published, for a period of fourteen years from the day of the publication.⁶ It is evident that the right of an author depends on the same principle as that of a patentee, viz., priority of invention or composition and publication; and, accordingly, it has been held, that a foreigner, not resident here, cannot have an English copyright, if he has first published his work abroad, before any publication of it in this country.⁷

Lastly, we may further observe, that the maxim under consideration is also applied to the practice of courts of law, of which the following instance may be given:—A motion was made, on the first day of term, that a prisoner should be brought up under the compulsory clause of the Lords' Act,⁸ for the purpose of giving in his schedule; on the same day a motion was made for the prisoner's discharge under the stat. 48 Geo. 3, c. 123. The Court, after granting in each instance a rule nisi (since the requisite notice had not been

¹ *Gamble v. Kurtz*, 3 C. B. 425; E. C. L. R. 54.

² *Beard v. Egerton*, 3 C. B. 97; E. C. L. R. 54; see *Chappell v. Purday*, 14 M. & W. 318. (*)

³ Judgment, 14 M. & W. 316. (*) See, generally, as to copyright, *Wheaton v. Peters*, 8 Peters, R. (U. S.) 591.

⁴ *Millar v. Taylor*, 4 Burr. 2303.

⁵ *Donaldson v. Becket*, 4 Burr. 2408.

⁶ The term of copyright is now fixed by the recent statute, 5 & 6 Vict. c. 45. See 10 & 11 Vict. c. 95.

⁷ *Chappell v. Purdy*, 14 M. & W. 308. (*) See *Beard v. Egerton*, 3 C. B. 97; E. C. L. R. 54; *Cocks v. Purday*, 2 Car. & K. 269; E. C. L. R. 61; 7 & 8 Vict. c. 12, s. 19.

⁸ 32 Geo. 2, c. 28.

given by the defendant), said, that the case must be determined as it stood on the first day of the *term; and that, on the principle, *qui prior est tempore, potior est jure*, the plaintiff's rule [*274] for bringing up the prisoner must first be made absolute, and then, subject to the proper notice, the rule for the prisoner's discharge.¹

§ II.—PROPERTY—ITS RIGHTS AND LIABILITIES.

In this section are contained remarks upon the legitimate mode of enjoying property, the limits and extent of that enjoyment, and the rights and liabilities attaching to it. The maxims commented upon, in connexion with this subject, are four in number, and are expressive of the following well-known principles: that a man shall so use his own property as not to injure his neighbour—that the owner of the soil is entitled likewise to that which is above and underneath it—that what is annexed to the freehold becomes, in many cases, subject to the same right of ownership—and, lastly, we have briefly explained and illustrated the legal meaning of the popular maxim, that “every man's house is his castle.”

SIC UTERE TUO UT ALIENUM NON LÆDAS.

Qui sua sua utitur, non nocet vicinis. (9 Rep. 59.)
*Enjoy your own property in such a manner as not to injure that of another person.*²

A man must enjoy his own property in such a manner as not to invade the legal rights of his neighbour—*Expedit reipublicæ ne sua re quis male utatur*³—the invasion of an established right will, *per se*, constitute an injury for *which damages are in general recoverable; for in all civil acts our law does not so much regard [*275] the intent of the actor as the loss and damage of the party suffering. In trespass *qu. cl. fr.*, the defendant pleaded, that he had land adjoining plaintiff's close, and upon it a hedge of thorns; that he cut the thorns, and that they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, which was the same trespass, &c. On demurrer, judgment was given for the plaintiff, on the ground, that, though a man do a lawful thing, yet, if any

¹ Davis v. Curtis, 3 Bing. N. C. 259; E. C. L. R. 32.

² 2 Selw. N. P. 10th ed. 1114.

³ I. 1, 8, 2.

damage thereby befalls another, he shall be answerable if he could have avoided it. Thus, if a man lop a tree, and the boughs fall upon another, *ipso invito*, yet an action lies; so, if a man shoot at a butt, and hurt another unawares, an action lies. A. has land through which a river runs to turn B.'s mill; A. lops the trees growing on the river side, and the loppings accidentally impede the progress of the stream, which hinders the mill from working: A. will be liable. So, if I am building my own house, and a piece of timber falls on my neighbour's house, and injures it, an action lies; or, if a man assaults me, and I lift up my staff to defend myself, and in lifting it strike another, an action lies by that person, and yet I did a lawful thing, and the reason of all these cases is, because he that is damaged ought to be recompensed; but it is otherwise in criminal cases, for in them, as we have seen in the preceding chapter, *actus non facit reum nisi mens sit rea*:¹ the intent and the act must both concur to constitute the crime.²

[*276] *The following instances will serve to show in what manner the maxim which we have placed at the head of these remarks is applied, to impose restrictions, first, upon the enjoyment of property,³ and, secondly, upon the acts and conduct of each individual member of the community. In illustration of the first branch of the subject, we may observe, that, if a man builds a house so close to mine that his roof overhangs mine, and throws the water off upon it, this is a nuisance, for which an action will lie.⁴ So, an action will lie, if, by an erection on his own land, he obstructs my ancient lights and windows; for a man has no right to erect a new edifice on his ground so as to prejudice what has long been enjoyed by another⁵—*ædificare in tuo proprio solo non licet quod alteri noceat*.⁶

¹ See *Lambert v. Bessey*, T. Raym. 422; per Blackstone, J., *Scott v. Shepherd*, 3 Wils. 403; per Lord Kenyon, C. J., *Haycraft v. Creasy*, 2 East, 104; *Tuberville v. Stampe*, 1 Ld. Raym. 264; recognised, *Vaughan v. Menlove*, 3 Bing. N. C. 468; E. C. L. R. 32; *Grocers' Company v. Donne*, 3 Bing. N. C. 84; E. C. L. R. 32; *Aldridge v. Great Western Railway Company*, 4 Scott, N. R. 156, and cases there cited.

² Per Lord Kenyon, C. J., *Fowler v. Padget*, 7 T. R. 514; 3 Inst. 54; cited, *Borra-dalle v. Hunter*, 5 Scott, N. R. 429, 430.

³ See per Holt, C. J., *Tenant v. Goldwin*, 2 Ld. Raym. 1092-3.

⁴ 3 Bla. Com. 216; *Penruddocke's case*, 5 Rep. 100; *Fay v. Prentice*, 1 C. B. 828; E. C. L. R. 50.

⁵ 3 Bla. Com. 216, 217. See *Dodd v. Holme*, 1 Ad. & E. 498; E. C. L. R. 28; recognised, *Bradbee v. Mayor, &c. of London*, 5 Scott, N. R. 120; *Partridge v. Scott*, 3 M. & W. 220; (*) recognising *Wyatt v. Harrison*, 3 B. & Ad. 871; E. C. L. R. 23; *Brown v. Windsor*, 1 Cr. & J. 20.

⁶ 3 Inst. 201.

In like manner, if a man, by negligence and carelessness in pulling down his house, occasion damage to, or accelerate the fall of, his neighbour's, he will be clearly liable,¹ although the mere circumstance of juxtaposition does not, in the absence of any right of easement, render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall, nor is such person, if he be ignorant of the existence of the adjoining wall, bound to use extraordinary caution in pulling down his own.²

*Where a person builds a house on his own land, which has been previously excavated to its extremity for mining [*277] purposes, it has been held that he does not thereby acquire a right to support for the house from the adjoining land of another, at least, such right will not be acquired until twenty years has elapsed since the house first stood on excavated land, and was in part supported by the adjoining land, in which case a *grant* from the owner of the adjoining land of such right to support may be inferred; and this case is an authority to show, that a man, by building a house on the extremity of his own land, does not thereby acquire any right of easement for support or otherwise, over the adjoining land of his neighbour. He has no right to load his own soil, so as to make it require the support of that of his neighbour, unless he has some grant to that effect.³

Again, the rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established, and is particularly illustrative of the maxim under consideration. According to this rule, each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, and to use the same as he pleases for any purposes of his own, provided that they be not inconsistent with a similar right in the proprietor of the land above or below; so that neither can any proprietor above diminish the quantity or injure the quality of the water, which would otherwise natu-

¹ *Bradbee v. Mayor, &c. of London*, 5 Scott, N. R. 120; per Lord Denman, C. J., *Dodd v. Holme*, 1 Ad. & E. 505; E. C. L. R. 28. See *Peyton v. Mayor, &c. of London*, 9 B. & C. 725; E. C. L. R. 17.

² *Chadwick v. Trower*, 6 Bing. N. C. 1; E. C. L. R. 37; reversing S. C., 3 Bing. N. C. 334; E. C. L. R. 82; cited, 5 Scott, N. R. 119; *Grocers' Company v. Donne*, 3 Bing. N. C. 84; E. C. L. R. 32; *Davis v. London and Blackwall Railway Company*, 2 Scott, N. R. 74.

³ *Partridge v. Scott*, 3 M. & W. 220, 228; (*) recognised, *Acton v. Blundell*, 12 M. & W. 352; (*) ante, p. 150.

rally descend; nor can any proprietor below throw back the water without the *license or the grant of the proprietor above.¹ [*278] Where, therefore, the owner of the land applies the stream running through it to the use of a mill newly erected, or to any other purpose, he may, if the stream is diverted or obstructed by the proprietor of land above, recover against such proprietor for the consequential injury to the mill;² and the same principle seems to apply where the obstruction or diversion has taken place prior to the erection of the mill, unless, indeed, the owner of land higher up the stream has acquired a right to any particular mode of using the water by prescription, that is, by user continued until the presumption of a grant has arisen.³

With respect to water flowing in a subterraneous course, it has been held, that in this, the owner of land through which it flows has no right or interest (at all events, in the absence of an uninterrupted user of the right for more than twenty years), which will enable him to maintain action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry;⁴ for, according to the principle already stated, if a man digs a well on his own land, so close to the soil of his neighbour as to require the support of a rib of clay or stone in his neighbour's land to retain the water in the well, no action would lie against the [*279] owner of the adjacent *land for digging away such clay or stone, which is his own property, and thereby letting out the water; and it would seem to make no difference as to the legal rights of the parties if the well stands some distance within the plaintiff's boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant's boundary, which is, in substance, the very case above stated.⁵

The principle which the above instances have been selected to

¹ *Mason v. Hill*, 5 B. & Ad. 1; E. C. L. R. 27; *Wright v. Howard*, 1 Sim. & Stu. 190; cited Judgment, 12 M. & W. 349; (*) *Magor v. Chadwich*, 11 Ad. & E. 571; E. C. L. R. 39; 3 Kent, Com. 4th ed. 488.

² In *Platt v. Johnson*, 15 Johns. R. (U. S.) 213, recognised *Panton v. Holland*, 17 Id. 100, a contrary doctrine is laid down.

³ Judgment, *Mason v. Hill*, 5 B. & Ad. 25; E. C. L. R. 27, where the Roman law upon this subject is briefly considered. As to the stat. 3 & 4 Will. 4, c. 71, *infra*, see *Hale v. Oldroyd*, 14 M. & W. 789. (*)

⁴ *Acton v. Blundell*, 12 M. & W. 324; (*) *South Shields Waterworks Company v. Cookson*, 15 L. J., Ex. 315.

⁵ Judgment, 12 M. & W. 352, 353. (*)

illustrate likewise applies where various rights, which are at particular times unavoidably inconsistent with each other, are exercised concurrently by different individuals; as, in the case of a highway, where right of common of pasture and right of common of turbary may exist at the same time, or of the ocean, which, in time of peace, is the common highway of all; in that of a right of free passage along the street, which right may be sometimes interrupted by the exercise of other rights, as by erecting a hoard for repairing a house; or in that part of a port or navigable river, which may be likewise subject at times to temporary obstruction. In these and similar cases, where such different coexisting rights happen to clash, the maxim, *sic utere tuo ut alienum non lædas*, will, it has been observed, generally serve as a clue to the labyrinth.⁴ And, further, the possible jarring of pre-existing rights can furnish no [*280] warrant for an innovation which seeks to create a new right to the prejudice of an old one, for there is no legal principle to justify such a proceeding.⁵

Not only, moreover, does the law give redress where a substantive injury to property is committed, but on the same principle, the erection of anything offensive so near the house of another as to render it useless and unfit for habitation is actionable.⁶ An action, however, cannot be maintained for the reasonable use of a person's right, although exercised so as to occasion annoyance or inconvenience to another: as, if a butcher, brewer, &c., carry on his trade in a convenient place; or if a man build a house whereby my prospect is interrupted,⁷ or open a window whereby my privacy is disturbed;

¹ Per Story, J., *The Marianna Flora*, 11 Wheaton, R. (U. S.) 42.

² See *Bradbee v. Mayor, &c., of London*, 5 Scott, N. R. 79; *Wilkes v. Hungerford Market Company*, 2 Bing. N. C. 281; E. C. L. R. 29; which was an action on the case of continuing an authorized obstruction for an unreasonable time.

³ See *Mayor of Colchester v. Brooke*, 7 Q. B. 389; E. C. L. R. 53; *Dobson v. Blackmore*, 16 L. J., Q. B. 238.

⁴ Judgment, *Rex v. Ward*, 4 Ad. & E. 384; E. C. L. R. 81; Judgment, 15 Johns. R. (U. S.) 218; *Panton v. Holland*, 17 Id. 100.

⁵ Judgment, *Rex v. Ward*, supra.

⁶ Per Burrough, J., *Deane v. Clayton*, 7 Taunt. 497; E. C. L. R. 2; *Doe d. Bish v. Keeling*, 1 M. & S. 95; E. C. L. R. 28.

⁷ *Elliotsen v. Feetham*, 2 Bing. N. C. 134; E. C. L. R. 29; *Bliss v. Hall*, 4 Bing. N. C. 183; E. C. L. R. 83; *Flight v. Thomas*, 10 Ad. & E. 590; E. C. L. R. 37; *Knowles v. Richardson*, 1 Mod. 55; per Wray, C. J., 9 Rep. 58 b. See argument, *Acton v. Blundell*, 12 M. & W. 341. (*)

⁸ Com. Dig., "Action upon the Case for a Nuisance," (C.); *Aldred's case*, 9 Rep. 58. According to the Roman law it was forbidden to obstruct the prospect from a neighbour's house; see D. 8, 2, 3, & 15; Wood, Civ. Law, 3d ed. 92, 93.

in which latter case, the only remedy is to build on the adjoining land opposite to the offensive window.¹ In the instances just mentioned the general principle applies—*qui jure suo utitur neminem lædit*.²

By stat. 2 & 3 Will. 4, c. 71, s. 2, it is provided that, where a right to an easement is claimed by any person who has enjoyed the same, without interruption, for the full period of twenty years, such claim shall not be defeated or destroyed by showing only that such easement was first *enjoyed at a time prior to such period of [*281] twenty years, though it may be defeated in any other way in which it might have been defeated prior to that statute.

In case for annoying plaintiff in the enjoyment of his house, by causing offensive smells to arise near to, in, and about it, defendant pleaded enjoyment as of right for twenty years of a mixen on defendant's land contiguous and near to plaintiff's house, whereby, during all that time, offensive smells necessarily and unavoidably arose from the said mixen; and, after verdict for the defendant, the Court of Queen's Bench held the plea bad, because it did not show a right to cause offensive smells in the plaintiff's premises, nor that any smells had, in fact, been used to pass beyond the limits of defendant's own land.³

Again, if the owner of adjacent land erects a building so near the house of the plaintiff as to prevent the air and light from entering and coming through the plaintiff's windows, an action will, in some cases, lie. The law on this subject formerly was, that no action would lie, unless a right had been gained in the lights by prescription;⁴ but it was subsequently held, that, upon evidence of an adverse enjoyment of lights for twenty years or upwards unexplained, a jury might be directed to presume a right by grant or otherwise, even though no lights had existed there before the commencement of the twenty years:⁵ and although, formerly, if the period of enjoyment fell short of twenty years, a presumption in favour of the

¹ Per Eyre, C. J., cited 3 Camp. 82; 2 Sel. N. P. 10th ed. 1114. See *Cross v. Lewis*, 4 D. & R. 284; E. C. L. R. 16.

² Vide D. 50, 17, 151 & 155, § 1.

³ *Flight v. Thomas*, 10 Ad. & E. 590; E. C. L. R. 37. See, also, *Holford v. Han-kinson*, 5 Q. B. 584; E. C. L. R. 48; *Arkwright v. Gell*, 5 M. & W. 203; (*) *Ward v. Robins*, 15 M. & W. 237. (*)

⁴ See D. 8, 2, 9.

⁵ 2 Selw., N. P. 10th ed. 1108, 1109. See, also, *Woodf., L. & T.* 5th ed. B. 2, c. 7, s. 3.

plaintiff's right might have been raised from other circumstances, it is now enacted by *2 & 3 Will. 4, c. 71, s. 6, that no pre-^[*282]sumption shall be allowed or made in support of any claim upon proof of the exercise of the enjoyment of the right or matter claimed for less than twenty years; and by sect. 3 of the same statute, that, "when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years, *without interruption*, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." And by sect. 4, it is further enacted, that "the period of twenty years shall be taken to be the period next before some suit or action wherein the claim shall have been brought into question; and no act or matter shall be deemed to be an interruption within the meaning of the statute, unless the same shall have been submitted to, or acquiesced in, for one year after the party interrupted shall have had notice thereof, and of the person making or authorizing the same to be made." The last section of this act is applicable not only to obstructions preceded and followed by portions of the twenty years, but also to an obstruction ending with that period; and, therefore, a prescriptive title to the access and use of light may be gained by an enjoyment for nineteen years and three hundred and thirty days, followed by an obstruction for thirty-five days.¹

We may, in the next place, observe, that, according to the maxim *sic utere tuo ut alienum non lædas*, a person is made liable at law for the consequences of his own negligence. *It has, there-^[*283]fore, been held, that an action lies against a party for so negligently constructing a hayrick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbour's house was burnt down; and, in such a case, the proper criterion for the guidance of the jury is, whether the defendant has been guilty of gross negligence, viewing his conduct with reference to the caution which a prudent man would, under the given circumstances, have observed.²

¹ *Flight v. Thomas* (in error), 11 Ad. & E. 688; E. C. L. R. 39, affirmed by the House of Lords, 8 Cl. & Fin. 231. See, also, *The Salters' Company v. Jay*, 8 Q. B. 109; E. C. L. R. 43, where a plea of the custom of London was held bad.

² *Vaughan v. Menlove*, 3 Bing., N. C. 468; E. C. L. R. 32; *Turberville v. Stampe*, Ld. Raym 264; S. C. 1 Salk. 13; *Piggot v. The Eastern Counties Railway Com-*

So, the owners of a canal, taking tolls for the navigation, are, by the common law, bound to use reasonable care in making the navigation secure, and will be responsible for the breach of such duty upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap-door open without any protection, by which his customers suffer injury.¹

Where, however, in cases similar to the preceding, the immediate and proximate cause of damage is the unskilfulness of the plaintiff himself, he clearly cannot recover. Thus, some bricklayers, employed by the defendant, had laid several barrowsfull of lime-rubbish before the defendant's door, and, whilst the plaintiff was passing in a one-horse chaise, the wind raised a cloud of dust from the lime-rubbish, which frightened the horse, although usually very quiet; he, consequently, started on one side, and would have run against a wagon which was meeting them, but the plaintiff hastily pulled [*284] *him round, and the horse then ran over a lime heap lying before another man's door; by the shock the shaft was broken, and the horse, being thus still more frightened, ran away, and, the chaise being upset, the plaintiff was thrown out and hurt; it was held, that, as the immediate and proximate cause of the injury was the unskilfulness of the driver, the action could not be maintained.²

With respect to one important class of cases of frequent occurrence, and which fall directly within the general principle under review, viz., where damage is caused by collision between two vessels, it has been observed, that "there are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party, as, where the loss is occasioned by a storm, or any other *vis major*. In that case, the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame, where there has been a want of due diligence or of skill on both sides. In such a case, the rule of law is, that the loss must be ap-

pany, 3 C. B. 229; E. C. L. R. 54. As to liability for fire caused by negligence at common law, see per Tindal, C. J., *Ross v. Hill*, 2 C. B. 889, and 3 C. B. 241; E. C. L. R. 54; *Smith v. Frampton*, 1 Ld. Raym. 62; and under the statute law, see *Viscount Canterbury v. The Attorney-General*, 1 Phill. 306; *Filliter v. Phippard*, Q. B. 12 Jur. 202. See, also, *Clark v. Foot*, 8 Johns. R. (U. S.) 421.

¹ *Parnaby v. Lancaster Canal Company*, 11 Ad. & E. 223, 243; E. C. L. R. 39.

² *Flower v. Adam*, 2 Taunt. 814.

portioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only, and then the rule is, that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran the other down; and, in this case, the injured party would be entitled to an entire compensation from the other.”¹

Without dwelling further upon this particular illustration *of our present subject, we shall merely observe, in accord- [*285] ance with a recent decision, that the liability of a ship-owner for the damage done by the collision of his ship with another vessel is limited, by the stat. 53 Geo. 3, c. 159, to the value of his ship “at the time of,” that is, *immediately before* the collision. He is not, therefore, exempted from liability where, by the same collision, his own ship instantly foundered.²

Again, with reference to restitution in a case of capture, Lord Stowell has observed: “The natural rule is, that, if a party be unjustly deprived of his property, he ought to be put, as nearly as possible, in the same state as he was before the deprivation took place; technically speaking, he is entitled to restitution with costs and damages. This is the general rule upon the subject; but, like all other general rules, it must be subject to modification. If, for instance, any circumstances appear, which show that the suffering party has himself furnished occasion for the capture, if he has, by his own conduct, in some degree contributed to the loss, then he is entitled to a somewhat less degree of compensation than what is technically called simple restitution.”³

The law also, through regard to the safety of the community, requires, that persons having in their custody instruments of danger, should keep them with the utmost care. Where, therefore, defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and a damage accrued to the plaintiff’s son in consequence of the girl’s presenting the gun at him and drawing the trigger, [*286] *when the gun went off; it was held that the defendant was liable to damages in an action on the case.⁴ “If,” observed Lord

¹ Judgment, *The Woodrop-Sims*, 2 Dods. Adm. R. 86; *Hay v. Le Neve*, 2 Shaw, Scotch App. Cas. 895; judgment, *De Vaux v. Salvador*, 4 Ad. & E. 481; *E. C. L. R. 31*; *The Test*, 11 Jur. 998.

² *Brown v. Wilkinson*, 15 M. & W. 891. (*)

³ *The Acteon*, 2 Dods. Adm. R. 51-2.

⁴ *Dixon v. Bell*, 5 M. & S. 198.

Denman, delivering the judgment of the Court of Queen's Bench in another and more recent case, "I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set in motion, to the injury of a third; and if that injury should be brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first."¹ In the case referred to, the evidence showed that the defendant had negligently left his horse and cart unattended in the street; and that plaintiff, a child seven years old, having got upon the cart in play, another child incautiously led the horse on, whereby plaintiff was thrown down and hurt; and in answer to the argument, that plaintiff could not recover, having, by his own act, contributed to the accident, it was observed, that the plaintiff, although acting without prudence or thought, had shown these qualities in as great a degree as he could be expected to possess them, and that his misconduct, at all events, bore no proportion to that of the defendant.² The established rule, indeed, applicable to such cases is, that the mere want of a *superior* degree of skill or care cannot be set up as a bar to the plaintiff's claim for redress; and that although the plaintiff may himself have been guilty of negligence, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he will be entitled to recover; if, by ordinary care, he might have avoided them, he must be *considered as the author of [*287] his own wrong.³ Ordinary care, it has, moreover, been observed, must mean that degree of care which may be reasonably expected from a person in the plaintiff's situation;⁴ and, in the absence of such ordinary care on the part of the plaintiff, the case will fall within and be governed by the general rule of the English law, that no one can maintain an action for a wrong where he has consented or contributed to the act which occasions his loss.⁵

¹ Lynch v. Nurdin, 1 Q. B. 35; E. C. L. R. 41.

² Lynch v. Nurdin, 1 Q. B. 29; E. C. L. R. 41; Illidge v. Goodwin, 5 C. & P. 190; E. C. L. R. 24.

³ Per Parke, B., Bridge v. The Grand Junction Railway Co., 3 M. & W. 248; (*) recognised in Davies v. Mann, 10 M. & W. 546; (*) Holden v. The Liverpool New Gas and Coke Company, 3 C. B. 1; E. C. L. R. 54; per Lord Ellenborough, C. J., Butterfield v. Forrester, 11 East, 61; Marriott v. Stanley, 1 Scott, N. R. 392; Lynch v. Nurdin, 1 Q. B. 29; E. C. L. R. 41; Goldthorpe v. Hardmans, 18 M. & W. 377. (*)

⁴ Judgment, 1 Q. B. 36; E. C. L. R. 41.

⁵ Per Tindal, C. J., Gould v. Oliver, 2 Scott, N. R. 257. See Smith v. Dobson, 3 Scott, N. R. 386; Taylor v. Clay, 16 L. J., Q. B. 44.

It is not, however, true as a general proposition, that *misconduct*, even wilful and culpable misconduct, must necessarily exclude the plaintiff who is guilty of it from the right to sue; and against such general proposition the case of *Bird v. Holbrook* is a decisive authority.¹ In that case, the defendant, for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house, and the plaintiff, who climbed over the wall in pursuit of a stray fowl, having been shot and seriously injured, the defendant was held liable in damages.² It was, indeed, observed in a very recent case, that this decision proceeded on the ground, that the setting spring-guns without notice was, even *independently of the statute,³ an unlawful act; but, it was likewise remarked, that, although the correctness of [*288] such a position might perhaps be questioned, yet, if it were sound, the above decision was correct:⁴ and on the whole, we may, it seems, conclude with reference to this subject, that although the law, in certain cases forbids the setting of instruments capable of causing injury to man, where such injury will be a probable consequence of setting them, yet, with the exception of those cases, a man has a right to do what he pleases with his own land.⁵

We may add, that, where an accident happens entirely from a superior agency, and without default on the part of the defendant, or blame imputable to him, an action for injury resulting from such accident cannot be maintained, and facts constituting the above defence, may, moreover, be given in evidence under the general issue.

Lastly, we may observe, that although a man has a right to keep an animal which is *feræ naturæ*, and no one can interfere with him in doing so until some mischief happens, yet, as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible;

¹ See, also, the judgment, *Mayor of Colchester v. Brooke*, 7 Q. B. 339; E. C. L. R. 53; citing *Davies v. Mann*, *supra*.

² *Bird v. Holbrook*, 4 Bing. 628; E. C. L. R. 13-15; cited 1 Q. B. 37; *Hott v. Wilkes*, 3 B. & Ald. 304; E. C. L. R. 5, as to which case see *ante*, p. 202. See, also, argument, 1 Scott, N. R. 393, 394.

³ 7 & 8 Geo. 4, c. 18.

⁴ Judgment, *Jordin v. Crump*, 8 M. & W. 789, (*) where the Court agree in opinion with *Gibbs, C. J.*, in *Deane v. Clayton*, 7 Taunt. 489; E. C. L. R. 2, which was an action for killing plaintiff's dog by a spike placed on defendant's land for the preservation of his game.

⁵ Judgment, 8 M. & W. 787. (*)

⁶ *Wakeman v. Robinson*, 1 Bing. 218, 215; E. C. L. R. 8; *Hall v. Fearney*, 8 Q. B. 919; E. C. L. R. 43; *Weaver v. Ward, Hobart*, 134.

and there is, in truth, as observed in a recent case, no distinction between the case of an animal which breaks through the tameness of its nature and is fierce, and known by the owner to be so, and one which is *feræ naturæ*.¹

[*289] *The above instances (which might easily be extended to a much greater space than it has been thought desirable to occupy), will, it is hoped, suffice to give a general view of the manner in which the maxim, *sic utere tuo ut alienum non lædas*, is applied in our law to restrict the enjoyment of property, and to regulate in some measure the conduct of individuals by enforcing compensation for injuries wrongfully occasioned by a violation of the principle which it involves, a principle which is obviously based in justice and essential to the peace, order, and well-being of the community.

CUJUS EST SOLUM EJUS EST USQUE AD CÆLUM.

(Co. Litt. 4, a.)

He who possesses land possesses also that which is above it.

Land, in its legal signification, has an indefinite extent upwards, so that, by a conveyance of land, all buildings, growing timber, and water, ~~erected and~~ being thereupon, shall likewise pass.² So, if a man eject another from land, and afterwards build upon it, the building belongs to the owner of the ground on which it is built, according to the principle, *ædificatum solo, solo cedit*,³ which we shall presently consider; and if in the case just supposed, the rightful owner brings ejectment for the land, he may do so without mentioning the building, unless, indeed, it be *a messuage, in which case it ought, [*290] perhaps, to be particularly named.⁴

From the principle, *cujus est solum ejus est usque ad cælum*, it follows, that a person has no right to erect a building on his own land which interferes with the due enjoyment of adjoining premises, and occasions damage thereto, either by overhanging them, or by the flow of water from the roof and eaves upon them, unless, indeed, a legal right so to build has been conceded by grant, or may be pre-

¹ Jackson v. Smithson, 15 M. & W. 568; (*) May v. Burdett, 16 L. J., Q. B. 64. See, also, Mason v. Keeling, 1 Ld. Raym. 606; Jenkins v. Turner, Id. 109.

² Co. Litt. 4, a; 2 Bla. Com. 18, 19; 9 Rep. 54; 4 Cruise Dig. 4th ed. 267. In ejectment water is technically described as so many acres of land covered with water; 2 Bla. Com. 18.

³ Post, p. 295.

⁴ Goodtitle d. Chester v. Alker, 1 Burr. 143, 144; Adams's Eject. 4th ed. 27.

sumed by user, and by the operation of the recent stat. 2 & 3 Will. 4, c. 71.

Where the declaration alleged that the defendant had erected a house upon his freehold, so as to project over the house of the plaintiff *ad nocumentum liberi tenementi ipsorum*, but did not assign any special nuisance, the Court, on demurrer, held the declaration good, inasmuch as the erection must evidently have been a nuisance productive of legal damage;¹ and, in a very recent case, it was held, that the erection of a cornice projecting over the plaintiff's garden was a nuisance, from which the law would infer injury to the plaintiff, and for which, therefore, an action on the case would lie.²

With respect to the nature of the remedy for an injury of the kind to which we are now alluding, the general rule is, that case is the proper form of action for the consequential, and trespass for the immediate and direct, injury resulting from the act complained of. Thus, if the occupier of a house, who has a right to have the rain fall from the eaves of it upon the land of his neighbour, fixes up a spout whereby the rain is discharged in a body upon the land, *the proper form of action by the land-owner against the occupier of the house for this injury is in case, because the [*291] flowing of the water, which constitutes the injury, is not the immediate act of the occupier of the house in fixing up the spout, but is the consequence only of such act.³ Where, however, a direct injury is committed to houses or lands which are in the possession of the party complaining, the proper form of action is trespass; as where the defendant builds upon the soil or messuage of the plaintiff. There are, also, some few instances in which case and trespass are concurrent remedies; as, for heightening and building on a party-wall, whereby plaintiff's windows are darkened; in which case, it will be observed, the injury is done partly by an act of trespass, viz., the building on the property of the plaintiff, and partly by that which was not an act of trespass, but the subject of an action on the case, viz., the building on the defendant's soil and the consequent obstruction.⁴

But not only for each of the above injuries will an action lie at suit of the occupier, but the reversioner may also recover by action

¹ Baten's case, 9 Rep. 53.

² Fay v. Prentice, 1 C. B. 828; E. C. L. R. 50.

³ Reynolds v. Clarke, 2 Lord Raym. 1899. See Thomas v. Thomas, 2 Cr., M. & R. 34; 9 Rep. 54.

⁴ Wells v. Ody, 1 M. & W. 452. (*)

on the case, provided the jury think that a damage has been done to the reversion: as, for building a roof with eaves which discharge water by a spout into adjoining premises;¹ but the declaration must allege the act to have been done to the damage of the reversion, or must state an injury of such a permanent nature as to occasion necessarily a damage thereto.²

[*292] *Not only will a man be liable who erects a building either upon or so as to overhang his neighbour's land,³ but an action will lie against him if the boughs of his tree are allowed to grow so as to overhang the adjoining land, which they had not been accustomed to do.⁴ In a case before Lord Ellenborough, at *Nisi Prius*,⁵ which was an action of trespass for nailing a board on defendant's own wall, so as to overhang the plaintiff's garden, and where the maxim, *cujus est solum ejus est usque ad cælum*, was cited in support of the form of action, his Lordship observed, that he did not think it was a trespass to interfere with the column of air superincumbent on the close; that, if it was, it would follow, that an aeronaut was liable to an action of trespass qu. cl. fr. at the suit of the occupier of every field over which his balloon might happen to pass; since the question, whether or not the action was maintainable, could not depend upon the length of time for which the superincumbent air was invaded; and the Lord Chief Justice further remarked, that, if any damage arose from the object which overhung the close, the remedy was by action on the case, and not by action of trespass.⁶

It must be observed, moreover, that the maxim under consideration is not a presumption of law applicable in all cases and under all circumstances; for example, as remarked in a recent case already

¹ *Tucker v. Newman*, 11 Ad. & E. 40; E. C. L. R. 39.

² *Jackson v. Peaked*, 1 M. & S. 234; E. C. L. R. 28. See *Dobson v. Blackmore*, 16 L. J., Q. B. 233. In *Rich v. Basterfield*, 16 L. J., C. P. 273, the liability of the owner of property for a nuisance caused by the tenant was much considered, and the law upon this subject was laid down.

³ 1 Steph. Com. 158; 3 Id. 499; 3 Bla. Com. 217; 3 Inst. 201; Vin. Abr., "Nuisance," (G.) In *Holmes v. Wilson*, 10 Ad. & E. 503; E. C. L. R. 37, it was held, that trespass would lie for continuing a building on another man's land, after a previous recovery for erecting it. As to what is a sufficient possession to entitle a person to bring trespass, see *Dyson v. Collins*, 5 B. & Ald. 600; E. C. L. R. 7.

⁴ *Norris v. Baker*, 1 Rol. Rep. 393; *Lodie v. Arnold*, 2 Salk. 458; 3 Steph. Com. 500.

⁵ *Pickering v. Rudd*, 4 Camp. 219; per *Shadwell*, V. C. E., *Saunders v. Smith*, ed. by *Crawford*, 20.

⁶ See *Reynolds v. Clarke*, 2 Ld. Raym. 1399; *Fey v. Prentice*, supra.

cited, it does not apply to chambers *in the inns of court;¹ for “a man may have an inheritance in an upper chamber, [*293] though the lower buildings and soil be in another.”²

Not only has land in its legal signification an indefinite extent upwards, but in contemplation of law it extends also downwards, so that whatever is in a direct line between the surface of any land and the centre of the earth belongs to the owner of the surface; and hence, the word “land,” which is *nomen generalissimum*, includes, not only the face of the earth, but everything under it or over it; and therefore, if a man grants all his lands, he grants thereby all his mines, his woods, his waters, and his houses, as well as his fields and meadows.³ Where, however, a demise was made of premises late in the occupation of A. (particularly described), part of which was a yard, it was held, that a cellar, situate under the yard and late in the occupation of B., did not pass by the demise; for though *primâ facie* it would do so, yet that might be regulated and explained by circumstances.⁴

The maxim, then, above cited, gives to the owner of the soil all that lies beneath its surface, and accordingly the land immediately below is his property. Whether, therefore, it be solid rock, or porous ground, or venous earth, or part soil and part water, the person who owns the surface may dig therein, and apply all that is there found to his purposes, at his free will and pleasure;⁵ although, as already stated, he may in some cases incur liability by so digging and excavating at the extremity and under the *surface of his own land as to occasion damage to the house or other building of [*294] his neighbour.⁶

But, although the general rule, which obtains in the absence of any express covenant or agreement between the parties interested in land is as above stated, and although it is a presumption of law that the owner of the freehold has a right to the mines and minerals underneath, yet this presumption may be rebutted by showing a distinct title to the surface and to that which is beneath; for mines may form a distinct possession and different inheritance:⁷ and, in-

¹ Per Maule, J., 1 C. B. 840; E. C. L. R. 50.

² Co. Litt. 48, b.

³ 2 Bla. Com. 18.

⁴ Doe d. Freeland v. Burt, 1 T. R. 701.

⁵ Judgment, Acton v. Blundell, 12 M. & W. 324, 354. (*) See Magor v. Chadwick, 11 Ad. & E. 571; E. C. L. R. 39.

⁶ Ante, p. 150; Dodd v. Holme, 1 Ad. & E. 493; E. C. L. R. 28; Wyatt v. Harrison, 3 B. & Ad. 876; E. C. L. R. 23.

⁷ 1 Crabb, Real Prop., p. 98.

deed, it frequently happens, that a person being entitled both to the mines and to the land above, grants away the land, excepting out of the grant the mines, which would otherwise have passed under the conveyance of the land, and also reserving to himself the power of entering upon the surface of the land which he has granted away, in order to do such acts as may be necessary for the purpose of getting the minerals excepted out of the grant, a fair compensation being made to the grantee for so entering and working the mines. In this case one person has the land above, the other has the mines below, with the power of getting the minerals; and the rule is, according to the maxim last considered, that each shall so use his own right of property as not to injure his neighbour; and, therefore, the grantor will be entitled to such mines only as he can work, leaving a reasonable support to the surface. And here we may observe, that the bare exception of the mines and minerals, without reservation of right of entry, would vest in the grantor, the whole of the mines and minerals; but he would have no right to work or get them except [*295] by *the consent of the plaintiff, or by means of access through other shafts and channels, with which the grantee's land had nothing to do; because, in this case, the two properties, viz., in the surface and in the subterranean products, are totally distinct.¹ Analogous to the preceding case is that of the grant of an upper room in a house, with the reservation by the grantor of a lower room, he undertaking not to do anything which will derogate from the right to occupy the upper room. In this case, if he were to remove the supports of the upper room, he would be liable in an action of covenant.²

QUICQUID PLANTATUR SOLO, SOLO CEDIT.

(Wentw. Off. Ex., 14th ed., 145.)

Whatever is affixed to the soil belongs thereto.

It may be stated, as a general rule of great antiquity, that, whatever is affixed to the soil becomes, in contemplation of law, a part of it, and is consequently subjected to the same rights of property as the soil itself.³ In the Institutes of the Civil Law it is laid down,

¹ Harris v. Ryding, 5 M. & W. 60, 86, 72. (*) See Earl of Rosse v. Wainman, 14 M. & W. 859; (*) 1 Crabb, Real Prop. 95; Cox v. Glue, C. P. 12 Jur. 185.

² 5 M. & W. 71, 76. (*)

³ Woodf., L. & T. 5th ed. 447.

that if a man builds on his own land with the materials of another, the owner of the soil becomes, in law, the owner of the building also—*quia omne quod solo inædificatur solo cedit*.¹ In this case, indeed, the property in the materials used still continued in the original owner; and although, by a law of the XII. Tables, the object of which was to prevent the destruction *of buildings, he was unable, unless the building were taken down, to reclaim the [*296] materials in specie, he was, nevertheless, entitled to recover double their value as compensation, by the action *de tigno juncto*.² On the other hand, if a person built, with his own materials, on the land of another, the house likewise belonged to the owner of the soil; for, in this case, the builder was presumed intentionally to have transferred his property in the materials to such owner.³ In like manner, if trees were planted or seed sown in the land of another, the proprietor of the soil became proprietor also of the tree, the plant, or the seed, as soon as it had taken root.⁴ And this latter proposition is fully adopted almost in the words of the civil law by our own law writers—Britton, Bracton, and Fleta.⁵ According to the Roman law, indeed, where buildings were erected upon, or improvements made to, property, by the party in possession *bonâ fide*, and without notice of any adverse title, compensation was, it seems, allowed for such buildings and improvements to the party making them, as against the rightful owner;⁶ and although this principle is not recognised by our own common law, nor to its full extent by courts of equity, yet, where a man, supposing that he has a good title to an estate, builds upon the land with the knowledge of the real owner, who stands by and suffers the erections to proceed, without [*297] *giving any notice of his own claim, he will be compelled, by a court of equity, in a suit brought for recovery of the land, to make due allowance and compensation for such improvements.⁷ “As to

¹ I. 2, 1, 29; D. 47, 3, 1.

² Id.

³ I. 2, 1, 30.

⁴ I. 2, 1, 31 & 32; D. 42, 1, 7, 18.

⁵ Britton (by Wingate), c. 33, 180; Bracton, c. 3, ss. 4, 6; Fleta, lib. 3, c. 2, s. 12.

⁶ *Sed quamvis ædificium fundo cedit, fundi tamen dominus condemnari solet ut eum duntaxat recipiat, reddito sumptu quo pretiosior factus est, aut super fundo atque ædificio pensio imponatur ex meliorationis æstimatione si maluerit; Gothofred. ad. I. 2, 1, 30.*

⁷ 1 Story, Eq. Jurisp. 4th ed., s. 388; 2 Id. s. 1237. Where a sale is set aside on account of the inadequacy of consideration, the purchaser will be allowed for lasting and valuable improvements; Sudg. V. & P. 11th ed. 327.

the equity arising from valuable and lasting improvements, I do not consider," remarked Lord Chancellor Clare,¹ "that a man who is conscious of a defect in his title, and with that conviction on his mind expends a sum of money in improvements, is entitled to avail himself of it. If a person really entitled to the estate will encourage the possessor of it to expend his money in improvements, or if he will look on and suffer such expenditure, without apprising the party of his intention to dispute his title, and will afterwards endeavour to avail himself of such fraud—upon the ground of fraud the jurisdiction of a court of equity will clearly attach upon the case."

Having thus touched upon the general doctrine, that what has been affixed to the freehold becomes a portion of it, we shall proceed to consider in what manner and with what qualifications the maxim, *quicquid plantatur solo, solo cedit*, applies: 1st, with reference to trees; 2dly, emblements; 3dly, away-going crops; and, 4thly, fixtures:—treating these important subjects with brevity, and merely endeavouring to give a concise outline of the law respecting each.

1. The general property in trees, being *timber*, is in the [*298] *owner of the inheritance of the land upon which they grow; that in bushes and underwood, on the other hand, is in the tenant. The tenant cannot, indeed, without rendering himself liable to an action on the case for waste, do anything which will change the nature of the thing demised; he cannot, for instance, stub up a wood, or destroy a park paling; neither can he destroy young plants destined to become trees, nor grub up or cut down and destroy fences; nor, in short, do any act prejudicial to the inheritance. He may, however, cut down trees which are not timber, either by general law, or by particular local custom; and he may likewise cut down such trees as are of seasonable wood, *i. e.*, such as are usually cut as underwood, and in due course grow up again from the stumps, and produce again their ordinary and usual profit by such growth.²

It follows from the rule just stated, that if trees, being timber, are blown down by the wind, the lessor shall have them, for they are

¹ *Kenney v. Browne*, 3 *Ridgw.*, Par. Cas. 462, 519; cited, argument, *Austin v. Chambers*, 6 Cl. & Fin. 31. See, per Lord Brougham, C., *Perrott v. Palmer*, 3 My. & K. 640.

² *Lord D'Arcy v. Askwith*, Hob. 284; judgment, *Phillipps v. Smith*, 14 M. & W. 589; (*) per *Tindal, C. J.*, *Berriman v. Peacock*, 9 Bing. 386, 387; E. C. L. R. 23; Com. Dig. "Biens," (H.)

part of his inheritance, and not the tenant for life or years; but if they be dotards, without any timber in them, the tenant for life or years shall have them.¹

So, where timber is severed by a trespasser, and by wrong, it belongs to him who has the first vested estate of inheritance, whether in fee or in tail, and he may bring trover for it.² And, if there are intermediate contingent estates of inheritance, and the timber is cut down by combination between the tenant for life and the person who has the next vested estate of inheritance, or, if the tenant for life himself *has such an estate, and fells timber, in these cases [*299] the Court of Chancery will order it to be preserved for him [who has the first contingent estate of inheritance under the settlement].³

On the other hand, where trees not fit for timber are cut down by the lessor, the property in such trees vests in the tenant; for the lessor would have no right to them, if severed by the act of God, and, therefore, can have no right to them, where they have been severed by his own wrongful act; and the same rule holds where they are severed by a stranger.⁴

A tenant who is answerable for waste only, may cut down trees for the purposes of reparation, without committing waste, either where the damage has accrued during the time of his being in possession in the ordinary course of decay, or where the premises were ruinous at the time he entered; if, however, the decay happened by his default, in this case to cut down trees, in order to do the repair, would be waste;⁵ and, at all events, the tenant can only justify felling such trees as are fit for the purposes of repair.⁶ It is, moreover, a general rule, that waste can only be committed of the thing demised; and, therefore, if trees are excepted out of the demise, no waste can be committed of them, and, consequently, ejectment does not lie on the ground of a forfeiture. Trespass in such a case would be the proper remedy.⁷

¹ Herlakenden's case, 4 Rep. 62, 3d Resolution; Countess of Cumberland's case, Moore, 813.

² Woodf., L. & T., 5th ed. 438, 439; Ward v. Andrews, 2 Chit. R. 636.

³ Bewick v. Wintfield, 3 P. Wms. 268.

⁴ Channon v. Patch, 5 B. & C. 897, 902; E. C. L. R. 11; Ward v. Andrews, 2 Chit. R. 686.

⁵ Wood., L. & T. 5th ed. 440.

⁶ Simmons v. Norton, 7 Bing. 640; E. C. L. R. 20.

⁷ Goodright v. Vivian, 8 East, 190; Rolls v. Rock, cited, 2 Selw., N. P. 10th ed. 1314.

A tenant "without impeachment of waste" is entitled to cut down [*300] timber, which he could not otherwise do; but *this clause does not extend to allow destructive or malicious waste, such as cutting down timber which serves for the shelter or ornament of the estate.¹ A tenant for life without impeachment of waste has as full power to cut down trees for his own use as if he had an estate of inheritance, and is equally entitled to the timber if severed by others, so that an action of trover for such timber will not lie against him at suit of a tenant in tail expectant on the termination of a life estate.² But, if the tenant for life cut timber so as not to leave enough for repairs, or, if he cut down trees planted for ornament or shelter to the mansion-house, or saplings not fit to be felled for timber, a court of equity will restrain him by injunction.³ And where a tenant for life without impeachment of waste pulled down a mansion-house and rebuilt it in a more eligible situation, an act which was not complained of by the remainderman, an injunction was granted to restrain the tenant for life from destroying timber which had formed an ornament of shelter to the original mansion.⁴

Lastly, it is an inseparable incident to an estate tail, that the tenant shall not be punished for committing waste by felling timber; but this power must be exercised, if at all, during the life of the tenant in tail; for, at the instant of his death, it ceases. If, therefore, tenant in tail sells trees growing on the land, the vendee must cut them down during the life of the tenant in tail; for, otherwise, they will descend to the heir as part of the inheritance.⁵ In like manner, the grantee of tenant in tail is said to be dispensable [*301] *for waste;⁶ nor is tenant in tail, after a possibility of issue extinct, liable for waste;⁷ though equity would, in this case, interfere to restrain extravagant and malicious devastation.⁸

2. The next exception to the general rule, that whatever is planted or annexed to the soil or freehold passes with it, occurs in the case of emblements, which term comprises not only corn sown, but roots planted, and other annual artificial profits of the land;⁹ and these,

¹ Packington's case, 3 Atk. 215.

² Pyne v. Dor, 1 T. R. 55.

³ Woodf., L. & T. 5th ed. 881.

⁴ Morris v. Morris, 16 L. J., Chanc. 201. See Duke of Leeds v. Earl of Amherst, Id. 5; S. C. 2 Phill. 117.

⁵ Woodf., L. & T. 5th ed. 440, 879.

⁶ Id. 879.

⁷ Williams v. Williams, 15 Ves. jun. 427; 2 Bla. Com. 125.

⁸ 2 Bla. Com. 16th ed. 238, n. (10).

⁹ Com. Dig., "Biens," (G. 1.)

in certain cases, are distinct from the realty, and subject to many of the incidents attending personal property.¹

The rule upon this subject has been already stated, and is, that those only are entitled to emblements who have an uncertain estate or interest in the land, which is determined by the act of God, or of the law, between the period of sowing and the severance of the crop.² Where, however, the tenancy is determined by the tenant's own act, as by forfeiture for waste committed, or by the marriage of a feme copyholder or a tenant *durante viduitate*, and other similar cases, the tenant is not entitled to emblements; for the principle on which law gives emblements is, that the tenant may be encouraged to cultivate by being sure of receiving the fruit of his labour, notwithstanding the determination of his estate by some unforeseen and unavoidable event.³ By this rule, however, the tenant is not entitled to *all* the fruits of his labour, or such right might be extended to things of a more permanent nature, such as *trees,⁴ or to more crops than one, [^{*302}] since the cultivator very often looks for a compensation for his capital and labour in the produce of successive years; but the principle is limited to this extent, that he is entitled to one crop of that species only which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period.⁵

If, then, a tenant for life, or *pur autre vie*, sows the land, and dies before harvest, his personal representatives shall have the emblements or profits of the crop; and if the tenant for life sows the land, and afterwards grants over his estate, and the grantee dies before the corn is severed, it shall go to the tenant for life, and not to the grantee's executor; and, if a man sows land, and lets it for life, and the lessee for life dies before the corn is severed, the reversioner, and not the lessee's executor, shall have the emblements, although, if the lessee had sown the land himself, it would have been otherwise.⁶

Further, the under-tenants or lessees of tenant for life shall be

¹ 2 Bla. Com. 404.

² Co. Litt. 55, a; ante, p. 177.

³ Com. Dig. "Biens," (G. 2.); 1 Steph. Com. 242, 243.

⁴ See 2 Bla. Com. 123.

⁵ Judgment, *Graves v. Weld*, 5 B. & Ad. 117, 118; E. C. L. R. 27; citing *Kingsbury v. Collins*, 4 Bing. 202; E. C. L. R. 13-15. In *Latham v. Atwood*, Cro. Car. 515, hops growing from ancient roots were held to be like emblements, because they are "such things as grow by the manurance and industry of the owner."

⁶ Argument, *Knevett v. Pool*, Cro. Eliz. 464; Woodf., L. & T., 5th ed. 502.

entitled to emblements in those cases where tenant for life shall not have them, viz., where the life estate determines by the act of the last-mentioned party; as, in the case of a woman who holds *durante viduitate*, her taking husband is her own act, and, therefore, deprives her of the emblements; but if she leases her estate to an under-tenant, who sows the land, and she then marries, this act shall not [*303] *deprive the tenant of his emblements; for he is a stranger, and could not prevent her.¹ All these cases evidently involve the application of the general principle above stated.

The rule as to emblements likewise applies where a life estate is determined by the act of law; therefore, if a lease be made to husband and wife during coverture, which gives them a determinable estate for life, and the husband sows the land, and afterwards the parties are divorced *à vinculo matrimonii*, the husband shall have the emblements; for the sentence of divorce is the act of law, and *actus legis nemini facit injuriam*.² So, if a purchaser buy pending a tenancy under the Court, and the Court, in order to give possession to the purchaser, determine the tenancy, the tenant is entitled to his emblements against the purchaser.³

So, the parochial clergy are tenants for their own lives, and the advantages of emblements are expressly given to them by stat. 28 Hen. 8, c. 11, s. 6, together with a power to enable the parson to dispose of the corn by will; but if the estate is determined by the act of the party himself, as by resigning his living, according to the principle above stated, he will not be entitled to emblements. The lessee of the glebe of a parson who resigns is, however, in a different situation; for, his tenancy being determined by the act of another, he shall have the emblements.⁴

A tenant for years, or from year to year, is not entitled to emblements where the duration of the tenancy depends [*304] *upon a certainty; as, if tenant for years holds for a term of ten years from Midsummer, and, in the last year, sows a crop of corn, which is not ripe and cut before Midsummer, at the end of the term his landlord shall have it; for the tenant knew the expiration of his term, and, therefore, it was his own folly to sow that of which he

¹ Co. Litt. 55, b.

² Oland's case, 5 Rep. 116; S. C. 1 Roll. Abr. 726, "Emblements," (A.) But in this case the marriage was void *ab initio—causâ præcontractus*; and, therefore, the supposed husband never had any estate. See the remarks in *Davis v. Eyton*, 7 Bing. 159, 160; E. C. L. R. 20.

³ 1 Sugd., V. & P. 11th ed. 80.

⁴ *Bulwer v. Bulwer*, 2 B. & Ald. 470, 472; *Woodf., L. & T.* 5th ed. 502.

could never reap the profits.¹ But where the tenancy for years, or from year to year, depends upon an uncertainty, as upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife, or if the term of years be determinable upon a life or lives, in these and similar cases, the estate not being certainly to expire for a time foreknown, but merely by the act of God, the tenant, or his representatives, shall have the emblements in the same manner as a tenant for life would be entitled to them;² and, if the lessee of tenant for life be disseised, and the lessee of the disseisor sow, and then the tenant for life dies, and the remainderman enters, the latter shall not have the corn, but the lessee of the tenant for life.³

Where, however, a tenant for years, or from year to year, himself puts an end to the tenancy, as if he does anything amounting to a forfeiture, the landlord shall have the emblements;⁴ and it is a general rule that he shall take them when he enters for a condition broken, because he enters by title paramount, and is in as of his first estate.⁵ In a recent case, where a lease was granted on condition, that, if the lessee contracted a debt on which he should be sued to judgment, followed by execution, the lessor should re-enter as of his former estate, it was held, that the lessor, having accordingly re-entered after a judgment and execution, was entitled to the emblements.⁶

It has been mentioned that emblements are subject to many of the incidents attending personal property. Thus, by stat. 11 Geo. 2, c. 19, they may be distrained for rent,⁷ they are forfeitable by outlawry in a personal action, they were devisable by testament before the statute of wills, and at the death of the owner they vest in his executors and not in his heir.⁸ So, where tenant in fee or in tail dies after the corn has been sown, but before severance, it shall go to his personal representatives and not to the heir.⁹ If, however,

¹ But the lessee would be entitled to emblements if there were a special covenant to that effect. Co. Litt. 55, a, and Mr. Hargrave's note (5).

² Woodf., L. & T. 5th ed. 503.

³ Knevet v. Pool, Cro. Eliz. 468.

⁴ Co. Litt. 55, b; 2 Bla. Com. 145.

⁵ Per Bosanquet, J., 7 Bing. 160; E. C. L. R. 20; Com. Dig., "Biens," (G. 2; Co. Litt. 55, b.

⁶ Davis v. Eyton, 7 Bing. 154; E. C. L. R. 20.

⁷ See, also, stat. 58 Geo. 3, c. 50; Hutt v. Morrell, 16 L. J., Q. B. 240.

⁸ 2 Bla. Com. 404; Id., by Stewart, 485, 486.

⁹ Com. Dig., "Biens," (G. 2; Co. Litt. 55, b, note (2) by Mr. Hargrave.

tenant in fee sows land, and then devises the land by will and dies before severance, the devisee shall have the corn, and not the devisor's executors; and it is not easy to account for this distinction, which gives corn growing to the devisee, but denies it to the heir.² The remainderman for life shall also have the emblements sown by the devisor in fee in preference to the executor of the tenant for life;³ and the legatee of goods, stock and movables, is entitled to growing corn in preference both to the devisee of the land and the executor.⁴

In the case of a strict tenancy at will, if the tenant sows his land, and the landlord, before the corn is ripe, or before *it is [*306] reaped, puts him out, yet the tenant shall have the emblements, since he could not possibly know when his landlord would determine his will, and therefore could make no provision against it; but it is otherwise when the tenant himself determines the will, for in this case the landlord shall have the profits of the land.⁵

Tenants under execution are entitled to emblements, when, by some sudden and casual profit, arising between seed-time and harvest, the tenancy is put an end to by the judgment being satisfied.⁶ Again, if A. acknowledge a statute or recognisance, and afterwards sow the land, and the conusee extend the land, the latter shall have the emblements; and where judgment was given against a person, and he then sowed the land and brought a writ of error to reverse the judgment, but it was affirmed, it was held, that the recoverer should have the corn.⁷

3. An away-going crop may be defined to be the crop sown during the last year of tenancy, but not ripe until after its expiration. The right to this is usually vested in the out-going tenant, either by the express terms of the lease or contract, or by the usage or custom of the country;⁸ but, in the absence of any contract or custom, and provided the law of emblements does not apply, the landlord is entitled to crops unsevered at the determination of the tenancy, as being a

¹ Anon., Cro. Eliz. 61; Co. Litt. 55, b, n. (2); Spencer's case, Winch. 51.

² See Co. Litt. 55, b, n. 2; Gilb. Ev. 250.

³ Toll. Exors. 157.

⁴ Cox v. Godsalve, 6 East, 604, note; West v. Moore, 8 East, 339; 2 Selw., N. P. 10th ed. 1356.

⁵ Litt. s. 68, with the commentary thereon; Co. Litt. 55; 2 Bla. Com. 146.

⁶ Woodf., L. & T. 5th ed. 503, 504.

⁷ 2 Leo. R. 54.

⁸ Wicks v. Jordan, 2 Bulstr. 213.

⁹ Woodf., L. & T. 5th ed. 505.

Contra in Virginia.

portion of the realty, and by virtue of that general maxim, the exceptions to which we are now considering.

*The common law, it has been observed, does so little to prescribe the relative duties of landlord and tenant, that it is [*307] by no means surprising the Courts should have been favourably inclined to the introduction of those regulations in the mode of cultivation which custom and usage have established in each district to be the most beneficial to all parties.¹ The rule, therefore, is, that evidence of custom is receivable, although there be a written instrument of demise, provided the incident which it is sought to import by such evidence into the contract is consistent with the terms of such contract; but evidence of custom is inadmissible, if inconsistent with the express or implied terms of the instrument; and this rule applies to tenancies as well by parol agreement as by deed or written contract of demise.²

In *Wigglesworth v. Dallison*,³ which is a leading case on this subject, the tenant was allowed an away-going crop, although there was a formal lease under seal. There the lease was entirely silent on the subject of such a right; and Lord Mansfield said, "that the custom did not alter or contradict the lease, but only added something to it."

The same point subsequently came under the consideration of the Court of King's Bench in the case of *Senior v. Armytage*,⁴ which was an action by a tenant against his landlord for compensation for seed and labour under the denomination of tenant right. Mr. Justice Bayley, on its appearing that there was a written agreement between the *parties, nonsuited the plaintiff; but the Court afterwards set aside the nonsuit, and held, that, though there was a [*308] written contract between landlord and tenant, the custom of the country would still be binding, if not inconsistent with the terms of such written contract, and that, not only all common law obligations, but those imposed by custom, were in full force where the contract did not vary them; and the Court seems to have held, that the custom operated, unless it could be collected from the instrument, either

¹ Judgment, *Hutton v. Warren*, 1 M. & W. 466.(*)

² *Wigglesworth v. Dallison*, 1 Dougl. 201; *Clarke v. Roystone*, 13 M. & W. 752.(*)

³ 1 Dougl. 201; affirmed in error, *Id.* 207, n. (8). See *Beavan v. Delahay*, 1 H. Bla. 5; recognised *Griffiths v. Puleston*, 13 M. & W. 358, 360;(*) *Knight v. Bennett*, 3 Bing. 361; *E. C. L. R.* 11; *White v. Sayer*, *Palm. R.* 211.

⁴ *Holt*, N. P. C. 197; *E. C. L. R.* 3.

expressly or impliedly, that the parties did not mean to be governed by it. On the second trial, the Lord Chief Baron Thompson held, that the custom prevailed, although the written instrument contained an express stipulation, that all the manure made on the farm should be spent on it, or left at the end of the tenancy, without any compensation being paid; such a stipulation certainly not excluding by implication the tenant's right to receive a compensation for seed and labour.¹

The next reported case as to the admissibility of evidence of custom respecting the right to an away-going crop is that of *Webb v. Plummer*,² in which there was a lease of down lands, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm, and also, in the last year of the term, to carry out the manure on parts of the fallowed farm pointed out by the lessor, the lessor paying for fallowing land and carrying out the dung, but nothing for the dung itself, and paying for grass on the ground and threshing the corn. The claim was for a customary allowance for foldage (a *mode of manuring the ground), [³⁰⁹] but the Court held, that as there was an express provision for some payment, on quitting, for the things covenanted to be done, and an omission of foldage, the customary obligation to pay for the latter was excluded, the language in the lease being equivalent to a stipulation that the lessor should pay for the things mentioned and no more.

The substance of the preceding remarks is extracted from the judgment delivered in the case of *Hutton v. Warren*,³ where it was held, that a custom, by which the tenant, cultivating according to the course of good husbandry, was entitled on quitting to receive from the landlord or in-coming tenant a reasonable allowance for seeds and labour bestowed on the arable land in the last year of the tenancy, and was bound to leave the manure for the landlord, if he would purchase it, was not excluded by a stipulation in the lease to consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as should

¹ In *Holding v. Pigott*, 7 Bing. 465; E. C. L. R. 20, it is observed, that the rights of landlord and tenant may be governed by the terms of the agreement during the tenancy, and by the custom immediately afterwards.

² 2 B. & Ald. 750.

³ 1 M. & W. 466. (*) Proof of the custom lies on the out-going tenant: *Caldecott v. Smythies*, 7 C. & P. 808; E. C. L. R. 32.

not be so spread on the land for the use of the landlord on receiving a reasonable price for it.

Where a tenant continues to hold over after the expiration of his lease, without coming to any fresh agreement with his landlord, he must be taken to hold under the terms of the lease, on which, therefore, the admissibility of evidence of custom will depend.¹

The principle with respect to the right to take an away-going crop applies equally to the case of a tenancy from *year to year as to a lease for a longer term:² such custom, it has been observed, is just; for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly.³ It may be observed, too, that the question as to away-going crops under a custom is quite a different matter from emblements, which are by the common law.⁴

4. The doctrine as to fixtures is peculiarly illustrative of the legal maxim under consideration; for the general rule, as laid down in the old books, is, that, if the tenant or occupier of land annexes anything to the freehold, neither he nor his representatives can afterwards take it away.⁵

Questions respecting the right to what are ordinarily called fixtures principally arise between three classes of persons: 1st, between heir and executor or administrator of tenant in fee; 2dly, between the personal representatives of tenant for life or in tail and the remainderman or reversioner; 3dly, between landlord and tenant. In the first of these cases, the general rule obtains with the most *rigour in favour of the inheritance, and against the right to

¹ *Boraston v. Green*, 16 East, 71; *Roberts v. Barker*, 1 Cr. & M. 808; *Griffiths v. Puleston*, 13 M. & W. 358. (*) See *Kimpton v. Eve*, 3 Ves. & Beam. 349.

² *Onslow v. —*, 16 Ves. jun. 178. See *Thorpe v. Eyre*, 1 Ad. & E. 926; *E. C. L. R. 28*, where the custom was held not to be available in the case of a tenancy which was determined by an award. *Ex parte Mandrell*, 2 Mad. 315.

³ *Judgment, Wigglesworth v. Dallison*, 1 Dougl. 201; *Dalby v. Hirst*, 1 B. & B. 224; *E. C. L. R. 5*.

⁴ *Per Taunton, J.*, 1 Ad. & E. 933; *E. C. L. R. 28*; citing *Com. Dig.*, "Biens," (G. 2.)

⁵ *Amos & Fer.*, on *Fixtures*, 9.

disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto;¹ in the second case, the right to fixtures is considered more favourably for the personal representatives than in the preceding; and, in the last case, the greatest latitude and indulgence have always been allowed in favour of the tenant;²—so that decisions, establishing the right of the personal representatives to fixtures in the first and second of the above cases, will apply, *à fortiori*, to the third.

It is necessary to premise, that the term “fixtures” is often used indiscriminately in allusion to those articles which are not by law removable when once attached to the freehold, as well as to those which are severable therefrom.³ But, in its correct sense, the word “fixtures” includes such things only of a personal nature as have been annexed to the realty, and which may be afterwards severed or removed by the party who united them, or his personal representatives, against the will of the owner of the freehold.⁴ Where the article annexed to the land is irremovable, it is viewed in law as part of the freehold, and is subject to all the rules and incidents of real property.⁵

In the class of cases arising between heir and executor, the rule has been thus stated, that whatever is strongly affixed to the freehold or inheritance, and cannot be severed thence without violence or damage, [*312] *quod ex ædibus non facile revellitur*, *is become a member of the inheritance, and shall, therefore, pass to the heir;⁶ and, in the first place, it must be observed, that a chattel does not lose its personal nature unless fixed in or to the ground, or in or to some foundation which in itself forms part of the freehold. It is not sufficient that the article in question rests merely upon the soil, or upon such foundation;⁷ unless there be annexation, no difficulty can, under any circumstances, occur. It is frequently, however, a matter of doubt, whether the annexation can be considered as sufficient; and

¹ Per Lord Ellenborough, C. J., *Elwes v. Maw*, 3 East, 51; per Abbott, C. J., *Colegrave v. Dias Santos*, 2 B. & C. 78; E. C. L. R. 9. ² *Ib.*

³ Per Parke, B., *Minshall v. Lloyd*, 2 M. & W. 459. (*)

⁴ Judgment, *Hallen v. Runder*, 1 Cr., M. & R. 276.

⁵ Per Parke, B., *Minshall v. Lloyd*, 2 M. & W. 459; (*) recognised *Mackintosh v. Trotter*, 3 M. & W. 186. (*)

⁶ 2 Bla. Com. 281, 428. See, also, *Shep. Touch.* 469, 470; *Com. Dig.*, “*Biens*,” (B.)

⁷ *Rex v. Inhabitants of Otley*, 1 B. & Ad. 161, 165; E. C. L. R. 20, which was the case of a windmill resting on a foundation of brick-work. See, also, *Wood v. Hewitt*, 15 L. J., Q. B. 247.

in such cases the best test appears to be whether the removal can be effected without substantial injury to the freehold.¹

The strictness of the rule under consideration, was, it may be remarked, very early relaxed, as between landlord and tenant, in favour of such fixtures as are partly or wholly essential to trade or manufacture;² and the same relaxation has, in several modern cases, been extended to decisions of that class which we are now considering, viz., those between heir and executor. In the case of *Elwes v. Maw*, which is justly regarded as a leading authority on the subject of fixtures, Lord Ellenborough observed,³ that, in determining whether a particular fixed instrument, machine, or even building, should be considered as removable by the executor as between him and the heir, the Court, in the three principal cases⁴ on the subject, may be considered *as having decided mainly on this ground, that, [*313] where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle), was an accessory to a matter of a personal nature, it should be itself considered as a personalty. In two of these cases,⁵ a fire-engine was considered as an accessory to the carrying on the trade of getting and vending coals—a matter of a personal nature. In *Lord Dudley v. Lord Ward*, Lord Hardwicke says, “A colliery is not only an enjoyment of the estate, but in part carrying on a trade;” and in *Lawton v. Lawton*, he says, “One reason that weighs with me is its being a mixed case, between enjoying the profits of the lands and carrying on a species of trade; and, considering it in this light, it comes very near the instances in brewhouses, &c., of furnaces and coppers.” Upon the same principle, Lord C. B. Comyns may be considered as having decided the case of the cider-mill,⁶ i. e., as a mixed case, between enjoying the profits of the land and carrying on a species of

¹ *Avery v. Cheslyn*, 3 Ad. & E. 75; E. C. L. R. 30.

² Judgment, 3 East, 51, 52; per Story, J., delivering the judgment in *Van Ness v. Pacard*, 2 Peters, R. (U. S.) 143, 145. ³ 3 East, 38.

⁴ Viz., *Lawton v. Lawton*, 3 Atk. 13, which was the case of a fire-engine to work a colliery erected by tenant for life; *Lord Dudley v. Lord Ward*, Amb. 118, which was also the case of a fire-engine; and *Lawton v. Salmon*, 1 H. Bla. 259, n., which was trover for salt-pans brought by the executor against the tenant of the heir-at-law.

⁵ *Lawton v. Lawton*, 3 Atk. 13; *Lord Dudley v. Lord Ward*, Amb. 118.

⁶ Cited in *Lawton v. Lawton*, 3 Atk. 13; but see the observations respecting this case by Lord Hardwicke, in *Lawton v. Salmon*, 1 H. Bla. 259, n.; *Lord Dudley v. Lord Ward*, Amb. 118; and in *Ex parte Quincey*, 3 Atk. 477, and Bull., N. P. 84. It seems that no rule of law can be extracted from a case of the particulars of which so little is known. See per Lord Cottenham, *Fisher v. Dixon*, 12 Cl. & Fin. 329.

trade, and as considering the cider-mill as properly an accessory to the trade of making cider. In the case of the salt-pans,¹ Lord Mansfield does not seem to have considered them as accessory to the carrying on a *trade, but as merely the means of enjoying [*314] the benefit of the inheritance. Upon this principle, he considered them as belonging to the heir as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor as the means or instrument of carrying on a trade.²

In a recent case before the House of Lords, it appeared that the absolute owner of land, for the purpose of better using and enjoying that land, had erected upon and affixed to the freehold certain machinery. It was held, that, in the absence of any disposition by him of this machinery, it would go to the heir as part of the real estate; and, further, that if the *corpus* of the machinery passed to the heir, all that belonged to such machinery, although more or less capable of being detached from it, and of being used in such detached state, must also be considered as belonging to the heir.³

As between devisee and executor the rule seems, in principle, to be the same as that already considered, the devisee standing in place of the heir as regards his rights to fixtures; for, if a freehold house be devised, fixtures pass;⁴ but, if tenant for life or in tail devise fixtures, his devise is void, he having no power to devise the realty to which they are incident. He may, however, devise such fixtures as would pass to his executor.⁵

[*315] *As between the heir and devisee, it may be considered as a rule, that the latter will be entitled to all articles which are affixed to the land, whether the annexation in fact took place prior or subsequent to the date of the devise, according to the maxim, *quod ædificatur in aræ legatâ cedit legatô*; and, therefore, by a devise of a house, all personal chattels which are annexed to the house, and which are essential to its enjoyment, will pass to the devisee.⁶

¹ *Lawton v. Salmon*, 1 H. Bla. 259, n.

² Per Lord Ellenborough, C. J., 3 East, 54. Seen *Winn v. Ingilby*, 5 B. & Ald. 625; *E. C. L. R. 7*; *Rex v. St. Dunstan*, 4 B. & C. 686, 691; *E. C. L. R. 10*; *Harvey v. Harvey*, Stra. 1141.

³ *Fisher v. Dixon*, 12 Cl. & Fin. 312. In this case the exception in favour of trade was held not applicable; the judgments delivered contain, however, some remarks as to the limits of this exception, which are well worthy of consideration.

⁴ Per Best, J., *Colegrave v. Dias Santos*, 2 B. & C. 80; *E. C. L. R. 9*; 2 Smith, L. C. 121.

⁵ *Shep. Touch.* 469, 470; 4 Rep. 62.

⁶ *Amos & Fer., Fixtures*, 198.

As between vendor and vendee, everything which forms part of the freehold passes by a sale and conveyance of the freehold itself, if there be nothing to indicate a contrary intention.¹

Thus, in *Colegrave v. Dias Santos*,² the owner of a freehold house, in which there were various fixtures, sold it by auction. Nothing was said about the fixtures. A conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house. It was held, that they passed by the conveyance of the freehold; and that, even if they did not, the vendor, after giving up possession, could not maintain trover for them. The effect of a mortgage, moreover, with regard to fixtures is similar to that of a conveyance;³ and trover will not lie against either vendee or mortgagee⁴ in possession for chattels affixed to the freehold, but which might have been removed before possession was given under the deed. Where, however, there was a mortgage of dwelling-houses, foundries, and other premises, "together with all grates, &c., in and about the said two dwelling-houses and the brewhouses thereto belonging," it was held that, although without these words the fixtures in the foundries would have passed, yet by them the fixtures intended to pass were confined to those in the dwelling-houses and brewhouses.⁵

In case of an absolute sale of premises, where the conveyance is not general, but contains a stipulation, that the fixtures are to be taken at a valuation, those things only should be valued which would be deemed personal assets as between the heir and the executor, and would not pass with the inheritance.⁶

With respect to ornamental fixtures, there are some cases in which the executor has been permitted to remove even these against the heir.⁷ But, in these cases, the articles given up to the executor seem

¹ *Colegrave v. Dias Santos*, 2 B. & C. 76; E. C. L. R. 9; cited, argument, *Id.* 610; per Parke, B., *Hitchman v. Walton*, 4 M. & W. 416; (*) per Patteson, J., *Hare v. Horton*, 5 B. & Ad. 730; E. C. L. R. 27. See *Steward v. Lombe*, 1 B. & B. 506, 513; E. C. L. R. 5; *Ryall v. Rolle*, 1 Atk. 175; *Thompson v. Pettit*, 16 L. J., Q. B. 162.

² 2 B. & C. 76; E. C. L. R. 9.

³ Per Parke, B., 4 M. & W. 416; (*) *Longstaff v. Meagoe*, 2 Ad. & E. 167; E. C. L. R. 29. See *Trappes v. Harter*, 2 Cr. & M. 153.

⁴ 2 B. & C. 76; E. C. L. R. 9; *Longstaff v. Meagoe*, 2 Ad. & E. 167; E. C. L. R. 29. See *Boydell v. M'Michael*, 1 Cr., M. & R. 177; *Ex parte Bently*, 2 Mon., Dea., & De Gex, 591.

⁵ *Hare v. Horton*, 5 B. & Ad. 726; E. C. L. R. 27.

⁶ *Amos & Fer., Fixtures*, 186.

⁷ See *Harvey v. Harvey*, Stra. 1141; *Squier v. Mayer*, 2 Freem. 240; *Beck v. Rebow*, 1 P. Wms. 94; 2 Bla. Com. 428.

to have been very slightly annexed to the freehold, easily capable of removal therefrom, and not essential to the enjoyment of the inheritance.¹

There are, moreover, several recent decisions, in which the judges have incidentally stated the old rule, viz., that whatever was affixed to the freehold descended to the heir as parcel of the inheritance, as still existing, with scarcely any relaxation, between the executor and the heir;² and, on the whole, as observed by a learned writer, it would [*317] seem that the law is by no means clearly settled respecting *the right of the executor of tenant in fee to fixtures set up for ornament or domestic convenience.³

Secondly, we have already observed,⁴ that the heir is more favoured in law than the remainderman or reversioner, and, therefore, all cases in which an executor or administrator of the tenant in fee would be entitled to fixtures, as against the heir, will apply *à fortiori* to support the claim of the representatives of tenant for life, or in tail, against the remainderman or reversioner. The personal representatives, therefore, in the latter case, seem clearly entitled to fixtures erected for purposes of trade, as against the party in remainder or reversion.⁵

With respect to the right of the executor of tenant for life, as against the remainderman or reversioner, to fixtures set up for ornament or domestic convenience, it is remarked, in the treatise above referred to, that, in the absence of cases relating directly to this subject, those which support the right of the executor against the heir to ornamental fixtures must be taken as express authorities; and further, that the strong expressions of judges in favour of the heir, above adverted to, cannot correctly be applied with reference to the conflicting claims of the executor of tenant for life or in tail, and the remainderman or reversioner.⁶

In the third class of cases above mentioned, that, viz., between landlord and tenant, the general rule, that, whatever has once been annexed to the freehold becomes a part of it, and cannot afterwards be removed, except by or with the consent of him who is entitled to

¹ 2 Steph. Com. 261; 2 Smith, L. C. 119.

² Per Bayley, J., 2 B. & C. 77; E. C. L. R. 9; and 4 Id. 691; per Lord Hardwicke, C., Ambl. 118; Winn v. Ingilby, 5 B. & Ald. 625; E. C. L. R. 7.

³ 1 Williams, Executors, 3d ed. 582.

⁴ Ante, p. 311.

⁵ Lawton v. Lawton, 3 Atk. 13; Lord Dudley v. Lord Ward, Ambl. 113.

⁶ 1 Williams, Executors, 3d ed. 586.

the inheritance,¹ *must be qualified more largely than in the preceding classes: thus, the tenant may take away during [*318] the continuance of his term, or at the end of it, although not after he has quitted possession, such fixtures as he has himself put upon the demised premises, either for the purposes of trade, or for the ornament or furniture of his house;² but here a distinction must be observed between erections for the purposes of trade annexed to the freehold; and those which are for purposes merely agricultural.³ With respect to the former, the exception engrafted upon the general rule is of almost as high antiquity as the rule itself, being founded upon principles of public policy, and originating in a desire to encourage trade and manufactures. With respect to the latter class, however, it has been expressly decided, that to such cases the general rule must be applied.

In the leading case on this subject,⁴ it was held, that a tenant in agriculture, who erected at his own expense and for the necessary and convenient occupation of his farm, a beast-house, and carpenter's shop, &c., which buildings were of brick and mortar, and tiled, and let into the ground, could not legally remove the same even during his term, *although by so doing he would leave the premises [*319] in the same state as when he entered; and the distinction was here expressly taken between annexations to the freehold for the purposes of trade, and those made for the purposes of agriculture and for better enjoying the immediate profits of the land, it being laid down, in favour of the tenant's right to remove trade fixtures, that, where a superincumbent building is erected as a mere accessory to a personal chattel, as an engine, it may be removed; but where it

¹ Co. Litt. 53, a. Trover does not lie for fixtures until after severance; Minshall v. Lloyd, 2 M. & W. 450; (*) recognised 3 Id. 186.

² Such as stoves, grates, ornamental chimney-pieces, wainscots fastened with screws, coppers, a pump very slightly affixed to the freehold, and various other articles. Grymes v. Boweren, 6 Bing. 437; E. C. L. R. 19; and per Tindal, C. J., Id. 439, 440; Horn v. Baker, 9 East, 215, 238. In Buckland v. Butterfield, 2 B. & B. 54; E. C. L. R. 6, which is another important decision on this subject, it was held, that a conservatory erected on a brick foundation, attached to a dwelling-house, and communicating with it by windows, and by a flue passing into the parlour chimney, becomes part of the freehold, and cannot be removed by the tenant or his assignees. See West v. Blakeway, 3 Scott, N. R. 218.

³ 2 Steph. Com. 262; per Lord Kenyon, C. J., Penton v. Robart, 2 East, 90; judgment, Earl of Mansfield v. Blackburne, 3 Bing., N. C. 438; E. C. L. R. 32. A nurseryman may, at the end of his term, remove trees planted for the purpose of sale; Amos & Fer. on Fixtures, 279.

⁴ Elwes v. Maw, 3 East, 38.

is accessory to the realty, it can in no case be removed. The distinction, however, as remarked by Mr. Justice Story,¹ is certainly a nice one between fixtures for the purposes of trade and fixtures for agricultural purposes, at least in those cases where the sale of the produce constitutes the principal object of the tenant, and the erections are for the purpose of such a beneficial enjoyment of the estate.

It has been stated, that the right of removal, where it exists, must be exercised during the continuance of the term; for, if the tenant forbears to exercise it within that period, or during such further period as he holds the premises under a right still to consider himself as tenant, the law presumes that he voluntarily relinquishes the claim in favour of his landlord.² It is also important to remark, that the legal right of the tenant to remove fixtures is capable of being either extended or controlled by the express agreement of the parties; and it is, in fact, very usual to introduce into a lease a covenant for this purpose, either specifying what fixtures shall be [*320] removable by the *tenant, or stipulating that he will, at the end of the term, deliver up all fixtures annexed during its continuance to the landlord's use.³

In an action of trespass for breaking and entering the plaintiff's apartment, and for taking a certain brass-plate from the outer door of the dwelling-house, the defendant pleaded, first, not guilty; and, secondly, as to removing the brass-plate, that the plaintiff was not possessed thereof: no evidence was given as to whether it was or was not a fixture, nor was any question as to this point raised at the trial. The jury assessed the damages separately, for the breaking and entering, and for the removal of the door plate; and the Court held, that, after verdict, it must be assumed that the said plate was not a fixture, and that the defendant, having treated it as an independent chattel, and thereby thrown the plaintiff off his guard, could not, the verdict being against him, turn round and treat the matter differently;⁴ for this would have been "blowing hot and cold,"

¹ *Van Ness v. Pacard*, 2 Peters, R. (U. S.) 144.

² *Amos & Fer. on Fixtures*, 87; cited by Lord Tenterden, C. J., *Lyde v. Russell*, 1 B. & Ad. 395; E. C. L. R. 20; *Weeton v. Woodcock*, 7 M. & W. 14, 19; (*) *Lee v. Risdown*, 7 Taunt. 188; E. C. L. R. 2.

³ See *Earl of Mansfield v. Blackburne*, 8 Bing. N. C. 438; E. C. L. R. 32; *Foley v. Addenbroke*, 18 M. & W. 174; (*) *Sleddon v. Cruikshank*, 16 M. & W. 71. (*)

⁴ *Lane v. Dixon*, 16 L. J., C. J. 129, 131; recognising *Welsh v. Nash*, 8 East, 394.

and, therefore, inadmissible, as opposed to a principle already mentioned.¹

It is also worthy of notice, that the right of property in fixtures generally has been liable to modification by the effect of a special usage, if any such can be shown to have long prevailed in the particular neighbourhood;² and it may, also, as in the case of landlord and tenant, be modified by evidence of the intention of the parties; *ex. gr.*, a chattel placed by the owner upon the *freehold of [*321] another, but severable from it, does not necessarily become part of the freehold; it is matter of evidence whether, by agreement, it does not remain the property of the original owner.³

In concluding these remarks concerning fixtures, we may observe, that the uncertainty of the law on this subject results necessarily from the fact, that each case involving a question as to the right to fixtures is professedly and necessarily, in a great measure, decided according to its own particular circumstances; and a perusal of the preceding pages will sufficiently show that the maxim, *quicquid plantatur solo, solo cedit*, is held up by our law only to be departed from on account of the acknowledged injurious effects which would ensue from too strict an application of it.⁴

DOMUS SUA CUIQUE EST TUTISSIMUM REFUGIUM.

(5 Rep. 92.)

*Every man's house is his castle.*⁵

In the case which is always referred to as showing the application of the above well-known maxim, the facts may be shortly stated thus:—The defendant and one B. were joint-tenants of a house in London. B. acknowledged a recognisance in the nature of a statute staple to the plaintiff, and, being possessed of certain goods in the said house, died, whereupon the house in which the goods remained became vested in the defendant by survivorship. Plaintiff sued out process of extent on the statute to the sheriffs of London; and, on the sheriffs having returned the conusor *dead, he had an- [*322] other writ to extend all the lands which B. had at the time of

¹ Ante, p. 127.

² 1 Williams, Executors, 8d ed. 579; Vin. Abr., "Executors," U. 74; Davis v. Jones, 2 B. & Ald. 165, 168.

³ Wood v. Hewitt, 15 L. J., Q. B. 247.

⁴ Amos & Fer. on Fixtures, Introd., pp. 24, 25.

⁵ Nemo de domo sua extrahi debet, D. 50, 17, 108.

acknowledging the statute, or at any time after, and all the goods which he had at the day of his death. This writ plaintiff delivered to the sheriffs, and told them that divers goods belonging to B. at the time of his death were in the defendant's house; upon which the sheriffs charged a jury to make inquiry according to the said writ, and the sheriffs and jury came to the house aforesaid, and offered to enter in order to extend the goods, the outer door of the house being then open; whereupon the defendant, *præmissorum non ignarus*, and intending to disturb the execution, shut the door against the sheriffs and jury, whereby the plaintiff lost the benefit of his writ.¹

In the above case, the following points, which bear upon the present subject, were resolved, and may be thus shortly stated.

1st. That the house of every one is his castle, as well for his defence against injury and violence, as for his repose; and, consequently, although the life of man is a thing precious and favoured in law, yet, if thieves come to a man's house to rob or murder him, and the owner or his servants kill any of the thieves in defence of himself and his house, this is not felony. So, if any person attempt to burn or burglariously to break any dwelling-house in the night-time, or attempt to break open a house in the day-time, with intent to rob, and be killed in the attempt, the slayer shall be acquitted and discharged, for the homicide is justifiable.² So, in defence of his house, a man is justified in killing a trespasser who [*323] would forcibly dispossess him of it; *and in these cases not only the owner, whose person or property is thus attacked, but his servants, and the members of his family, or even strangers who are present at the time, are equally justified in killing the assailant.

In order, however, that a case may fall within the preceding rule, the intent to commit such a forcible and atrocious crime as above mentioned must be clearly manifested by the felon; otherwise, the homicide will amount to manslaughter, at least, if not to murder.⁴

2dly. It was resolved in the principal case, that, when any house is recovered by ejectment, the sheriff may break the house, in order to deliver seisin and possession thereof to the lessor of the plaintiff.

¹ Semayne's case, 5 Rep. 91.

² 1 Hale, P. C. 481, 488. By stat. 9 Geo. 4, c. 81, s. 10, no punishment or forfeiture shall be incurred by any person who shall kill another in his own defence.

³ 1 Hale, P. C. 481, 484 et seq.

⁴ 1 Hale, P. C. 484; Rex v. Scully, 1 C. & P. 319; E. C. L. R. 12.

The officer may, if necessary, break open doors, in order to execute a writ of *habere facias possessionem*, if the possession be not quietly given up; or he may take the *posse comitatus* with him, if he fear violence;¹ and, after he has got possession, he may remove all persons, goods, &c., from off the premises before he gives possession.² After verdict and judgment in ejectment, it is in practice usual for the lessor of the plaintiff to point out to the sheriff the premises recovered, and then the sheriff gives the lessor, at his own peril, execution of what he demands.³ By the stat. 1 & 2 Vict. c. 74, s. 1, which was passed in order to facilitate the recovery of tenements held at a rent not exceeding 20*l.* a year, the officers acting under the warrant obtained in pursuance of that act are expressly authorized to enter by force, if needful, into the *premises of which possession is [*324] sought to be recovered, and to give possession of the same to the landlord or his agent.

3dly. The third exception to the general rule is, where the execution is at suit of the Crown, as where a felony or misdemeanour has been committed, in which case the sheriff may break open the outer door of the defendant's dwelling-house, having first signified the cause of his coming and desired admission.⁴

But bare suspicion touching the guilt of the party will not warrant the proceeding to this extremity, though a felony has been actually committed, unless the officer comes armed with a warrant from a magistrate grounded on such suspicion.⁵ And a plea of justifying the breaking and entering a man's house without warrant on suspicion of felony ought distinctly to show, not only that there was reason to believe that the suspected person was there, but also that the defendant entered for the purpose of apprehending him.⁶

4thly. In all cases where the outer door of a house is open the sheriff may enter and do execution, either of the body or goods of

¹ 5 Rep. 91.

² *Upton v. Wells*, 1 Leon. R. 145.

³ *Ad. Eject.*, 4th ed. 300, 301.

⁴ *Semayne's case*, 3d resolution; *Finch, Law*, 39. See, also, *Sherwin v. Swindall*, 12 M. & W. 783; (*) *Launock v. Brown*, 2 B. & Ald. 692, which was a case of arrest for a misdemeanour; *Burdett v. Abbot*, 14 East, 157, 158, where the plaintiff was arrested under the Speaker's warrant for a breach of privilege; *Foster on Homicide*, 320. As to the power of arrest under the warrant of a Secretary of State, see *Rex v. Wilkes*, 2 Will. 151; *Entick v. Carrington*, Id. 275.

⁵ *Foster on Homicide*, 320.

⁶ *Smith v. Shirley*, 3 C. B. 142; *E. C. L. R.* 54.

the occupier, at the suit of any subject of the Crown, and the landlord may, in such case, likewise enter to distrain for rent. But the [*325] sheriff cannot, in order to *execute a writ of *ca. sa.* or *fi. fa.* at suit of a private person, break open the outer door of a man's house, even after request made, and refusal to open it: nor can the outer door be broken open in order to make a distress, except in the case of goods fraudulently removed, and under the directions of the stat. 11 Geo. 2, c. 19.¹

Where, however, the sheriff has obtained admission to a house, he may justify subsequently breaking open inner doors, if he finds that necessary, in order to execute his process.² Where A., therefore, let a house, except one room, which he reserved for himself and occupied separately, and the outer door of the house being open, a constable broke open the door of the inner room occupied by A., in order to arrest him; it has been held, that trespass would not lie against the constable.³ So, where it appeared that the front door of the house was in general kept fastened, the usual entrance being through the back door, and that the sheriff, having entered by the back door while it was open in the night, broke open the door of an inner room in which A. B. was with his family, and there arrested him; the arrest was held to have been lawful.⁴ In an action of trespass against a sheriff for breaking and spoiling a lock, bolt, and staple, affixed to the outer door of plaintiff's dwelling-house, the defendant pleaded, that being lawfully in a room of the dwelling-house occupied by D., as tenant to the plaintiff, he peaceably entered into the residue of the said house through the door communicating between the room and the residue, and took plaintiff's *goods [*326] in execution under a *fi. fa.*; and because the outer door was shut and fastened with the lock, bolt, and staple, so that defendant could not otherwise take away the goods, and because neither plaintiff nor any other on his behalf was in the dwelling-house to whom request could be made,⁵ defendant did, for the purpose aforesaid, open the outer door, and, in so doing, did break and spoil the lock, &c., doing no unnecessary damage.⁶ The Court held, that the plea

¹ Woodf., L. & T., 5th ed. 337.

² Lee v. Gansel, Cowp. 1; Ratcliffe v. Burton, 3 B. & P. 223; Browning v. Dann, Cas temp. Hardw. 167. See Woods v. Durrant, 16 M. & W. 149; (*) Hutchison v. Birch, 4 Taunt. 619.

³ Williams v. Spence, 5 John. R. (U. S.) 352.

⁴ Hubbard v. Mace, 17 Johns. R. (U. S.) 127.

⁵ See Ratcliffe v. Burton, 3 B. & P. 223; 2 Selw., N. P., 10th ed. 1332.

⁶ Pugh v. Griffith, 7 Ad. & E. 827; E. C. L. R. 84.

was good, although it was not shown how the defendant entered into the house, nor who fastened the outer door; they also thought it sufficiently appeared, that there was no other way of getting out than that adopted; and that, in the absence of the plaintiff, the sheriff was excused from making a demand, and was justified in breaking the lock, &c., as matter of necessity, in order to get the goods out to execute the writ. In the previous case of *White v. Whitshire*,¹ it had been held, that, though the sheriff cannot break open a house in order to make execution under a *fi. fa.*, yet, if the door is open, and the bailiffs enter and are disturbed in their execution by the parties who are within the house, he may break into the house and rescue his bailiffs, and so take execution. In this case, as observed by the Court in *Pugh v. Griffith*, above cited, the breaking into the house was justified, because the plaintiff himself had occasioned the necessity of it; but it does not follow, that there may not be other occasions where the outer door may be broken.²

The privilege which, by the fourth resolution in *Semayne's case*, was held to attach to a man's house, must, however, *be [*327] strictly confined thereto, and does not extend to barns or out-houses unconnected with the dwelling-house.³ It admits also of this exception, that, if the defendant escape from arrest, the sheriff may, after demand of admission and refusal, break open either his own house or that of a stranger for the purpose of retaking him.⁴ Moreover, if the sheriff breaks open an outer door, when he is not justified in doing so, this does not vitiate the execution, but merely renders the sheriff liable to an action of trespass.⁵ A sheriff's officer, in execution of a bailable writ, peaceably obtained entrance by the outer door; but before he could make an actual arrest, was forcibly expelled from the house, and the outer door fastened against him. The officer thereupon, having obtained assistance, broke open the outer door, and made the arrest: and it was held, that he was justified in so doing; for the outer door being open in the first instance, the officer was entitled to enter the house under civil process, and being lawfully in the house, the prosecutor was guilty of a trespass

¹ Palm. R. 52; Cro. Jac. 555.

² Judgment, 7 A. & E. 840; E. C. L. R. 34.

³ *Penton v. Browne*, 1 Sid. 186.

⁴ *Anon.*, 6 Mod. 105; *Lloyd v. Sandilands*, 8 Taunt. 250; E. C. L. R. 4. See *Genner v. Sparkes*, 1 Salk. 79.

⁵ See fourth resolution in *Semayne's case*, ad finem; 2 Bac. Abr. "Execution," (N.)

in expelling him; and that the act of locking the outer door being unlawful, the prosecutor could confer no privilege upon himself by that unlawful act. In the above case, it was further held, that a demand of re-entry by the officer was not, under the circumstances, requisite to justify him in breaking open the outer door; for "the law, in its wisdom, only requires this ceremony to be observed, when it possibly may be attended with some advantage, and may render the breaking open of the outer door unnecessary."¹

[*328] *5thly, it was resolved, that a man's house is not a castle for any one but himself, and shall not afford protection to a third party who flies thither, or to his goods, if brought or conveyed into the house to prevent a lawful execution, and to escape the ordinary process of law. In these latter cases, therefore, the sheriff may, after request and denial, break open the door, or he may enter if the door be open.² It must be observed, however, that he does so at his peril; and, if it turn out that the defendant was not in the house, or had no property there, he is a trespasser.³

The distinction being now clearly established, that, if a sheriff enters the house of the defendant himself for the purpose of arresting him or taking his goods, he is justified, provided he has reasonable grounds for believing that the party is there or his goods; but if he enters the house of a stranger with the like object in view, he can be justified only by the event.⁴

It may not be inappropriate to add, in connexion with the maxim under consideration, that, according to a recent case, although as a general rule, where a house has been unlawfully erected on a common, a commoner, whose enjoyment of the common has been thus interrupted, may pull it down; he is, nevertheless, not justified in so doing, if there are persons actually in it at the time, by reason of the imminent risk of a breach of the peace to which such a proceeding [*329] would give rise:⁵ and the same reason seems *also applicable to the case of a forcible entry by a freeholder upon his

¹ *Aga Kurboolie Mahomed v. The Queen*, 4 Moore, P. C. Cas. 239.

² *Semayne's case*, *supra*; per Tindal, C. J., *Cook v. Clark*, 10 Bing. 21; E. C. L. R. 25; Com. Dig., "Execution," (C. 5); *Penton v. Browne*, 1 Sid. 186.

³ *Johnson v. Leigh*, 6 Taunt. 246; E. C. L. R. 1; *Morrish v. Murray*, *infra*; Com. Dig., "Execution," (C. 5.)

⁴ *Morrish v. Murray*, 13 M. & W. 52, 57; (*) *Cooke v. Birt*, 5 Taunt. 765; E. C. L. R. 1.

⁵ *Perry v. Fitzhowe*, 15 L. J., Q. B. 239.

own freehold, which is wrongfully and against his own will in the possession and occupation of another party;¹ although it has been said that the freeholder would not in such a case be responsible, except to the public by indictment for a forcible entry.²

We may conclude these remarks with observing, that, although the law of England has so particular and tender a regard to the immunity of a man's house, that it will not suffer it to be violated with impunity,—and although, for this reason, outward doors cannot, in general, be broken open to execute any civil process (the principal exception which occurs to the rule, viz., in criminal cases, resulting from the principle, that the public safety should supersede the private),³ yet, in the words of an eminent lawyer,⁴ “This rule, that every man's house is his castle, when applied to arrests in legal process, hath been carried as far as the true principles of political justice will warrant—perhaps beyond what in the scale of sound reason and good policy, they will warrant.”

*§ III.—THE TRANSFER OF PROPERTY.

[*380]

The two most important maxims relative to the transfer of property are, first, that alienation is favoured by the law; and, secondly, that the assignee holds property subject to the same rights and liabilities as attached to it whilst in the possession of the grantor. Besides the above very general principles, we have included in this section several minor maxims of much practical importance connected with the same subject; and each of these, according to the plan pursued in this treatise, has been briefly illustrated by decided cases.

ALIENATIO REI PRÆFERTUR JURI ACCRESCENDI.

(Co. Litt. 185, a.)

Alienation is favoured by the law rather than accumulation.

Alienatio is defined to be, *omnis actus per quem dominium transfertur*,⁵ and it is the well-known policy of our law to favour aliena-

¹ *Newton v. Harland*, 1 Scott, N. R. 474; per Patteson, J., *Doe d. Stevens v. Lord*, 6 Dowl. 256.

² See *Harvey v. Brydges*, 14 M. & W. 442, 448. (*)

³ 4 Bla. Com. 228.

⁴ Sir M. Foster, *Discourse of Homicide*, p. 319.

⁵ Brisson. ad verb., “*Alienatio*.”

tion, and to discountenance every attempt to tie up property unreasonably, or, in other words, to create perpetuities.

The reader will at once remark, that the feudal policy was directly opposed to those more wise and liberal views which have now long prevailed. It is, indeed, generally admitted,¹ that under the Saxon sway, the power of alienating real property was altogether unrestricted; and that land first ceased to be alienable when the feudal system *was introduced into this country, shortly after [*331] the Norman conquest; for, although the Conqueror's right to the Crown of England seems to have been founded on title, and not on conquest, yet, according to the fundamental principle of that system, all land within the king's territory was held to be derived, either mediately or immediately, from him as the supreme lord, and was subjected to those burthens and restrictions which were incident to the feudal tenure. Now this tenure originated in the mutual contract between lord and vassal, whereby the latter, in consideration of the feud with which he was invested, bound himself to render certain services to the former, and as the feudatory could not, without the consent of his lord, substitute the services of another for his own,² so, neither could the lord, without the feudatory's consent, transfer his fealty and allegiance to another.³ It is, however, necessary to bear in mind the distinction which was recognised by the feudal laws between alienation and subinfeudation; for, although alienation, meaning thereby the transfer of the original feud, and substitution of a new for the old feudatory, was strictly prohibited, yet subinfeudation, whereby a new and inferior feud was carved out of that originally created, was practised and permitted. Moreover, as feudatories did, in fact, under colour of subinfeudation, frequently dispose of their lands, this practice, which was in its tendency opposed to the spirit of the feudal institutions, was expressly restrained by the 32d chap. of Magna Charta, which was merely in affirmance of the common law on this subject, and which allowed the tenants of [*332] common or mesne lords—though not, it seems, such as *held directly of the Crown—to dispose of a *reasonable part* of their lands to subfeudatories.

The right of subinfeudation to the extent thus expressly allowed by statute, evidently prepared the way for the more extensive power of alienation which was conferred on mesne feudatories by the statute

¹ Wright, Tenures, 154 et seq.

² See Bradshaw v. Lawson, 4 T. R. 443.

³ Wright, Tenures, 171; Mr. Butler's note, Co. Litt. 309, a. (1).

Quia Emptores, 18 Edw. 1, st. 1, c. 1. This statute, which effected, indeed, a most material change in the nature of the feudal tenure, by permitting the transfer or alienation of lands in lieu of subinfeudation, after stating, by way of preamble, that, in consequence of this latter practice, the chief lords had many times lost their escheats, marriages, and wardships of lands and tenements belonging to their fees, enacted, "that from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands and tenements of the chief lord of the same fee, by such service and customs as his feoffee held before."

This statute, it will be observed, did not extend to tenants *in capite*; and although by the subsequent act, 17 Edw. 2, c. 6, *De Prærogativâ Regis*, it was declared, that no one holding of the Crown by military service, can, without the king's license, alien the *greater part* of his lands, so that enough shall not remain for the due performance of such service: from which it has been inferred, that, prior to this enactment, tenants *in capite* possessed the same right of subinfeudation as ordinary feudatories possessed prior to the stat. *Quia Emptores*. Yet it does not appear that even after the stat. *De Prærogativâ*, alienation of any part of lands held *in capite* ever occurred without the king's license; and, at all events, this question was set at rest by the subsequent stat. 34 Edw. 3, c. 15, which rendered valid such *alienations as had been made by tenants holding under Hen. 3, and preceding sovereigns, although [*333] there was a reservation of the royal prerogative as regarded alienations made during the reigns of the first two Edwards.

Having thus remarked, that, by a fiction of the feudal law, all land was held, either directly or (owing to the practice of subinfeudation) mediately of the Crown, we may next observe, that gifts of land were in their origin simple, without any condition or modification annexed to them; and although limited or conditional donations were gradually introduced for the purpose of restraining the right of alienation, yet, since the Courts construed such limitations liberally, in order to favour that right which they were intended to restrain, the stat. of Westm. 2, 13 Edw. 1, usually called the statute *De Donis*, was passed, which enacted, "That the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to alien the land so given,

but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver, or his heir, if issue fail." The effect, therefore, of the above statute was to prevent a tenant in tail from alienating his estate for a greater term than that of his own life, or, rather, its effect was to render the grantee's estate certain and indefeasible during the life of the tenant in tail only, upon whose death it became defeasible by his issue or the remainderman or reversioner.¹

Prior to this act, indeed, where land was granted to a man and the heirs of his body, the donee was held to take a conditional fee-simple, which became absolute the instant *issue was born; but after [*334] the passing of the statute *De Donis*, the estate was, in contemplation of law, divided into two parts, the donee taking a new kind of particular estate, which our judges denominated a fee-tail, the ultimate fee-simple of the land expectant on the failure of issue remaining vested in the donor.²

"At last," says Lord Mansfield, C. J.,³ "the people having groaned for two hundred years under the inconveniences of so much property being unalienable, and the great men to raise the pride of their families, and (in those turbulent times) to preserve their estates from forfeitures, preventing any alteration by the legislature, the judges adopted various modes of evading the statute *De Donis*, and of enabling tenants in tail to charge or alien their estates. The first of these was founded on the idea of a recompense in value; in consequence of which it was held, that the issue in tail was bound by the warranty of his ancestor, where assets of equal value descended to him from such ancestor. In the next place, they held, in the reign of Edw. 4, that a feigned recovery should bar the issue in tail and the remainders and reversion."⁴ And, lastly, the legislature, by the stat. 32 Hen. 8, c. 36, expressly declared that a fine should be a bar to the issue in tail."⁵

And now, under the late act for abolishing fines and recoveries, 3

¹ 1 Cruise, Dig., 4th ed. 77, 78.

² 2 Bla. Com. 112.

³ Taylor v. Horde, 1 Burr. 115.

⁴ Taltarum's case, Yr. Bk. 12 Edw. 4, 14, 19, where the Court expressly founded their argument upon the assumption that a recovery properly suffered would destroy an entail, although they decided, that, under the particular circumstances of that case, the entail had not been destroyed.

⁵ Except where the reversion was in the Crown, 34 & 35 Hen. 8, c. 20. As to the respective effects of the stats. 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, see Mr. Hargrave's note (1), Co. Litt. 121, a.

& 4 Will. 4, c. 74, the tenant in tail may, by *any species of deed duly enrolled, and otherwise made in conformity with [*835] the act, absolutely dispose of the estate of which he is seised in tail in the same manner as if he were absolutely seised thereof in fee.¹

Having thus seen in what manner the restrictions, which were in accordance with the spirit of the feudal laws imposed upon the alienation of land by *deed*, have been gradually relaxed, we must further observe, that the power of disposing of land by *will* was quite as much opposed to the policy of those laws; and, consequently, although land in this country was devisable until the conquest, yet it shortly afterwards ceased to be so, and, in fact, remained inalienable by will² until the stats. 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5; the latter of which statutes is explanatory of the former, and declares that every person (except as therein mentioned) having a sole estate or interest or being seised in fee-simple of and in any manors, lands, tenements, rents, or other hereditaments in possession, reversion, remainder, or of rents or services incident to any reversion or remainder, shall have full and free liberty, power, and authority, to give, dispose, will, or devise to any person or persons (except bodies politic and corporate) by his last will and testament in writing, all his said manors, lands, tenements, rents, and hereditaments, or any of them, at his own free will and pleasure. It is, indeed, true, that, by the above statutes, some restriction was imposed upon the right of alienating by will lands held by military tenure, yet since such tenures were, by the stat. 12 Car. 2, c. 24, converted into free and common socage tenures, we do, in fact, derive from the acts passed in the reign of Hen. 8 the important *right of disposing by will of all (except copyhold)³ lands and [*336] tenements: a privilege which has received some important [*336] extensions by the recent stat. 1 Vict. c. 26, and which now attaches to all real and personal estate to which an individual may be entitled, either at law or in equity, at the time of his death.⁴

It remains to consider how far the right of alienation exists at common law, when viewed without reference to the arbitrary restrictions which were imposed under the feudal system, and to show in what manner this right has been recognised and favoured by our

¹ See 1 Cruise, Dig. 4th ed. 83.

² A tenant in gavelkind, however, could devise by will prior to the Statute of Wills: Wright, Tenures, 207.

³ As to which now, see 1 Vict. c. 26, s. 3.

⁴ Section 8.

courts of law, and encouraged by the legislature. And, in the first place, we must observe, that the *potestas alienandi*, or right of alienation, is a right necessarily incident, in contemplation of law, to an estate in fee-simple; it is inseparably annexed to it, and cannot, in general, be indefinitely restrained by any proviso or condition whatsoever;¹ for, although a "fee-simple" is explained by Littleton² as being *hæreditas pura*, yet it is not so described, because it imports an estate purely allodial (for we have already seen that such an estate did not, in fact, exist in this country), but because it implies a simple inheritance clear of any condition, limitation, or restriction to any particular heirs, and descendible to the heirs general, whether male or female, lineal or collateral.³ In illustration of the above incident of an estate in fee-simple, we find it laid down,⁴ that, "if a man makes a feoffment on condition that the feoffee shall not alien to any, the condition is void, because, where a man is en- [*337] feoffed of land or tenements, he has *power to alien them to any person by the law; for, if such condition should be good, then the condition would oust him of the whole power which the law gives him, which would be against reason; and, therefore, such condition is void." A testator devised land to A. B. and his heirs for ever; but, in case A. B. died without heirs, then to C. D. (who was a stranger in blood to A. B.) and his heirs; and, in case A. B. offered to mortgage or suffer a fine or recovery upon the whole or any part thereof, then to the said C. D. and his heirs. It was held, that A. B. took an estate in fee, with an executory devise over, to take effect upon the happening of conditions which were void in law, and that a purchaser in fee from A. B. would have a good title against all persons claiming under the said will.⁵ So, if a man, before the statute *De Donis*, had made a gift to one and the heirs of his body after issue born, he had, by the common law, *potestatem alienandi*; and, therefore, if the donor had in such a case added a condition, that, after issue, the donee should not alien, the condition would have been repugnant and void. And, by like reasoning, if, after the statute, a man had made a gift in tail, on condition that the tenant in tail should not suffer a common recovery, such condition would have been void; for, by the gift in tail, the tenant has an absolute power given to suffer a recovery, and so to bar the en-

¹ 4 Cruise, Dig. 4th ed. 380.² Section 1.³ Wright, Tenures, 147.⁴ Mildmay's case, 6 Rep. 42; Co. Litt. 206, b.⁵ Ware v. Cann, 10 B. & C. 438; E. C. L. R. 21.

tail.¹ And here we may conveniently remark, that the distinction which exists between real and personal property is further illustrative of the present subject; for, with respect to the latter, it is laid down, that, where an estate tail in things personal is given to the first or any subsequent possessor, it vests in *him the total [*338] property, and no remainder over shall be permitted on such a limitation; for this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail, and, therefore, the law vests in him at once the entire dominion of goods, being analogous to the fee-simple, which a tenant in tail may acquire in real estate.² A. B.,³ wishing to devise his estates to each son and his issue successively in remainder, and to prevent the possibility of alienation, so as to defeat the remainder over, caused an indenture to be made to this purport: "that the lands and tenements were given to his eldest son upon such condition; that, if the eldest son alien in fee or in fee tail, &c., or if any of his sons alien, &c., that then their estate should cease and be void, and that the same lands and tenements immediately should remain to the second son, and to the heirs of his body begotten, *et sic ultra*, the remainder to his other sons;" and livery of seisin was made accordingly. "But," observes Littleton,⁴ "it seemeth by reason, that all such remainders in the form aforesaid are void and of no value." And if, in the case put, the eldest son had aliened in fee, the estates would thereupon have vested in the alienee, and the parties in remainder would have been barred; that is to say, the condition which the testator attempted to annex to the estate would have been inoperative.

We may, in connexion with this subject, likewise refer to Sir W. Blackstone's celebrated judgment in *Perrin v. Blake*,⁵ where a distinction is drawn between those rules of law which are to be considered as the fundamental rules *of the property of this king- [*339] dom, and which cannot be exceeded or transgressed by any intention of a testator, however clearly or manifestly expressed, and those rules of a more arbitrary, technical, and artificial kind, which the intention of a testator may control. Amongst rules appertaining to the first of these two classes, Sir W. Blackstone mentioned

¹ 6 Rep. 41; argument, *Taylor v. Horde*, 1 Burr. 84; *Corbet's case*, 1 Rep. 88; *Portington's case*, 10 Rep. 35.

² 2 Bla. Com. 398.

³ Litt. s. 720; Co. Litt. 379, b. (1).

⁴ Litt. s. 721.

⁵ Hargrave's Tracts, fol. 500.

these:—first, that every tenant in fee-simple or fee-tail shall have the power of alienating his estates by the several modes adapted to their respective interests; and, secondly, that no disposition shall be allowed, which, in its consequence, tends to perpetuity.¹ Mr. Butler, moreover, remarks,² with reference to the case from Littleton above cited, that it “is one of the many attempts which have been made at different times to prevent the exercise of that right of alienation which is inseparable from the estate of a tenant in tail.”

Not only will our Courts oppose the creation of a perpetuity by deed, but they will likewise frustrate the attempt to create it by will, and, therefore, “upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that the property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted.³ The rule is accordingly well established, that, although an estate may be rendered inalienable during the existence of a life or of any number of lives in being, and twenty-one years after, or, possibly, even for nine months beyond the twenty-one years, in case the person ultimately entitled to the estate should be [*340] an infant **in ventre sa mère*,⁴ at the time of its accruing to him, yet that all attempts to postpone the enjoyment of the fee for a longer period are void.⁵

With respect to trusts for accumulation, we may observe, that these are now regulated by stat. 39 & 40 Geo. 3, c. 98,⁶ an act which was passed in consequence of the will of the late Mr. Thellusson, and subsequently to the decision establishing the validity of that will in the well-known case of *Thellusson v. Woodford*.⁷ The above-mentioned statute enacts, that no person shall thenceforth, by any

¹ Mr. Butler's note, Co. Litt. 376, b. (1).

² Co. Litt. 381, a. note.

³ Judgment, *Cadell v. Palmer*, 10 Bing. 140; E. C. L. R. 25. See *Ware v. Cann*, 10 B. & C. 433, supra; E. C. L. R. 21.

⁴ In an executory devise, the period of gestation may be reckoned both at the beginning and the end of the twenty-one years: thus, if land is devised with remainder over in case A.'s son die under the age of twenty-one, and A. dies leaving a son *in ventre sa mere*, then if the son marries in his 21st year, and dies leaving his widow *enciente*, the estate vests, nevertheless, in the infant *in ventre sa mere*, and does not go over. See per Lord Eldon, C., *Thellusson v. Woodford*, 11 Ves. jun. 149; 1 Jarm., Wills. 223.

⁵ *Cadell v. Palmer*, 10 Bing. 140; E. C. L. R. 25. See *Lord Dungannon v. Smith*, 12 Cl. & Fin. 546; *Spencer v. Duke of Marlborough*, 3 Bro. P. C. 232.

⁶ As to this statute, see 1 Jarm., Wills, c. 9, s. 3.

⁷ 4 Ves. jun. 227; S. C., 11 Id. 112, in which case Mr. Hargrave's argument respecting perpetuities is well worthy of perusal.

deed, surrender, will, codicil, or otherwise, settle or dispose of any real or personal property, so that the rents or produce thereof shall be wholly or partially accumulated for any longer term than the life of the grantor or settlor, or the term of twenty-one years from the death of the grantor, settlor, or testator, or during the minority or respective minorities of any person or persons who shall be living, or *in ventre sa mère*, at the time of the death of such grantor or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurance, directing *such accumulations, would, for the time being, if of full age, be entitled to the rents or [*341] annual produce so directed to be accumulated.

It will be evident, from the preceding remarks, and cases already cited, that the rule against perpetuities is observed both by courts of law and of equity.¹ In consequence, however, of the peculiar jurisdiction which courts of equity exercise, for the protection of the interests of married women, the right of alienation has, in one case, with a view to their benefit, been restricted, and that restriction thus imposed may, in fact, be considered as an exception to the operation of the maxim in favour of alienation, which we have been considering. It is now fully established, that where property is conveyed to the separate use of a married woman in fee, with a clause in restraint of anticipation, such clause is valid; for equity, having in this instance created a particular kind of estate, will reserve to itself the power of modifying that estate in such manner as the Court may think fit, and will so regulate its enjoyment as to effect the purpose for which the estate was originally created.² The law upon this subject may be considered to have been finally settled by the decision in *Tullet v. Armstrong*,³ where Lord Cottenham, C., after an elaborate review of the cases and authorities, held that a gift to the sole and separate use of a woman, whether married or unmarried, with a clause against anticipation, was good against an after-acquired husband; and this decision has been in subsequent cases fully recognised and adopted.⁴

The reason of the rule thus established is fully stated by *his lordship, in a subsequent case, in these words:—“When [*342]

¹ See, also, per Wilmot, C. J., *Bridgeman v. Green*, Wilmot, Opin. 61.

² See per Lord Lyndhurst, C., *Baggett v. Meux*, 15 L. J., Chanc. 262; S. C., 1 Phill. 627.

³ 4 My. & Cr. 877.

⁴ *Baggett v. Meux*, supra.

first, by the law of this country, property was settled to the separate use of the wife, equity considered the wife as a *feme sole*, to the extent of having a dominion over the property. But then it was found that that, though useful and operative, so far as securing to her a dominion over the property so devoted to her support, was open to this difficulty—that, she being considered as a *feme sole*, was of course at liberty to dispose of it as a *feme sole* might have disposed of it, and that, of course exposing her to the influence of her husband, was found to destroy the object of giving her a separate property; therefore, to meet that, a provision was adopted of prohibiting the anticipation of the income of the property, so that she had no dominion over the property till the payments actually became due. That is the provision of the law as it now stands, and that is found perfectly sufficient for the purpose of securing the interests of married women.”¹

Having thus observed that our law favours the alienation of real property, to use the words of Lord Mansfield, that, “the sense of wise men, and the general bent of the people in this country, have ever been against making land perpetually unalienable;” and having seen that “the utility of the end was thought to justify any means to attain it,”² it remains to add, that the same policy obtains with reference to personalty; and, in support of this remark, may be adduced the well-known rule of the law-merchant—that, for the encouragement of commerce, the right of survivorship, which is ordinarily incident to a joint tenancy, shall not exist amongst trading [*343] partners—**jus accrescendi inter mercatores pro beneficio commercii locum non habet*,³—a rule which is now extended to real as well as personal property. So that it may be considered as settled, that all property, whatever be its nature, purchased with partnership capital for the purposes of the partnership trade, continues to be partnership capital, and to have to every intent the quality of personal estate,⁴ unless, indeed, a special stipulation be made between the partners to prevent the application of this equi-

¹ Per Lord Cottenham, *Rennie v. Ritchie*, 12 Cl. & Fin. 234.

² Per Lord Mansfield, *C. J.*, 1 Burr. 115.

³ *Co. Litt.* 182, a; 2 *Brownl.* 99; *Noy, Max.*, 9th ed. 79; 1 *Beawes, Lex Merc.*, 6th ed. 42.

⁴ Per Sir J. Leach, *M. R.*, *Phillips v. Phillips*, 1 My. & K. 663; and in *Fereday v. Wightwick*, 1 *Russ. & My.* 49; *Townshend v. Devaynes*, 1 *Mont.*, *Partnership*, 2d ed., note, p. 96 (2 A.); per Lord Eldon, *C.*, *Selkrig v. Davis*, 2 *Dow*, 242; *Dale v. Hamilton*, 16 *L. J.*, *Chanc.* 397; *Crawshay v. Maule*, 1 *Swanst.* 521; cited, *Baxter, app.*, *Newman, resp.*, 8 *Scott, N. R.* 1035.

table doctrine.¹ The rule which thus holds in cases of partnership evidently favours alienation, by rendering capital invested in trade applicable to partnership purposes, and directly available to the creditors of the firm.

Again—we have already had occasion to observe, that there cannot be an estate tail in personalty;² so neither can a perpetuity be created in property of this description. Indeed, where the subject-matter of a grant is a personal chattel, it is impossible so to tie up the use and enjoyment of it as to create in the donee a life estate which he may not alien. It is true, however, that this object may be attained indirectly, in a manner consistent with the known rules of law, by annexing to the gift a forfeiture or defeasance on [*344] the happening of a particular event, or on a *particular act being done: for in that case the donee takes by the limitation of a certain estate, of which the event or act is the measure, and upon the happening of the event, or the doing of the act, a new and distinct estate accrues to a different individual. If, for instance, a testator be desirous to give an annuity without the power of anticipation, he can only do so by declaring that the act of alienation shall determine the interest of the legatee, and create a new interest in another.³

Property may also be given to a party to be enjoyed by him until he becomes bankrupt or insolvent, and if either of these events happen the property may be given over to another party. A person cannot, however, create an absolute interest in property, and, at the same time, deprive the party to whom that interest was given of those incidents, and of that right of alienation which belonged, according to the elementary principles of the common law, to the ownership of the estate. Where, therefore, a testator directed his trustees to pay an annuity to his brother, until he should attempt to charge it, or some other person should claim it, and then to apply it for his support and maintenance, it was held, that, on the insolvency of the annuitant, his assignees became entitled to the annuity.⁴

The distinction between a proviso or condition subsequent⁵ and a

¹ *Balmain v. Shore*, 9 Ves. jun. 500.

² As to heir-looms, see the maxim, *accessorium sequitur principale*, post. As to annexing personal to real estate, the latter being devised in strict settlement, see 2 Jarm., Wills, 507.

³ Per Lord Brougham, 2 My. & K. 204.

⁴ *Younghusband v. Gisborne*, 15 L. J., Chanc. 355, 356.

⁵ A condition subsequent in defeasance of an estate, must at law be pleaded by him who would take advantage of it. *Brooke v. Spong*, 15 M. & W. 153. (*)

limitation above exemplified may be further explained in the words of Lord Eldon, who says: "There is no doubt that property may be given to a man until he shall become bankrupt. It is equally clear, [*345] generally speaking, that, if property is given to a man for his life, the *donor cannot take away the incidents to a life estate, and, as I have observed, a disposition to a man until he shall have become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a *proviso* that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited."¹

The preceding remarks will suffice to establish the truth and to show the very wide application of the proposition, that, in our law, *alienatio rei præfertur juri accrescendi*, for, as we have seen, the power of alienation, whether by deed or by will, of which the land-owners were deprived on the introduction of the feudal system, has been in succeeding ages gradually restored to them. Both our courts of law and our legislature have, on all occasions, discountenanced attempts to create perpetuities, either by an astute application of legal machinery, for the purpose of defeating them, or by special enactments, calculated to effect the same salutary object. A perpetuity has, indeed, been pronounced to be "a thing odious in law and destructive to the commonwealth,"² inasmuch as its tendency is to put a stop to commerce, and to prevent the free circulation of the riches of the kingdom; and we may accordingly ascribe to the policy of our law in favouring alienation, not only those extensive innovations on the feudal system to which we have above adverted, but likewise the various measures which have, from time to time, been adopted, as well for simplifying the forms of conveyance,³ as for rendering the realty liable to debts,⁴ and making property in [*346] more general more easily available to creditors, and therefore more directly applicable to the exigencies of the trading portion of the community. The *alienatio rei* has, moreover, been effectually promoted by the negotiable character which has been esta-

¹ *Brandon v. Robinson*, 18 Ves. 433, 434.

² 1 Vern. 164.

³ See stat. 8 & 9 Vict. c. 119.

⁴ The feudal restraint of alienation necessarily prevented land from being subject to the debts of the tenant; but by Stat. Westm. 2, 13 Edw. 1, st. 1, c. 18, one moiety of the land was made liable to execution. *Wright, Tenures*, 169, 170.

blished as belonging to bills of exchange, and which has been specifically annexed to promissory notes and some other mercantile instruments. And we may remark that the disposition of our Courts at the present time evidently is to favour still further the assignment of choses in action, and thus to afford increased facilities for the transfer and circulation of property. That such is the true policy of a great commercial country cannot be doubted, and it is believed that we may yet look with confidence to the legislature for additional aid in carrying out and effecting the same beneficial object.

CUJUS EST DARE EJUS DISPONERE.

(Wing. Max. 53.)

*The bestower of a gift has a right to regulate its disposal.*¹

It will be evident, from a perusal of the preceding pages, that the above general rule must, at the present day, be received with very considerable qualification. It does, in fact, set forth the principle on which the old feudal system of feoffment depended: *tenor est qui legem dat fuedo*²—it is the tenor of the feudal grant which regulates its effect *and extent: and the maxim itself is, in another form, still applicable to modern grants—*modus legem dat donationi*³—the bargainer of an estate may, since the land moves from him, annex such conditions as he pleases to the estate bargained, provided that they are not illegal, repugnant, or impossible.⁴ Moreover, it is always necessary that the grantor should expressly limit and declare the continuance and quantity of the estate which he means to confer; for, by a bare grant of lands, the grantee will take an estate for life only, a feoffment being still considered as a gift, which is not to be extended beyond the express limitation or manifest intention of the feoffor.⁵ As, moreover, the owner may, subject to certain beneficial restrictions, impose conditions at his pleasure upon the feoffee, so he may likewise, by insertion of special covenants in a conveyance or demise, reserve to himself rights of easement and other privileges in the land so conveyed or demised, and thus surrender the enjoyment of it only partially, and not absolutely, to the

¹ Bell, Dict. & Dig. of Scotch Law, 242.

² Craig, Jus. Feud., 8d ed. 66.

⁴ 2 Rep. 71; 2 Bla. Com. 299.

³ Co. Litt. 19, a.

⁵ Wright, Tenures, 151, 152.

feoffee or tenant. "It is not," as remarked by Lord Brougham, C.,¹ "at all inconsistent with the nature of property, that certain things should be reserved to the reversioners all the while the term continues. It is only something taken out of the demise—some exception to the temporary surrender of the enjoyment: it is only that they retain more or less partially the use of what was wholly used by them before the demise, and what will again be wholly used by them when that demise is at an end."

[*348] "The general principle," says Mr. Justice Ashhurst,² "is clear, *that the landlord having the *jus disponendi* may annex whatever conditions he pleases to his grant, provided they be not illegal or unreasonable." It is, for instance, reasonable that a landlord should exercise his judgment with respect to the person to whom he trusts the management of his estate; and, therefore, a covenant not to assign is legal. Covenants to that effect are, indeed, frequently inserted in leases, and ejectments are every day brought on breach of such covenants.³

In accordance with the above maxim, it is also laid down, that a college or charity is the founder's creature; that he may dispose and order it as he will, and may give it whatever shape he pleases, provided it be a legal one. And hence the founder of any lay corporation, whether civil or eleemosynary, may appoint himself, his heirs, or assigns, or any other persons specially named as trustees, to be the visiters; such trustees being, however, subject to the superintending power of the Court of Chancery, as possessing a general jurisdiction, in all cases of an abuse of trust, to redress grievances and suppress frauds.⁴

On this principle, likewise, an agreement by defendant to allow plaintiff, with whom he cohabited, an annuity for life, provided she should continue single, was held to be valid, for this was only an original gift, with a condition annexed; and *cujus est dare ejus est disponere*. Moreover, the grant of the annuity was not an inducement to the plaintiff to continue the cohabitation, it was rather an inducement to separate.⁵

¹ Keppell v. Bailey, 2 My. & K. 536-7.

² Roe d. Hunter v. Galliers, 2 T. R. 137, 138.

³ Ibid.

⁴ Bell, Dict. and Dig. of Scotch Law, 242. See 1 Kyd on Corporations, 50; 2 Kyd on Corporations, 195; Skin. R. 481, 502; 2 Kent Com., 4th ed. 302, 303.

⁵ Gibson v. Dickie, 3 M. & S. 463; E. C. L. R. 30.

*Another remarkable illustration of the *jus disponendi* presents itself in that strict compliance with the wishes of the grantor, which our Courts have regarded¹ as essential to the due execution of a power. Whatever arbitrary terms the grantor of the power may impose upon the party executing it, or however absurd or unreasonable such terms may appear to be, they must, nevertheless, be fulfilled; and any substantial deviation from the mode prescribed, however desirable in itself, upon a just consideration of all the circumstances, will vitiate the instrument which purports to be an execution of the power.²

As, moreover, the wishes and the intention of the testator will, as far as possible, be complied with, and carried into effect in a court of justice, a person taking under a will may have a right of alienating the property devised in his lifetime, and yet have no power of disposing of it by any testamentary instrument. For instance, A. devised his copyhold and real estate to B., his heirs, and assigns, with a restriction upon alienation, in these words: "In case B. shall depart this life without leaving any issue of his body lawfully begotten then living or being no such issue, and he my said son shall not have *disposed and parted with* his interest of, in, and to the aforesaid copyhold estate and premises;" and then followed a devise over to C. The Court held, that the intention of the testator evidently was to give to his son absolute dominion over the estate, *provided he chose to exercise that dominion in his lifetime; that the restriction imposed upon the power of alienation be-³ came effectual by the son dying seized; and that a devise of the estate in question was not a *disposing* of it within the meaning of the will.³

Without citing additional instances of the application of the maxim, *cujus est dare ejus est disponere*, which has here been mentioned as introductory merely to that which concerns the rights and liabilities which pass by an assignment of property, we may observe, that, although, in general, the law permits every man to part with his own

¹ By 1 Vict. c. 26, s. 10, every will executed as prescribed by that Act will be a valid execution of a power of appointment by will, although other required solemnities may not have been observed. This Act, however, does not extend to any will made before January 1st, 1838.

² *Rutland v. Doe d. Wythe*, 12 M. & W. 857, 378, 378; (*) S. C., 10 Cl. & Fin. 419; *Doe d. Earl of Egremont v. Burrough*, 6 Q. B. 229; E. C. L. R. 51; *Doe d. Blomfield v. Eyre*, 8 C. B. 557; E. C. L. R. 54.

³ *Doe d. Stevenson v. Glover*, 1 C. B. 448; E. C. L. R. 50.

interest, and to qualify his own grant as it pleases himself, it nevertheless does not permit any allowance or recompense to be made, if the thing granted be not taken as it is granted; or, in the words of Lord Bacon's maxim—" *Quod sub certâ formâ concessum vel reservatum est non trahitur ad valorem vel compensationem:*" and, therefore, if I grant common for ten beasts for three years, and the grantee neglect for two years to use the right thus given, he shall not the third year have common for thirty beasts, for the time is certain and precise.¹

ASSIGNATUS UTITUR JURE AUCTORIS.

(Halk. Max. p. 14.)

*An assignee is clothed with the rights of his principal.*²

It is laid down as a general and leading rule with reference to alienations and forfeitures, that, *quod meum est sine facto meo vel defectu meo amitti vel in alium transferri non potest*, *where [*351] *factum* may be translated "alienations," and *defectus* "forfeiture;"³ and it seems desirable to preface our remarks as to the rights and liabilities which pass by the transfer of property, by stating this elementary and obvious principle, that where property in land or chattels has once been effectively and indefeasibly acquired, the right of property can only be lost by some act amounting to alienation or forfeiture on the part of the owner or his representatives.⁴

An "assignee" is one, who by such act as aforesaid, or by the operation of law, as in the event of death, possesses a thing or enjoys a benefit; the distinction between an *assignee* and a *deputy* being, that the former occupies in his own right, whereas the latter occupies in the right of another.⁵ A familiar instance of the first mode of transfer above mentioned, presents itself in the assignment of a lease by deed; and of the second, in the case of the heir of an intestate who is an assignee in law of his ancestor.⁶ Under the term "assigns,"

¹ Bac. Max., reg. 4.

² "Auctores" dicuntur a quibus jus in nos transit. Brisson, ad verb. "Auctor."

³ 1 Prest., Abs. Tit. 147, 318. The kindred maxims are, *quod semel meum est amplius meum esse non potest*, Co. Litt. 49, b; *Duo non possunt in solido unam rem possidere*, Co. Litt. 368, a. See 1 Prest., Abs. Tit. 318; 2 Id. 86, 286; 2 Dods., Ad. R. 157; Argument, 2 Curt. 76.

⁴ See Bromage v. Lloyd, 1 Exch. Rep. 32.

⁵ Perkins's Prof. Bk., s. 100; Dyer, 6.

⁶ Spencer's case, 5 Rep. 16.

moreover, is included the assignee of an assignee *in perpetuum*,¹ provided the interest of the person originally entitled is transmitted on each successive devolution of the estate or thing assigned; for instance, the executor of A.'s executor is the assignee of A., but not so the executor of A.'s administrator, or the administrator of A.'s executor, who is in no *sense the representative of A., and to whom, therefore, the unadministered residue of A.'s estate will not pass.² [*352]

In order to place in a clear light the general bearing and application of the maxim, *assignatus utitur jure auctoris*, we propose to inquire, 1st, as to the quantity; and, 2dly, as to the quality or nature of the interest in property which can be assigned by the owner to another party. And, 1st, it is a well-known rule, imported into our own from the civil law, that no man can transfer a greater right or interest than he himself possesses—*Nemo plus juris in alterum transferre potest quam ipse habet*.³ The owner, for example, of a base or determinable fee can do no more than transfer to another his own estate, or some interest of inferior degree created out of it; and if there be two joint-tenants of land, a grant or a lease by one of them will operate only on his own moiety.⁴ In like manner, where the grantor possessed only a temporary or revocable right in the thing granted, and this right becomes extinguished by efflux of time or by revocation, the title of the assignee must of course cease to be valid, according to the rule, *resoluto jure concedentis resolvitur jus concessum*.⁵ It must, however, be observed that the maxim above mentioned, which is one of the leading rules as to titles, or the equivalent maxim, *non dat qui non habet*, is said not to apply to wrongful conveyances or tortious acts;⁶ for instance, prior to the stat. 3 & 4 Will. 4, c. 74, if a tenant for years make a feoffment, this feoffment vested in the feoffee a defeasible estate of freehold; for, according to the ancient doctrine, every person having possession of *land, however slender or however tortious his possession might be, [*353] was, nevertheless (unless, indeed, he were the mere bailiff of the party having title), considered to be in the seisin of the fee, so as to be able by livery to transfer it to another; and, consequently, if, in the case above supposed, the feoffee had, subsequently to the conveyance, levied a fine, such fine would, at the end of five years after the

¹ Co. Litt. 384, b.

² D. 50, 17, 54; Wing. Max., p. 56.

⁵ Mackeld., Civ. Law, 179.

² 2 Bla. Com. 506.

³ 3 Prest., Abs. Tit. 25, 222.

⁶ 3 Prest., Abs. Tit. 25; 1 Id. 244.

expiration of the term, have barred the lessor.¹ In the case just supposed, the base fee is, in contemplation of law, an estate greater than that possessed by the feoffor, and is by fine and non claim made instrumental in the creation of a perfect and indefeasible estate of inheritance. So, where a feoffment was made by tenant in tail without fine, it is clear that the base fee thus created had, until it was determined by the entry of the issue in tail, all the incidents of an estate in fee-simple;² and the above cases, although not, perhaps, strictly speaking, exceptions to the maxim, that a man cannot transfer to another a greater interest than he himself possesses, will, at all events, suffice to show that this rule must be understood in a somewhat qualified and restricted sense.

We must also observe, that, as between the parties themselves, viz. the assignor and assignee, an interest may be transferred, although greater than that which the assignor himself possessed; for instance, a jury found that the lessor had nothing in the land when he made the lease to the plaintiff, and afterwards the lessor entered and ejected him, and it was held that this lease was good as between [*354] the parties.³ So, where a termor having previously *assigned the term by way of mortgage, makes a sub-demise, such lease will be good by way of estoppel, as between the mortgagor and tenant; and if in this case the mortgagor should subsequently reacquire the legal estate, the lease by estoppel would become a lease in interest, and the relation of landlord and tenant would thereupon exist, as perfectly as if the lessor had been actually seised of the land at the time when the lease was made.⁴

In mercantile transactions, as well as in those connected with real property, the general rule undoubtedly is, that a person cannot transfer to another a right which he does not himself possess; and of this rule a familiar instance is noticed by M. Pothier, who observes, that, where prescription has begun to run against a creditor, it will continue to do so against his heir, executors, or assignees, for the latter succeed only to the rights of their principal, and cannot stand in a better position than he did himself, *nemo plus juris in alium trans-*

¹ The reader will find this subject elaborately considered in Mr. Butler's note (1), Co. Litt. 380, b.

² *Machell v. Clarke*, 2 Ld. Raym. 778; 1 Cruise, Dig. 4th ed. 80.

³ *Rawlins's case*, 4 Rep. 52; cited, Pollexf. 68; 15 L. J., Exch. 214.

⁴ *Sturgeon v. Wingfield*, 15 M. & W. 224, 280; (*) *Pargeter v. Harris*, 7 Q. B. 708; *E. C. L. R.* 58. *Blake v. Foster*, 8 T. R. 487; *Stokes v. Russell*, 8 T. R. 678; *Webb v. Austin*, 8 Scott, N. R. 419.

*ferre potest quam ipse habet.*¹ However, in considering hereafter those maxims which are peculiarly applicable to the law of contracts,² we shall have occasion to notice several cases which are directly opposed in principle to the rule now under review; for instance, by a sale in market overt, one wrongfully in possession of a chattel may convey a good title to a *bona fide* purchaser;³ and, in like manner, the holder of a negotiable instrument, who could not himself recover upon it as against the rightful owner, may frequently, by transferring it for value, vest a perfectly valid and unimpeachable title in the assignee. Another remarkable exception to the rule [*355] *occurs in connexion with the important subject of stoppage *in transitu*; for, although, as between the consignor and consignee of goods, the title to the goods, and the question whether or not the property in them has passed, will depend upon the real contract entered into by the parties; yet, if the consignor and original owner indorses and delivers the bill of lading to the consignee, he thereby puts it in the power of the latter to transfer the property in the goods to a *bona fide* purchaser for a valuable consideration, and thus to deprive himself of any right of stoppage *in transitu* which he might have had as against the consignee prior to such transfer. "The actual holder of an endorsed bill of lading," said Tindal, C. J., delivering judgment in a recent case,⁴ "may, undoubtedly, by endorsement, transfer a greater right than he himself has. It is at variance with the general principles of law, that a man should be allowed to transfer to another a right which he himself has not; but the exception is founded on the nature of the instrument in question, which being, like a bill of exchange, a negotiable instrument, for the general convenience of commerce, has been allowed to have an effect at variance with the ordinary principles of law. But this operation of a bill of lading, being derived from its negotiable quality, appears to us to be confined to the case where the person who transfers the right is himself in possession of the bill of lading, so as to be in a situation to transfer the instrument itself, which is the symbol of the property itself."

Having thus adverted to the amount or quantity of interest assignable, with reference more especially to the grantor, we must, in the next place, observe, that, as a general rule, the assignee of property

¹ 2 Pothier, Oblig. 268.

² Chap. ix.

³ Post.

⁴ Jenkyns v. Usborne, 8 Scott, N. R. 523.

[*356] takes it subject to *all the liabilities, and clothed with all the rights, which attached to it in the hands of the assignor; and this is in accordance with the maxim of the civil law, *qui in jus dominiumve alterius succedit jure ejus uti debet*.¹ We have already given one instance illustrative of this rule, viz., where an heir or executor becomes invested with the right to property against which the Statute of Limitations has begun to run. To this we shall add only one other example, as the same general principle will necessarily again present itself to our notice in connexion with the law of contracts, which has been reserved for especial consideration in a subsequent portion of this work.

Where, then, a person pays a bill of exchange on account and for the honour of a party to the bill, the person making such payment becomes a holder of the bill, as upon a transfer from the party for whom the payment was made; that is to say, he is put in the situation of an endorsee under such party, and is clothed with all the rights and liabilities incident to that character. Thus, if A. pays the bill for the honour of B., he thereupon has a right to consider himself as an endorsee under B., and, consequently, to give notice of the dishonour to him; and if B. thereupon gives a notice to the drawer, which is within the time, so far as he is concerned A. will have a right to adopt and take advantage of it as a notice given to himself:²—*Qui alterius jure utitur eodem jure uti debet*.³

Without pursuing further our inquiry respecting the *quantity* of interest in property which is capable of being transferred, we shall, [*357] secondly, proceed to consider briefly the *quality* or nature of that interest; and we must commence our remarks upon this branch of the subject with observing, that there is an important distinction which must always be kept in view between the transfer of the right of property in a chattel, and the transfer of the right of action for the same; for instance, in the case just put, although it is true that the right of property in goods may be transferred by the endorsement over of the bill of lading, yet the original contract between the owner and the consignee is not thereby transferred so as to enable the endorsee to sue upon the bill of lading in his own name.⁴

¹ D. 50, 17, 177, pr. For instance, fee-simple estates are subject, in the hands of the heir or devisee, to debts of all kinds contracted by the deceased.

² Goodall v. Polhill, 1 C. B. 238, 242; E. C. L. R. 50.

³ Pothier, Tr. de Change, pt. 1, ch. 4, art. 5, s. 114.

⁴ Thompson v. Dominy, 14 M. & W. 408; (*) ante, p. 355.

No doubt, indeed, he might, under the circumstances, have a remedy in trover for the recovery of the goods assigned, or their value; but this remedy is of a different nature from that which he would have had if the right of action on the contract, as well as the right of property in the goods, had been assignable. It is, indeed, a well-known rule of law, that a chose in action cannot in general be assigned so as to vest in the assignee a right of action upon it in his own name.¹ Where, for instance, the drawer of a ticket in the Derby lottery sold it to the plaintiff before the race, and the horse named in it was ultimately declared to be the winner, it was held that an action for money had and received would not lie by the plaintiff against the stake-holder, there being no privity of contract originally between those parties, and the assignment of a chose in action not giving to the assignee a right of action.² So, although an interest in a partnership, or an equitable interest in land, is **a thing of value*, [³⁵⁸] and may be made the subject of a valid contract, yet it is not assignable at law, so as to enable the assignee to sue in his own name, for example, as copartner, or as owner of the beneficial interest;³ and, although it is perfectly legal, and in practice very common, to assign debts for the benefit of creditors, yet the assignee must sue for them in the name of the assignor.⁴ Even at law, however, the assignment of a debt will, in certain cases, give to the assignee a right to sue in his own name for its recovery;⁵ and, in order to constitute a good *equitable* assignment, it is in general sufficient if there be an engagement by the debtor that a particular fund shall be charged with or appropriated to the payment of the debt,⁶ although in equity it is usual, if it be not always indispensable, to make the assignor holding the legal title a party to the suit, as well as the assignee who is beneficially interested.⁷ Courts of equity will,

¹ 2 Bla. Com. 442; *Lampet's case*, 10 Rep. 48 Co. Litt. 282, b. See as to this rule the remarks of Buller, J., 4 T. R. 340.

² *Jones v. Carter*, 8 Q. B. 184; E. C. L. R. 55. See, now, stat. 8 & 9 Vict. c. 109, which renders wagers illegal.

³ *Tempest v. Kilner*, 2 C. B. 300, 308; E. C. L. R. 52; per Buller, J., *Master v. Miller*, 4 T. R. 341.

⁴ Per Bayley, J., *Price v. Seaman*, 4 B. & C. 528; E. C. L. R. 10.

⁵ Per Buller, J., *Tatlock v. Harris*, 3 T. R. 180; *Fairlie v. Denton*, 8 B. & C. 395, 400; E. C. L. R. 15; *Wharton v. Walker*, 4 B. & C. 166; E. C. L. R. 10; *Walker v. Rostron*, 9 M. & W. 411; (*) Com. Dig., Action upon case upon Assumpsit (B. 1, 3). See, also, *Ex parte Lane*, 16 L. J., Bank. 4.

⁶ See 2 Story, Eq. Jurisp., 4th ed. 406.

⁷ Story, Eq. Plead., ss. 153, 154.

however, give effect to assignments, not only of choses in action, but likewise of property, in many cases, where such assignments would not be recognised at law as valid or effectual to pass titles; they will, for instance, support assignments of contingent interests, of expectancies, and of things resting in mere possibility, and they look upon the assignment of a debt as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to make use of the name of the assignor for its recovery.¹

[*359] *Without attempting to enumerate the various rights which are assignable, either by the express act of the party, or by the operation of the law, we may observe generally, that the maxim, *assignatus utitur jure auctoris*, is subject to very many restrictions besides those to which we have just alluded; for instance, although the assignee of the reversion in land is, by the common law, entitled to sue upon covenants in law,² and has, under the stat. 32 Hen. 8, c. 34, a right to sue on express covenants contained in the lease, yet the operation of this statute is confined to such covenants as are technically said to run with the land, that is, such as require something to be done which is in some manner annexed and appurtenant to the land itself.³ In like manner, although the general effect of the various provisions in the enactment relative to bankrupts is to give the assignees of an uncertificated bankrupt the beneficial interest in all property acquired and contracts entered into by him, yet when an injury is done to the person, feelings, or reputation of the bankrupt, and not to his property, the right of suit for such an injury does not pass to the assignees, but remains vested in, and must be exercised, if at all, by the bankrupt;⁴ and even where there is a consequential damage to the personal estate resulting from an injury to the person, as in the case of a breach of a contract to cure or to marry, the damage may be so dependent upon, [*360] *and inseparable from the injury, that no right of action in respect of

¹ 2 Story, Eq. Jurisp., 4th ed. 386, 387.

² Coote, L. & T. 814; Vyvyan v. Arthur, 1 B. & C. 414; E. C. L. R. 8; Harper v. Burgh, 2 Lev. 206.

³ Spencer's case, 5 Rep. 16, 1st resolution. See Doughty v. Bowman, 16 L. J., Q. B. 414; S. C. affirmed in error, 12 Jur. 182; Standen v. Christmas, Id., Q. B. 265; Wright v. Burroughes, Id., C. P. 6.

⁴ Hancock v. Caffyn, 8 Bing. 366, 368; E. C. L. R. 21; Howard v. Crowther, 8 M. & W. 603; (*) Drake v. Beckham, 11 M. & W. 819; (*) Judgment, Rogers v. Spence, 13 M. & W. 580, 581; (*) affirmed, 12 Cl. & Fin. 700; S. C., 11 M. & W. 191; (*) Clark v. Calvert, 8 Taunt. 742; E. C. L. R. 4. See, also, Ellis v. Russell, 16 L. J., Q. B. 428; Williams v. Chambers, Id. 230.

such consequential damage will pass to the assignee.¹ So, the legal effect of marriage is to vest in the husband the right of reducing into possession the chattels real and choses in action generally of the wife, yet if he dies without having exercised this power, the above descriptions of property will survive to the wife;² and, as we shall hereafter see, the rule, that a vested right of action is by death transferred to the personal representatives of the deceased, is subject to some important exceptions, and must, therefore, be applied with considerable caution.³ It is, moreover, a well-known principle, that the right of action *ex delicto*, for a tort either to the person or the property, cannot in any case be assigned, although, of course, the assignee of property is entitled to sue in respect of an injury thereto subsequent to the assignment.

The case of a pawn or pledge of a chattel, is, we may further observe, peculiarly illustrative of the principle, *assignatus utitur jure auctoris*, as also of the more technical legal rule, that the right of action for a tort cannot be assigned; for here the pawnor retains a property in the chattel, qualified, however, by the right vested in the pawnee; and a sale of the chattel by its owner would, therefore, transfer to the vendee that qualified right only which the vendor himself possessed. If, moreover, in the case supposed, the chattel pledged be injured by default of the pawnee, and while in his custody, the vendor, and not the purchaser, will be the proper plaintiff in an action to recover *compensation for the injury caused by a breach of contract, express or implied, inasmuch as the [*361] original contract of bailment was with him. If, however, a new contract be subsequently entered into with the purchaser, or, if the injury be by the destruction or conversion of the chattel after the sale, the latter party will be entitled to enforce the remedy, as having the property in the chattel at the time of the tort committed.⁴

Again, the well-known distinction between *absolute* and *special* property may be adverted to generally, as showing in what manner, and under what circumstances, the maxim, that an assignee succeeds to the rights of his grantor, is, in a large class of cases, directly ap-

¹ *Drake v. Beckham*, 11 M. & W. 815; (*) *Herbert v. Sayer*, 5 Q. B. 965; E. C. L. R. 48; is an important case with reference to the right of an uncertificated bankrupt to sue.

² Per Parke, B., *Gaters v. Madeley*, 6 M. & W. 426, 427; (*) Com. Dig., Bar. & Feme, (E).

³ See the maxim, *Actio personalis moritur cum personâ*, post.

⁴ *Franklin v. Neate*, 18 M. & W. 481; (*) *Rogers v. Kennay*, 15 L. J., Q. B. 381.

plicable. *Absolute* property, according to Mr. Justice Lawrence, is, where one having the possession of chattels, has also the exclusive right to enjoy them, which right can only be defeated by some act of his own. *Special* property, on the other hand, is, where he who has the possession holds them subject to the claims of other persons.¹ According, therefore, as the property in the grantor was absolute or subject to a special lien, so will be that transferred to his assignee—*qui in jus dominiumve alterius succedit jure ejus uti debet*; and the same principle applies where a subsequent transfer of the property is made by such assignee.²

It will be evident, that, with regard to a legal maxim so comprehensive and so general in its application as that before us, little can be attempted beyond giving to the reader a brief and necessarily imperfect outline of such only of the various classes of cases exemplifying its meaning and qualifications *as may seem apposite to the end which has in this section been kept more particularly in view, that, viz., of presenting a *compendious* statement of the most practically useful and important principles connected with the transfer of property.

We shall, therefore, without occupying additional space in remarking upon the rule above illustrated, proceed at once to an enumeration of some few other kindred maxims, which are indeed of minor importance, but which, nevertheless, could not properly be omitted in even the most cursory notice of the above-mentioned branch of our legal system.

CUICUNQUE ALIQUIS QUID CONCEDIT CONCEDERE VIDETUR ET ID
SINE QUO RES IPSA ESSE NON POTUIT.

(11 Rep. 52.)

Whoever grants a thing is supposed also tacitly to grant that without which the grant itself would be of no effect.

When anything is granted, all the means to attain it,³ and all the fruits and effects of it, are granted also, and shall pass inclusive,

¹ *Webb v. Fox*, 7 T. R. 398.

² See *Cooper v. Willomatt*, 1 C. B. 672; *E. C. L. R.* 50, as to a sale by bailee for hire.

³ See *Dalton's Justice*, p. 397, ed. 1655; cited, *Evans v. Rees*, 12 Ad. & E. 57, 58; *E. C. L. R.* 40; *Argument, Reg. v. Mayor of London*, 16 L. J., Q. B. 192.

together with the thing by the grant of the thing itself, without the words *cum pertinentiis*, or any such like words.¹

Therefore, by the grant of a piece of ground is granted a right of way to it over the grantor's land as incident to the grant; and, in like manner, it seems, that by a reservation of the close is reserved also a right of way to it; and *by the grant of trees is granted power to enter on the land to cut them down, and [*363] take them away.² If a man leases his land and all mines where there are no open ones, the lessee may dig for the minerals; and by the grant of fish in a man's pond is granted power to come upon the banks and fish for them.³ On the same principle, where trees are excepted in a lease, the lessor has a power by law, as incident to the exception, to enter upon the land demised in order to fell and take away the trees, though this power is often, for the greater caution, expressly reserved to him.⁴ In like manner, a rector may enter into a close to carry away the tithes over the usual way, as incident to his right to the tithes.⁵ So, a tenant at will, after notice to quit, or any other party who is entitled to emblements, shall have free entry, egress, and regress, to cut and carry them away.⁶ The right to emblements does not, however, give a title to the exclusive occupation of the land. Therefore, it seems, that, if the executors occupy till the corn or other produce be ripe, the landlord may maintain an action for the use and occupation of the land.⁷ On the same principle, where a tenant is entitled to any away-going crop, he may likewise be entitled by custom to retain possession of that portion of the land on *which it grows; and, in this case, the custom [*364] operates as a prolongation of the term, or rather of the legal right of possession, as to such portion.⁸

¹ Shep. Touch. 89; Hobart, 284; Vaugh. R. 109.

² Howton v. Frearson, 8 T. R. 56; Noy, Max., 9th ed., pp. 54, 56; Plowd. Com. 16 a; 1 Wms. Saund. 328 note (6); Finch, Law, 63; Clarke v. Cogge, Cro. Jac. 170; Beaudely v. Brook, Id. 190; per Best, C. J., 2 Bing. 88; E. C. L. R. 9. See Robertson v. Gantlett, 16 M. & W. 289. (*) As to right of way by necessity, see also 1 Crabb, Real Prop., p. 380; Buckby v. Coles, 5 Taunt. 311; E. C. L. R. 1.

³ 1 Wms. Saund. 328, n. (6); Shep. Touch. 89; Co. Litt. 59, b; Liford's case, 11 Rep. 52; Foster v. Spooner, Cro. Eliz. 18; Saunders's case, 5 Rep. 12; Noy, Max., 9th ed., p. 56.

⁴ 1 Wms. Saund. 322, note (5); Liford's case, 11 Rep. 52; Ashmead v. Ranger, 1 Ld. Raym. 552.

⁵ 1 Wms. Saund. 323, note (6); ad finem.

⁶ Litt. s. 68; Co. Litt. 56, a. 158, a, cited 1 M. & S. 660; E. C. L. R. 28.

⁷ Woodf., L. & T. 5th ed. 501; 1 Wms. Exors., 8d ed. 564.

⁸ Per Bayley, J., Boraston v. Green, 16 East, 81; Griffiths v. Puleston, 13 M. & W. 358. (*) Ex parte Mandrell, 2 Madd. 315. See Strickland v. Maxwell, 2 Cr. & M. 539. (*)

So, it has been observed, that, when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use; as, if a man gives me a license to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter, and dig the land, in order to mend the pipes, though the soil belongs to another, and not to me.¹

And where an act of Parliament empowered a railway company to cross the line of another company, by means of a bridge, it was held, that the first-mentioned company had, consequently, the right of placing temporary scaffolding on the land belonging to the latter, if the so placing it were necessary for the purpose of constructing the bridge; ² for *ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest*.

In a very recent case, it was held, that a certain coal-shoot, water and other pipes, all which were found, by special verdict, to be necessary for the convenient and beneficial use and occupation of a certain messuage, did, under the particular circumstances, pass to the lessee as integral parts of such messuage; and it was further held, in strict accordance with the rule of law now under consideration, that the right of passing and repassing over the soil of a certain passage, for the purpose of using the said coal-shoot, and using, cleaning, and repairing the said pipes, likewise *passed to the [*365] lessee as a necessary incident to the subject-matter actually demised, although not specially named in the lease.³

In a deed of conveyance of certain land, the grantor excepted and reserved out of the grant all coal-mines, together with sufficient way-leave and stay-leave to and from the said mines, and the liberty of sinking pits: the Court held, that, as the coals were excepted, and a right to dig pits for getting those coals reserved, all things "depending on that right, and necessary for the obtaining it," were, according to the above rule, reserved also, and consequently, that the owner had, as incident to the liberty to sink pits, the right to fix such machinery as would be necessary to drain the mines, and draw the coals from the pits; and, further, that a pond for the

¹ Per Twysden, J., *Pomfret v. Ricroft*, 1 Saund. R. 323; cited, per Story, J., *Charles River Bridge v. Warren Bridge*, 11 Peters, R. (U. S.) 630; Judgment, *Hodgson v. Field*, 7 East. 622, 723.

² *Clarence Railway Company v. Great North of England Railway Company*, 13 M. & W. 706, 721. (*)

³ *Hinchliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1; E. C. L. R. 85.

supply of the engine, and likewise the engine-house, were necessary accessories to such an engine, and were, therefore, lawfully made.¹

Again, the power of making by-laws is, on the same principle, incident to a corporation: for, when the Crown creates a corporation, it grants to it, by implication, all powers that are necessary for carrying into effect the objects for which it is created, and securing a perpetuity of succession. Now, a discretionary power somewhere to make minor regulations, usually called by-laws, in order to effect the objects of the charter, is necessary; and the reasonable exercise of this power is, therefore, impliedly granted by the Crown, and is conferred by the very act of incorporation.²

*The above maxim, however, must be understood as applying to such things only as are incident to the grant, and *directly* [*366] necessary for the enjoyment of the thing granted; therefore, if a man, as in the instance above put, grants to another the fish in his ponds, the grantee cannot cut the banks to lay the ponds dry, for he may take the fish with nets or other engines.³ So, if a man, upon a lease for years, reserves a way for himself through the house of the lessee to a back-house, he cannot use it but at seasonable times, and upon request.⁴ A way of necessity is also limited by the necessity which created it, and, when such necessity ceases, the right of way likewise ceases; therefore, if, at any subsequent period, the party formerly entitled to such way can, by passing over his own land, approach the place to which it led by as direct a course as he would have done by using the old way, the way ceases to exist as of necessity.⁵

On a principle similar to that which has been thus briefly considered, it is a rule, that, when the law commands a thing to be

¹ *Dand v. Kingscote*, 6 M. & W. 174, (*) and cases cited in the argument; *Hodgson v. Field*, 7 East, 618.

² *Rex v. Westwood*, 7 Bing. 20; E. C. L. R. 20. See *Chilton v. The London and Croydon Railway Company*, 16 M. & W. 212; (*) *Calder and Hebble Navigation Company v. Pilling*, 14 M. & W. 76, (*) cited ante, p. 22. A by-law is "a rule made prospectively, and to be applied whenever the circumstances arise for which it is intended to provide:" *Judgment, Gosling v. Veley*, 7 Q. B. 451; E. C. L. R. 53; *Bac. Abr., Corporations (D.)*

³ 1 *Wms. Saund.* 233, n. (6), ad finem; *Lord Darcy v. Askwith*, Hob. 234; per *Parke, B.*, 6 M. & W. 189. (*)

⁴ *Tomlin v. Fuller*, 1 *Ventr.* 48. See, also, *Morris v. Edgington*, 3 *Taunt.* 24, cited 6 M. & W. 189; (*) *Wilson v. Bagshaw*, 5 *Man. & Ry.* 448; *Osborn v. Wise*, 7 *C. & P.* 761; E. C. L. R. 32.

⁵ *Holmes v. Goring*, 2 *Bing.* 76; E. C. L. R. 9.

done, it authorizes the performance of whatever may be necessary for executing its command: *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud*.¹ Thus, constables, whose duty it is to see the peace kept, may, when necessary, command the assistance of others.² In like manner, the sheriff is authorized in [*367] *the execution of a writ to take the *posse comitatus*, or power of the county, to help him, and every one is bound to assist him when required so to do;³ and by analogy, the persons named in a writ of rebellion, and charged with the execution of it, have a right, at their discretion, to require the assistance of any of the liege subjects of the Crown to assist in the execution of the writ.⁴

On the other hand, *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*⁵—whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance;⁶ of which maxim the following instance will be a sufficient illustration:—If a tenant, under covenant not to “let, set, assign, transfer, or make over” the indenture of lease, give a warrant of attorney to confess judgment to a creditor, for the express purpose of enabling such creditor to take the lease in execution under the judgment, this is in fraud of the covenant, and the landlord, under the clause of re-entry in the lease for breach of the condition, may recover the premises in ejectment from a purchaser under the sheriff’s sale. In this case, the tenant could not, by any assignment, under lease, or mortgage, have conveyed his interest to a creditor, [*368] *and, consequently, he cannot convey it by an attempt of this kind. If the lease had been taken by the creditor under an adverse judgment, the tenant not consenting, it would not have been a forfeiture; but, in the above case, the tenant concurred

¹ 5 Rep. 116.

² Noy. Max., 9th ed., p. 55.

³ Foljamb’s case, 5 Rep. 116; cited 4 Bing., N. C. 583; E. C. L. R. 33; Noy, Max., 9th ed., p. 55.

⁴ Miller v. Knox, 4 Bing., N. C. 574; E. C. L. R. 33.

⁵ 2 Inst. 48.

⁶ Booth v. The Bank of England, 7 Cl. & Fin. 509; Judgment, 12 Peters, R. (U. S.) 605; Co. Litt. 228, b; Wing. Max., p. 618; per Lord Kenyon, C. J., 8 T. R. 301, 415. See Hughes v. Statham, 4 B. & C. 187, 193; E. C. L. R. 10; Duke of Marlborough v. Lord Godolphin, cited 2 T. R. 251, 252. A court of law will not use a power which it has for the purpose of indirectly exercising a power which it has not: Attorney-General v. Bovet, 15 M. & W. 71.(*) “In actions for the infringement of patent rights, it is of constant recurrence that the gravamen is laid, not as a direct infringement, but as something amounting to a colourable evasion of the right secured to the party,” per Tindal, C. J., 7 Cl. & Fin. 546.

throughout, and the whole transaction was performed for the very purpose of enabling the tenant to convey his term to the creditor.¹

But, although the above is, no doubt, the general rule, and is evidently consistent with sound sense and common honesty, yet there are cases, as was recently observed with reference to the *modus operandi* of a court of equity, in which that Court will effect, by an indirect course, that which it could not do directly. For instance, the Court will not, by any direct order, compel a person who has improperly erected a wall which is a nuisance to another, to pull it down; but the Court can make an order requiring him not to continue the nuisance, and this order will necessarily have the effect of compelling him to pull down the wall.²

ACCESSORIUM NON DUCIT SED SEQUITUR SUUM PRINCIPALE.

(Co. Litt. 152, a.)

*The incident shall pass by the grant of the principal, but not the principal by the grant of the incident.*³

Upon the maxim, *res accessoria sequit urrem principalem* depended the important doctrine of *accessio* in the Roman *law, *accessio* [*369] being that particular mode of acquisition of property whereby the proprietor of the principal thing became, *ipso jure*, proprietor also of all belonging to the principal as accessory to it. Two extensive classes of cases were accordingly comprised within the operation of the above-mentioned principle: 1st, that in which the proprietor of a thing acquired the right of property in the organic products of the same, as in the young of animals, the fruit and produce of trees, the alluvion or deposit on land, and some other descriptions of property originating under analogous circumstances. The second class of cases above alluded to comprised those in which one thing becomes so closely connected with and attached to another, that their separation cannot be effected at all, or at all events not without injury to one or other of them; and in such cases the owner of the principal thing was held to become proprietor also of the accessory connected therewith.⁴

¹ Doe d. Mitchinson v. Carter, 8 T. R. 300; S. C. Id. 57.

² Per Lord Lyndhurst, C., Hills v. Croll, 1 Cooper, Prac. Cas. 86; Colman v. Morris, 18 Ves. jun. 437.

³ Co. Litt. 152, a, 151, b; per Vaughan, B., Harding v. Pollock, 6 Bing. 63; E. C. L. R. 19.

⁴ See Mackeld., Civ. Law, 279, 281; I. 2, 1, De Rerum Divisione; Brisson ad verb "Accessorium."

The above maxim, *accessorium non ducit sed sequitur suum principale*, is, then, derived from the Roman law, and signifies that the accessory right follows the principal;¹ it may be illustrated by the remarks appended to the rule immediately preceding,² as also by the following examples:—

The owner of land has, *prima facie*, a right to the title deeds, as something annexed to his estate in the land, and it is accordingly laid down, that, if a man seised in fee conveys land to another, and his heirs, without warranty, all the title deeds belong to the purchaser, as incident to the land, though not granted by express words.³

[*370] In like *manner, heir-looms are such goods and chattels as go by special custom to the heir along with the inheritance, and not to the executor or administrator of the last owner of the estate; they are due to the heir by custom, and not by the common law, and he shall accordingly have an action for them. There are also some other things in the nature of heir-looms which likewise descend with the particular title or dignity to which they are appurtenant.⁴

Again, rent is incident to the reversion, and, therefore, by a general grant of the reversion, the rent will pass; though by the grant of the rent generally, the reversion will not pass, for *accessorium non ducit sed sequitur suum principale*: however, by the introduction of special words, the reversion may be granted away, and the rent reserved.⁵ So, an advowson appendant to a manor is so entirely and intimately connected with it, as to pass by the grant of the manor *cum pertinentiis*, without being expressly mentioned or referred to; and, therefore, if a tenant in tail of a manor with an advowson appendant suffered a recovery, it was not necessary for him to make any express mention of his intention to include the advowson in the recovery: for any dealing with the manor, which is the principal, operates on the advowson, which is the accessory, whether expressly named or not. It is, however, to be observed, that, although the conveyance of the manor *prima facie* draws after it the advowson also, yet it is always competent for the owner to sever the advowson

¹ Bell, Dict. and Dig. of Scotch Law, p. 7. See, also, Co. Litt. 389, a.

² See, also, Reg. v. Stoke Bliss, 6 Q. B. 158; E. C. L. R. 51; Chanel v. Robotham, Yelv. 68.

³ Lord Buckhurst's case, 1 Rep. 1; Goode v. Burton, 11 Jur., Exch. 851.

⁴ See 1 Crabb, Real Prop., pp. 11, 12.

⁵ 2 Bla. Com. 176; Litt. s. 229; Co. Litt. 148, a.

from the manor, either by conveying the advowson away from the manor, or by conveying the manor without the advowson;¹ and hence there is a marked distinction *between the preceding [*371] cases and those in which the incident is held to be inseparably connected with the principal, so that it cannot be severed therefrom. Thus, it is laid down that estovers, or wood granted to be used as fuel in a particular house, shall go to him that hath the house; and that inasmuch as a court baron is incident to a manor, the manor cannot be granted and the court reserved.² In some cases, also, that which is parcel or of the essence of a thing passes by the grant of the thing itself, although at the time of the grant it were actually severed from it; by the grant, therefore, of a mill, the mill-stone will pass, although severed from the mill.³

Again, common of pasture *appendant* is the privilege belonging to the owners or occupiers of arable land holden of a manor to put upon the wastes of the manor their horses, cattle, or sheep; it is appendant to the particular form, and passes with it, as incident to the grant.⁴ But divers things which, though continually enjoyed with other things, are only appendant thereto, do not pass by a grant of those things; as, if a man has a warren in his land, and grants or demises the land, by this the warren does not pass, unless, indeed, he grants or demises the land *cum pertinentiis*, or with all the profits, privileges, &c., thereunto belonging, in which case the warren might, perhaps, pass.⁵

Another well-known application of the maxim under consideration is to covenants running with the land, which *pass therewith, [*372] and on which the assignee of the lessee, or the heir or devisee of the covenantor, is in many cases liable, according to the kindred maxim of law, *transit terra cum onere*,⁶ a maxim, the principle of which holds not merely with reference to covenants, but likewise with reference to such customs as are annexed to land,—for instance, it is laid down that the custom of gavelkind being a custom by reason of

¹ Judgment, *Mosely v. Motteux*, 10 M. & W. 544; (*) Bac. Abr., "Grants," (I. 4.)

² Finch, Law, 15.

³ Shep. Touch. 90. See *Wyld v. Pickford*, 8 M. & W. 448. (*) As to what shall be deemed to pass as appendant, appurtenant, or incident, see Bac. Abr., "Grants," (I. 4.)

⁴ 2 Steph. Com. 4, 5; Shep. Touch. 89, 240; 2 Bla. Com., by Stewart, 81; Bac. Abr., "Grants," (I. 4); Co. Litt., by Thomas, vol. 1, p. 227.

⁵ Shep. Touch. 89; 1 Crabb, Real. Prop. p. 488. See *Pannell v. Mill*, 8 C. B. 625; E. C. L. R. 54.

⁶ Co. Litt. 281, a.

the land, runs therewith, and is not affected by a fine or recovery had of the land; but "otherwise it is of lands in ancient demesne, partible among the males, for there the custom runneth not with the land simply, but by reason of the ancient demesne; and, therefore, because the nature of the land is changed, by fine or recovery, from ancient demesne to land at the common law, the custom of parting it among the males is also gone."¹

With reference to titles, moreover, one of the leading rules is *cesante statu primitivo cessat derivativus*²—the derived estate ceases on the determination of the original estate; and the exceptions to this rule have been said to create some of the many difficulties which present themselves in the investigation of titles.³ The rule itself may be illustrated by the ordinary case of a demise for years by a tenant for life, or by any person having a particular or defeasible estate, which, unless confirmed by the remainderman or reversioner, will determine on the death of the lessor; and the same principle applies whenever the original estate determines according to the express terms or nature of its limitation, or is defeated by a condition in consequence of the act of the party, as by the marriage of a [*373] tenant *durante viduitate*, or by the resignation of the *parson who has leased the glebe lands or tithes belonging to the living.⁴

The law relative to contracts and mercantile transactions likewise presents many examples of the rule that the accessory follows, and cannot exist without its principal; thus the obligation of the surety is accessory to that of the principal, and is extinguished by the release or discharge of the latter, for *quum principalis causa non consistit ne ea quidem quæ sequuntur locum habent*,⁵ and *quæ accessionum locum obtinent extinguntur cum principales res peremptæ fuerint*.⁶ The converse, however, of the case just instanced does not hold, and the reason is, that *accessorium non trahit principale*.⁷ As it would be tedious to enumerate cases illustrative of maxims so evidently true and so widely applicable to the above, we shall merely add that, as a general rule, costs follow the verdict.⁸ So, likewise, interest of money is accessory to the principal, and must, in legal

¹ Finch, Law, 15, 16.

² 8 Rep. 84.

³ 1 Prest. Abs. Tit. 245.

⁴ 1 Prest. Abs. Tit. 197, 317, 358, 359.

⁵ D. 50, 17, 129, § 1; 1 Pothier, Oblig. 418.

⁶ 2 Pothier, Oblig. 202.

⁷ 1 Pothier, Oblig. 477; 2 Id. 147, 202.

⁸ See *Chappell v. Purday*, 16 L. J., Chanc. 261; *Reg. v. Stoke Bliss*, 6 Q. B. 158; E. C. L. R. 51.

language, "follow its nature;"¹ and, therefore, if the plaintiff in any action is barred from recovering the principal, he must be equally barred from recovering the interest.²

In a recent case, the declaration stated that the defendant, sixteen years before, delivered his promissory note payable on demand with interest, to the plaintiff, but neglected to *pay, except inter- [*874] rest, which he paid up to a day within six years; the defendant pleaded that the cause of action did not accrue within six years: and this plea was held sufficient on demurrer, for the cause of action was the principal money due, to which the interest was only accessory, and the plea being good in bar of the principal, the accessory must necessarily fall along with it.³

Lastly, in criminal law it is also true that *accessorius sequitur naturam sui principalis*;⁴ and, therefore, an accessory cannot be guilty of a higher crime than his principal, being only punished as a partaker of his guilt.⁵

LICET DISPOSITIO DE INTERESSE FUTURO SIT INUTILIS TAMEN FIERI
POTEST DECLARATIO PRÆCEDENS QUÆ SORTIATUR EFFECTUM IN-
TERVENIENTE NOVO ACTU.

(Bac. Max., reg. 14.)

Although the grant of a future interest is invalid, yet a declaration precedent may be made which will take effect on the intervention of some new act.

"The law," says Lord Bacon, "doth not allow of grants except there be a foundation of an interest in the grantor; for the law that will not accept of grants of titles, or of things in action which are imperfect interests, much less will it allow a man to grant or incur that which is no interest at all, but merely future. But of declarations precedent, before any interest vested, the law doth allow,

¹ 8 Inst. 139; Finch, Law, 23.

² Judgment, Clark v. Alexander, 8 Scott, N. R. 165. See, per Lord Ellenborough, C. J., 3 M. & S. 10; E. C. L. R. 30; 2 Pothier, Oblig. 479. "This giving of interest is not by way of a penalty, but is merely doing the plaintiff full justice, by having his debt with all the advantages properly belonging to it. It is in truth a compensation for delay." Judgment, 16 M. & W. 144. (*)

³ Hollis v. Palmer, 2 Bing. N. C. 718; E. C. L. R. 29.

⁴ 8 Inst. 139.

⁵ 4 Bla. Com. 86.

[*375] but with this difference, so that there be some new act *or conveyance to give life and vigour to the declaration precedent."¹

With respect to the first part of the above rule, viz., that a disposition of after-acquired property is altogether inoperative, it was observed in a recent case,² that Lord Bacon assumes this as a proposition of law which is to be considered as beyond dispute, and accordingly we find the same general rule laid down by all the old writers of authority. "It is," says Perkins,³ "a common learning in the law that a man cannot grant or charge that which he hath not; and, therefore, if a man grant a rent charge out of the manor of Dale, and in truth he hath nothing in that manor, and after he purchases the same manor, yet he shall hold it discharged." And again, it is said, that if a man grants unto me all the wool of his sheep, meaning thereby the wool of sheep which the grantor at that time has, the grant is good;⁴ but a man cannot grant all the wool which shall grow upon his sheep that he shall buy hereafter, for then he hath it neither actually nor potentially.⁵ So, it was held in a recent case, that a man cannot by deed of bargain and sale pass the property in goods which are not in existence, or, at all events, which are not belonging to the grantor at the time of executing the deed;⁶ and, in accordance with the same principle, where a bill of sale purported to be an absolute assignment of furniture and farming stock, "and other things, which are now, or which at any time *during the continuance of this security* shall be in, and about, and belonging to the *dwelling-house," the Court of Queen's Bench held, that [*376] such deed could not operate as an assignment of the goods thereafter to be brought upon the premises, and not specified therein.⁷

It will be observed, however, that, according to the distinction just stated, a grant of the future produce of property actually in the possession of the grantor at the time of the grant is valid. "He that hath it (land) may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant;"⁸ and

¹ Bac. Max., reg. 14.

² Judgment, 1 B. C. 386.

³ Tit. "Grants," s. 65. See, also, Vin. Abr. "Grants," (H. 6); Noy, Max., 9th ed. 162; Com. Dig. "Grant," (D.)

⁴ Perkins, tit. "Grants," s. 90.

⁵ Grantham v. Hawley, Hob. 132. See Shep. Touchstone, by Preston, 241.

⁶ Lunn v. Thornton, 1 C. B. 379; E. C. L. R. 50. See Tapfield v. Hillman, 6 Scott, N. R. 967.

⁷ Gale v. Burnell, 7 Q. B. 850; E. C. L. R. 53; affirming the principle laid down in Lunn v. Thornton, 1 C. B. 79; E. C. L. R. 50.

Grantham v. Hawley, Hobart, 132.

this proposition was fully recognised in a recent case, where a tenant for years of a farm, being indebted to his landlord, assigned to him, by deed, all his household goods, &c., and also all his "tenant right and interest yet to come and unexpired" in and to the farm and premises; and it was held, that, under this assignment, the tenant's interest in crops grown in future years of the term passed to the landlord.

It remains, then, to consider the second part of Lord Bacon's rule above stated, viz. that a declaration, if followed by some act or conveyance, may be effectual in transferring property not actually in possession of the party at the time of making such declaration. In illustration of this rule Lord Bacon observes,² that, if there be a feoffment by a disseisee, and a letter of attorney to enter and make livery of seisin, and afterwards livery of seisin is made accordingly, this is a good feoffment, although the feoffor had a right only at the time of making the *feoffment; the reason assigned being, [*377] that a deed of feoffment is but matter of declaration and evidence, and there is a new act, that is to say, the livery subsequent, which gives effect and validity to the prior conveyance. In like manner, "if I grant unto J. S. authority by my deed to demise for years the land whereof I am now seised, or hereafter shall be seised, and after I purchase lands, and J., my attorney, doth demise them, this is a good demise, because the demise of my attorney is a new act, and all one with a demise by myself;" and although, as above stated, a grant of goods which are not in existence,³ or do not belong to the grantor at the time of executing the deed, is void, yet the grantor may ratify his grant by some act done by him with that view, after he has acquired the property in the goods, or by some act indicating his intention that they should pass under the deed already executed.⁴ From these instances it sufficiently appears that "there must be some new act or conveyance to give life and vigour to the declaration precedent,"⁵ that is, there must be some new act to be done by the grantor in furtherance of the original disposition, and for the avowed object and with the view of carrying it into effect.

¹ Petch v. Tutin, 15 M. & W. 110; (*) recognising and following Grantham v. Hawley, Hobart, 182. ² Max., reg. 14.

³ 2 Kent Com. 4th ed. 468.

⁴ Lunn v. Thornton, supra; 1 Fonb. Eq. 5th ed. 216.

⁵ Bac. Max., reg. 14.

But although a conveyance of future property is inoperative and void, yet, by will, property to which the testator has become entitled subsequently to its execution will, undoubtedly, pass; a will, however, is an instrument of a peculiar nature, being ambulatory and revocable during the life of the testator, and speaking only at his death, *unless an intention to the contrary is clearly manifested,* according to the maxims, *voluntas testatoris est ambulatoria usque ad extremum vitæ exitum,*³ and *omne testamentum morte consummatum est.*⁴ It is, indeed, the ambulatory and revocable quality of a will just adverted to, which makes the present effect of such an instrument different from that of a disposition by deed postponing the possession or enjoyment, or even the vesting, of an estate until the death of the disposing party, although in both these cases the effect upon the usufructuary enjoyment is precisely the same; for instance, if a man by deed limit lands to the use of himself for life, with remainder to the use of A. in fee; the effect, with reference to the enjoyment, is the same as if he should by his will make an immediate devise of such lands to A. in fee; and yet, in the former case, A. immediately on the execution of the deed becomes entitled to a remainder in fee, though it is not to take effect in possession until the decease of the settlor; whereas, in the latter, he would take no interest whatever until the decease of the testator should have called the instrument into operation.⁵

Upon the whole, then, the case of a devise by will of after-acquired property does not seem to offer any exception to the maxim laid down by Lord Bacon, which appears to be strictly correct when explained and qualified in accordance with his own suggestions, and with those subsequent authorities and decisions to which we have briefly adverted.

¹ 1 Vict. c. 26, s. 3. See per Lord Mansfield, C. J., 1 Cowp. 305, 306; Norris v. Norris, 15 L. J., Chanc. 420; S. C., 2 Coll. 719. In Doe d. Cross v. Cross, 15 L. J., Q. B. 217, a point arose as to whether an instrument operated as a gift *inter vivos* or as a will.

² 1 Vict. c. 26, s. 24; 1 Jarman on Wills, 11; per Sir J. Leach, M. R., Gittings v. M'Dermott, 2 My. & K. 73. See, per Lord Brougham, C., 1 My. & K. 485.

³ 4 Rep. 61.

⁴ Co. Litt. 322, b.

⁵ 1 Jarman on Wills, 11.

*CHAPTER VII.

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RULES RELATING TO MARRIAGE AND DESCENT.

It seemed most convenient to insert a selection of rules relating to Marriage and Descent immediately after those which concern more peculiarly the legal rights and liabilities attaching to property in general. For additional information on the subjects briefly treated of in this Chapter, the reader may consult with advantage the different authorities and references given in the note.¹

CONSENSUS, NON CONCUBITUS, FACIT MATRIMONIUM.

(Co. Litt. 38, a.)

It is the consent of the parties, and not their concubinage, which constitutes a valid marriage.

Marriage is constituted by the *conjunctio animorum*, or present consent of the parties expressed under such circumstances as by law required, so that, though the parties, after consent so given, should, by death or disagreement, or any *other cause, happen not to consummate the marriage *conjunctione corporum*, they are, [*380] nevertheless, entitled to all the legal rights consequent on marriage.²

The above maxim, in the words of Sir William Blackstone, has been adopted from the civil law³ by the common lawyers, who, indeed, have borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws;⁴ and, by the latter, as well as by the earlier ecclesiastical law, marriage was a mere *consensual* contract, only differing from other contracts

¹ 2 Steph. Com., book iii., c. ii., which treats of Husband and Wife. The important judgments delivered in the case of Reg. v. Millis, 10 Cl. & Fin. 584, which contain learned researches respecting the nature and requisites of the marriage contract; the 2d volume of Sir W. Blackstone's Commentaries, chap. xiv., which, however, must be read with reference to the recent alterations introduced into the law respecting Descent and Seisin; and Cruise, Dig. 4th ed., vol. 3, tit. 29, chaps. 1, 2, 3, which treat of Descent and Consanguinity.

² See Bell, Dict. & Dig. of Scotch Law, p. 217.

³ *Nuptias non concubitus sed consensus facit*, D. 50, 17, 30.

⁴ 1 Bla. Com. 484; Co. Litt. 38, a. See 2 Voet. Com. Pandect., lib. 28, tit. 2.

of this class in being indissoluble even by the consent of the contracting parties. It was always deemed to be a contract executed without any part performance; so that the maxim was undisputed and peremptory, *consensus, non concubitus, facit nuptias vel matrimonium*.¹

By the law of England,² also, marriage is considered in the light of a contract, and, therefore, the ordinary principles which attach to contracts in general are, with some exceptions, applied to it.³ The principle expressed in the above maxim, and which alone we propose to consider, is, that in order to render a marriage valid, the parties must be willing to contract. The weight of authority, indeed, seems to show, that, even prior to the Marriage Act *(26 Geo. 2, [*381] c. 33), a present and perfect consent, that is, a consent expressed *per verba de præsenti*, was sufficient to render a contract of marriage indissoluble between the parties themselves, and to afford to either of them, by application to the spiritual court, the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself unless made in the presence and with the intervention of a minister in holy orders.⁴

In the recent case of *Reg. v. Millis*,⁵ the facts were these:—A. and B. entered into a present contract of marriage *per verba de præsenti* in Ireland, in the house and in the presence of a placed and regular Presbyterian minister. A. was a member of the Established Church; B. was either a member of the Established Church, or a Protestant dissenter. A religious ceremony of marriage was performed on the occasion by the said minister between the parties, according to the usual form of the Presbyterian Church, in Ireland. A. and B., after the contract and ceremony, cohabited and lived

¹ Per Lord Brougham, in *Reg. v. Millis*, 10 Cl. & Fin. 719. See, also, Lord Stowell's celebrated judgment in *Dalrymple v. Dalrymple* (by Dodson), p. 10 (a), where many authorities respecting this maxim are collected. See, also, the remarks upon this case, 10 Cl. & Fin. 679.

² The following authorities may be referred to as explanatory of the law of Scotland respecting marriages *per verba de præsenti*: *Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 54; *Hamilton v. Hamilton*, 9 Cl. & Fin. 327; *Stewart v. Menzies*, 8 Id. 309; *Shelf. on Marriage & Div.* 91. ³ 2 Steph. Com. 279, 280.

⁴ Per Tindal, C. J., delivering the opinion of the judges in *Reg. v. Millis*, 10 Cl. & Fin. 655; *Catherwood v. Caslon*, 13 M. & W. 261. (*)

⁵ 10 Cl. & Fin. 534, as to which case, see the observations of Dr. Lushington, *Catterall v. Catterall*, 11 Jur. 914. See the recent stats. 7 & 8 Vict. c. 81, s. 83; 5 & 6 Vict. c. 118.

together for two years as man and wife. A. afterwards, and whilst B. was living, married C. in England. It was held, that A. was not indictable for bigamy.

“It will appear, no doubt,” says Tindal, C. J., delivering the opinion of the judges in the case just cited, “upon referring to the different authorities, that, at various periods of our history, there have been decisions as to the nature and description of the religious ceremonies necessary for the completion of a perfect marriage, which cannot *be reconciled together; but there will be found no authority to contravene the general position, that, at all times, [*382] by the common law of England, it was essential to the constitution of a full and complete marriage, that there must be some religious solemnity; that both modes of obligation should exist together, the civil and religious; that, besides the civil contract, that is, the contract *per verba de præsenti*, which has always remained the same, there has at all times been also a *religious ceremony*, which has not always remained the same, but has varied from time to time, according to the variation of the laws of the Church; with respect to which ceremony it is to be observed, that, whatever at any time has been held by the law of the Church to be a sufficient religious ceremony of marriage, the same has at all times satisfied the common law of England in that respect.” Where, for instance, the Church has held, as it has often done down to the time of passing the Marriage Act, that a marriage celebrated by a minister in holy orders, but not in a church, or by such minister in a church, but without publication of banns, and without license, is irregular, and renders the party liable to ecclesiastical censures, but is sufficient, nevertheless, to constitute the religious part of the obligation, and that the marriage is valid notwithstanding such irregularity; the law of the land has followed the spiritual court in that respect, and held such marriage to be valid. “But it will not be found in any period of our history, either that the Church of England has held the religious celebration sufficient to constitute a valid marriage, unless it was performed in the presence of an ordained minister, or that the common law has held a marriage complete without such celebration.”¹

*In support of the position thus laid down, the learned Chief Justice, whose words we have above quoted, refers to [*383] the state of the law relative to the validity of marriages of Quakers and Jews, both prior and subsequent to the Marriage Act. Since

¹ 10 Cl. & Fin. 655, 656.

the passing of this act, he observes, it has generally been supposed that the exception contained therein as to the marriages of Quakers and Jews amounted to a tacit acknowledgment by the legislature, that a marriage solemnized with the religious ceremonies which they were respectively known to adopt ought to be considered sufficient; but before the passing of that act, when the question was left perfectly open, we find no case in which it has been held that a marriage between Quakers was a legal marriage, on the ground that it was a marriage by a contract *per verba de præsenti*, but, on the contrary, the inference is strong that it was never considered legal. As to the case of the Jews, he subsequently proceeds to remark: it is well known, that, in early times, they stood in a very peculiar and excepted condition. For many centuries they were treated not as natural-born subjects, but as foreigners, and scarcely recognised as participating in the civil rights of other subjects of the Crown. The ceremony of marriage by their own peculiar forms might, therefore, be regarded as constituting a legal marriage, without affording any argument as to the nature of a contract of marriage, *per verba de præsenti*, between other subjects.¹

The preceding remarks, with reference to the requisites at common law of the marriage contract,² must, of course, be understood as subject to restriction by the various enactments which have from [*384] time to time been passed by the legislature *with reference to this subject, and of which we shall merely allude to the recent stat. 6 & 7 Will. 4, c. 85. This statute recognises marriage as essentially a civil contract; and by the 20th section enacts, that marriages may be solemnized in places registered for the purpose, in presence of a registrar and two witnesses, and, subject to certain provisoes, according to such form and ceremony as the parties may see fit to adopt. By the 21st section it is further provided, that persons who shall object to marry under the provisions of the act in any registered building may, after due notice and certificate issued, contract and solemnize marriage at the office of the superintendent registrar in the manner therein pointed out.

Having thus observed that marriage is a contract entered into by consent of the parties, and with certain forms, either of a purely civil or of a religious nature, prescribed and sanctioned by the law, it is important further to remark the difference which exists between a contract of marriage *per verba de præsenti* and a contract *per*

¹ 10 Cl. & Fin. 671, 678.

² See Shelf., Marr., Index, "Statutes."

verba de futuro; for the latter does not, under any circumstances, constitute a marriage by our law: it only gives a right of action for damages in case of its violation, though mutual consent will relieve the parties from their engagement;¹ and this, like most other contracts, is not valid, unless the party making the promise be of the full age required by the law, viz., twenty-one;² so that, if there are mutual promises to marry between two persons, one of whom has attained the age of twenty-one, and the other of whom is within that age, the first is so far bound by the contract *as to be liable to an action, if it be broken;³ but the latter may avoid it, if [*385] he pleases;⁴ and this distinction is founded on the well-known principle, that, where a contract may be, to the benefit of an infant, or to his prejudice, the law so far protects him as to give him an opportunity of reconsidering it when he comes of age, and it is good or voidable at his election.⁵

But not only is want of age sufficient to avoid a contract of marriage to take place *in futuro*, but, in some cases, it renders void, or rather voidable, the actual ceremony, by reason of the presumed imbecility of judgment in the parties contracting, and their consequent inability to consent. Therefore, if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and, when either of them come to full age, that party may disagree, and declare the marriage void, without any divorce or sentence in the spiritual court; and this is founded on the civil law; whereas the canon law pays greater regard to the constitution than the age of the parties, and, if they are *habiles ad matrimonium*, the marriage is good, whatever be their respective ages; and in our law the marriage will be good to this extent, that, if at the age of consent they agree to continue together, they need not be married again. If, moreover, the husband be of years of discretion and the wife under twelve, when she comes to years of discretion he may disagree as well as she, for in contracts the obligation must be mutual; both must be bound, or neither; and so it is, vice versâ, when the wife is of years of discretion, and the husband under.⁶

¹ Per Lord Lyndhurst, C., 10 Cl. & Fin. 837. As to a plea of exoneration and the evidence necessary to support it, see particularly the recent case of King v. Gillett, 7 M. & W. 55, 59. (*) See, also, Short v. Stone, 15 L. J., Q. B., 143.

² 2 Steph. Com. 282, 283.

³ Per Lord Ellenborough, C. J., Warwick v. Bruce, 2 M. & S. 209; E. C. L. R. 28; S. C., affirmed in error, 6 Taunt. 118; E. C. L. R. 1; Holt v. Ward, 2 Stra. 987.

⁴ Judgment, 2 Stra. 989.

⁵ *Ib.*

⁶ 1 Bla. Com., by Stewart, 470; 2 Steph. Com. 282.

[*386] *Again, by the common law, if the parties themselves were of the age of consent, the concurrence of no other party was necessary in order to make the marriage valid, and this was agreeable to the canon law. Where, however, one of the contracting parties is under age, the law is now regulated by the stat. 4 Geo. 4, c. 76, which enacts (sect. 8), that, from and after the 1st November, 1823, no parson shall be punishable by ecclesiastical censures for solemnizing a marriage without the consent of parents or guardians between persons, both or one of whom shall be under twenty-one after banns published, unless such parson shall have notice of the dissent of such parents or guardians. And if such parents or guardians shall openly declare their dissent at the time of publication, such publication shall be void. And by sect. 14, where either of the parties (not being a widower or widow) shall be under the age of twenty-one, it is required¹ that one of the parties shall personally swear, that the consent of those persons whose consent is necessary has been obtained. By sect. 16, the father, if living, of any party under twenty-one, not being a widow or widower, or, if the father be dead, the guardian of the person of the party so under age, and if no guardian, then the mother, if unmarried, and, if married, the guardian appointed by the Court of Chancery, shall have authority to give consent to the marriage of such party; and, by sect. 17, if the father shall be *non compos*, or the guardian or mother shall be *non compos*, or in parts beyond seas, or shall unreasonably withhold consent, application may be made to the Court of Chancery, by petition, in a summary way; and if the marriage shall appear to be proper, it shall be so declared. It has, moreover, been held, that [*387] the language of *the 17th section only goes to require consent, and the marriage is not absolutely void if solemnized without it.²

Further, by stat. 6 & 7 Will. 4, c. 85³ (amended by 7 Will. 4 & 1 Vict. c. 22, and 3 & 4 Vict. c. 72), the like consent is required to any marriage in English solemnized by license, as would have been required by law in a case of marriage solemnized by license, immediately before the passing of the act; and every person whose consent to a marriage by license is required by law, is thereby authorized to forbid the issue of the superintendent registrar's certificate, whether the marriage is intended to be with license or without.

¹ See, also, 6 & 7 Will. 4, c. 85, s. 12.

² *Rex v. Birmingham*, 8 B. & C. 85; E. C. L. R. 15.

³ Sect. 10.

Lastly, in connexion with this branch of the subject, viz., as to the consent of other than the contracting parties to the marriage, we may observe, that, by the Royal Marriage Act (12 Geo. 3, c. 11), no descendant of the body of King George II. (other than the issue of princesses married into foreign families) is capable of contracting matrimony without the previous consent of the sovereign signified under the great seal, and any marriage contracted without such consent is void; provided, that such of the said descendants as are above the age of twenty-five, may, after a twelve months' notice given to the Privy Council, contract and solemnize marriage without the consent of the Crown, unless both Houses of Parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. In order to bring a marriage within the prohibition of this statute, it is not necessary that it should have been contracted within the realm of England; but the statute extends to prohibit and to annul *marriages wherever the same be contracted or solemnized, either within the realm of England or without.¹

The rule, that *consensus facit matrimonium*, is also applicable to cases in which either party, at the date of the marriage, is labouring under mental incapacity; for, without a competent share of reason, neither this nor any other express contract can be valid, for consent is absolutely requisite to matrimony, and persons *non compotes mentis* are incapable of consenting to anything.²

HÆRES LEGITIMUS EST QUEM NUPTIÆ DEMONSTRANT.

(Co. Litt. 7, b.)

*The common law takes him only to be a son whom the marriage proves to be so.*³

The word "heir," in legal understanding, signifies him to whom lands, tenements, or hereditaments, by the act of God and right of blood, descend, of some estate of inheritance, for *Deus solus hæredem facere potest, non homo*, and he only is heir who is *ex justis nuptiis procreatus*.⁴ It is, then, a rule or maxim of our law, with

¹ The Sussex Peerage, 11 Cl. & Fin. 85.

² 1 Bla. Com. 488; 15 Geo. 2, c. 30; judgment, 1 Hagg., Cons. R. 417.

³ Mirror of Justices, p. 70; Fleta, lib. 6, c. 1.

⁴ Co. Litt. 7, b; cited 5 B. & C. 440, 454; E. C. L. R. 11. The rule respecting property in the young of animals is in accordance with the Roman law, *partus sequitur ventrem*. (1. 2, 1, 19; D. 6, 1, 5, § 2; 2 Bla. Com. 390.)

respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and [*389] mother; and this is a rule *juris positivi*, as indeed are all *the laws which regulate succession to real property, this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and canon law, *pater est quem nuptiæ demonstrant*,¹ by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate;² and this rule of descent, being a rule of positive law annexed to the land itself, cannot be broken in upon or disturbed by the law of the country where the claimant was born. And, therefore, in the case of Doe d. Birtwhistle v. Vardill,³ it was held, that a person born in Scotland of parents domiciled there, but not married till after his birth, though legitimate by the laws of Scotland,⁴ cannot take real estate in England as heir, the father having died intestate.

The above rule, it was observed in the case referred to, is one of a positive, inflexible nature, applying to and inherent in the land itself, which is the subject of descent,—of the same nature and character as that rule which prohibited the descent of land to any but those who were of the whole blood to the last taker,—or like the custom of gavelkind or borough English, which causes the land to descend in the one case to all the sons together, in the other to the younger son alone.⁵

If, moreover, the parent be incapable of inheriting land himself, he has no heritable blood in him, which he can transmit to his child according to the maxim and old acknowledged rule of descent, [*390] that *qui doit inheriter al père doit inheriter al fitz*,—*he who would have been heir to the father shall be heir to the son;⁶ and, therefore, if, in the case above put, the son had died, leaving a child, before the intestate, such child could not, according to the English law, have inherited under the circumstances.⁷

In the case of attainder, however, there is an exception to the

¹ D. 2, 4, 5.

² 1 Bla. Com. 446.

³ 2 Cl. & Fin. 571; S. C., 1 Scott, N. R. 828; 6 Bing., N. C. 385; E. C. L. R. 37; 5 B. & C. 438; E. C. L. R. 11. See the remarks on this case, Law Mag., No. lv., p. 26, et seq.

⁴ See Countess of Dalhousie v. M'Dowall, 7 Cl. & Fin. 817; Munro v. Munro, Id. 842; Birtwhistle v. Vardill, Id. 895.

⁵ 1 Scott, N. R. 838.

⁶ 2 Bla. Com. 223, 250.

⁷ 1 Scott, N. R. 842.

rule last mentioned; for it is enacted by stat. 3 & 4 Will. 4, c. 106, s. 10, that when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the 1st day of January, 1834. This act, however, by sect. 11, shall not extend to any descent which shall take place on the death of any person who shall die before that day.

There is, likewise, another rule of law immediately connected with, and similar in principle to, the preceding, which may be here properly mentioned, and is as follows:—*Qui ex damnato coitu nascuntur inter liberos non computentur*¹—neither a bastard nor any person not born in lawful wedlock can be, in the legal sense of the term, an heir;² for a bastard is reckoned by the law to be *nullius filius*, and, being thus the son of nobody, he has no inheritable blood in him,³ and consequently, cannot take land by succession; and if there be no other claimant than such *illegitimate child (a circumstance, which, however, can rarely happen), the land [*391] shall escheat to the lord. Moreover, as a bastard cannot be heir himself, so neither can he have any heirs but those of his own body; for, as all collateral kindred consists in being derived from the same common ancestor, and, as a bastard has no legal ancestors, he can have no collateral kindred, and consequently, can have no legal heirs but such as claim by a lineal descent from himself; and, therefore, if a bastard purchases land, and dies seized thereof without issue and intestate, the land shall escheat to the lord of the fee.⁴ And the same general principle, subject to certain statutory regulations and modifications, applies also to aliens, who cannot hold lands by purchase, and cannot, therefore, by the common law, acquire an estate of inheritance.⁵

¹ Co. Litt. 8, a.

² Glanville, lib. 7, c. 18.

³ See the argument, *Stevenson's Heirs v. Sullivant*, 5 Wheaton, R. (U. S.) 226, 227; Id. 262, note.

⁴ 2 Bla. Com. 247, 249; Co. Litt. 8 b; Finch, Law, 117, 118.

⁵ As to this, see 1 Steph. Com. 405 et seq. Also, by the recent stat. 7 & 8 Vict. c. 66, s. 3, every person born of a British mother may hold real and personal estate: by sect. 4, alien friends may hold every species of personal property, except chattels real; and, by sect. 5, subjects of a friendly state may hold lands, &c., for the purpose of residence or occupation, &c., for twenty-one years. As to the naturalization of aliens in the Colonies, see 10 & 11 Vict. c. 83.

It may be proper to add one remark, although not strictly connected with the maxim which has given rise to the preceding observations, viz., that there is a manifest distinction between the right of succession to real property in this country being dependent on the law of England respecting legitimacy, and the fact of a marriage contracted according to the *lex loci* being considered as valid by our tribunals; for, as observed in the principal case above referred to, there can be no doubt but that marriage, which is a personal contract, when entered into according to the rites of the country, the [*392] *lex loci*, where the parties are domiciled, *and the marriage celebrated, would be considered and treated as a perfect and complete marriage throughout the whole of Christendom.¹ It does not, however, therefore follow, that with the adoption of the marriage contract, the foreign law adopts also *all* the conclusions and consequences which hold good in the country where the marriage was celebrated; ² as, for instance, its retrospective operation in legitimatising the *ante natus*. Hence, although the right of inheritance does not follow the law of the domicile of the parties, but that of the country where the land lies, yet, with respect to personal property, which has no locality, and is of an ambulatory nature, it is part of the law of England that this description of property should be distributed according to the *jus domicilii*.³ “It is a clear proposition,” observed Lord Loughborough, “not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner, both with [*393] *respect to the disposition of it, and with respect to the transmission of it, either by succession, or by the act of the party;

¹ Dalrymple v. Dalrymple, 2 Hagg., Con. R. 54; per Abbott, C. J., Lacon v. Higgins, 8 Stark. 188; Kent v. Burgess, 11 Sim. 361; Catherwood v. Caslon, 13 M. & W. 261; (*) Reg. v. Millis, ante, p. 381; Story, Conf. of Laws, c. v. By stat. 4 Geo. 4, c. 91, marriages performed by a minister of the Church of England in the chapel of any British embassy or factory, or in the ambassador's house, or by an authorized person within the British lines, are declared to be valid. See Lloyd v. Petitjean, 2 Curt. 251. The marriage of an officer celebrated by a chaplain of the British army within the lines of the army when serving abroad, is valid under the 9 Geo. 4, c. 91, though such army is not serving in a country in a state of actual hostility, and though no authority for the marriage was previously obtained from the officer's superior in command: The Waldegrave Peerage, 4 Cl. & Fin. 649.

² 1 Scott, N. R. 839.

³ Per Abbott, C. J., 5 B. & C. 451, 452; E. C. L. R. 11; per Holroyd and Bayley, JJ., Id. 454. See, also, the Law Mag., No. lv., p. 32; Story, Conf. of Laws, c. ix.

it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession."¹

NEMO EST HÆRES VIVENTIS.

(Co. Litt. 22, b.)

No one can be heir during the life of his ancestor.

By law, no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead; before the happening of this event he is called heir-apparent, or heir-presumptive,² and his claim must necessarily be to an estate which remained in the ancestor at the time of his death, and of which he has made no testamentary disposition; so that it is subject to be defeated by the superior title of an alienee in the ancestor's lifetime, or of a devisee under his will.³ Therefore, if an estate be made to A. for life, remainder to the heirs of B., now, if A. dies before B., the remainder is at an end, for, during B.'s life, he has no heir;⁴ but, if B. dies first, the *remainder immediately vests in his heir, who will be entitled to the land on the death of A.⁵ [*394]

It must be observed, that, in the case here supposed, the inheritance is plainly neither granted to A. nor to B., nor can it vest in B.'s heirs till his death; hence the doctrine formerly maintained was, that, during the life of B., the fee was in abeyance. The doctrine of abeyance was founded on this reasoning, that, inasmuch as the operation of the livery of seisin was immediate and entire, the livery to A. carried the remainder over with it at the same time out of the grantor, and thus the remainder passed from the grantor, but for the present, to nobody, and consequently remained in abeyance. The doctrine is now, however, very generally exploded, on the ground, that, if the remainder passed to nobody, it passed from

¹ *Sill v. Worswick*, 1 H. Bla. 690. And see this subject, with the authorities respecting it, fully considered, *Story, Conf. of Laws. c. ix.*

² 2 Bla. Com., by Stewart, 231; Co. Litt. 8, a.

³ 1 Steph. Com. 358.

⁴ 2 Bla. Com. 107; per Pateson, J., *Doe d. Winter v. Perratt*, 7 Scott, N. R. 23, 24; S. C., 9 Cl. & Fin. 606; per Littledale, J., S. C., 5 B. & C. 59; E. C. L. R. 11.

⁵ 2 Bla. Com. 170.

nobody, and that there is merely a suspension of the complete or absolute operation of such feoffment or conveyance, in regard to the inheritance, until the intended channel for the reception of such inheritance comes into existence; therefore, whatever portion of the inheritance cannot take effect *in præsentis* remains in the grantor or his heirs; and if the inheritance can never pass, as in the case of the parson of a church, who has only a life estate, then it always remains there.¹

The following may be cited as additional instances of the application of the maxim under consideration:—When property is settled in trust in remainder for the persons who should be the next of kin of the tenant for life at her death, the presumptive next of kin are not necessary parties to a suit instituted for the execution of the trusts during the lifetime of the tenant for life, for it is uncertain [*395] ^{*who will be the next of kin of the wife at her death.} “To hold that those who are at present her next of kin are necessary parties” seems inconsistent with the rule—*nemo est hæres viventis*.²

So it has been said, that “a will takes effect only on the testator’s death; during his life it is subject to his control, and, until it was consummated by his death, no one had, in a legal view, any interest in it,—*nemo est hæres viventis*.”³

The general rule being, that the law recognises no one as heir until the death of his ancestor, it follows, that, though a party may be heir-apparent, or heir-presumptive, yet he is not very heir, living the ancestor; and, therefore, where an estate is limited to one as a purchaser under the denomination of heir, heir of the body, heir male, or the like, the party cannot take as a purchaser, unless, by the death of the ancestor, he has, at the time when the estate is to vest, become very heir. But this rule has been relaxed in many instances, and an exception engrafted on it, that, if there be sufficient on the will to show, that by the word “heir” the testator meant heir-apparent, it shall be so construed; and in such a case the popular sense shall prevail against the technical.⁴ In other words, the authorities appear to establish this proposition, that, *prima facie*, the word

¹ *Id.*, 16th ed. 107, note (2); *Id.*, by Stewart, 121.

² Per Lord Cottenham, C., *Fowler v. James*, 1 Phill. 808.

³ Per Spencer, J., *Mann v. Pearson*, 2 Johnson, R. (U. S.) 86.

⁴ *Doe d. Winter v. Ferratt*, 10 Bing. 207, 208, 229; E. C. L. R. 25. See S. C., 7 Scott, N. R. 45 et seq.

“heir” is to be taken in its strict legal sense; but that, if there be a plain demonstration in the will, that the testator used it in a different sense, such different sense may be assigned to it. What will amount to such plain demonstration must in each case depend on the language used, and the circumstances under which it was used, and is not a question to be determined *by reference to reported [*396] cases, but by a careful consideration of that language and those circumstances in the particular case under discussion.¹

Hence, if a devise be made to A. for life, remainder to the heirs of the body of B. so long as B. shall live, an estate *pur autre vie* being given, and the ancestor being *cestui que vie*, the rule of law would plainly be excluded. So, a devise to A. for life, remainder to the right heirs of B. now living, vests the remainder in B.’s heir-apparent or presumptive; and a devise to A. for life, remainder to the right heir of B., he paying to B. an annuity upon coming into possession, would clearly vest the remainder in B.’s heir-apparent.² In like manner, the familiar expressions “heir to the throne,” “heir to a title or estate,” “heir-apparent,” “heir-presumptive,” prove that the existence of a parent is quite consistent with the *popular* idea of heirship in the child. In all such cases, the legal maxim has no place, nor can it have in any in which the person speaking knows of the existence of the parent, and intends that the devise to the child shall take effect during the life of the parent. It would appear that the question proper to be asked in each such case would be, “Did the testator use the word ‘heir’ in the strict legal sense, or in any other sense?” and, if the answer should be, that he used the term, not in the legal and technical, but in some popular sense, that the sense thus ascertained should be carried out.³

*NON JUS SED SEISINA FACIT STIPITEM. [*397]

(Fleta, lib. vi. c. 14.)

*It is not the right, but the seisin, which makes a person the stock from which the inheritance must descend.*⁴

No person, says Sir W. Blackstone, speaking of the law as it existed prior to the stat. 3 & 4 Will. 4, c. 106, can be properly such

¹ Per Patteson, J., 7 Scott, N. B. 26.

² Per Lord Brougham, 7 Scott, N. B. 46, 50.

³ Per Lord Cottenham, 7 Scott, N. B. 60, 61; S.C.,⁵ 5 B. & C. 48; E. C. L. R.; 11. Right v. Creber, 5 B. & C. 866; E. C. L. R. 11. ⁴ Noy, Max., 9th ed., p. 72, n. (b).

an ancestor as that an inheritance of lands or tenements can be derived from him, unless he has had an actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold, or unless he has had what is equivalent to corporal seisin in hereditaments that are incorporeal, such as the receipt of rent, a presentation to the church in case of an advowson, and the like. But he shall not be accounted an ancestor, who has had only a bare right or title to enter or be otherwise seised; for the law requires this notoriety of possession as evidence that the ancestor had that property in himself which is now to be transmitted to his heir.¹ The seisin, therefore, of any person, thus understood, makes him the root or stock from which all future inheritance by right of blood must be derived; and this is *very briefly expressed by the maxim, [*398] *seisina facit stipitem*.²

The rule of law, therefore, with respect to the descent of land, where such descent took place prior to the 1st of January, 1834, was, and still is,³ that the heir had not *plenum dominium*, or full and complete ownership, till he had made an actual corporal entry into the lands; for, if he died before entry made, his heir would not have been entitled to take the possession, but the heir of the person who was last actually seised. It was not, therefore, a mere right to enter, but the actual entry, that made a man complete owner, so as to transmit the inheritance to his own heirs.⁴

It may, then, be stated briefly, as the clear result of all the authorities, that, wherever a party succeeded to an inheritance by descent, he must have obtained an actual seisin, or possession, as contradistinguished from a seisin in law, in order to make himself the root or stock from which the future inheritance by right of blood must have been derived; that is, in other words, in order to make the estate transmissible to his heirs.⁵

¹ Mr. Serjeant Stephen, in his Commentaries, vol. 1, p. 365, and note (x), observes, that the origin of the maxim *seisina facit stipitem* seems never to have been fully and satisfactorily traced; and that, though Blackstone's explanation may sufficiently show why descent was not to be traced, except from a person who had obtained actual seisin, yet it does not show why the person last seised was to be the *propositus*, or root of descent, in preference to a known purchaser, who had also obtained actual seisin.

² 2 Bla. Com. 209.

³ The stat. 3 & 4 Will. 4, c. 106, does not apply to any descent which took place prior to January 1, 1834. (See sect. 11.)

⁴ 2 Bla. Com. 209, 312.

⁵ Judgment, Doe d. Parker v. Thomas, 4 Scott, N. R. 468.

With respect, however, to descents which take place on deaths since January 1st, 1834, the law has been entirely altered by the stat. 3 & 4 Will. 4, c. 106, of which sect. 1 enacts, that, in the construction of that act, the expression "person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain possession or receipt of the rents and profits thereof; *and sect. 2 enacts, that such person shall be deemed [*399] the purchaser.

It may seem superfluous to remark on this portion of the above act; one instance may, however, be given of its effect. Thus, if A. died seised of land, and B., his heir, died without making entry; according to the former law, the heir of A., and not of B., would have succeeded to the land,—that is, would have had the right of entry thereon; but, by the operation of the recent statute, B. must now be deemed the purchaser, and would accordingly transmit the estate to his own heir.

We may observe, moreover, that, although in many cases, the tracing descent from the person last seised amounted, in effect, to the same thing as tracing descent from the purchaser, yet this was not necessarily so. If, for example, in the case above put, B. had died leaving a brother of the half blood, this brother might possibly have been heir to A., but could, under no circumstances, have been heir to B., because descent was not then allowed between those related by the half blood.¹ It must also be borne in mind, that, in order to establish a title by descent, it was essential that the claimant should be of the blood of the first purchaser; there were, therefore, two requisites to such a title, viz., that the claimant should prove his consanguinity to the purchaser, and that he should make himself heir to the person last actually seised.²

The maxim, however, *non jus sed seisinam facit stipitem*, did not hold in the descent of estates tail, it being only necessary, in deriving a title to an estate of this kind by descent, to deduce the pedigree from the first purchaser, and to show that the claimant is heir to him; for the issue in tail *claim *per formam doni*, that is, [*400] they are as much within the view and intention of the donor, and as personally and precisely described in the gift, as any of their ancestors.³ Likewise, if the estate which descended was of a kind in

¹ See 1 Steph. Com. 365, 366.

² Id. 364, 367.

³ Cruise, Dig., 3d ed., vol. 3, p. 439; (cited, *Argument*, 7 Scott, N. B. 236); Id., 4th ed., p. 386.

which the owner cannot acquire actual seisin of the land (as is the case with a reversion or remainder expectant upon freehold, where the actual seisin belongs to the particular tenant), the rule was, that the claimant must trace his descent from, or, as it was usually expressed, *make himself heir to*, the purchaser.¹

HÆREDITAS NUNQUAM ASCENDIT.

(Glanville, lib. 7, c. 1.)

The right of inheritance never lineally ascends.

The above was an express rule of the feudal law, and remained an invariable maxim² until the recent act, 3 & 4 Will. 4, c. 106, effected so great a change in the law of inheritance. It is thus stated and illustrated by Littleton:³ If there be father and son, and the father has a brother, who is, therefore, uncle to the son, and the son purchase land in fee-simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, although the latter is nearer in blood, because it is a maxim in law that the inheritance may lineally descend, but not ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heir to the *son, and afterwards the uncle die without [*401] issue, living the father, the father shall have the land as heir to the uncle, and not as heir to the son, for he should rather come to the land by collateral descent than by lineal ascent.

It was, moreover, a necessary consequence of this rule, coupled with the maxim, *seisina facit stipitem*, that, if, in the instance above put, the uncle did not enter into the land, the father could not inherit it, because a man claiming as heir in fee simple by descent must make himself heir to him who was last seised of the actual freehold and inheritance; and, if the uncle, therefore, did not enter, he would have had but a freehold in law, and no actual freehold, and the last person seised of the actual freehold was the son, to whom the father could not make himself heir.⁴

And here we may remark, that the maxim *hæreditas nunquam ascendit*, applied only to exclude the ancestors in a direct line, for the inheritance might ascend indirectly, as in the preceding example, from the son to the uncle.⁵

¹ Ratcliff's case, 3 Rep. 42, a. See the judgment in Doe d. Andrew v. Hutton, 3 B. & P. 648.

² 2 Bla. Com. 211, 239; 3 Cruise Dig., 4th ed. 331.

³ Sect. 8.

⁴ Co. Litt. 11, b.

⁵ 2 Bla. Com., 16th ed., 212, n. (5); Bracton, lib. 2, c. 29.

The above rule has, however, been altered with respect to descents on deaths on or after the 1st January, 1834, it being enacted by stat. 3 & 4 Will. 4, c. 106, s. 6, that every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue. But by sect. 7 it is provided that none of the *maternal ancestors of the person from whom the descent is to be traced, nor any of their descen- [*402] dants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed, and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

And here we may conveniently advert to a well-known maxim of our law, which is thus expressed: *Linea recta semper præfertur transversali*¹—the right line shall always be preferred to the collateral. It is a rule of descent that the lineal descendants *in infinitum* of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living.²

Hence it is, that the son or grandchild, whether son or daughter, of the eldest son succeeds before the younger son, and the son or grandchild of the eldest brother before the younger brother; and so, through all the degrees of succession, by the right of representation the right of proximity is transferred from the root to the branches, and gives them the same preference as the next and worthiest of blood.³

Another rule, immediately connected with the preceding, was that

¹ Co. Litt. 10, b; Fleta, lib. 6, c. 1. The reader will find the above subject, which has been purposely only touched upon in the text, fully explained and considered, 1 Steph. Com. 385, 394.

² 3 Cruise, Dig., 4th ed. 333.

³ Hale, Hist., 6th ed. 322, 323; 3 Cruise, Dig., 4th ed. 333.

which related to the exclusion of the half blood, but which originally, [*403] it would seem, extended only *to exclude a *frater uterinus* from inheriting land descended *à patre*:¹ *frater fratri uterino non succedet in hæreditate paternâ*.² This rule, however, although expressed with considerable limitation in the maxim just cited, had this more extended signification—that the heir, in order to take by descent, need not be the nearest kinsman of the whole blood; but, although a distant kinsman of the whole blood, he should nevertheless be admitted to the total exclusion of a much nearer kinsman of the half blood; and, further, that the estate should escheat to the lord, rather than the half blood should inherit.

It has, however, been observed by Mr. Preston, that the mere circumstance that a person was of the half blood to the person last seised, would not have excluded him from taking as heir, if he were of the whole blood to those ancestors through whom the descent was to be derived by *representation*: thus, if two first cousins, D. and E., had intermarried, and had issue a son, F., and D. had married again and had issue, G., and F. died seised, G. could not have taken as half brother of F., but he might as maternal cousin to him;³ for *quando duo jura in undâ personâ concurrunt æquum est ac si essent in diversis*.⁴

The law on this subject has been, however, entirely altered and materially improved by the stat. 3 & 4 Will. 4, c. 106, s. 9, which enables the half blood to inherit next after any relation in the same degree of the whole blood and his issue, where the common ancestor is a male, and next after the common ancestor where a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part *of [*404] the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.

The rule, however, excluding the half blood did not hold on the descent of the Crown.⁵ Therefore, if a king had issue a son and a daughter by one venter, and a son by another venter, and died; on the death of the eldest son without issue, the younger son was entitled to the Crown, to the exclusion of the daughter. For instance, the Crown actually did descend from King Edward VI. to Queen

¹ 2 Bla. Com. 282, 283.

² Fort. de Laud. Leg. Ang., by Amos, p. 15.

³ 2 Prest., Abs. Tit. 447.

⁴ Id. 449.

⁵ See 1 Bla. Com., 16th ed. 79, n. (10).

Mary, and from her to Queen Elizabeth, who were respectively of the half blood to each other. Nor did the rule apply to the estates tail.¹

POSSESSIO FRATRIS DE FEODO SIMPLICI FACIT SOROREM ESSE
HEREDEM.
(8 Rep. 41.)

The brother's possession of an estate in fee simple makes the sister to be heir.

One consequence of the rule, *seisina facit stipitem*, remains to be mentioned, and was, that, if a man, being seised of land, had issue a son and a daughter by one venter, and a younger son by another venter, and the father died, and then the elder son entered and died, the daughter would have inherited the land as heir to her brother, who was the person last actually seised.²

*In the above maxim, however, every word is to be observed. First, the brother ought to be in actual possession of the fee [*405] and freehold, either by his own act or by the actual possession of another;³ but, if, neither by his own act, nor by the possession of another, he gains more than descends to him, i. e., the right of entry, the brother of the half blood shall inherit; and, therefore, if land, rent, an advowson, &c., descended to the elder brother, and he died before any entry by him made into the land, or before he received the rent or presented to the church, the younger brother would have inherited, and not the sister of the whole blood; the reason being, that of all hereditaments in possession the party claiming as heir must have made himself heir to him who was last actually seised.⁴

In copyhold land, the rule was, that the *possessio fratris* depended on entry, and not on admittance. Thus, the heir of an admitted heir might enter and take the profits before admittance; and, where he entered and took actual possession, and died before admittance, there would, nevertheless, be a *possessio fratris*. If, therefore, a

¹ 2 Bla. Com. 233; Chit., Pre. Crown, 10; Litt. ss. 14, 15; 3 Cruise, Dig., 4th ed. 386. See, also, Hume's History of England, vol. 4, pp. 242, 265.

² 2 Bla. Com. 227; Noy, Max., 9th ed., p. 72. In Murray, app., Thorniley, resp., 2 C. B. 217, the Court held, by analogy to the rule as to *possessio fratris*, that the words "actual possession" in the stat. 2 Will. 4, c. 45, s. 26, mean a possession in fact, as contradistinguished from a possession in law.

³ See per Abbott, C. J., Bushby v. Dixon, 3 B. & C. 304; E. C. L. R. 10; Noy, Max., 9th ed., p. 73.

⁴ Ratcliff's case, 1 Rep. 41; 2 Bla. Com. 227, 228; Jenk. Cent. 242.

copyholder in fee had issue a son and a daughter by one venter, and a son by another venter, and died seised, and the son by the first venter entered into the land, and died before admittance, the daughter would have inherited as heir to her brother, and not the son by the second venter as heir to his father.¹

The above rule, it must be further observed, although applicable to the case of one claiming as heir from an ancestor who himself took [*406] by descent, and died before actual *seisin, does not apply to the case of one claiming as heir-at-law of a devisee, that is, of a purchaser who died before actual seisin: therefore, where A., by his will, devised certain premises to the infant daughter of his sister in fee, and the infant devisee died before entry, and before obtaining any actual seisin or possession, it was held, that she had such a seisin in law of the premises devised as to enable her heir to take them from her by descent.²

Neither was the rule applicable to estates tail; and, therefore, if a man made a gift to one and the heirs of his body, and he had issue a son and a daughter by one venter, and a younger son by another venter, and the father died, and the elder son entered and died, the younger son would inherit, *per formam doni*, in preference to the sister of the whole blood, for he claimed as heir of the body of the donee, and not generally as heir to his brother of the half blood.³ The doctrine of *possessio fratris*, we may also observe, has been held not to affect the descent of a dignity by writ.⁴

We have already seen,⁵ that, by the recent Inheritance Act, entry is no longer necessary in order to constitute a good ancestor; and, likewise, that a sister must now trace her descent through the father, and not directly from her brother of the whole blood; and, therefore, the rule of *possessio fratris* is, by the operation of that act, virtually abolished, and is inapplicable to any case which has occurred since the 1st of January, 1834.

¹ Judgment, *Doe d. Hamilton v. Clift*, 12 Ad. & E. 572, 573; E. C. L. R. 40, and authorities cited in that case. See, also, the argument, *Doe d. Parker v. Thomas*, 4 Scott, N. R. 458.

² *Doe d. Parker v. Thomas*, 4 Scott, N. R. 449.

³ *Ratcliff's case*, 3 Rep. 41; *Doe d. Gregory v. Whichelo*, 8 T. R. 211; Noy, Max. 9th ed., p. 73. See, also, the argument in *Tolson, dem., Kaye, deft.* 7 Scott, N. R. 286 et seq., where the authorities on the above point are cited and reviewed.

⁴ *The Hastings Peerage case*, 8 Cl. & Fin. 144.

⁵ Ante, p. 398.

*PERSONA CONJUNCTA ÆQUIPARATUR INTERESSE PROPRIO. [*407]
(Bac. Max., reg. 18.)

The interest of a personal connexion is sometimes regarded in law as that of the individual himself.

In the words of the civil law, *jura sanguinis nullo jure civili dirimi possunt*,¹ the law, according to Lord Bacon, hath so much respect for nature and conjunction of blood, that, in divers cases, it compares and matches nearness of blood with consideration of profit and interest, and, in some cases, allows of it more strongly. Therefore, if a man covenant in consideration of blood to stand seised to the use of his brother or son, or near kinsman, an use is well raised by his covenant without transmutation of possession.²

“So, if a man menace me, that he will imprison or hurt in body my father or my child, except I make unto him an obligation, I shall avoid this duress as well as if the duress had been to mine own person; and yet, if a man menace me by the taking away or destruction of my goods, this is no good duress to plead, and the reason is, because the law can make me reparation of that loss, and so can it not of the other.”³

The above maxim, as to *persona conjuncta*, is likewise, in some cases, applicable in determining the liability of an infant on contracts for what cannot strictly be considered as “necessaries” within the ordinary meaning of that term. Thus, as observed by Lord Bacon, “if a man, under the years of twenty-one, contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own *ali- [*408] ments or erudition.” The like principle was, in a very recent case, extended so as to render an infant widow liable upon her contract for the funeral of her husband, who had left no property to be administered; for, as observed by Alderson, B., in delivering judgment in the case just referred to, the law permits an infant to make a valid contract of marriage, and all necessaries furnished to those with whom he becomes one person by or through the contract of marriage are, in point of law, necessaries to the infant himself. “Now, there are many authorities which lay it down, that decent Christian burial is a part of a man’s own rights; and we think it is no great extension of the rule to say, that it may be classed as a

¹ D. 50, 17, 8; Bac. Max. reg. 11.

² Bac. Max. reg. 18.

³ Ib.

personal advantage, and reasonably necessary to him. His property, if he leaves any, is liable, to be appropriated by his administrator to the performance of this proper ceremonial. If, then, this be so, the decent Christian burial of his wife and lawful children, who are the *personæ conjunctæ* with him, is also a personal advantage, and reasonably necessary to him; and then the rule of law applies, that he may make a binding contract for it. This seems to us to be a proper and legitimate consequence from the proposition, that the law allows an infant to make a valid contract of marriage. If this be correct, then an infant husband or parent may contract for the burial of his wife or lawful children; and then the question arises, whether an infant widow is in a similar situation. It may be said that she is not, because, during the coverture, she is incapable of contracting, and, after the death of the husband, the relation of marriage has ceased. But we think this is not so. In the case of the husband, the contract will be made after the death of the wife or child, and so after the relation which gives validity to the contract is at an end, to some purposes. But if the husband can contract *for this, it is [*409] because a contract for the burial of those who are *personæ conjunctæ* with him by reason of the marriage is as a contract for his own personal benefit; and, if that be so, we do not see why the contract for the burial of the husband should not be the same as a contract by the widow for her own personal benefit. Her coverture is at an end, and so she may contract; and her infancy is, for the above reasons, no defence, if the contract be for her personal benefit. It may be observed, that, as the ground of our decision arises out of the infant's previous contract of marriage, it will not follow from it that an infant child or more distant relation would be responsible upon a contract for the burial of his parent or relative."¹

The maxim under consideration does not, however, apply so as to render a parent liable on the contract of the infant child, even where such contract is for "necessaries," unless there be some evidence that the parent has either sanctioned or ratified the contract. If, says Lord Abinger, C. B.,² a father does any specific act from which it may reasonably be inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted; but the mere moral obligation of the father to maintain his child affords no inference of a legal promise to pay his debts. "In order

¹ Chapple v. Cooper, 13 M. & W. 259, 260.

² Mortimore v. Wright, 6 M. & W. 487.

to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person; and it would bring the law into great uncertainty if it were permitted to juries to impose a liability in each particular case, according to their own feelings or prejudices." "It is," observed Parke, B. in the same case, "a clear principle *of law, that a father is not under any legal obligation to pay his son's debts, except, [*410] indeed, by proceedings under the 43 Eliz.,¹ by which he may, under certain circumstances, be compelled to support his children according to his ability; but the mere moral obligation to do so cannot impose upon him any legal liability."

Again, we read, "It hath been resolved by the justices that a wife cannot be produced either against or for her husband, *quia sunt duæ animæ in carne undâ*, and it might be a cause of implacable discord and dissension between the husband and the wife, and a mean of great inconvenience;"² and this rule is here adverted to, because it is founded partly on the identity of interest which subsists between husband and wife, though partly also on a principle of public policy, which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice.³

In the sense then so fully explained in the case of *Chapple v. Cooper*, above cited, but with the restrictions suggested in the remarks subjoined thereto, must be understood the maxim illustrated by Lord Bacon, and with which we propose here to conclude our list of rules relative to marriage and descent—*persona conjuncta æquiparatur interesse proprio*.

*CHAPTER VIII.

[*411]

THE INTERPRETATION OF DEEDS AND WRITTEN INSTRUMENTS.

I HAVE endeavoured, in the pages immediately following, to give a general view of such maxims as are of most practical utility, and are

¹ See *Grinnell v. Wells*, 8 Scott, N. R. 741.

² Co. Litt. 6, b.

³ See *Hawksworth v. Showler*, 12 M. & W. 45; *Barker v. Dixie*, Cas. temp. Hardw. 264; *Reg. v. Tollett*, Car. & M. 112. It is no defence in ejectment that the defendant is the wife of one of the lessors, of the plaintiff; *Doe d. Daley v. Daley*, 15 L. J., Q. B. 295.

most frequently cited with reference to the mode of construing deeds and written instruments; and, in order to render the subject more complete, some remarks have been occasionally added, showing how these rules apply to the interpretation of wills and statutes. As the authorities and decided cases on the above subject are, of course, extremely numerous, and as in a work like the present it would be undesirable, and indeed impossible, to refer to any considerable portion of them, those only have been cited which exhibit and tend to elucidate most clearly the meaning, extent, and qualifications of the various maxims; and, as far as was consistent with this plan, the more modern judgments of the courts of law have been especially consulted and selected for reference, because the principles of interpretation are better understood at the present day, and consequently, more clearly defined and more correctly applied than they formerly were. The importance of fixed and determinate rules of interpretation is manifest, and not less manifest is the importance of a knowledge of those rules. In construing deeds and testamentary instruments, the language of which, owing to the use of inaccurate terms and expressions, so frequently falls short of, *or altogether [*412] misrepresents the views and intentions of the parties, such rules are necessary in order to insure just and uniform decisions; and they are equally so where it becomes the duty of a court of law to unravel and explain those intricacies and ambiguities which occur in legislative enactments, and which result from ideas not sufficiently precise, from views too little comprehensive, or from the unavoidable and acknowledged imperfections of language.¹ In each case, where doubt or difficulty arises, peculiar principles and methods of interpretation are applied, reference being always had to the general scope and intention of the instrument, the nature of the transaction, and the legal rights and situation of the parties interested.

Inasmuch as the principles developed in this chapter are applicable to the solution of many questions connected with the Law of Contracts and of Evidence, it has been thought better to consider them before proceeding to those important subjects which are treated of in the concluding chapters of this work.

The rules of construction and interpretation separately considered in this chapter are the following:—1st, that an instrument shall be construed liberally and according to the intention of the parties; 2dly, that the whole context shall be considered; 3dly, that the

¹ See Lord Teignmouth's *Life of Sir W. Jones*, 261.

meaning of a word may often be known from the context; 4thly, that a deed shall be taken most strongly against the grantor; 5thly, that a latent ambiguity may, but a patent ambiguity cannot, be explained by extrinsic evidence; 6thly, that, where there is no ambiguity, the natural construction shall prevail; 7thly, that an instrument or expression is sufficiently certain which can be made so; 8thly, that surplusage may *be rejected; 9thly, that a false description is often immaterial; 10thly, that general words [*413] may be restrained by reference to the subject-matter; 11thly, that the special mention of one thing must be understood as excluding another; 12thly, that the expression of what is implied is inoperative; 13thly, that a clause referred to must be understood as incorporated with that referring to it; 14thly, that relative words refer to the next antecedent; 15thly, that that mode of exposition is best which is founded on a reference to contemporaneous facts and circumstances; 16thly, that he who too minutely regards the form of expression, takes but a superficial, and, therefore, probably an erroneous view of the meaning of an instrument.

BENIGNÆ FACIENDÆ SUNT INTERPRETATIONES PROPTER SIMPLICITATEM LAICORUM UT RES MAGIS VALEAT QUAM PEREAT; ET VERBA INTENTIONI, NON E CONTRA, DEBENT INSERVIRE.

(Co. Litt. 86, a.)

A liberal construction shall be put upon written instruments, so as to uphold them, if possible, and carry into effect the intentions of the parties.

The two rules of most general application in construing a written instrument are—1st, that it shall, if possible, be so interpreted *ut res magis valeat quam pereat*;¹ and, 2dly, *that such a meaning [*414] shall be given to it as may carry out and effectuate to the fullest extent the intention of the parties. These maxims are indeed, in some cases restricted by the operation of technical rules, which, for the sake of uniformity, ascribe definite meanings to par-

¹ The Court will not construe that which was expressed and intended to be a lease as an assignment merely, *ut res pereat*, for this would be against the known and salutary maxim above considered: *Pollock v. Stacey*, 16 L. J., Q. B. 132, 133. As to the mode of construing an award, see per Coleridge, J., *Stonehewer v. Farrar*, 6 Q. B. 748; per Alderson, B., *Wynne v. Edwards*, 12 M. & W. 712. As to construing a modus, see per Parke, B., *Mayor of Bridgewater v. Allen*, 14 M. & W. 397. See, also, the cases cited, *Pannell v. Mill*, 5 C. B. 625.

ticular expressions; and, in other cases, they receive certain qualifications when applied to particular instruments, such qualifications being imposed for wise and beneficial purposes; notwithstanding, however, these exceptions and qualifications, the above maxims are undoubtedly the most important and comprehensive which can be applied in determining the true construction of written instruments.

It is then laid down repeatedly by the old reporters and legal writers, that, in construing a deed, every part of it must be made, if possible, to take effect, and every word must be made to operate in some shape or other.¹ The construction, likewise, must be such as will preserve rather than destroy,² it must be reasonable, and agreeable to common understanding;³ it must also be favourable, and as near the minds and apparent intents of the parties as the rules of law will admit;⁴ and, as observed by Lord Hale, the judges ought to be curious and subtle to invent reasons and means to make acts effectual according to the just intent of the parties;⁵ they will not, therefore, cavil about the propriety of words when the intent of the parties appears, but will rather apply the words to fulfil the intent, than destroy the intent by reason of the insufficiency of the words.⁶

*Deeds, then, shall be so construed as to operate according [415] to the intention of the parties, if by law they may; and, if they cannot in one form, they shall operate in that which by law will effectuate the intention; *Quando res non valet, ut ago, valeat quantum valere potest.*⁷ For, in these later times the judges have gone further than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intent of the parties, than the shadow, to wit the manner of passing it.⁸ For instance, a deed intended for a release, if it cannot operate as such, may amount to

¹ Shep. Touch. 84; Plowd. 156.

² Per Lord Brougham, C., *Langston v. Langston*, 2 Cl. & Fin. 248.

³ 2 Bla. Com. 378; 1 Bulst. 175; Hob. 304.

⁴ 2 Bla. Com. 378; 1 Anderson, 60; Jenk. Cent. 260.

⁵ *Crossing v. Scudamore*, 2 Lev. 9; per Lord Hobart, Hob. R. 277, cited Willes, B. 682; *Moseley v. Motteux*, 10 M. & W. 583. ⁶ 1 Plowd. 159, 160, 162.

⁷ Per Lord Mansfield, C. J., *Goodtitle v. Bailey*, Cowp. 600; cited *Roe d. Earl of Berkeley v. Archbishop of York*, 6 East, 105; 1 Vent. 216. See, also, the instances of the above rule mentioned in *Gibson v. Minet*, 1 H. Bla. 614, 620.

⁸ *Osman v. Sheaf*, 3 Lev. 370; cited, *Doe d. Lewis v. Davies*, 2 M. & W. 516; per Willes, C. J., *Smith v. Packhurst*, 3 Atk. 136; cited *Marquis of Cholmondeley v. Lord Clinton*, 2 B. & Ald. 687; *Tarleton v. Staniforth*, 5 T. R. 695; per Maule, J., *Borradaile v. Hunter*, 5 Scott, N. R. 431, 432; 2 Wms. Saund. 96, a. n. (1); 3 Prest., Abstr. Tit. 21, 22; 1 Id. 318.

a grant of the reversion, an attornment, or a surrender, and *é converso*.¹ So, if a man make a feoffment in fee, with a letter of attorney to give livery, and no livery is given; but there is, in the same deed, a covenant to stand seised to the uses of the feoffment, provided there be a consideration sufficient to raise the uses of the covenant, this will amount to a covenant to stand seised.² And, where A., in consideration of natural love and of 100*l.*, by deeds of lease and release, granted, released, and confirmed certain premises, after his own death, to his brother B. in tail, remainder to C., the son of another brother of A., in fee; and he covenanted and granted that the premises should, after his death, be held by B. and the heirs of his body, or by C. and his heirs, *according to the true [*416] intent of the deed; it was held, that although the deed could not operate as a release, because it attempted to convey a freehold *in futuro*, yet it was good as a covenant to stand seised.³ So, a deed of bargain and sale, void for want of inrolment, will operate as a grant of the reversion.⁴ And, if the King's charter will bear a double construction, one which will carry the grant into effect, the other which will make it inoperative, the former is to be adopted.⁵ In accordance with the same principle of construction, where divers persons join in a deed, and some are able to make such deed, and some are not able, this shall be said to be his deed alone that is able;⁶ and, if a deed be made to one that is incapable, and another that is capable, it shall enure only to the latter.⁷ So, if mortgagor and mortgagee join in a lease, this enures as the lease of the mortgagee, and the confirmation of the mortgagor.⁸ And if there be a joint lease by tenant for life and remainderman, such lease operates during the life of the tenant as his demise confirmed by the remainderman, and afterwards as the demise of such last-mentioned party.⁹

The preceding examples will probably suffice to show that where a deed cannot operate in the precise manner or to the full extent

¹ Shep. Touch. 82, 83; Co. Litt. 49, b; cited, 5 B. & C. 106.

² Shep. Touch. 82, 83.

³ *Roe v. Tranmarr*, Willes, R. 682. See the cases collected 2 Wms. Saund. 96 a. n. (1); 1 Prest., Abstr. Tit. 313; 1 Rep. 76; *Perry v. Watts*, 4 Scott, N. R. 366; *Doe d. Daniell v. Woodroffe*, 15 M. & W. 769.

⁴ 2 Smith, L. C. 294; *Haggerston v. Hanbury*, 5 B. & C. 101; *Adams v. Steer*, Cro. Jac. 210.

⁵ Per Tindal, C. J., *Rutter v. Chapman*, 8 M. & W. 102.

⁶ Shep. Touch. 81; Finch, Law, 60.

⁷ Shep. Touch. 82.

⁸ *Doe d. Barney v. Adams*, 2 Cr. & J. 232; per Lord Lyndhurst, C. B., *Smith v. Pocklington*, 1 Cr. & J. 446.

⁹ *Treport's case*, 6 Rep. 15.

intended by the parties, it shall, nevertheless, be made as far as possible to effectuate that intention. [*417] *Acting, moreover, on a kindred principle, the Court will endeavour to affix such a meaning to words of obscure and doubtful import occurring in a deed, as may best carry out the plain and manifest intention of the parties, as collected from the four corners of the instrument,—with these qualifications, however, that the intent of the parties shall never be carried into effect contrary to the rules of law, and that, as a general rule, the Court will not introduce into a deed words which are not to be found there,¹ nor strike out of a deed words which are there, in order to make the sense different.² The following important illustrations of the above propositions may advantageously be noticed, and many others of equal practical importance will, doubtless, readily suggest themselves to the reader.

In cases, then, prior to and excluded from the operation of the recent stats. 7 & 8 Vict. c. 76, s. 4,³ and 8 & 9 Vict. c. 106, s. 3, the question whether a particular instrument should be construed as a lease or as an agreement for a lease must be answered by considering the intention of the parties, as collected from the instrument itself; and any words which suffice to explain the intent of the parties, that the one should divest himself of the possession, and the other come into it for such a determinate time, whether they run in the form of a license, covenant, or agreement, will of themselves be held, in construction of law, to amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose.⁴ “The rule,” observes Parke, B., “which is [*418] laid down in all the cases, is, that you must look at the whole of the instrument to judge of the intention of the parties, as declared by the words of it, for the purpose of seeing whether it is an agreement or a lease.”⁵

¹ Vide, per Willes, C. J., *Parkhurst v. Smith*, Willes, 832; cited and applied, per Alexander, C. B., *Colmore v. Tyndall*, 2 Yo. & J. 618; per Lord Brougham, C., *Langston v. Langston*, 2 Cl. & Fin. 243.

² *Whyte v. Burnby*, 16 L. J., Q. B. 156; *secus* as to mere surplusage, post.

³ See *Burton v. Reeve*, 16 M. & W. 307. (*)

⁴ *Bac. Abr.* “Leases,” (K.); and 2 *Shep. Touch.* by Preston, 272; cited judgment, *Doe d. Parsley v. Day*, 2 Q. B. 152, et seq.; *E. C. L. R.* 42; *Alderman v. Neate*, 4 M. & W. 704. (*)

⁵ *Gore v. Lloyd*, 12 M. & W. 478; (*) *Doe d. Morgan v. Powell*, 8 Scott, N. R. 687; *Doe d. Wood v. Clarke*, 7 Q. B. 211; *E. C. L. R.* 53; per Wightman, J., *Jones v. Reynolds*, 1 Q. B. 517; *E. C. L. R.* 41; *Chapman v. Towner*, 6 M. & W. 100; (*) per Mansfield, C. J., *Morgan v. Bissell*, 3 Taunt. 72; *Curling v. Mills*, 7 Scott, N. R. 709, 725; *Tarte v. Darby*, 15 M. & W. 601. (*)

The rules applicable and cases decided with reference to the construction of covenants will also be found to furnish strong and abundant instances of the anxiety which our courts evince to effectuate the real intention of the parties to a deed or agreement; for it is not necessary, in order to charge a party with a covenant, that there should be express words of covenant or agreement, but it is enough if the intention of the parties to create a covenant be apparent.¹ Where, therefore, words of recital or reference manifest a clear intention that the parties shall do certain acts, the Court will, from these words, infer a covenant to do such acts, and will sustain actions of covenant for their non-performance as effectually as if the instrument had contained express covenants to perform them.²

In like manner, it seems now established, that where the language of a covenant is such that the covenant may be construed either as joint or as several, it shall be taken, at common law, to be joint or several, according to the interest of the parties, and in such a case the deed in which the covenant is inserted supplies the proper mode of its construction. Where, however, the covenant [*419] is in its terms expressly and positively joint, it must be construed as a joint covenant, in compliance with the declared intention of the parties.³ In equity, likewise, the terms of the instrument will, in the cases above alluded to, prevail, unless there be circumstances leading to a construction different from that which the ordinary meaning of the words would suggest; and if there be such the Court will construe the words accordingly, as in the instance of a joint bond given for a prior liability, which was joint and several.⁴ When, however, the Court is thus called upon to act in opposition to the legal effect of an instrument, it always requires the clearest and most distinct evidence;⁵ and where, as observed by Lord Cottenham, C., in a

¹ Per Tindal, C. J., *Courtney v. Taylor*, 7 Scott, N. R. 765; per Parke, B., *Rigby v. Great Western Railway Company*, 14 M. & W. 815. (*)

² Judgment, *Aspdin v. Austin*, 5 Q. B. 683; E. C. L. R. 48; cited *Dunn v. Sayles*, Id. 692; *Williams v. Burrell*, 1 C. B. 429; E. C. L. R. 50, where the distinction between express covenants and covenants in law is pointed out.

³ Judgment, *Bradburne v. Botfield*, 14 M. & W. 564, 572; (*) *Hopkinson v. Lee*, 6 Q. B. 964; E. C. L. R. 51; *Foley v. Addenbrooke*, 4 Q. B. 207; E. C. L. R. 45; *Sorsbie v. Park*, 12 M. & W. 146; (*) *Mills v. Ladbrooke*, 7 Scott, N. R. 1005, 1023; per Parke, B., *Wootton v. Steffenoni*, 12 M. & W. 134; (*) *Harrold v. Whitaker*, 15 L. J., Q. B. 345; *Wakefield v. Brown*, Id. 373. As to the construction of a warrant of attorney, see *Dalrymple v. Fraser*, 2 C. B. 698; E. C. L. R. 52.

⁴ See *Sumner v. Powell*, 2 Mer. 30; S. C., 1 T. & R. 423; *Church v. King*, 2 My. & Cr. 220.

⁵ *Church v. King*, 2 My. & Cr. 229.

recent case, the evidence to put such a construction upon the words is to be found in the instrument itself, it is much more safe and satisfactory than where the evidence is sought for in the circumstances and situation of the parties.¹

In like manner, the rule has been established by a long series of decisions in modern times, that the question, whether covenants are to be held dependent or independent of each other, is to be determined by the intention or meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case: to the *intention, when once discovered, all technical forms of expression must give way.² Where, therefore, a question arose whether certain covenants in marriage articles were dependent or not, Lord Cottenham, C., observed, "If the provisions are clearly expressed, and there is nothing to enable the Court to put upon them a construction different from that which the words import, no doubt the words must prevail; but if the provisions and expressions be contradictory, and if there be grounds appearing upon the face of the instrument, affording proof of the real intention of the parties, then that intention will prevail against the obvious and ordinary meaning of the words. If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention."³

And here we may fitly observe, that the important rules of construction under consideration are alike applied in the courts of law and equity: with a special reference, indeed, to the construction of covenants, it has been truly said, that their construction is the same in equity as at law. "But," as observed by Sir R. P. Arden, M. R., "though the construction is the same, it is most certain the performance may differ in one court from what it is in the other. At law a covenant must be strictly and literally performed according to the true intent and meaning of the parties, so far as circumstances [*421] will admit; but if, by unavoidable *accident,—if by fraud, by surprise or ignorance, not wilful, parties may have been

¹ Lloyd v. Lloyd, 2 My. & Cr. 205.

² Per Tindal, C. J., delivering judgment, *Stavers v. Curling*, 3 Bing. N. C. 368; E. C. L. R. 32. See *Maackintosh v. The Midland Counties Railway Company*, 14 M. & W. 548; (*) *Giles v. Giles*, 15 L. J., Q. B. 387.

³ Per Lord Cottenham, C., *Lloyd v. Lloyd*, 2 My. & Cr. 202. In the notes to *Porlage v. Cole*, 1 Wms. Saunds. 319, will be found a variety of cases in which the Court has done great violence to the strict letter of covenants, for the purpose of carrying into effect what was considered to be the real intention of the parties.

prevented from executing it literally, a court of equity will interfere, and, upon compensation being made, the party having done everything in his power, and being prevented by the means I have alluded to, will give relief."¹

The same sense, we may in the next place observe, is to be put upon the words of a contract in an instrument under seal as would be put upon the same words in any instrument not under seal: that is to say, the same intention must be collected from the same words, whether the particular contract in which they occur be special or not.²

In the case, then, of an agreement, whether by deed or parol, the Courts are bound so to construe it, *ut res magis valeat quam pereat*—that it may be made to operate rather than be inefficient; and, in order to effect this, the words used shall have a reasonable intention and construction.³ Words of art, for instance, which in the understanding of conveyancers, have a peculiar technical meaning, shall not be scanned and construed with a conveyancer's acuteness, if, by so doing, one part of the instrument is made inconsistent with another, and the whole is incongruous and unintelligible; but the Court will understand the words used in their popular sense, and will interpret the language of the parties *secundum subjectam materiam*, referring particular expressions to the particular subject-matter of the agreement, so that full and complete force may be given to the whole.⁴

*Whether, for example, a particular clause in a charter-party shall be held to be a condition, upon the non-performance of which by the one party, the other is at liberty to abandon the contract, and consider it at an end,—or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages,—must depend, in each particular case, upon the intention of the parties, to be collected from the terms of the agreement itself, and from the subject-matter to which it relates; it cannot depend on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole con-

¹ Per Sir R. P. Arden, M. R., 3 Ves. jun. 692.

² Per Lord Ellenborough, C. J., 13 East, 74.

³ Com. Dig., "Pleader," C. 25; Bac., Works, vol. 4, p. 25; Noy, Max., 9th ed., p. 50.

⁴ *Hallewell v. Morrell*, 1 Scott, N. B. 809; per Curiam, *Hill v. Grange*, Plowd. 164, 170; cited, *Argument*, 2 Q. B. 509; E. C. L. R. 42; per Willes, C. J., *Willes R.* 382.

tract.¹ In such a case, therefore, the rule applies, *in conventionibus contrahentium voluntas potius quam verba spectari placuit*²—in contracts and agreements the intention of the parties, rather than the words actually used by them, should be considered.

Subject, however, to the preceding remarks, courts both of law and equity will apply the ordinary rules of construction in interpreting instruments, and will construe words according to their strict and primary acceptation, unless, from the immediate context or from the intention of the parties apparent on the face of the instrument, the words appear to have been used in a different sense, or unless, in their strict sense, they are incapable of being carried into effect. It must, moreover, be observed that the meaning of a particular word may be shown by parol evidence to be different in some specified place, trade, or business, from its proper and ordinary acceptation.³

[*423] *With respect to patents, it was long since observed by Lord Eldon, that they are to be considered as bargains between the inventor and the public, to be judged of on the principles of good faith, by making a fair disclosure of the invention, and to be construed as other bargains.⁴ Moreover, although formerly there seems to have been very much a practice, with both judges and juries, to destroy the patent-right even of beneficial patents, by exercising great astuteness in taking objections as to the title of the patent, and more particularly as to the specification; in consequence of which many valuable patent-rights have been destroyed, yet, more recently, the Courts have not been so strict in taking objections to the specification, but have rather endeavoured to deal fairly both with the patentee and the public, willing to give to the patentee on his part the reward of a valuable patent, but taking care to secure to the public, on the other hand, the benefit of that proviso (*i. e.*, the proviso requiring a specification), which is introduced into the patent for their advantage, so that the right to the patent may be fairly and properly expressed in the specification.⁵

¹ Judgment, *Glaholm v. Hays*, 2 Scott, N. R. 482; recognised in *Ollive v. Brooker*, 17 Law, J., Exch. 21; per Lord Ellenborough, C. J., *Ritchie v. Atkinson*, 10 East, 306; Judgment, *Furze v. Sharwood*, 2 Q. B. 415; E. C. L. R. 42.

² 17 Johns. R. (U. S.) 150, and cases there cited.

³ See per Pollock, C. B., *Mallan v. May*, 18 M. & W. 511; (*) *Lewis v. Marshall*, 8 Scott, N. B. 477, 494; per Parke, B., *Clift v. Schwabe*, 3 C. B. 469, 470; E. C. L. R. 54.

⁴ Per Alderson, B., *Neilson v. Harford*, Webs. Pat. Cas. 341.

⁵ Per Parke, B., *Neilson's Patent*, Webs. Pat. Cas. 310; per Alderson, B., *Morgan v. Seaward*, Id. 173, who observes: "It is the duty of a party who takes out a patent

The rule of construction, consequently, now acted upon is, that the words of a specification shall be construed according to their ordinary and proper meaning, unless there be something in the context to give it a different meaning, or *unless the facts properly in evidence, and with reference to which the patent [*424] must be construed, should show that a different interpretation ought to be made.¹ The remarks of Lord Ellenborough, C. J., with reference to a policy of insurance, may then appropriately be introduced in this place, as applying to the specification of a patent,² as well as to all other instruments. "The same rule of construction," says that learned Judge, "which applies to all other instruments, applies equally to this instrument of a policy of insurance, viz., that it is to be construed according to its sense and meaning, as collected, in the first place, from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense."³ It may then truly be said, that the case of a patent forms no exception to the rule, that an instrument shall be construed favourably—*ut res magis valeat quam pereat*.⁴ The Court will not, indeed, make any forced construction, so as to extend the claim of the patentee beyond what the language employed and the facts in evidence would warrant; but they will construe the specification consistently with the fair import of the words used, and so as to make it, *if [*425] possible, coextensive with the discovery to which the grantee of the patent lays claim.⁵

to specify what his invention really is; and, although it is the bounden duty of a jury to protect him in the fair exercise of his patent-right, it is of great importance to the public, and by law it is absolutely necessary, that the patentee should state in his specification, not only the nature of his invention, but how that invention may be carried into effect."

¹ Judgment, *Elliott v. Turner* (in error), 2 C. B. 446, 461; E. C. L. R. 52.

² See *Hindm. Pat.* 197.

³ *Robertson v. French*, 4 East, 185, 186.

⁴ *Boulton v. Bull*, 2 H. Bla. 600; cited, per Story, J., 11 Peters, R. (U. S.) 608.

⁵ See the judgment, *Haworth v. Hardcastle*, 1 Bing. N. C. 191; E. C. L. R. 27; ante, p. 271.

In construing a will, it has been said, that the intention of the testator is the polar star by which the Court should be guided, provided no rule of law is thereby infringed.¹ "It is the duty of those who have to expound a will, if they can, *ex fumo dare lucem*."² In other words, the first thing for consideration always is, what was the testator's intention at the time he made the will; and then the law carries that intention into effect as nearly as it can, according to certain settled technical rules.³

"Touching the general rules to be observed for the true construction of wills," says Dodderidge, J.,—"in testamentis plenius testatoris intentionem scrutamur. But yet this is to be observed with these two limitations: 1st, his intent ought to be agreeable to the rules of law; 2dly, his intent ought to be collected out of the words of the will. As to this, it may be demanded, how shall this be known? To this it may be thus answered: secondly, to make such a construction, so that all the words of the will may stand; for to add anything to the words of the will, or in the construction made to relinquish and leave out any of the *words, is *maledicta glossa*. But every string [*426] ought to give its sound."⁴

In a recent case, involving important interests,⁵ the following were laid down as the leading and fundamental rules for construing a will. In the first place, the intention of the testator ought to be the only guide of the Court to the interpretation of his will; yet it must be his intention as collected from the words employed by himself in his will.⁶ No surmise or conjecture of any object, which the testator may be supposed to have had in view, can be allowed to have any weight in the construction of his will, unless such object can be col-

¹ Per Lord Kenyon, C. J., *Watson v. Foxon*, 2 East, 42; per Willes, C. J., *Doe v. Underdown*, Willes, R. 296; per Buller, J., *Smith v. Coffin*, 2 H. Bla. 450; cases cited, *Argument, Ley v. Ley*, 3 Scott, N. R. 168; *Doe d. Amlot v. Davies*, 4 M. & W. 599, 607; (*) *Doe d. Tremewen v. Permewen*, 11 Ad. & E. 481; *E. C. L. R.* 39; see *Co. Litt.* 376, b, note (1), by Mr. Butler.

² Per V. C. E., *De Beauvoir v. De Beauvoir*, 15 L. J., Chanc. 808.

³ Judgment, *Doe d. Scott v. Roach*, 5 M. & S. 490; *Hodgson v. Ambrose*, Dougl. 841; *Festing v. Allen*, 12 M. & W. 279; (*) *Doe d. Bills v. Hopkinson*, 5 Q. B. 228; *E. C. L. R.* 48; *Doe d. Stevenson v. Glover*, 1 C. B. 459; *E. C. L. R.* 50.

⁴ Per Dodderidge, J. *Blamford v. Blamford*, 3 Buls. 108.

⁵ *Earl of Scarborough v. Doe d. Savile*, 3 Ad. & E. 897; *E. C. L. R.* 30.

⁶ In *Doe d. Sams v. Garlick*, 14 M. & W. 701, (*) Parke, B., observes that difficulties have arisen from confounding the testator's intention with his meaning. "Intention may mean what the testator intended to have done, whereas the only question in the constructions of wills is on the meaning of the words."

lected from the language of the will itself. If, for instance, there be a question as to the meaning of a proviso in a will, and its application to a given state of facts, the Court will consider whether the testator has, by the proviso, declared an intention with sufficient clearness to reach the particular case which has actually happened, and whether he has employed such machinery in his will as is capable of carrying such declared intention into effect.¹

In the second place, it is a necessary rule in the investigation of the intention of a testator, not only that regard should be paid to the words of the will, in order to determine the operation and effect of the devise, but that the legal consequences which may follow from the nature and qualities of the estate, when once collected from the words of the will itself, should be altogether disregarded;² for example, in determining whether the intention of the testator was, in any particular case, to give the devisee an estate tail, or for life only, it is not a sound or legitimate mode of reasoning to import into the consideration of the question, that, if the estate is held to be an estate-tail, the devisee will have the power of defeating the intention of the testator altogether, by suffering a common recovery; for the Court will not assume that the testator was ignorant of the legal consequence and effect of the disposition which he has himself made;³ and a person ought to direct his meaning according to the law, and not seek to mould the law according to his meaning; for, if a man were assured, that, whatever words he made use of, his meaning only would be considered, he would be very careless about the choice of his words, and the attempt to explain his meaning in each particular case would give rise to infinite confusion and uncertainty.⁴

Hence, although it is the duty of the Court to ascertain and carry into effect the intention of the party, yet there are, in many cases, fixed and settled rules by which that intention is determined; and to such rules the wisest judges have thought proper to adhere, in oppo-

¹ Judgment, *Earl of Scarborough v. Doe d. Savile*, 8 Ad. & E. 962, 963; E. C. L. R. 30; cited, 8 M. & W. 200. (*)

² At the same time the circumstance, that the language if strictly construed will lead to a consequence inconsistent with the presumable intention, is not to be left out of view, especially if other considerations lead to the same result: Judgment, *Quicke v. Leach*, 13 M. & W. 228. (*)

³ 8 Ad. & E. 963, 964; E. C. L. R. 30; per Parke, B., *Morrice v. Langham*, 8 M. & W. 207. (*)

⁴ Plowd. 162.

sition to their own private opinions as to the probable intention of the party in any particular case.¹

The object, indeed, of all such technical rules is to create certainty, and to prevent litigation, by enabling those who *are [428] conversant with these subjects to give correct advice, which would evidently be impossible, if the law were uncertain and liable to fluctuation in each particular case.²

In accordance with the above remarks, Parke, B., in a recent important case respecting the application of the rule against perpetuities, thus expressed himself:—"We must first ascertain the intention of the testator, or, more properly, the meaning of his words in the clause under consideration, and then endeavour to give effect to them so far as the rules of law will permit. Our first duty is to construe the will, and this we must do exactly in the same way as if the rule against perpetuity had never been established or were repealed when the will was made, not varying the construction in order to avoid the effect of that rule, but interpreting the words of the testator wholly without reference to it."³

The rule in *Shelly's case*,—by which, where an estate of freehold is limited to a person, and the same instrument contains a limitation either mediate or immediate to his heirs or the heirs of his body, the word "heirs" is construed as a word of limitation,⁴—will occur to the reader as a familiar instance of an arbitrary and technical rule of construction, the authority of which is acknowledged by the Courts, even where its application may tend to defeat the intention of the testator. In like manner, it is a rule which has through a long series of cases been uniformly acted upon, although now by a recent statute rendered inapplicable in the case of wills,⁵ that a power [429] of appointment *over realty shall not be considered as executed unless the instrument which is relied upon as an execution of the power contain a reference thereto or to the property which was the subject of the power, or unless the provision made by

¹ See, per Alexander, C. B., 6 Bing. 478; E. C. L. R. 19; Judgment, 2 Phill. 68.

² Per Pollock, C. B., *Doe d. Sams v. Garlick*, 14 M. & W. 707. (*)

³ Per Parke, B., *Lord Dungannon v. Smith*, 12 Cl. & Fin. 599.

⁴ 2 Jarm., Wills, 241. As to this rule, see *Harrison v. Harrison*, 8 Scott, N. R. 862, 878.

⁵ The rule does not apply to any will made or republished since the stat. 1 Vict. c. 26 came into operation. See sect. 27, which provides, that real and personal property over which the testator has a power of appointment shall pass by a general devise or bequest, unless a contrary intention shall appear.

the person entrusted with the power would have been ineffectual, and would have had nothing to operate upon unless it were considered as an execution of such power.¹

So, in the case of personalty, the rule under the law as it formerly existed was, that a general bequest does not exercise a power, unless, indeed, an intention so to do can be collected from the entire instrument; and in a case before Sir W. Grant, M. R., to which this rule was applied,² and which, notwithstanding the recent statutory alteration of the law, may be mentioned as apposite to our present subject, it appeared that a person had power to appoint £100 by her will, and possessed nothing but a few articles of furniture of her own to answer the bequest; and the learned Judge observed, "In my own private opinion, I think the intention was to give the £100, which the testatrix had a power to dispose of, but I do not conceive that I can judicially declare it to have been executed."

"If," says Lord Cottenham in a recent case, "there be any ambiguity, then it is the duty of the Court to put that construction upon the words which seem best to carry the intention into effect; but if there be no ambiguity, however unfortunate it may be that the intention of the testator should fail, there is no right in any Court of justice *to say those words shall not have their plain and unambiguous meaning."³ [*430]

Not only are there fixed and established rules by which the Courts will, in certain cases, be guided in determining the legal effect and operation of a testamentary instrument, but there are likewise certain technical expressions, of which the established legal interpretation is different from the meaning which in ordinary language would be attributed to them; and, consequently, a will in which such expressions occur may, in some cases, be made to operate in a manner different from that intended by the testator;⁴ the duty of the Court being to give effect to *all* the words of the will, if that can be done without violating any part of it, and also to construe technical words

¹ Denn d. Nowell v. Roake, 6 Bing. 475; E. C. L. R. 19; S. C., 4 Bligh, N. S. 1; Doe d. Caldecott v. Johnson, 8 Scott, N. R. 761; Logan v. Bell, Id. 872; Hughes v. Turner, 3 My. & K. 666.

² Jones v. Tucker, 2 Mer. 533.

³ Earle of Hardwicke v. Douglas, 7 Cl. & Fin. 815; per Lord Kenyon, C. J., Denn v. Bagshawe, 6 T. R. 512; per Lord Alvanley, Poole v. Poole, 3 B. & P. 627-9.

⁴ See 2 Powell on Devises, by Jarman, 3d ed. 546 et seq.; Doe d. Blesard v. Simpson, 3 Scott, N. R. 774.

in their proper sense, where they can be so understood consistently with the context.¹

The following observations of V. C. Knight Bruce, although having reference to the particular circumstances of the case immediately under his consideration, show very clearly the general principles which guide the Court in assigning a meaning to technical expressions, and it may be almost unnecessary to remark that such principles are recognised and acted upon by courts of common law as well as of equity.

"Both reason and authority, I apprehend," says the [*431] learned Judge, "support the proposition that the defendants are entitled to ask the Court to read and consider the whole of the instrument in which the clause stands; and in reading and considering it, to bear in mind the state of the testator's family as at the time when he made the codicil he knew it to be; and if the result of so reading and considering the whole document with that recollection is to convince the Court, from its contents, that the testator intended to use the words in their ordinary and popular sense, and not in their legal and technical sense, as distinguishable from their ordinary and popular sense, to give effect to that conviction by deciding accordingly."²

The following instances will, perhaps, sufficiently serve to illustrate the above remarks:—If a testator leaves his property to be divided amongst his "children," which is a word bearing a strict technical meaning in law, the Court would at once construe "children" as meaning children born in wedlock; and if there were any such children to whom that term could be applied, the bequest would be limited to them, although it might also appear that the testator had other children born out of wedlock; and no evidence would be admissible to show that he intended that his property should be equally distributed amongst all his children, whether legitimate or illegitimate. But if, upon the evidence, it should appear that the testator never was married, so that it was impossible to apply the language of his will in its strict and primary sense, and if it further appeared that he had illegitimate children whom he had always

¹ Judgment, *Doe d. Cape v. Walker*, 2 Scott, N. R. 334; per Alderson, B., *Lees v. Mosley*, 1 Yo. & Coll. 589; cited, *Argument, Greenwood v. Rothwell*, 6 Scott, N. R. 672. See also, *Argument, Festing v. Allen*, 12 M. & W. 286; (*) *Jack v. M'Intyre*, 12 Cl. & Fin. 158.

² Per Knight Bruce, *V. C., Early v. Benbow*, 2 Coll. 353.

treated as his children, such evidence, and any other that would tend to prove that these were the intended objects of his bounty, might be used for the purpose *of construing the bequest according to the less strict and technical meaning of the term "children," [*432] so as to give effect to the bequest of the testator, which would otherwise be wholly inoperative.¹

In like manner, where a bequest is made to the "children," or "issue" of A. B., the whole context of the will must be considered in endeavouring to ascertain the proper effect to be attributed to the word "children" or "issue." It may be, that the word "children" must be enlarged and construed to mean "issue" generally, or the word "issue" restricted so as to mean "children," and each case must depend on the peculiar expressions used, and the structure of the sentences. When, however, the context is doubtful, the Court, so far as it can, will prefer that construction which will most benefit the testator's family generally, on the supposition that such a construction must most nearly correspond with his intention.²

Again, the general rule of construction applicable to wills, as established by a long course of decided cases, was, that the words "dying without leaving issue,"³ unless they were qualified and controlled by other words in the context, must be taken to refer to an indefinite failure of issue; and that any executory devise over, which was made to depend on the general failure of issue, was void, on the ground of its being too remote. The point to be considered, therefore, in determining whether or not the above words must *bear their [*433] proper and technical meaning, whenever the point arises with reference to a will unaffected by the recent statute, is, whether the testator has or has not shown, upon the face of the will, an intention that those words should receive a more limited and qualified construction.⁴

Further, it has been placed beyond doubt, by a great variety of

¹ Per Erskine, J., *Shore v. Wilson*, 5 Scott, N. R. 990. See Sir James Wigram's *Treatise on Extr. Evid.*, 2d ed. 29.

² Per Lord Langdale, M. R., *Farrant v. Nichols*, 9 Beav. 329, 380; *Slater v. Dangerfield*, 15 M. & W. 268. (*)

³ But now, by stat. 7 Will. 4 & 1 Vict. c. 26, s. 29, the words "die without issue," or "die without leaving issue," shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of the testator, unless a contrary intention shall appear by the will.

⁴ Judgment, *Walker v. Petchell*, 1 C. B. 661; E. C. L. R. 50.

decisions, that the word "estate" in a will is in itself sufficient to pass the fee-simple; but the Court will nevertheless examine the context and other parts of the will to ascertain if anything be there introduced to qualify its import; and the material question, if the late act does not apply, is, whether the word is to be understood as describing the quantity of interest of the testator in the property devised, or the local situation of the property only, or whether the meaning is left in too great uncertainty to defeat the claim of the heir-at-law, which cannot be done without express words or necessary implication.²

Lastly, in determining whether an estate-tail or a life estate only passes under the words of a given testamentary instrument, made before the 1st January, 1888,³ the same general rule of interpretation above considered is applicable, and has thus been forcibly stated and illustrated by Lord Brougham, who observes—"I take the principle [*434] of construction as consonant to reason and established by authority to be this—that, where, by plain words, in themselves liable to no doubt, an estate-tail is given, you are not to allow such estate to be altered and cut down to a life estate, unless there are other words which plainly show the testator to have used the former words as words of purchase, contrary to their natural or ordinary sense, or unless in the rest of the provisions there be some plain indication of a general intent inconsistent with an estate-tail being given by the words in question, and which general intent can only be fulfilled by sacrificing the particular provisions, and regarding the expressions as words of purchase. Thus, if there is a gift first to A. and the heirs of his body, and then, in continuation, the testator, referring to what he had said, plainly tells us that he used the words 'heirs of his body' to denote A.'s first and other sons, then, clearly, the first taker would only take a life estate. So, again, if a

¹ Estate, in Latin, *status*, signifies the condition in which the owner stands with regard to his property: 2 Bla. Com. 103.

² *Doe d. Lean v. Lean*, 1 Q. B. 229, 239, 240; E. C. L. R. 41, and cases cited in the Argument; *Hoare v. Byng*, 10 Cl. & Fin: 528; *Doe d. Tofield v. Tofield*, 11 East, 246; *Vaugh. R.* 262. In *Doe d. Hawe v. Earles*, 15 M. & W. 450, (*) the maxim above considered was applied in determining the construction of a will, per Platt, B., *dis.* The reader is also referred to 2 Jarm. on Wills, 181; *Sanderson v. Dobson*, 1 Exch. 141, and note (3), *infra*.

³ By stat. 7 Will. 4 & 1 Vict. c. 26, a devise of real estate without words of limitation shall, in the absence of a contrary intention, be construed to pass the whole estate or interest of which the testator had power to dispose by will.

limitation is made afterwards, and is clearly the main object of the will, which never can take effect unless an estate for life be given instead of an estate-tail: here, again, the first words become qualified, and bend to the general intent of the testator, and are no longer regarded as words of limitation, which, if standing by themselves, they would have been."¹

To the general maxims of construction applicable to wills, viz., *benigné faciendæ sunt interpretationes et verba intentioni debent inservire*, we may further observe, that the doctrine of cyprès is at once referable. According to this doctrine, which proceeds upon the principle of carrying into effect as far and as nearly as possible the intention of the testator, if there be a general and also a particular intention *apparent on the will, and the particular intention cannot take effect, the words shall be so construed as to give [*435] effect to the general intention.² The doctrine of cyprès, though fully recognised at law, is, however, carried into more efficient practical operation by courts of equity, as in the case of a condition precedent, annexed to a legacy, with which a literal compliance becomes impossible from unavoidable circumstances, and without any default of the legatee; or where a bequest is made for charitable purposes, with which a literal compliance becomes inexpedient or impracticable: in such cases a court of equity will apply the doctrine of cy-près, and will endeavour substantially, and as nearly as possible, to carry into effect the intention of the testator.³

The remarks above made, and authorities referred to, will serve to give a general view of the mode of applying to the interpretation of wills those very comprehensive maxims which we have been endeavouring to illustrate and explain, and which are, indeed, comprised in the well-known saying,—*ultima voluntas testatoris est perimplenda secundum veram intentionem suam*.⁴

We shall, therefore, sum up this part of our subject with observing,

¹ Fetherston v. Fetherston, 3 Cl. & Fin. 75, 76; per Lord Brougham, C., Thornhill v. Hall, 2 Cl. & Fin. 36.

² Per Buller, J., Robinson v. Hardcastle, 2 T. R. 254; Shep. Touch. 87. See, per Lord Kenyon, C. J., Brudenell v. Elwes, 1 East, 461.

³ 1 Story, Eq. Jurisp. 4th ed. 308; 2 Id. 572, where this doctrine is considered; Ironmongers' Company v. Attorney-General, 10 Cl. & Fin. 908; Mills v. Farmer, 19 Ves. 488. The entire doctrine of equity with regard to trusts, and especially such as are raised in a will by precatory words, will at once occur to the reader as fraught with illustrations of the maxims commented on in the text.

⁴ Co. Litt. 822, b.

that the only safe course to pursue in construing a will is to look carefully for the intention of the testator, as it is to be derived from the words employed by him within the whole of the will, regardless [*436] alike of any general surmise *or conjecture from without the will, as of any legal consequences annexed to the estate itself, when such estate is discovered within the will;¹ bearing in mind, however, that where technical rules have become established, such rules must be followed, although opposed to the testator's presumable and probable intention—that where technical expressions occur they must receive their legal meaning, unless, from a perusal of the entire instrument, it be evident that the testator employed them in their popular signification—that words which have no technical meaning shall be understood in their usual and ordinary sense, if the context do not manifestly point to any other²—and, lastly, that, where the particular intention of the testator cannot literally be performed, effect will, in many cases, be given to the general intention, in order that his wishes may be carried out as nearly as possible, and *ut res magis valeat quam pereat*.

It may not be uninteresting further to remark, that the rules laid down in the Roman civil law upon the subject under consideration, are almost identical with those which we have above stated, as recognised by our own jurists at the present day. Where, for instance, ambiguous expressions occurred, the rule was, that the intention of him who used them should especially be regarded,—*in ambiguis orationibus maxime sententia spectanda est ejus qui eas protulisset*,³ a rule which we learn was confined to the interpretation of wills wherein one person only speaks, and was not applicable to agreements generally, in which the intention of both the contracting parties was [*437] necessarily to *be considered;⁴ and, accordingly, in another passage in the Digest, we find the same rule so expressly qualified and restricted,—*Cum in testamento ambigue aut etiam perperam scriptum est benigne interpretari et secundum id quod credible est cogitatum credendum est*⁵—where an ambiguous, or even an erroneous expression occurs in a will, it should be construed liberally, and in accordance with the testator's probable meaning. In like

¹ Judgment, 3 Ad. & E. 964; E. C. L. R. 30.

² The question as to what will pass under the word "portrait" in a will is elaborately discussed, *Duke of Leeds v. Earl Amherst*, 9 Jur. 359; S. C. 13 Sim. 459.

³ D. 50, 17, 96.

⁴ Wood, Inst. 107.

⁵ D. 34, 5, 24; vide Brisson. ad verb. "*Perperam*;" Pothier ad Pand. (ed. 1819), vol. 8, p. 46, where examples of this rule are collected.

manner we find it stated, that a departure from the literal meaning of the words used is not justifiable, unless it be clear that the testator himself intended something different therefrom:—*Non aliter a significatione verborum recedi oportet quam cum manifestum est aliud sensisse testatorem*;¹ and, lastly, we find the general principle of interpretation to which we have already sufficiently adverted, thus concisely worded—*In testamentis plenius voluntates testantium interpretantur*,² that is to say, a will shall receive a more liberal construction than its strict meaning, if alone considered, would permit.³

The construction of a statute, like the operation of a devise, depends upon the apparent intention of the maker, to be collected either from the particular provision or the general context, though not from any general inferences drawn merely from the nature of the objects dealt with by the statute.⁴ Acts of Parliament and wills ought to be alike construed according to the intention of the parties *who made them*;⁵ and the preceding remarks as to the construction of deeds and testamentary instruments will, there- [*438] fore, in general, hold good with reference to the construction of statutes, the great object being to discover the true intention of the legislature; and wherever that intention can be indubitably ascertained, the Courts are bound to give it effect, whatever may be their opinion of its wisdom or policy.⁶ A remedial act, for instance, shall be construed liberally, and so as most effectually to meet the end in view.

It is by no means unusual, as remarked by Alexander, C. B., in construing a statute, to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief, where the statute is remedial. It is a mode of construction as familiar to every legal person as expounding the statute by equity.⁷

¹ D. 82, 69, pr.

² Id. 50, 17, 12.

³ Cujac. ad loc., cited 3 Pothier ad Pand. 46.

⁴ Fordyce v. Bridges, 1 H. L. Cas. 1. Where a *casus omissus* occurred in a statute, the doctrine of *cypres* was applied, Smith v. Wedderburne, 16 L. J., Exch. 14. See Salkeld v. Johnson, 2 C. B. 757; E. C. L. R. 52.

⁵ It is said, that a will is to be favourably construed, because the testator is *inops consilii*: "This," observed Lord Tenterden, "we cannot say of the legislature, but we may say that it is *magnas inter opes inops*." 9 B. & C. 752, 753; E. C. L. R. 17.

⁶ See the analogous remarks of Lord Brougham, with reference more particularly to the common law, in Reg. v. Millis, 10 Cl. & Fin. 749; also, per Vaughan, J., 9 Ad. & E. 980; E. C. L. R. 86; judgment, Fellowes v. Clay, 4 Q. B. 849; E. C. L. R. 45.

⁷ 2 Yo. & J. 215.

Again, although it is very true that the enacting words of an act of Parliament are not always to be limited by the words of the preamble, but must in many instances go beyond it, yet, on a sound construction of every act of Parliament, the words in the enacting part must be confined to that which is the plain object and general intention of the legislature in passing the act; and the preamble [489] affords a good clue to discover what that object was.¹ "The *only rule," it has been said, "for the construction of acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound the words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer,² is 'a key to open the minds of the makers of the act, and the mischiefs which they intended to redress.'"³

As, on the one hand, a remedial statute shall be liberally construed, so as to include cases which are within the mischief which the statute was intended to remedy, so, on the other hand, where the intention of the legislature is doubtful, the inclination of the Court shall always be against that construction which imposes a burthen on the subject.⁴ The words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted.

"The principle," remarked Lord Abinger, C. B., "adopted by

¹ Per Lord Tenterden, C. J., *Halton v. Cave*, 1 B. & Ad. 588; E. C. L. R. 20; Co. Litt. 79, a; per Buller, J., *Crespigny v. Wittenoom*, 4 T. R. 798; argument, *Skinner v. Lambert*, 5 Scott, N. R. 206; and cases cited, *Whitmore v. Robertson*, 8 M. & W. 472; (*) 15 Johns. R. (U. S.) 890; *Stockton and Darlington Railway Company v. Barrett*, 11 Cl. & Fin. 690.

² Plowd. 869.

³ Per Tindal, C. J., delivering the opinion of the Judges in the *Sussex Peerage*, 11 Cl. & Fin. 148.

⁴ Per Lord Brougham, *Stockton and Darlington Railway Company v. Barrett*, 11 Cl. & Fin. 607. "All acts which restrain the common law ought themselves to be restrained by exposition;" *Ash v. Abdy*, 3 Swanst. 664. Mere permissive words shall not abridge a common law right, ante, p. 28. *Ex parte Clayton*, 1 Russ. & My. 872.

Lord Tenterden,¹ that a penal law ought *to be construed strictly, is not only a sound one, but the only one consistent [*440] with our free institutions. The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject, and I hope will always remain so.”²

This rule, however, which is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, and not in the judicial department, must not be so applied as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend.³

Another important rule applicable to the interpretation of statutes is, that one part of a statute must be so construed by another that the whole may, if possible, stand;⁴ and that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant; and it is a sound general principle in the exposition of statutes, that less regard is to be paid to the words used than to the policy which dictated the act; as, if land be vested in the King and his heirs by act of Parliament, saving the right of A., and A. has at that time a lease of it for three years, in this case A. shall hold it for his term of three years, and *afterwards it shall go to the King; for this interpretation furnishes matter for every clause [*441] to work and operate upon.⁵

It is, also, an established rule of construction, that an act of Parliament shall be read according to the ordinary and grammatical sense of the words,⁶ unless, being so read, it would be absurd or

¹ See *Proctor v. Mainwaring*, 3 B. & Ald. 145; E. C. L. R. 5.

² Per Lord Abinger, C. B., *Henderson v. Sherborn*, 2 M. & W. 286; (*) judgment, *Fletcher v. Calthrop*, 6 Q. B. 887; E. C. L. R. 51; cited and adopted *Murray v. Reg.*, 7 Q. B. 707; E. C. L. R. 53.

³ See the judgment, *United States v. Wiltberger*, 5 Wheaton, R. (U. S.) 95.

⁴ Where the proviso of an act of Parliament is directly repugnant to the purview, the proviso shall stand and be a repeal of the purview, as it speaks the last intention of the makers; *Attorney-General v. Governors and Company of the Chelsea Water Works*, Fitzgib. 195.

⁵ 1 Bla. Com. 89; Bac. Abr., “Statute,” (I. 2); argument, *Hine v. Reynolds*, 2 Scott, N. R. 419.

⁶ “It is a good rule in the construction of Acts of Parliament, that the judges are not to make the law what they may think reasonable, but to expound it according to the common sense of its words,” per Cresswell, J., *Biffin v. Yorke*, 6 Scott, N. B.

inconsistent with the declared intention of the legislature, to be collected from the rest of the act,¹ or unless an uniform series of decisions has already established a particular construction,² or unless terms of art are used, which have a fixed technical signification; as, for instance, the expression "heirs of the body," which conveys to lawyers a precise idea, as comprising, in a legal sense, only certain lineal descendants; and this expression shall, therefore, be construed according to its known meaning.³

Lastly, it is a rule of the civil law adopted by Lord Bacon, which was evidently dictated by common sense, and is in accordance with the spirit of the maxim which we have been considering, that, where obscurities, ambiguities, or faults of expression render the meaning of an enactment doubtful, that interpretation shall be preferred which [^{*442}] is *most consonant to equity, especially where it is in conformity with the general design of the legislature. *In ambigua voce legis ea potius accipienda est significatio quæ vitio caret, præsertim cum etiam voluntas legis ex hoc colligi possit.*⁴

EX ANTECEDENTIBUS ET CONSEQUENTIBUS FIT OPTIMA
INTERPRETATIO.

(2 Inst. 178.)

A passage will be best interpreted by reference to that which precedes and follows it.

It is a true and important rule of construction, that the sense and meaning of the parties to any particular instrument should be collected *ex antecedentibus et consequentibus*; that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done;⁵ or, in other words, the construction must be made upon the entire instrument,

285. See, also, judgment, *Rex v. Hall*, 1 B. & C. 123; E. C. L. R. 8; cited 2 C. B. 66; E. C. L. R. 52; *Stracey v. Nelson*, 12 M. & W. 541; (*) U. S. v. *Fisher*, 2 Cranch, R. (U. S.) 286; cited 7 *Wheaton*, R. (U. S.) 169.

¹ Judgment, *Smith v. Bell*, 10 M. & W. 389; (*) *Turner v. Sheffield Railway Company*, Id. 484; judgment, *Steward v. Greaves*, 10 M. & W. 719; (*) per *Alderson*, B., *Attorney-General v. Lockwood*, 9 M. & W. 398; (*) judgment, *Hyde v. Johnson*, 2 Bing. N. C. 780; E. C. L. R. 29.

² Per *Parke*, B., *Doe'd. Ellis v. Owens*, 10 M. & W. 521; (*) per *Lord Brougham*, C., *The Earle of Waterford's Peerage*, 6 Cl. & Fin. 172.

³ 2 *Dwarr. Stats.* 702; *Poole v. Poole*, 3 B. & P. 620.

⁴ D. 1, 8, 19; *Bac. Max.*, reg. 8.

⁵ Per *Ld. Ellenborough*, C. J., *Barton v. Fitzgerald*, 15 East, 541; *Shep. Touch.* 87; per *Hobart*, C. J., *Winch*, 98.

and not merely upon disjointed parts of it;¹ the whole context must be considered, in endeavouring to collect the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause.² In short, the law will judge of a deed, or other instrument, consisting *of divers parts or clauses, by looking at the whole; and will give to each part its proper office, so as [*443] to ascertain and carry out the intention of the parties.³

Thus, in the case of a bond with a condition, the latter may be read and taken into consideration, in order to correct and explain the obligatory part of the instrument.⁴ So, in construing an agreement in the form of a bond in which a surety became liable for the due fulfilment of an agent's duties therein particularly enumerated, a general clause in the obligatory part of the bond must be interpreted strictly, and controlled by reference to the prior clauses specifying the extent of the agency.⁵ On the same principle, the recital in a deed or agreement may be looked at, in order to ascertain the meaning of the parties, and is often highly important for that purpose;⁶ and the general words of a subsequent distinct clause or stipulation, may often be explained or qualified by the matter recited.⁷ So, covenants are to be construed according to the obvious intention of the parties, as collected from the whole context of the instrument containing them, and according to the reasonable sense of the words; and, in conformity with the rule above laid down, a covenant in large

¹ 2 Bla. Com. 379; Lord North v. The Bishop of Ely, cited 1 Bulstr. 101; and judgment, Doe d. Meyrick v. Meyrick, 2 Cr. & J. 230. A court of equity also looks to the general intent of a deed, and will give it such a construction as supports that general intent, although a particular expression in the deed may be inconsistent with it; Arundell v. Arundell, 1 My. & K. 316.

² Coles v. Hulme, 8 B. & C. 568; E. C. L. R. 15; Hobart, 275; cited, Gale v. Reed, 8 East, 79; Chit. Contr. 3d ed. 84.

³ See Hobart, 275; Doe d. Marquis of Bute v. Guest, 15 M. & W. 160. (*)

⁴ Coles v. Hulme, 8 B. & C. 568; E. C. L. R. 15; and cases cited, Id. 574, n. (a).

⁵ Napier v. Bruce, 8 Cl. & Fin. 470.

⁶ Shep. Touch. 76; The Marquis of Cholmondeley v. Lord Clinton, 2 B. & Ald. 625; S. C., 4 Bligh, 1, where it was held (Bayley, J., diss.) that it was not competent to go into the intention of the settlor, apparent from the recital of a conveyance to uses, in order to explain the words of a particular limitation; such words being of plain and well-known import.

⁷ Payler v. Homersham, 4 M. & S. 423; E. C. L. R. 30; recognised, Simons v. Johnson, 3 B. & Ad. 180; E. C. L. R. 23; Solly v. Forbes, 2 B. & B. 38; E. C. L. R. 6; Charleton v. Spencer, 3 Q. B. 698; E. C. L. R. 43; Sampson v. Easterby, 9 B. & C. 505; E. C. L. R. 17; affirmed in error, 1 Cr. & J. 105.

[*444] and general terms has frequently been narrowed and *restrained,¹ where there has appeared something to connect it with a restrictive covenant, or where there have been words in the covenant itself amounting to a qualification:² and it has, indeed, been said, in accordance with the above rule, that, "however general the words of a covenant may be, if standing alone, yet, if from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the Court will limit the operation of the general words."³

We have also already observed, that covenants are to be construed as independent or restrictive of each other, according to the apparent intention of the parties, upon an attentive consideration of the whole deed; every particular case, therefore, must depend upon the precise words used in the instrument before the Court, and the distinctions will be found to be very nice and difficult.⁴

It is, moreover, as a general proposition, immaterial in what part of a deed any particular covenant is inserted.⁵ For instance, in the indenture of lease of a colliery, two lessees covenanted "jointly and severally, in manner following;" and then followed a number of covenants as to working the colliery; after which was a covenant, that the moneys appearing to be due should be accounted for, and paid by the lessees, their executors, &c., not saying, "and each of [*445] them;" it was held, that the general words at the *beginning of the covenants by the lessees extended to all the subsequent covenants throughout the deed on the part of the lessees, there not being anything in the nature of the subject to restrain the operation of those words to the former part only of the lease.⁶

Again, words may be transposed, if it be necessary to do so in order to give effect to the evident intent of the parties:⁷ as, if a lease

¹ Per Lord Ellenborough, C. J., *Iggulden v. May*, 7 East, 241; *Plowd.* 329; *Cage v. Paxton*, 1 Leon. 116; *Broughton v. Conway*, Moor, 58; *Gale v. Reed*, 8 East, 89; *Sicklemore v. Thistleton*, 6 M. & S. 9, cited *Jowett v. Spencer*, 15 M. & W. 662; (**Hesse v. Stevenson*, 3 B. & P. 365. See *Doe v. Godwin*, 4 M. & S. 265; *E. C. L. R.* 30.

² Judgment, *Smith v. Compton*, 3 B. & Ad. 200; *E. C. L. R.* 23.

³ Judgment, *Hesse v. Stevenson*, 3 B. & P. 574.

⁴ 1 *Wms. Saund.* 6th ed. 60, n. (I), ante, p. 419.

⁵ Per Buller, J., 5 T. R. 526; 1 *Wms. Saund.* 60, n. (I).

⁶ *Duke of Northumberland v. Errington*, 5 T. R. 522; *Copland v. Laporte*, 3 Ad. & E. 517; *E. C. L. R.* 30.

⁷ *Parkhurst v. Smith*, *Willes*, R. 382; *S. C.* 3 Atk. 185.

for years be made in February, rendering a yearly rent payable at Michaelmas-day and Lady-day during the term, the law will make a transposition of the feasts, and read it thus, "at Lady-day and Michaelmas-day," in order that the rent may be paid yearly during the term. And so it is in the case of an annuity.¹ And, although courts of law have no power to alter the words, or to insert words which are not in the deed, yet they may and ought to construe the words in a manner most agreeable to the meaning of the grantor, and may reject any words that are merely insensible.² Likewise, if there be two clauses or parts of a deed³ repugnant the one to the other, the former shall be received, and the latter rejected, unless there be some special reason to the contrary;⁴ for instance, in grants, if words of restriction are added which are repugnant to the grant, the restrictive words must be rejected.⁵

It seems, however, to be a true rule, that this rejection of repugnant matter can be made in those cases only where there is a full and intelligible contract left to operate after the repugnant matter is excluded; otherwise, *the whole contract, or such parts of [*446] it as are defective, will be pronounced void for uncertainty.⁶

A marriage settlement recited that it was the intention of the parties to settle a rent-charge or annuity of 1000*l.* per annum, on the intended wife, in case she should survive her husband. In the body of the deed the words used were, "1000*l.* sterling lawful money of Ireland." It was held that the words "of Ireland" must be excluded, for the expression could have no meaning, unless some of the words were rejected, and it is a rule of law, that, if the first words used would give a meaning, the latter words must be excluded.⁷

The principle above stated applies to wills as well as to other instruments, for it is a rule that all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one

¹ Co. Litt. 217, b.

² Per Willes, C. J., 3 Atk. 136; S. C. Willes, R. 382; Savile, 71.

³ *Secus* of a will, see p. 446.

⁴ Shep. Touch. 88; Hardr. 94.

⁵ Hobart, 172; Mills v. Wright, 1 Freem. 247.

⁶ 2 Anderson, R. 108. In *Doe d. Wyndham v. Carew*, 2 Q. B. 317; E. C. L. R. 42, a proviso in a lease was held to be insensible. In *Youde v. Jones*, 13 M. & W. 534, (*) an exception introduced into a deed of appointment under a power was held to be repugnant and void. See, also, *Furnivall v. Coombes*, 6 Scott, N. R. 522; *White v. Hancock*, 2 C. B. 880; E. C. L. R. 52; Amer. Jur. xxiii., p. 280.

⁷ *Cope v. Cope*, 15 L. J., Chanc. 274.

consistent whole.¹ Where, however, two clauses or gifts in a will are irreconcilable, so that they cannot possibly stand together, the clause or gift which is posterior in position shall prevail, the subsequent words being considered to denote a subsequent intention: *cum duo inter se pugnantia reperiuntur in testamento ultimum ratum est.*² It is well settled that where there are two repugnant clauses in a will, the last shall prevail, as being most indicative of the intent,³ and this results from the general rule of construction; for, unless [*447] the principle were *recognised, of adopting one and rejecting the other of two repugnant clauses, both would be necessarily void, each having the effect of neutralising and frustrating the other.⁴ Therefore, if a testator, in one part of his will, gives to a person an estate of inheritance in land, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a life interest only, the prior gift is restricted accordingly.⁵

The maxim last mentioned must, however, in its application, be restricted by, and made subservient to, that general principle, which requires that the testator's intention shall, if possible, be ascertained and carried into effect.

"I think it may be taken as clearly established," observed Coleridge, J., in a recent case,⁶ "that this rule must not be acted on so as to clash with another paramount rule, which is, that, before all things, we must look for the intention of the testator as we find it expressed or clearly implied in the general tenor of the will; and when we have found that on evidence satisfactory in kind and degree, to that we must sacrifice the inconsistent clause or words, whether standing first or last, indifferently: and this rests upon good reason; for although, when there are repugnant dispositions, and nothing leads clearly to a performance of one, or rejection of the other, convenience is strongly in favour of some rule, however arbitrary; yet the foundation of this rule, as of every other established for the

¹ Per Lord Eldon, C., *Gittins v. Steele*, 1 Swanst. 28; per Lord Brougham, C., *Foley v. Parry*, 2 My. & K. 138; *Doe d. Snape v. Nevill*, Q. B. 12 Jur. 181.

² Co. Litt. 112, b.

³ 16 Johns. R. (U. S.) 546.

⁴ 1 Jarm., Wills, 411. Also words and passages in a will, which cannot be reconciled with the general context, may be rejected. *Id.* 420.

⁵ *Id.* 412. See, also, *Doe d. Murph v. Marchant*, 7 Scott, N. R. 644, where a codicil was held reconcilable with the will as to the disposition of the ultimate fee in certain estates.

⁶ *Morrall v. Sutton*, 1 Phill. 536-7.

interpretation of wills, obviously is, that it was supposed to be *the safest guide, under the circumstances, to the last intention of the testator. [*448]

And, in the same case, Parke, B., states the principal rules applicable to the interpretation of wills, to be, "that technical words are, prima facie, to be understood in their strict technical sense; that the clause is, if possible, to receive a construction which will give to every expression in it some effect, so that none may be rejected; that all the parts of the will are to be construed so as to form a consistent whole; that of two modes of construction, that is to be preferred which would prevent an intestacy; and that where two provisions of a will are totally irreconcilable, so that they cannot possibly stand together, and there is nothing in the context or general scope of the will which leads to a different conclusion, the last shall be considered as indicating a subsequent intention, and prevail."¹

"There are," says Sir J. Leach, "two principles of construction, upon which it appears to me that a Court may come to a conclusion without the necessity, which, if possible, is always to be avoided, of declaring the will void for uncertainty. First, if the general intention of the testator can be collected upon the whole will, particular terms used which are inconsistent with that intention may be rejected as introduced by mistake or ignorance on the part of the testator as to the force of the words used. Secondly, where the latter part of the will is inconsistent with a prior part, the latter part of the will must prevail."²

Lastly, it is an established rule, in construing a statute, that the intention of the lawgiver and the meaning of the *law are to be ascertained by viewing the whole and every part of the act. [*449] If any section be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another.³ This, as Sir E. Coke observes, is the most natural and genuine method of expounding a statute;⁴ and it is, therefore, a true principle, that *verba posteriora propter certitudinem*

¹ The two learned judges, whose remarks are cited in the text, differed in the case referred to, but merely as to the *application* of the rule in question.

² *Sherratt v. Bentley*, 2 My. & K. 157. And see, also, per Lord Brougham, C., *Id.* 165.

³ *Stowel v. Lord Zouch*, Plowd. 365; *Doe d. Bywater v. Brandling*, 7 B. & C. 643; *E. C. L. R.* 14.

⁴ *Co. Litt.* 381, a.

*addita ad priora quæ certitudine indigent sunt referenda*¹—reference should be made to a subsequent section in order to explain a previous clause of which the meaning is doubtful.

“It is, in my opinion,” observes Mr. Justice Coleridge, in a recent case,² “so important for the Court, in construing modern statutes, to act upon the principle of giving full effect to their language, and of declining to mould that language, in order to meet either an alleged inconvenience or an alleged equity, upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation of a section which is within its words, but clear and unambiguous evidence that so to do is to fulfil the general intent of the statute, and also, that, to adhere to the literal interpretation, is to decide inconsistently with other and overruling provisions of the same statute. When the evidence amounts to this, the Court may properly act upon it; for the object of all rules of construction being to ascertain the meaning of the language used, and it being unreasonable to impute to the legislature inconsistent intents upon the same general [*450] subject-matter, what it has *clearly said in one part must be the best evidence of what it has intended to say in the other; and if the clear language be in accordance with the plain policy and purview of the whole statute, there is the strongest reason for believing that the interpretation of a particular part inconsistently with that is a wrong interpretation. The Court must apply, in such a case, the same rules which it would use in construing the limitations of a deed; it must look to the whole context, and endeavour to give effect to all the provisions, enlarging or restraining, if need be, for that purpose, the literal interpretation of any particular part.”

NOSCITUR A SOCIIS.

(3 T. R. 87.)

*The meaning of a word may be ascertained by reference to the meaning of words associated with it.*³

It is a rule laid down by Lord Bacon, that *copulatio verborum*

¹ Wing. Max., p. 167; 8 Rep. 236. See 4 Leon. R. 248.

² Rex v. The Poor Law Commissioners (St. Pancras), 6 Ad. & E. 7; E. C. L. R. 38. See, also, per Parke, B., Perry v. Skinner, 2 M. & W. 476. (*)

³ This, it has been observed, in reference to King v. Melling, 1 Vent. 225, was a rule adopted by Lord Hale, and was no pedantic or inconsiderate expression when falling from him, but was intended to convey, in short terms, the grounds upon which he formed his judgments. See 3 T. R. 87; 1 B. & C. 644; E. C. L. R. 8; Argument, 13 East, 531.

*indicat acceptationem in eodem sensu*¹—the coupling of words together shows that they are to be understood in the same sense. And, where the meaning of any particular word is doubtful or obscure, or where the particular expression when taken singly is inoperative, the intention of the party who has made use of it may frequently be ascertained and carried into effect by looking at the adjoining words, or at expressions occurring in other parts of the same instrument, for, *quæ non valeant singula juncta juvant*²—*words which are [*451] ineffective when taken singly operate when taken conjointly : one provision of a deed, or other instrument, must be construed by the bearing it will have upon another.³

It is not proposed to give many examples of the application of the maxim *noscitur à sociis*, nor to enter at length into a consideration of the very numerous cases which might be cited to illustrate it: it may, in truth, be said to be comprised in those principles which universally obtain, that courts of law and equity will, in construing a written instrument, endeavour to discover and give effect to the intention of the party, and with a view to so doing will examine carefully every portion of the instrument. The maxim is, moreover, applicable, like other rules of grammar, whenever a construction has to be put upon a will, statute, or agreement; and although difficulty very frequently arises in applying it, yet this results from the particular words used, and from the particular acts existing in each individual case; so that one decision, as to the inference of a person's meaning and intention, can be considered as an express authority to guide a subsequent decision only where the circumstances are similar, and the words are identical or nearly so.

One instance of the application of the maxim, *noscitur à sociis*, to a mercantile instrument may, however, be mentioned on account of its importance, and will suffice to show in what manner the principle which it expresses has been made available for the benefit of commerce. The general words inserted in a maritime policy of insurance after the enumeration of particular perils are as follow:—"and of all perils, losses, and misfortunes, that have or *shall come to the hurt, detriment, or damage of the said goods and mer- [*452] chandises, and ship, &c., or any part thereof." These words, it has been observed, must be considered as introduced into the policy in

¹ Bac. Works, vol. 4, p. 26.

² 2 Bulstr. 132.

³ Argument, Galley v. Barrington, 2 Bing. 391; E. C. L. R. 9; per Lord Kenyon, C. J., 4 T. R. 227.

furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words: they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument: and this will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated, and occasioned by similar causes; that is to say, the meaning of the general words may be ascertained by referring to the preceding special words.¹

That the exposition of every will must be founded on the whole instrument, and be made *ex antecedentibus et consequentibus*, is, observes Lord Ellenborough, one of the most prominent canons of testamentary construction; and, therefore, in this department of legal investigation, the maxim *noscitur à sociis* is necessarily of very frequent practical application; yet where between the parts there is no connexion by grammatical construction, or by some reference, express or implied, and where there is nothing in the will declarative of some common purpose from which it may be inferred that the testator meant a similar disposition by *such different parts, though [*453] he may have varied his phrase or expressed himself imperfectly, the Court cannot go into one part of a will to determine the meaning of another, perfect in itself, and without ambiguity, and not militating with any other provision respecting the same subject-matter, notwithstanding that a more probable disposition for the testator to have made may be collected from such assisted construction. For instance, if a man should devise generally his lands, after payment of his debts and legacies, his trust³ estates would not pass; for, in such a case, *noscitur à sociis* what the land is which the testator intended to pass by such devise: it is clear he could only mean lands which he could subject to the payment of his debts and legacies. But, from a testator having given to persons standing in a certain

¹ See the judgment, *Cullen v. Butler*, 5 M. & S. 465, where it was held, that plaintiff might recover on a special count, the ship having been sunk owing to another ship's firing upon her through mistake. *Phillips v. Barber*, 5 B. & Ald. 161; *E. C. L. R. 7*; *Devaux v. J'Anson*, 5 B. & C. 519; *E. C. L. R. 11*. In *Borradaile v. Hunter*, 5 Scott, N. R. 445, 446, this maxim is applied by Tindal, C. J. (diss. from the rest of the Court), to explain a proviso in a policy of life insurance. In *Clift v. Schwabe*, 8 C. B. 437; *E. C. L. R. 54*, the same maxim was likewise applied in similar circumstances.

² *Roe v. Read*, 8 T. R. 118; 1 *Jarman on Wills*, 645.

degree of relationship to him a fee-simple in certain land, no conclusion which can be relied on can be drawn, that his intention was to give to other persons standing in the same rank of proximity the same interest in another part of the same land; and where, moreover, the words of the two devises are different, the more natural conclusion is, that, as the testator's expressions are varied, they were altered, because his intention in both cases was not the same.¹

In a very recent case a testator, after disposing of certain real estate, gave all the rest of his "household furniture, books, linen, and china (except as hereinafter mentioned), goods, chattels, *estate*, and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my death," to certain executors in trust to sell; and on a special *case stated for the opinion of the Court, it was held, that the testator's real estate did not pass [*454] by the above words; for although the word "estate" is sufficiently comprehensive to include real property, yet this *prima facie* meaning may be cut down or explained by the context, and where the word in question is associated with other words indicating personalty only. The Court observed, that, in the case before them, the word "estate" could not have been used as *nomen generalissimum*, because it appeared from other portions of the will not to have been used as including *all* the personal property of the testator; that it was, consequently, necessary to give it some more limited meaning than that which would *prima facie* have been assigned to it, and that such meaning could only be ascertained by applying the maxim *noscitur à sociis*, and holding that the word had reference exclusively to matters of the same nature as those whereto the words related with which it was associated.²

In addition to the preceding general observations, a few instances may be referred to as illustrating the distinction which exists between the conjunctive and disjunctive, and which it is so essential to observe whenever it is necessary to assign a construction to a testamentary instrument.

A leasehold estate for a long term was devised after the death of A. to B. for life, remainder to his child or children by any woman

¹ Judgment, *Right v. Compton*, 9 East, 272, 273; 11 East, 228; *Hay v. The Earl of Coventry*, 3 T. R. 83; per Coltman, J., *Knight v. Selby*, 3 Scott, N. R. 409, 417; *Argument*, 1 M. & S. 333; E. C. L. R. 28.

² *Sanderson v. Dobson*, 1 Exch. 141; *Doe d. Haw v. Earles*, 15 M. & W. 450. (*) See, also, *Vandeleur v. Vandeleur*, 3 Cl. & Fin. 98, where the maxim is differently applied.

whom he should marry, and his or their executors, &c., for ever, upon condition, that, in case the said B. should die "an infant, unmarried, and without issue," the premises should go over to his father and his three *other children, share and share alike, [*455] and their heirs, executors, &c.:—Held, that the devise over depended upon one contingency, viz., B.'s dying an infant, attended with two qualifications, viz., his dying without leaving a wife surviving him, or dying childless; and that the devise over could only take effect in case B. died in his minority, leaving neither wife nor child; and it was observed by Lord Ellenborough, in delivering judgment, that, if the condition has been, "if he dies an infant, or unmarried, or without issue," that is to say, in the disjunctive throughout, the rule would have applied, *in disjunctivis sufficit alteram partem esse veram*;¹ and, consequently, that if B. had died in his infancy, leaving children, the estate would have gone over to B.'s father and his children, to the prejudice of B.'s own issue.² According to the same rule of grammar, also, where a condition inserted in a deed consists of two parts in the conjunctive, both must be performed, but otherwise where the condition is in the disjunctive; and where a condition or limitation is both in the conjunctive and disjunctive, the latter shall be taken to refer to the whole; as, if a lease be made to husband and wife for the term of twenty-one years, "if the husband and wife or any child between them shall so long live," and the wife dies without issue, the lease shall, nevertheless, continue during the life of the husband, because the above condition shall be construed throughout in the disjunctive.³

In the construction of statutes, likewise, the rule *noscitur à sociis* [*456] is very frequently applied, the meaning of a word, *and, consequently, the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject-matter.⁴ As it would, however, be useless to cite additional cases for the purpose of illustration merely, or with a view of facilitating the application of the rule in question,

¹ Co. Litt. 225, a; 10 Rep. 58; Wing. Max., p. 13; D. 50, 17, 110, § 3.

² Doe d. Everett v. Cooke, 7 East, 272. As to changing the copulative into the disjunctive, see 1 Jarman on Wills, 448 et seq.

³ Co. Litt. 225, a; Shep. Touch. 138, 139. See, also, Burgess v. Brachar, 2 Ld. Raym. 1866.

⁴ Per Coleridge, J., Cooper v. Harding, 7 Q. B. 941; E. C. L. R. 53; Judgment, Stephens v. Taprell, 2 Curt. 465.

we shall conclude these remarks with observing, that the three rules or canons of construction with which we have commenced this chapter are so intimately connected together, that they should, perhaps, in strictness rather have been considered under one head than treated separately, and that they must always be kept in view collectively when the practitioner applies himself to the interpretation of a doubtful instrument.

VERBA CHARTARUM FORTIUS ACCIPIUNTUR CONTRA PROFERENTEM.
(Co. Litt. 36, a.)

The words of an instrument shall be taken most strongly against the party employing them.

It is a general rule, that the words in a deed are to be construed most strongly *contra proferentem*,—regard being had, however, to the apparent intention of the parties, as collected from the whole context of the instrument;¹ for as observed by Mr. Justice Blackstone, the principle of *self-preservation will make men sufficiently careful not to prejudice their own interest by the too [*457] extensive meaning of their words, and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own constructions upon them.² Moreover, the adoption of this rule puts an end to many questions and doubts which would otherwise arise as to the meaning and intention of the parties, which, in the absence of it, might be differently construed by different judges; and it tends to quiet possession, by taking acts and conveyances executed beneficially for the grantees and possessors.³

We may remark, also, that the general rule above stated has been held to apply still more strongly to a deed-poll⁴ than to an indenture, because in the former case the words are those of the grantor only; in the latter, the grantee has given his consent to them, and they must be considered as the words of both parties.⁵ But, though

¹ Per Lord Kenyon, C. J., *Barrett v. Duke of Bedford*, 8 T. R. 605; per Lord Eldon, C. J., 2 B. & P. 22; per Bayley, J., 15 East, 546; per Park, J., 1 B. & B. 335; E. C. L. R. 5; *Miller v. Mainwaring*, Cro. Car. 400; 3 Ves. jun. 48; Co. Litt. 183, a; Noy, Max., 9th ed., p. 48.

² 2 Bla. Com. 380. See *Saunderson v. Piper*, 5 Bing. N. C. 425; E. C. L. R. 35; *Reynolds v. Barford*, 8 Scott, N. R. 228, 289.

³ Bac. Max., reg. 3, which treats of the general rule.

⁴ See stats. 8 & 9 Vict. c. 106, s. 5; 7 & 8 Vict. c. 76, s. 11.

⁵ 2 Bla. Com. 380; Plowd. 134; *Shep. Touch.*, by Preston, 88, n. (81).

a deed-poll is to be construed against the grantor, the Court will not add words to it, nor give it a meaning contradictory to its language.¹

If, then, a tenant in fee-simple grants to any one an estate [*458] *for life generally, this shall be construed to mean an estate for the life of the grantee, because an estate for a man's own life is higher than for the life of another.²

But if tenant for life leases to another for life, without specifying for whose life, this shall be taken to be a lease for the lessor's own life; for, this is the greatest estate which it is in his power to grant.³ And, as a general rule, it appears clear, that, if a doubt arise as to the construction of a lease between the lessor and the lessee, the lease must be construed most beneficially for the latter.⁴

In like manner, if two tenants in common grant a rent of 10s., this is several, and the grantee shall have 10s. from each; but if they make a lease, and reserve 10s., they shall have only 10s. between them.⁵ So, it is a general rule of construction, that, where there is any reasonable degree of doubt as to the meaning of an exception in a lease, the words of the exception, being the words of the lessor, are to be taken most favourably for the lessee, and against the lessor;⁶ and where a deed may enure to divers purposes, he to whom the deed is made shall have election which way to take it, and he shall take it that way which shall be most to his advantage.⁷ But the instrument ought, in such a case, if pleaded, to be stated according to its legal effect, in that way which it is intended to have it operate.⁸

[*459] *According to the principle above laid down, it was held, "and of all lands or meadows to the said messuage or mill belonging,

¹ Per Williams, J., *Doe d. Myatt v. St. Helen's Railway Company*, 2 Q. B. 373; E. C. L. R. 42. In an action for slander or libel, also, the words must be construed according to common sense and their ordinary meaning, and as they would be understood by the hearers or readers; but the doctrine that doubtful words are to be taken *in mitiori sensu*, has long been exploded: *Argument, Hughes v. Rees*, 4 M. & W. 206; (*) 2 Selw., N. P., 10th ed. 1245, 1246. See *Poland v. Mason, Hobart*, 305; *Clark v. Gilbert*, Id. 381; *Wing. Max.*, p. 708.

² Co. Litt. 42, a; 2 Bla. Com. 380; *Plowd.* 156; *Finch, Law*, 63.

³ *Finch, Law*, 55, 56. See, also, Id. 60.

⁴ *Dunn v. Spurrier*, 3 B. & P. 399, 403, where various authorities are cited. The maxim in the text is also considered at some length in the *American Jurist*, No. 47, p. 11.

⁵ 5 Rep. 7; *Plowd.* 140; Co. Litt. 197, a, 267, b.

⁶ Per Bayley, J., *Bullen v. Denning*, 5 B. & C. 847; E. C. L. R. 11.

⁷ *Shep. Touch.* 83; cited, 8 Bing. 106; E. C. L. R. 21.

⁸ 2 *Smith L. C.* 295, and cases there cited.

or used, occupied, and enjoyed, or deemed, taken, or accepted as part thereof." This, said Lord Loughborough, C. J., being a case arising on a deed, is to be distinguished from those of a like nature which have arisen on wills. In general, where there is a question on the construction of a will, neither party has done anything to preclude himself from the favour of the Court. But, in the present instance, the rule of law applies, that *a deed shall be construed most strongly against the grantor.*¹

The rule of law, moreover, that a man's own acts shall be taken most strongly against himself, not only obtains in grants, but extends, in principle, to all other engagements and undertakings.²

Thus, the return to a writ of *fi. fa.* shall, if the meaning be doubtful, be construed against the sheriff; nor, if sued for a false return, shall he be allowed to defend himself by putting a construction on his own return, which would make it bad, when it admits of another construction which will make it good.³

In like manner, with respect to contracts not under seal, the generally received principle of law undoubtedly is, that the party who makes any instrument should take care so to express the amount of his own liability, as that he may not be bound further than it was his intention that he should be bound; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it, should rather have a construction put upon it in his favour, because the words of the instrument are not his, but those of the other party.⁴ [*460]

According to this principle, if the party giving a guarantee leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself;⁵ and if a carrier give two different notices, limiting his responsibility in case of loss, he will be bound by that which is least beneficial to himself.⁶ In like manner, where a party made a contract of sale as agent for A., and, on the face of such agreement, stated, that he made the purchase, paid the deposit, and agreed to comply with the conditions of sale, for A., and in the

¹ Doe d. Davies v. Williams, 1 H. Bla. 25, 27.

² 1 H. Bla. 586.

³ See Reynolds v. Barford, 8 Scott, N. R. 233, 239.

⁴ Per Alderson, B., Mayer v. Isaacs, 6 M. & W. 612; (*) commenting on the observations of Bayley, B., in Nicholson v. Paget, 1 Cr. & M. 48. (*) See Alder v. Boyle, 16 L. J., C. P. 232.

⁵ Hargreave v. Smees, 6 Bing. 244, 248; E. C. L. R. 19; Stephens v. Pell, 2 Cr. & M. 710. (*) See Cumpston v. Haigh, 2 Bing., N. C. 449, 454; E. C. L. R. 29.

⁶ Munn v. Baker, 2 Stark., N. P. C. 255; E. C. L. R. 8.

mere character of agent, it was held, that this act of the contracting party must be taken *fortissimè contra proferentem*; and that he could not, therefore, sue as principal on the agreement, without notice to the defendant before action brought, that he was the party really interested.¹ So, if an instrument be made in terms so ambiguous as to make it doubtful whether it be a bill of exchange or promissory note, the holder may, at his election, as against the party who made the instrument, treat it as either.²

In the Roman law, the rule under consideration for the construction of contracts may be said, in terms, to have existed, although its meaning was directly the reverse of that which attaches to it in our own: the rule there was, *fere secundum promissorem interpretatur*,³ *where *promissor*, in fact, signified the person who contracted the obligation,⁴ that is, who replied to the *stipulatio* proposed by the other contracting party. In case of doubt, then, the clause in the contract thus offered and accepted was interpreted against the *stipulator*, and in favour of the *promissor*. In *stipulationibus cum quaeritur quid actum sit verba contra stipulatorem interpretanda sunt*,⁵ and the reason given for this mode of construction is, *quia stipulatori liberum fuit verba late concipere*:⁶ the person stipulating should take care fully to express that which he proposes shall be done for his own benefit. But, as remarked by Mr. Chancellor Kent, "the true principle appears to be, as far as practicable, to give to a contract that particular sense in which the person making the promise believed the other party to have accepted it;"⁷ though this remark must necessarily be understood as applicable only where an ambiguity exists after applying those various and stringent rules of interpretation by which the meaning of a passage must in very many cases be determined.

In pleading, also, it is a general rule, that where two different meanings present themselves, that construction shall be adopted which is most unfavourable to the party pleading;⁸ *ambiguum placi-*

¹ Bickerton v. Burrell, 5 M. & S. 383, 386, as to which case, see Rayner v. Grote, 15 M. & W. 859. (*)

² Edis v. Bury, 6 B. & C. 433; E. C. L. R. 18; Block v. Bell, 1 M. & Rob. 149; Miller v. Thompson, 4 Scott, N. R. 204; Wood v. Mytton, 16 L. J., Q. B. 446.

³ D. 45, 1, 99, pr.

⁴ Brisson., ad verb. "Promissor," "Stipulatio." 1 Pothier, by Evans, 58.

⁵ D. 45, 1, 38, § 18.

⁶ D. 45, 1, 99, pr.; D. 2, 14, 39.

⁷ 2 Kent, Com. 4th ed. 557.

⁸ Steph. Plead. 5th ed. 415 and n. (c), where many authorities are cited; Bac. Max., reg. 3. "It is a maxim in the construction of pleadings, that everything

tum interpretari debet contra proferentem, for every man is presumed to make the best of his own case.¹ Thus, if in trespass *qu. cl. fr.* the *defendant pleads, that the *locus in quo* was his freehold, [*462] he must allege that it was his freehold at the time of the trespass, otherwise the plea is insufficient.² So, where a plea of set-off stated, that, at the time of the commencement of the action, the plaintiff was indebted to the defendant in sums of money exceeding the debt claimed by the plaintiff, but omitted to add, "and still is;" it was held bad on special demurrer, for the defendant not having pleaded that there was an existing debt, the Court would not infer it, but had a right to infer that it was satisfied.³ Also, in debt on a bond conditioned to make assurance of land, if the defendant pleads that he executed a release, his plea is bad if it does not express that the release concerns the same land.⁴ And, in an action on a bill of exchange against the acceptor, a plea of release must aver that the bill was accepted before the execution of the release.⁵

It must be observed, however, that, ambiguity, such as the above, although ground for demurrer, is cured by pleading over; and at subsequent stages of the cause, that construction of the ambiguous expression must be adopted which is most favourable to the party by whom it is used.⁶

"If," says Maule, J., "the language of the declaration is ambiguous, and the defendant pleads over, it must, if capable of such a construction, be taken in a sense that will require an answer."⁷

*We may also add, that, in construing a plea, it ought to [*463] be read like any other composition, and that no violent or forced construction ought to be made beyond the ordinary and fair meaning of the words employed, either to support or to invalidate it.⁸

shall be taken most strongly against the party pleading," per Coleridge, J.: *Howard v. Gossett*, 14 L. J., Q. B. 376.

¹ Co. Litt. 303, b; *Hobart*, 242; *Finch, Law*, 64.

² Com. Dig. "Pleader," (E. 5;) *Jenk. Cent.* 176.

³ *Dendy v. Powell*, 3 M. & W. 442. (*)

⁴ Com. Dig. "Pleader," (E. 5;) *Manser's case*, 2 Rep. 3. See *Goodday v. Mitchell*, Cro. Eliz. 441.

⁵ *Ashton v. Freestun*, 2 Scott, N. R. 278.

⁶ *Fletcher v. Pogson*, 3 B. & C. 192, 194; E. C. L. R. 10; *Hobson v. Middleton*, 6 B. & C. 295; E. C. L. R. 13; *Lord Huntingtower v. Gardiner*, 1 B. & C. 297; E. C. L. R. 8.

⁷ *Boydell v. Harkness*, 3 C. B. 171, 172; E. C. L. R. 54; citing, *Hobson v. Middleton*, 6 B. & C. 302; E. C. L. R. 13; judgment, *Bevins v. Hulme*, 15 M. & W. 97. (*)

⁸ Judgment, *Hughes v. Done*, 1 Q. B. 299; E. C. L. R. 41.

On the same principle, it has been laid down as a rule in equity pleading, that "The presumption is always against the pleader, because the plaintiff is presumed to state his case in the most favourable way for himself; and, therefore, if he has left anything material to his case in doubt, it is assumed to be in favour of the other party."¹ So, if the plaintiff's statement is in itself so ambiguous that in one sense it would not, and in another it would, amount to a charge of breach of trust, the Court will not, upon demurrer, adopt the unfavourable interpretation and extend the meaning of the allegation beyond that which the plaintiff has himself stated on the record; and, by the rules of pleading, in putting a meaning on doubtful expressions, the presumption is rather against the party pleading than the party who objects to the language of the pleading. If, for instance, the allegation in a bill is, that two funds are in the possession of the defendant, a trustee, one of which might, and the other could not, be legitimately applied in a particular mode; and that the defendant, having those two funds, intends to make a payment, which, if paid out of the one fund, would be a breach of trust, but which would not be a breach of trust if paid out of the other: it is never presumed, on a general allegation of that description, that the [*464] payment is intended to be made out of that fund which *could only be dealt with by a breach of trust; on the contrary, the presumption is, that what is intended to be done is intended to be rightfully and properly done, provided there are circumstances enabling the party to do that properly which it is alleged he intended to carry into effect.²

It must further be observed, that the general rule in question, being one of some strictness and rigour, is the last to be resorted to, and is never to be relied upon but when all other rules of exposition fail.³ In some cases, indeed, it is possible that any construction which the Court may adopt will be contrary to the real meaning of the parties; and, if parties make use of such uncertain terms in their contracts, the safest way is to go by the grammatical construction, and if the sense of the words be *in equilibrio* then the strict rule of law must be applied.⁴

¹ Per Lord Cottenham, C., *Columbine v. Chichester*, 2 Phill. 28.

² Per Lord Cottenham, C., *Attorney-General v. Mayor of Norwich*, 2 My. & Cr. 422, 423; *Vernon v. Vernon*, Id. 145; *Bowes v. Fernie*, 2 My. & Cr. 632.

³ *Bac. Max.*, reg. 3; 2 *Bla. Com.* 380.

⁴ Per Bayley, J., *Love v. Pares*, 18 *East*, 86.

Moreover, the principle of taking words *fortius contra proferentem* does not seem to hold when a harsh construction would work a wrong to a third person, it being a maxim that, *constructio legis non facit injuriam*.¹ Therefore, if tenant in tail make a lease for life generally, this shall be taken to mean a lease for the life of the lessor,² for this stands well with the law, and not for the life of the lessee, which it is beyond the power of a tenant in tail to grant;³ and it is a general rule, that "whensoever the words of a deed or of the parties without deed may have a double intendment, and one standeth with law and right, *and the other is wrongful and [*465] against law, the intendment that standeth with law shall be taken."⁴

Acts of Parliament are not, in general, within the reason of the rule under consideration, because they are not the words of *parties*, but of the legislature, neither does this rule apply to wills.⁵ Where, however, an act of Parliament is passed for the benefit of a canal, railway, or other company, it has been observed, that this, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed and set forth in the act, and the rule of construction in all such cases is now fully established to be, that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public, the former being entitled to claim nothing which is not *clearly* given to them by the act.⁶ Where, therefore, by such an act of Parliament, rates are imposed upon the public, and for the benefit of the company, such rates must be considered as a tax upon the subject; and it is a sound general rule, that a tax shall not be considered to be imposed (or at

¹ Co. Litt. 183, a.

² Per Bayley, J., *Smith v. Doe d. Earl of Jersey*, 2 B. & B. 551; E. C. L. R. 6. Finch, Law, 60.

³ 2 Bla. Com. 380.

⁴ Co. Litt. 42, 183; 2 Bla. Com. 380; Shep. Touch. 88; Noy, Max. 9th ed. 211.

⁵ 2 Dwarr. Stats. 688; Bac. Max. reg. 8.

⁶ Per Lord Tenterden, C. J., *Stourbridge Canal Co. v. Wheeley*, 2 B. & Ad. 798; E. C. L. R. 22; recognised, *Priestley v. Foulds*, 2 Scott, N. R. 228; per Coltman, J., Id. 226; cited, argument, Id. 738; judgment, *Gildart v. Gladstone*, 11 East, 685; recognised, *Barrett v. Stockton and Darlington Railway Co.*, 2 Scott, N. R., 370; S. C., affirmed in error, 3 Scott, N. R., 808; and in the House of Lords, 8 Scott, N. R., 641; per Maule, J., *Portsmouth Floating Bridge Co. v. Nance*, 6 Scott, N. R. 831; *Blakemore v. Glamorganshire Canal Co.*, 1 My. & K. 166; argument, *Thicknesse v. Lancaster Canal Co.*, 4 M. & W. 482, (*) ante, p. 8.

least not for the benefit of a subject) without a plain declaration of the intent of the legislature to impose it.¹

[*466] *In a well-known case, which is usually cited as an authority, with reference to the construction of acts for the formation of companies, with a view to carrying works of a public nature into execution, the law is thus distinctly laid down by Lord Eldon: —“When I look upon these acts of Parliament, I regard them all in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting, that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution. Such acts of Parliament have now become extremely numerous, and from their number and operation they so much affect individuals, that I apprehend those who come for them to Parliament do in effect undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and shall forbear all that they are thereby required to do, and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals.”²

So, with respect to railway acts, it has been repeatedly laid down, that the language of these acts of Parliament is to be treated as the language of the promoters of them; they ask the legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally [*467] in favour of the public.³ “The statute,” says *Alderson, B.,⁴ speaking of a railway company’s act, “gives this company power to take a man’s land without any conveyance at all; for if they cannot find out who can make a conveyance to them, or if he refuse to convey, or if he fail to make out a title, they may pay their money into

¹ Judgment, *Kingston-upon-Hull Dock Company v. Browne*, 2 B. & Ad. 58, 59; E. C. L. R. 22; *Grantham Canal Navigation Company v. Hall* (in error), 14 M. & W. 880. (*)

² *Blakemore v. The Glamorganshire Canal Navigation*, 1 My. & K. 162.

³ Judgment. *Parker v. The Great Western Railway Company*, 7 Scott, N. R. 870.

⁴ *Doe d. Hutchinson v. Manchester, Bury, and Rossendale Railway Company*, 14 M. & W. 694; (*) *Webb v. The Manchester and Leeds Railway Company*, 1 Railw. Cas. 576, 599; per Lord Langdale, M. R., *Gray v. The Liverpool and Bury Railway Company*, 4 Id. 240.

Chancery, and the land is at once vested in them by a parliamentary title. But in order to enable them to exercise this power, they must *follow the words of the act strictly.*" And it is clear that the words of a statute will not be strained beyond their reasonable import to impose a burthen upon, or to restrict the operation of, a public company.¹ It will, of course, be borne in mind that the general principle of construing an act of Parliament of the kind above alluded to *contra proferentem*, can only be applied where a doubt presents itself as to the meaning of the legislature; for such an act, and every part of it, must be read according to the ordinary and grammatical sense of the words used, and with reference to those established rules of construction which we have already stated.

Lastly, with reference to the maxim *fortius contra proferentem*, where a question arises on the construction of a grant from the Crown, the rule under consideration is reversed; for such a grant is construed most strictly against the grantee, and most beneficially for the Crown, and nothing will pass to the grantee but by clear and express words.²

*AMBIGUITAS VERBORUM LATENS VERIFICATIONE SUPPLETUR; NAM QUOD EX FACTO ORITUR AMBIGUUM VERIFICATIONE FACTI TOLLITUR. [*468]

(Bac. Max., reg. 25.)

Latent ambiguity may be supplied by evidence; for an ambiguity which arises by proof of an extrinsic fact may, in the same manner, be removed.

Two kinds of ambiguity occur in written instruments: the one is called *ambiguitas latens*, i. e., where the writing appears on the face of it certain, and free from ambiguity; but the ambiguity is introduced by evidence of something extrinsic, or by some collateral matter out of the instrument: the other species is called *ambiguitas patens*, i. e., an ambiguity apparent on the face of the instrument itself.³

¹ *Smith v. Bell*, 2 Railw. Cas. 877; *Parrott Navigation Company v. Robins*, 3 Id. 888.

² *Argument, Rex v. Mayor, &c. of London*, 1 Cr., M. & R. 12, 15, (*) and cases there cited; *Chit. Pre. of the Crown*, 391; *Finch, Law*, 101.

³ *Bac. Max.*, reg. 25. The following remarks respecting ambiguity should be taken in connexion with the five maxims which successively follow, and especially with that relative to *falsa demonstratio*, post. The subject of latent and patent ambiguities, and

Ambiguitas patens, says Lord Bacon, cannot be holden by averment, and the reason is, because the law will not couple and mingle matter of speciality, which is of the higher account, with matter of averment, which is of the lower account in law, for that were to make all deeds hollow, and subject to averment; and so, in effect, to make that pass without deed which the law appoints, shall not pass but by deed;¹ and this rule, as above stated and explained, applies not only to deeds, but to written contracts in general;² [*469] *and especially, as will be seen by the examples immediately following, to wills.

On this principle, a devise to "one of the sons of J. S." cannot be explained by parol proof;³ and if there be a blank in the will for the devisee's name, parol evidence cannot be admitted to show what person's name the testator intended to insert;⁴ it being an important rule, that, in expounding a will, the Court is to ascertain, not what the testator actually intended as contradistinguished from what his words express, but what is the meaning of the words he has used.⁵

If, as observed by Sir James Wigram, the Statute of Frauds merely had required that a nuncupative will should not be set up in opposition to a written will, parol evidence might, in many cases, be admissible to explain the intention of the testator, where the person or thing intended by him is not adequately described in the will; but if the true meaning of that statute be, that the writing which it requires shall itself express the intention of the testator, it is difficult to understand how the statute can be satisfied by a writing merely,

likewise of misdescription, has been very briefly treated in the text, since ample information thereupon may be obtained by reference to the masterly treatise of Sir James Wigram, upon the "Admission of Extrinsic Evidence in Aid of the Interpretation of Wills."

¹ Bac. Max., reg. 25; commented on, 2 Phill. Ev., 9th ed. 818; Doe d. Tyrrell v. Lyford, 4 M. & S. 550; E. C. L. R. 30; Lord Cholmondeley v. Lord Clinton, 2 Mer. 348; Judgment, Doe d. Gard v. Needs, 2 M. & W. 189; (*) S. P., Stead v. Berrier, Sir T. Raym. 411.

² See *Hollier v. Eyre*, 9 Cl. & Fin. 1; *Goldshede v. Swan*, 1 Exch. 154. (*)

³ *Strode v. Russel*, 2 Vern. 624; *Cheney's case*, 5 Rep. 68. See *Castledon v. Turner*, 8 Atk. 257; *Harris v. Bishop of Lincoln*, 2 P. Wms. 186, 187; per *Tindal, C. J.*, *Doe d. Winter v. Perratt*, 7 Scott, N. R. 36. See, also, the observations of *Littledale, J.*, and *Parke, J.*, in *Shortrede v. Cheek*, 1 Ad. & E. 57; E. C. L. R. 28, where a question arose as to the sufficiency of the description of a promissory note referred to in a guarantee.

⁴ *Baylis v. Attorney-General*, 2 Atk. 289; *Hunt v. Hort*, 3 Bro. C. C. 811; cited, 8 Bing. 254; E. C. L. R. 21.

⁵ Per *Parke, J.*, *Doe d. Gwillim v. Gwillim*, 5 B. & Ad. 129; E. C. L. R. 27.

if the description it contains have nothing *in common with* that of the person intended to take under it, or not enough to determine his identity. To define that which is indefinite is to make a material addition to the *will.¹ In accordance with these observations, where a testator devised his real estate "first to K., then [^{*470}] to —, then to L., then to M., &c.," and the will referred to a card as showing the parties designated by the letters in the will, which card, however, was not shown to have been in existence at the time of the execution of the will, it was held clearly inadmissible in evidence; the Court observing, that this was a case of a patent ambiguity, and that, according to all the authorities on the subject, parol evidence to explain the meaning of the will could not legally be admitted.²

If, then, as further observed in the treatise already cited, a testator's words, aided by the light derived from the circumstances with reference to which they were used, do not express the intention ascribed to him, evidence to prove the sense in which he intended to use them is, as a general proposition, inadmissible; in other words, the judgment of a Court in expounding a will must be simply declaratory of what is in the will;³ and to make a construction of a will where the intent of the testator cannot be known, has been designated as *intentio cæca et sicca*.⁴

The devise, therefore, in cases falling within the scope of the above observation, will, since the will is *insensible*, and not really *expressive of any intention*, be void for uncertainty.

The rule as to patent ambiguities which we have just been considering, is by no means confined in its operation *to the interpretation of wills; for instance, where a bill of exchange was [^{*471}] expressed in figures to be drawn for 245*l.*, and in words for two hundred pounds, value received, with a stamp applicable to the higher amount, evidence to show that the words "and forty-five" had been omitted by mistake, was held inadmissible;⁵ for, the doubt being on the face of the instrument, extrinsic evidence could not be received to explain it. The instrument, however, was held to be a good bill for the smaller amount, it being a rule laid down by commercial writers, that, where a difference appears between the figures and the

¹ See Wigram, Extrin. Evid., 3d ed. 120, 121.

² Clayton v. Lord Nugent, 13 M. & W. 200. (*)

³ Wigram, Extrin. Evid., 3d ed., 87th and following pages, in which many instances of the application of this rule are given. And refer to Goblet v. Beechey, Id. p. 185; S. C., 3 Sim. 24.

⁴ Per Rolle, C. J., Taylor v. Webb, Styles, 319.

⁵ Saunderson v. Piper, 5 Bing N. C. 425; E. C. L. R. 36.

words of a bill, it is safer to attend to the words.¹ But, although a patent ambiguity cannot be explained by extrinsic evidence, it may, in some cases, be helped by construction, or a careful comparison of other portions of the instrument with that particular part in which the ambiguity arises; and in others, it may be helped by a right of election vested in the grantee or devisee, the power being given to him of rendering certain that which was before altogether uncertain and undetermined. For instance, where a general grant is made of ten acres of ground adjoining or surrounding a particular house, part of a larger quantity of ground, the choice of such ten acres is in the grantee, and a devise to the like effect is to be considered as a grant;² and if I grant ten acres of wood where I have 100, the grantee may elect which ten he will take; for, in such a case, the law presumes the grantor to have been indifferent on the subject.³ So, if a testator leaves a number of articles of the same kind to a legatee, and dies [472] possessed of a greater number, the legatee and not the executor has the right of selection.⁴

On the whole, then, we may observe, in the language of Lord Bacon, that, all ambiguity of words within the deed, and not out of the deed, may be helped by construction, or in some cases, by election, but never by averment, but rather shall make the deed void for uncertainty.⁵

The general rule, however, as to patent ambiguity must be received with this qualification, viz., that extrinsic evidence is unquestionably admissible for the purpose of showing that the uncertainty which appears on the face of the instrument does not, in point of fact, exist; and that the intent of the party, though uncertainly and ambiguously expressed, may yet be ascertained, by proof of facts, to such a degree of certainty as to allow of the intent being carried into effect; in cases falling within the scope of this remark, the evidence is received, not for the purpose of proving the testator's intention, but of explaining the words which he has used.⁶ Suppose, for instance, a legacy "to one of the children of A.," by her late husband, B.; suppose, further, that A. had only one son by B., and that this fact was known to the testator; the necessary consequence, in such a case, of bringing the

¹ Id. 481, 484.

² *Hobson v. Blackburn*, 1 My. & K. 571.

³ *Bac. Max.*, reg. 25. See, also, per Cur., in *Richardson v. Watson*, 4 B. & Ad. 787; *E. C. L. R.* 24; *Vin. Abr.*, "Grants," (H. 5.)

⁴ *Jaques v. Chambers*, 15 L. J., *Chanc.* 225.

⁵ *Bac. Max.*, reg. 25; per Tindal, C. J., 7 *Scott*, N. B. 86; *Wigram, Extrin. Evid.*, 8d ed. 88, 101.

⁶ 2 *Phill. Evid.*, 9th ed. 314.

words of the will into contact with the circumstances to which they refer, must be to determine the identity of the person intended, it being the form of expression only, and not the intention, which is ambiguous; and evidence of facts requisite to reduce the testator's meaning to certainty would not, it should seem, in the instance above put, be excluded; *though it would be quite another question if A. had more sons than one, or if her husband were living.¹ [*473]

"In the case of a patent ambiguity," remarks Sir T. Plumer, "that is, one appearing on the face of the instrument, as a general rule, a reference to matters *dehors* the instrument is forbidden. It must, if possible, be removed by construction and not by averment. But, in many cases, this is impracticable where the terms used are wholly indefinite and equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed; if in such cases the Court were to reject the only mode by which the meaning could be ascertained, viz., the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense and the law of England (which are seldom at variance) warrant the departure from the general rule, and call in the light of extrinsic evidence."²

With respect to *ambiguitas latens*, the rule is, that, inasmuch as the ambiguity is raised by extrinsic evidence, so it may be removed in the same manner.³ Therefore, if a person grant his manor of S. to A. and his heirs, and the truth is, he hath the manors both of North S. and South S., this ambiguity shall be helped by averment as to the grantor's intention.⁴ So, if A. levies a fine to William his son, and A. has two sons named William, the averment that it was his intention to levy the fine to the younger is *good, and stands well with the words of the fine.⁵ So, if one devise to [*474] his son John, when he has two sons of that name,⁶ or to the eldest son of J. S., and two persons, as in the case of a second marriage,

¹ Wigram, Ex. Evid., 3d ed. 66.

² Per Sir Thos. Plumer, M. R., *Colpoys v. Colpoys*, 1 Jac. R. 468, 464, where several instances are given; *Collison v. Curling*, 9 Cl. & Fin. 88.

³ 2 Phill. Evid., 9th ed. 315; Wigram, Extrin. Evid., 3d ed. 101; *Judgment, Bradley v. Washington Steam Packet Company*, 13 Peters, R. (U. S.) 97.

⁴ Bac. Max., reg. 25; Plowd. 85, b; *Miller v. Travers*, 8 Bing. 248; E. C. L. R. 21.

⁵ *Altham's case*, 8 Rep. 155; cited, 8 Bing. 251; E. C. L. R. 21.

⁶ *Couden v. Clerke*, Hob. 32; *Jones v. Newman*, 1 W. Bla. 60; *Cheney's case*, 5 Rep. 68; per Tindal, C. J., *Doe d. Winter v. Perratt*, 7 Scott, N. R. 36.

meet that designation,¹ evidence is admissible to explain which of the two was intended. Whenever, in short, the words of the will in themselves are plain and unambiguous, but they become ambiguous by the circumstance that there are two persons to each of whom the description applies, then parol evidence may be admitted to remove the ambiguity so created.²

In all cases, indeed, in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will; and this appears to be the extent of the maxim as to *ambiguitas latens*.³ The characteristic of these cases is, that the words of the will *do* describe the object or subject intended, and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever: it only enables [*475] the *Court to reject one of the subjects or objects to which the description in the will applies, and to determine which of the two the deviser understood to be signified by the description which he used in the will.⁴

A devise was made of land to M. B. for life, remainder to "her three daughters, Mary, Elizabeth, and Ann," in fee, as tenants in common. At the date of the will, M. B. had two legitimate daughters, Mary and Ann, living, and one illegitimate, named Elizabeth. Extrinsic evidence was held admissible to rebut the claim of the last-mentioned, by showing that M. B. formerly had a legitimate daughter named Elizabeth, who died some years before the date of the will, and that the testator did not know of her death, or of the birth of the illegitimate daughter.⁵

¹ Per Erskine, J., 5 Bing. N. C. 488; E. C. L. R. 85; Doe d. Gord v. Needs, 2 M. & W. 129; (*) Richardson v. Watson, 4 B. & Ad. 792; E. C. L. R. 24. And see the cases on this subject, cited, 2 Phill. Ev., 9th ed. 816, et seq.

² Per Alderson, B., 18 M. & M. 206, and in Smith v. Jeffrys, 15 M. & W. 561; (*) The Duke of Dorset v. Lord Hawarden, 3 Curteis, Eccj. R. 80.

³ Judgment, Miller v. Travers, 8 Bing. 247, 248; E. C. L. R. 21; per Abbott, C. J., Doe d. Westlake, 4 B. & Ald. 58; E. C. L. R. 6.

⁴ Judgment, Doe d. Gord v. Needs, 2 M. & W. 140; (*) Lord Walpole v. Earl of Cholmondeley, 7 T. R. 188.

⁵ Doe d. Thomas v. Beynon, 12 Ad. & E. 481; E. C. L. R. 40; Doe d. Allen v. Allen, Id. 451.

It is true, moreover, that parol evidence must be admissible to some extent to determine the application of every written instrument. It must, for instance, be received to show what it is that corresponds with the description; and the admissibility of such evidence for this purpose being conceded, it is only going one step further to give parol evidence, as in the above instances, of other extrinsic facts, which determine the application of the instrument to one subject, rather than to others, to which, on the face of it, it might appear equally applicable.¹

"Speaking philosophically," says Rolfe, B., "you must always look beyond the instrument itself to some extent, in order to ascertain who is meant; for instance, you must look to names and places;"² and, "in every specific devise or bequest, it is clearly competent and necessary to *inquire as to the thing specifically devised or bequeathed."³ Thus, if the word Blackacre be used in a [*476] will, there must be evidence to show that the field in question is Blackacre.⁴ Where there is a devise of an estate purchased of A., or of a farm in the occupation of B., it must be shown, by extrinsic evidence, what estate it was that A. purchased, or what farm was in the occupation of B., before it can be known what is devised.⁵ So, whether parcel or not of the thing demised is always matter of evidence.⁶ In these and similar cases, the instrument appears on the face of it to be perfectly intelligible, and free from ambiguity, yet extrinsic evidence must, nevertheless, be received, for the purpose of showing what the instrument refers to.⁷

The rule as to *ambiguitas latens*, above briefly stated, may likewise be applied to mercantile instruments, with a view to ascertain the *intention*, though not to vary the *contract*, of the parties.⁸ In the case of a guarantee, for instance, as of a will, the circumstances under which the document was executed may be looked at, not to

¹ 2 Phill. Ev., 9th ed. 297, 329.

² 13 M. & W. 207. (*)

³ Per Lord Cottenham, C., *Shuttleworth v. Greaves*, 4 My. & Cr. 38.

⁴ *Doe d. Preedy v. Holtom*, 4 Ad. & E. 82; E. C. L. R. 81; recognised, *Doe d. Norton v. Webster*, 12 Ad. & E. 450; E. C. L. R. 40.

⁵ Per Sir Wm. Grant, M. R., 1 Mer. 658.

⁶ Per Buller, J., *Doe d. Freeland v. Burt*, 1 T. R. 701, 704; *Paddock v. Fradley*, 1 Cr. & J. 90; *Doe d. Beach v. Earl of Jersey*, 3 B. & C. 870; E. C. L. R. 10.

⁷ Per Patteson, J., and Coleridge, J., 4 Ad. & E. 81, 82; E. C. L. R. 81. See *Doe d. Norton v. Webster*, 12 Ad. & E. 442; E. C. L. R. 40. Evidence admitted to identify pauper with person described in indenture of apprenticeship, *Reg. v. Inhabitants of Wooldale*, 6 Q. B. 549; E. C. L. R. 51.

⁸ *Smith v. Jeffryes*, 15 M. & W. 561. (*)

make the document, but to show its construction.¹ Moreover, as we shall hereafter see, whenever a contract is entered into with reference [*477] to a known and recognised use of particular *terms employed by the contracting parties, or with reference to a known and established usage, evidence may be given to show the meaning of those terms, or the nature of that usage, amongst persons conversant with the particular branch of commerce or business to which they relate.² But cases of this latter class more properly fall within a branch of the law of evidence which we shall separately consider, viz., the applicability of usage and custom to the explanation of written instruments.³

QUOTIES IN VERBIS NULLA EST AMBIGUITAS, IBI NULLA EXPOSITIONO CONTRA VERBA FIENDA EST.

(Wing. Max., p. 24.)

In the absence of ambiguity, no exposition shall be made which is opposed to the express words of the instrument.

It seems desirable, before proceeding further with the consideration of some additional maxims relative to the subject of ambiguity in written instruments, to take this opportunity of observing, that, according to the rule which stands at the head of these remarks, it is not allowable to interpret what has no need of interpretation, and that the law will not make an exposition against the express words and intent of the parties.⁴ Hence, if I grant to you that you and your heirs, or the heirs of your body, shall distrain for a rent of forty shillings within my manor of S., this, by construction of law, [*478] *ut res magis valeat*, *shall amount to a grant of a rent out of my manor of S., in fee-simple, or fee-tail; for the grant would be of little force or effect if the grantee had but a bare distress and no rent. But if a bare rent of forty shillings be granted out of the manor of D., with a right to distrain if such rent be in arrear in the manor of S., this will not amount to a grant of rent out of the manor of S., for the rent is granted to be issuing out of the manor of D.,

¹ Goldshede v. Swan, 1 Exch. 154, (*) and cases there cited.

² Robertson v. Jackson, 2 C. B., 412; E. C. L. R. 52; Grant v. Maddox, 16 L. J., Exch. 227; S. C., 15 M. & W. 737. (*)

³ Post, chap. 10.

⁴ Co. Litt. 147, a; 7 Rep. 108; per Kelynge, C. J., Lanyon v. Carne, 2 Saunds. R. 167. See Jesse v. Roy, 1 Cr., M. & R. 816. (*)

and the parties have expressly limited out of what land the rent shall issue, and upon what land the distress shall be taken.¹

It may, moreover, be laid down as a general rule, applicable as well to cases in which a written instrument is required by law, as to those in which it is not, that, where such instrument appears on the face of it to be complete, parol evidence is inadmissible to contradict the agreement:² in such cases the Court will look to the written contract in order to ascertain the meaning of the parties, and will not admit the introduction of parol evidence, to show the agreement was in reality different from that which it purports to be.³ Although, moreover, it has been said that a somewhat strained interpretation of an instrument may be admissible where an absurdity would otherwise ensue, yet, if the intention of the parties is not clear and plain, but *in equilibrio*, the words shall receive their more natural and proper construction.⁴

The general rule, observes a learned judge, I take to be, that, where the words of any written instrument are free from ambiguity in themselves, and where external circumstances *do not [⁴⁷⁹] create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible.⁵ The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception from—or, perhaps, to speak more precisely, not so much an exception from, as a corollary to—the general rule above stated, that, where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no

¹ Co. Litt. 147, a.

² 2 Phill. Ev., 9th ed. 357.

³ Per Bayley and Holroyd, JJ., *Williams v. Jones*, 5 B. & C. 108; E. C. L. R. 11.

⁴ *Earl of Bath's case*, Cart., R. 108, 109, adopted 1 Fonbl. Eq., 5th ed. 445, n.

⁵ Per Tindal, C. J., *Shore v. Wilson*, 5 Scott, N. R. 1087. For an instance of the application of this rule to a will, see *Doe d. Oxenden v. Chichester*, 8 Taunt. 147; affirmed in error, 4 Dow, 65; cited and explained, *Wigram, Extrin. Evid.*, 8d ed. 77.

other means can the language of the instrument be made to speak the real mind of the party.¹

The following cases may be mentioned as falling within the scope of the preceding remarks: 1st, where the instrument is in a foreign language, in which case the jury must ascertain the meaning of the terms upon the evidence of persons skilled in the particular language; 2dly, ancient words may be explained by contemporaneous usage; *3dly, if the instrument be a mercantile contract, the [*480] meaning of the terms must be ascertained by the jury according to their acceptance amongst merchants; 4thly, if the terms are technical terms of art, their meaning must, in like manner, be ascertained by the evidence of persons skilled in the art to which they refer. In such cases, the Court may at once determine upon the inspection of the instrument, that it belongs to the province of the jury to ascertain the meaning of the words, and, therefore, that, in the inquiry, extrinsic evidence to some extent must be admissible.²

It may be scarcely necessary to observe, that the maxim under consideration applies equally to the interpretation of an act of Parliament, the general rule being, that *a verbis legis non est recedendum*.³ A court of law will not make any interpretation contrary to the express letter of a statute; for nothing can so well explain the meaning of the makers of the act as their own direct words, since *index animi sermo*, and *maledicta expositio quæ corrumpit textum*;⁴ it would be dangerous to give scope for making a construction in any case against the express words, where the meaning of the makers is not opposed to them, and when no inconvenience will follow from a literal interpretation.⁵ "Nothing," observed Lord Denman, C. J., in a recent case,⁶ "is more unfortunate than a disturbance of the plain language of the legislature, by the attempt to use equivalent terms."

¹ Per Tindal, C. J., 5 Scott, N. R. 1037, 1038.

² Per Erskine, J., 5 Scott, N. R. 988; per Parke, B., Clift v. Schwabe, 8 C. B. 469, 470; E. C. L. R. 54. As to the construction of a settlement in equity, see, per Lord Campbell, Evans v. Scott, 1 H. L. Cas. 66.

³ 5 Rep. 119; cited, Wing. Max., p. 25.

⁴ 4 Rep. 35; 2 Rep. 24; 11 Rep. 84; Wing. Max., p. 29.

⁵ Eldrich's case, 5 Rep. 119; cited, Argument, Gaunt v. Taylor, 3 Scott, N. R. 709.

⁶ Everard v. Poppleton, 5 Q. B. 184; E. C. L. R. 48; per Coltman, J., Gadsby, app., Barrow, resp., 8 Scott, N. R. 804.

*CERTUM EST QUOD CERTUM REDDI POTEST. [*481]
(Noy, Max., 9th ed. 265.)

That is sufficiently certain which can be made certain.

The above maxim, which sets forth a rule of logic as well as of law, is peculiarly applicable in construing a written instrument. For instance, although every estate for years must have a certain beginning and a certain end, yet "albeit there appear no certainty of years in the lease, yet if by reference to a certainty it may be made certain, it sufficeth;"¹ and, therefore, if a man make a lease to another for so many years as J. S. shall name, this is a good lease for years; for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. So, if a person make a lease for twenty or more years, if he shall so long live, or if he shall so long continue parson, it is good, for there is a certain period fixed, beyond which it cannot last, though it may determine sooner on the death of the lessor, or his ceasing to be parson.²

It is true, said Lord Kenyon, C. J., that there must be a certainty in the lease as to the commencement and duration of the term, but that certainty need not be ascertained at the time; for if, in the fluxion of time, a day will arrive which will make it certain, that is sufficient. As if a lease be granted for twenty-one years, after three lives in being, though it is uncertain at first when that term will commence because those lives are in being, yet when *they die it is reduced to a certainty, and *id certum est quod certum reddi potest*, and such terms are frequently created for raising portions for younger children.³ [*482]

Again, it is a rule of law, that "no distress can be taken for any services that are not put into certainty nor can be reduced to any certainty, for *id certum est quod certum reddi potest*;"⁴ and, accordingly, where land is demised at a rent which is capable of being reduced to a certainty, the lessor will be entitled to distrain for the same.⁵

¹ Co. Litt. 45, b. See *Lovelock v. Frankland*, 16 L. J., Q. B. 182. The maxim is applied to an indenture of apprenticeship, *Reg. v. Inhabitants of Wooldale*, 6 Q. B. 549, 566; E. C. L. R. 51.

² 2 Bla. Com. 148; 6 Rep. 35; Co. Litt. 45, b.

³ *Goodright d. Hall v. Richardson*, 8 T. R. 468.

⁴ Co. Litt. 96, a; 142, a; *Parke v. Harris*, 1 Salk. 262.

⁵ *Daniel v. Gracie*, 6 Q. B. 145; E. C. L. R. 51. See *Pollitt v. Forest*, 16 L. J., Q. B. 424.

In like manner, in the case of a feoffment, the office of the premises of the deed is twofold: first, rightly to name the feoffor and the feoffee; and, secondly, to comprehend the certainty of the lands or tenements to be conveyed by the feoffment; and this may be done either by express words, or by words which may by reference be reduced to a certainty, according to the principle, *certum est quod certum reddi potest*.¹ So, a grant shall be void if it be totally uncertain; but if the King's grant refers to another thing which is certain, it is sufficient, as if he grant to a city all liberties which London has, without saying what liberties London has.²

An agreement in writing for the sale of a house, did not by description ascertain the particular house, but it referred to the deeds as being in the possession of A. B., named in the agreement. The Court held the agreement *sufficiently certain, inasmuch as it [*483] appeared upon the face of the agreement that the house referred to was the house of which the deeds were in the possession of A. B., and, consequently, the house might easily be ascertained before the Master, and *id certum est quod certum reddi potest*.³

A testator having devised his estates in a particular way, directed that a different disposition of them should take place "in case certain contingent property and effects in expectancy shall fall in and become vested interests to my children." The children, it appeared, were entitled to no vested interests at the date of the will; and the Court, in accordance with a rule which we have already stated, refused to admit evidence offered for the purpose of showing that the testator referred to expectations from particular individuals, which had, in fact, subsequently been realized. The Master of the Rolls, however, observed that, if at the making of the testator's will his children had been entitled to any contingent interests, evidence would have been plainly admissible to ascertain those interests; because the expression of contingency had a definite legal meaning, and *id certum est quod certum reddi potest*, so that the evidence would not in that case have added to the will, but would have explained it.⁴

¹ Co. Litt. 6, a; 4 Cruise, Dig., 4th ed. 269. The office of the *habendum* is to limit, explain, or qualify the words in the premises; but if the words of the *habendum* are manifestly contradictory and repugnant to those in the premises, they must be disregarded: Doe d. Timmis v. Steele, 4 Q. B. 668; E. C. L. R. 45.

² Com. Dig., "Grant," (E. 14), (G. 5); Finch, Law, 49.

³ Owen v. Thomas, 3 My. & K. 358.

⁴ King v. Badeley, 3 M. & K. 417, 425.

Again, the word "certain" must, in a variety of cases, where a contract is entered into for the sale of goods, refer to an indefinite quantity at the time of the contract made, and must mean a quantity which is to be ascertained according to the above maxim.¹

*And where the law requires a particular thing to be done, [*484] but does not limit any period within which it must be done, the act required must be done within a reasonable time; and a reasonable time is as capable of being ascertained by evidence, and, when ascertained, is as fixed and certain as if specified by act of Parliament.²

Where it was awarded, that the costs of certain actions should be paid by the plaintiff and defendant in specified proportions, the award was held to be sufficiently certain, since it would become so upon taxation of costs by the proper officer.³

The proper office of the innuendo in a declaration for libel being to exhibit with certainty to the Court the nature of the imputation cast upon the plaintiff, may also be noticed in connexion with the maxim under consideration; for, if there be contained in the alleged libel matter which is capable of receiving the interpretation put upon it by the innuendo, that will be sufficient to support the count, even without any explanatory averments, which are usually introduced to fix and point the libel; whereas, if the words complained of cannot apply to the individual plaintiff, no previous averments or subsequent innuendoes can help to give the words an application which they have not. "Suppose," for instance, "the words to be 'a murder was committed in A.'s house last night,' no introduction can warrant the innuendo 'meaning that B. committed the said murder,' nor would it be helped by the finding of the jury for the plaintiff; for the court must see that the words *do not and cannot mean it, and would arrest the judgment accordingly—*Id certum est quod* [*485] *certum reddi potest.*"⁴

Lastly, with respect to an indictment, the maxim just cited must be understood in a restricted sense; for it is laid down, that an indictment ought to be certain to every intent, and without any intendment to the contrary;⁵ and the charge contained in it must be

¹ Per Lord Ellenborough, C. J., *Wildman v. Glossop*, 1 B. & Ald. 12.

² See per Lord Ellenborough, C. J., *Palmer v. Moxon*, 2 M. & S. 50; E. C. L. R. 28.

³ *Cargey v. Aitcheson*, 2 B. & C. 170; E. C. L. R. 9. See *Pedley v. Goddard*, 7 T. R. 78; *Wood v. Wilson*, 2 Cr., M. & R. 241; (*) *Waddle v. Downman*, 12 M. & W. 562. (*)

⁴ Judgment, *Solomon v. Lawson*, 15 L. J., Q. B. 257.

⁵ Cro. Eliz. 490.

sufficiently explicit to support itself; for no latitude of intention can be allowed to include anything more than is expressed.¹

Neither is the maxim above considered applicable where a general judgment has been given upon an indictment containing several counts, one of which is bad; for in this case, the court is not at liberty to apply the judgment to that part of the record which would support it, but will hold that the judgment was altogether erroneous.² But it is no ground for a new trial that the jury have found a verdict for the Crown on several counts of an indictment, some of which are bad, as it cannot be intended that judgment will be given on the bad counts.³

[*486]

*UTILE PER INUTILE NON VITIATUR.

(8 Rep. 10.)

Surplusage does not vitiate that which in other respects is good and valid.

It is a rule of extensive application with reference to the construction of written instruments, and in the science of pleading, that matter which is mere surplusage may be rejected, and does not vitiate the instrument or pleading in which it is found—*surplusagium non nocet*⁴ is the maxim of our law.

Accordingly, where words of known signification were so placed in the context of a deed that they make it repugnant and senseless, they are to be rejected equally with words of no known signification.⁵ It is also a rule in conveyancing, that, if an estate be granted in any premises, and that grant is express and certain, the *habendum*, although repugnant to the deed, shall not vitiate it. If, however, the estate granted in the premises be not express, but arise by implication of the law; then a void *habendum*, or one differing materially from the grant, may defeat it.⁶

¹ Rex v. Wheatley, 2 Burr. 1127; Rex v. Perrott, 2 M. & S. 881; E. C. L. R. 28; Rex v. Stevens, 5 B. & C. 246; E. C. L. R. 11. Dickins. Quarter Sess., by Mr. Serjt. Talfourd, 5th ed. 227, (a). With respect to the degree of certainty requisite in an indictment, the reader is also referred to 8 Burn, Just., 29th ed. 864, where the cases upon this subject are collected.

² Ante, p. 258; Campbell v. Reg., 15 L. J., Q. B. 192.

³ Reg. v. Gompertz, 16 L. J., Q. B. 121. In further illustration of the above maxim, see Barker v. Butcher, 15 L. J., Q. B. 289, 291; Woolley v. Smith, 8 C. B. 610, 617; E. C. L. R. 54.

⁴ Branch, Max., 5th ed. 216; *Non solent quæ abundant vitare, scripturas*, D. 50. 17, 94.

⁵ Vaugh. R. 176. See Whittome v. Lamb, 12 M. & W. 818. (*)

⁶ Argument, Goodtitle v. Gibbs, 5 B. & C. 712, 718; E. C. L. R. 11, and cases there cited; Shep. Touch. 112, 113; Hobart, 171. See, also, instances of the application

A cause and all matters of difference were referred to the arbitration of three persons, the award of the three or *of any two of them to be final. The award purported on the face of it [*487] to be made by all three, but was executed by two only of the arbitrators, the third having refused to sign it when requested so to do. This award was held to be good as the award of the two, for the statement that the third party had concurred, might, it was observed, be treated as mere surplusage, the substance of the averment being, that two of the arbitrators had made the award.¹

As a further instance of the application of the above rule, we may observe, that, if a valid contract should be made between A. and B., that A. should perform a journey on B.'s lawful business, and another and distinct contract should subsequently be entered into on the same day, that on the journey A. should commit a crime, the latter contract would of course be void, but it would not dissolve the prior agreement, nor exonerate the parties from their liabilities under it. To such a case, then, it has been said, that the maxim would apply, *utile per inutile non vitiatur*.²

The above maxim, however, applies peculiarly to pleading; in which it is a rule, that matter immaterial cannot operate to make a pleading double, and that mere surplusage does not vitiate a plea, and may be rejected;³ and, although, if a pleading be inconsistent with itself, or repugnant, this is ground for demurrer, yet, where the second allegation, which creates the repugnancy, is merely superfluous and redundant, so that it may be rejected from the pleading without materially altering the general sense and *effect, it shall in that case be rejected, at least if laid under a *videlicet*, and shall [*488]

of this rule to an order of removal, *Reg. v. Rotherham*, 3 Q. B. 776, 782; *E. C. L. R.* 48; *Reg. v. Silkstone*, 2 Q. B. 522; *E. C. L. R.* 42; to an order under 2 & 3 Vict. c. 85, s. 1, *Reg. v. Goodall*, 2 Dowl. P. C., N. S. 382; *Reg. v. Oxley*, 6 Q. B. 256; *E. C. L. R.* 51; to a conviction, *Chaney v. Payne*, 1 Q. B. 722; *E. C. L. R.* 41; to a notice of an objection under 6 & 7 Vict. c. 18, *Allen*, app., House, resp., 8 Scott, N. B. 987; cited, *Argument*, 2 C. B. 9; *E. C. L. R.* 52; to an information, *Attorney-General v. Clero*, 12 M. & W. 640. (*)

¹ *White v. Sharp*, 12 M. & W. 712. (*) See, also, per Alderson, B., *Wynne v. Edwards*, 12 M. & W. 712; (*) *Harlow v. Read*, 1 C. B. 738; *E. C. L. R.* 50.

² See 18 Johns. R. (U. S.) 98, 94.

³ *Co. Litt.* 308, b; *Steph. Pl.* 5th ed. 468; *Id.* 294 et seq. See *Wright v. Watts*, 3 Q. B. 89; *E. C. L. R.* 48; *Williams v. Jarman*, 13 M. & W. 128. (*) *Ring v. Roxburgh*, 2 Cr. & J. 418 (cited, per Rolfe, B., *Duke v. Forbes*, Exch. 11 Jur. 954), is an instance of the rejection of surplusage in a declaration.

not vitiate the pleading.¹ But a *videlicet* cannot make that immaterial which is in its nature material, though the omission of it may render that material which would otherwise not be so. For instance, a *videlicet* could not make the sum in a bill of exchange immaterial, so as to cure what would otherwise be a variance.² So, although, in general, in pleading, the time, when laid under a *videlicet*, need not be strictly proved, yet there are instances in which time happens to form a material point in the merits of the case; and in which, if a traverse be taken, the time laid is of the substance of the issue, and must be strictly proved. In these instances, the pleader must state the time truly at the peril of failure; as for a variance: and here the insertion of a *videlicet* will give no help.³ In like manner, with respect to quantity and value, the pleader may in general allege any quantity or value that he pleases (at least if it be laid under a *videlicet*), without risk from the variance in the event of a different amount being proved; but there are instances in which it forms part of the substance of the issue, and in these it must be strictly proved as laid.⁴

*Although, then, it is a general rule in pleading, that a [*489] plea being entire is not divisible, and being bad in part is bad for the whole;⁵ and, although this rule, when correctly applied, is logical and just, yet it has no application where the objection is merely on account of surplusage; for, if the plea states sufficient matter in bar, even if it states something afterwards which is inac-

¹ Steph. Pl. 5th ed. 415; 2 Wms. Saund. 291 (1), 316 (14); Wyatt v. Ayland, 1 Salk. 824; Smith v. Nicolls, 5 Bing. N. C. 201, 218; E. C. L. R. 85. As to the nature and use of a *videlicet*, see Hobart, R. 171, 172.

² Per Patteson, J., Cooper v. Blick, 2 Q. B. 918; E. C. L. R. 42; per Coltman, J., 6 Scott, N. R. 892; per Tindal, C. J., 1 C. B. 164; E. C. L. R. 50; Drew v. Avery, 18 M. & W. 402. (*)

³ Steph. Pl. 5th ed. 329, and cases there cited. See Parkinson v. Whitehead, 2 Scott, N. R. 620; Harrison v. Heathorn, 6 Scott, N. R. 121. "Of all things the date of a record is most material," per Tindal, C. J., 1 C. B. 164; E. C. L. R. 50.

⁴ Steph. Pl. 5th ed. 386, 387; Nightingale v. Wilcoxon, 10 B. & C. 215; E. C. L. R. 21; Rivers v. Griffiths, 5 B. & Ald. 680; E. C. L. R. 7; Rubery v. Stevens, 4 B. & Ad. 241; E. C. L. R. 24; Couzens v. Paddon, 5 Tyrw. 547; Falcon v. Benn, 2 Q. B. 314; E. C. L. R. 42; Marks v. Lahee, 8 Bing. N. C. 408; E. C. L. R. 32. As to entering a *remittitur* where too much is claimed by the declaration, see Duppa v. Mayo, 1 Wms. Saunds. 6th ed. 282, and notes thereto; Simmons v. Wood, 5 Q. B. 170; E. C. L. R. 48.

⁵ Earl of Manchester v. Vale, 1 Wms. Saunds. 6th ed. 27. It is a universal rule, that if a plea is pleaded to both counts, and is bad as to one, it is bad as to both, see per Lord Denman, C. J., Hartley v. Manton, 5 Q. B. 265; E. C. L. R. 48.

curate, yet that will not vitiate the whole: *utile per inutile non vitiatur*.¹

But, although surplusage, including in that term unnecessary matter of whatever description, is not a subject for demurrer, yet, when any flagrant fault of this kind occurs, and is brought to the notice of the Court, it is visited with the censure of the judges; and they will, moreover, in some cases, refer the pleadings to their officer to strike out the redundant matter, and in others, where the redundancy is manifest, they will themselves direct such matter to be struck out, and the party offending will usually have to pay the costs of the application.

In connexion with this subject, we may further observe, that, although the issue to be tried by the jury ought to be material, single, and specific, yet a party does not make an issue upon the substantial matter bad, merely because he includes in it "something of total surplusage and immateriality."³

Lastly, with respect to an indictment, it is laid down, that *although an averment, which is altogether superfluous, may [*490] here be rejected as surplusage; yet, if an averment be part of the description of the offence, or be embodied by reference in such description, it cannot be so rejected, and its introduction will be fatal.⁴

FALSA DEMONSTRATIO NON NOCET.

(6 T. R. 876.)

Mere false description does not make an instrument inoperative.

Falsa demonstratio may be defined to be an erroneous description of a person or thing in a written instrument;⁵ and the above rule respecting it may be thus stated and qualified: as soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by the particular instrument, any subsequent erroneous addition will not vitiate it:⁶ *quicquid demonstratæ rei additur satis demonstratæ frustra est*.⁷ "I have always understood,"

¹ See per Kent, C. J., *Douglass v. Satterlee*, 11 Johns. R. (U. S.) 19; per Buller, J., *Duffield v. Scott*, 3 T. R. 876, 877.

² See Steph. Pl., 5th ed. 467, 468, 469.

³ Per Tindal, C. J., *Palmer v. Gooden*, 8 M. & W. 894. (*)

⁴ *Dickins. Quart. Sess.*, 5th ed., by Mr. Serjt. Talfourd, 175.

⁵ See Bell. Dict. and Dig. of Scotch Law, 420.

⁶ Per Parke, B., *Llewellyn v. Earl of Jersey*, 11 M. & W. 189; (*) Com. Dig. "Fait," (E. 4.)

⁷ D. 88, 4, 1, § 8.

observes Lord Kenyon, speaking with reference to a will,¹ "that such *falsa demonstratio* should be superadded to that which was sufficiently certain before, there must *constat de personâ*; and if to that inapt [*491] *description be added, though false, it will not avoid the devise;" and this observation is applicable not only to wills, but to other instruments;² so that the characteristic of cases strictly within the rule is this, that the description, so far as it is false, applies to no subject, and, so far as it is true, it applies to one subject only; and the Court, in these cases, rejects no words but those which are shown to have no application to any subject.³

In the case of *Selwood v. Mildmay*,⁴ the testator devised to his wife part of his stock in the £4 per Cent. Annuities of the Bank of England, and it was shown by parol evidence, that, at the time he made his will, he had no stock in the £4 per Cent. Annuities, but that he had had some, which he had sold out, and of which he had invested the produce in Long Annuities: it was held in this case, that the bequest was, in substance, a bequest of stock, using the words as a denomination, not as the identical *corpus* of the stock; and as none could be found to answer the description but the Long Annuities, it was decided that such stock should pass, rather than the will be altogether inoperative.

A testatrix by her will, bequeathed several legacies to different individuals, of £3 per Cent. Consols standing in her name in the books of the Bank of England; but, at the date of her will, as well as at her death, she possessed no such stock, nor stock of any kind whatever. It was held that the ambiguity in this case being latent, [*492] evidence was *admissible to show how the mistake of the testatrix arose, and to discover her intention.⁵

¹ *Thomas v. Thomas*, 6 T. R. 676. See, also, *Mosley v. Massey*, 8 East, 149; per Parke, J., *Doe d. Smith v. Galloway*, 5 B. & Ald. 51; E. C. L. R. 7; per Littledale, J., *Doe d. Ashforth v. Bower*, 3 B. & Ad. 459; E. C. L. R. 28; *Gynes v. Kemsley*, 1 Freem. 298; *Hobart*, 82, 171; *Green v. Armsteed*, Id. 65; *Vin. Abr.*, "Devise," (T. b.) pl. 4.

² *London Grand Junction Railway Company v. Freeman*, 2 Scott, N. R. 705, 748. See *Reg. v. Wilcock*, 7 Q. S. 317; *Ormerod v. Chadwick*, 16 L. J., M. C. 143, 148; *Jaek v. M'Intyre*, 12 Cl. & Fin. 151.

³ See *Wigram, Ex. Ev.*, 3d ed. 142, 165; *Mann v. Mann*, 14 Johns. R. (U. S.) 1.

⁴ 8 Ves. jun. 306. This case is designated as a very strong one in 8 Bing. 252; E. C. L. R. 21.

⁵ *Lindgren v. Lindgren*, 15 L. J., Chanc. 428; citing *Selwood v. Mildmay*, 3 Ves. 306; *Miller v. Travers*, 8 Bing. 244; E. C. L. R. 21; and *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 368. (*)

On the same principle, in the case of a lease of a portion of a park, described as being in the occupation of S., and lying within certain specified abutments, with all houses, &c., belonging thereto, and "which are now in the occupation of S.," it was held, that a house, situated within the abutments, but not in the occupation of S., would pass.¹ So, where an estate is devised, called A., and described as in the occupation of B., and it is found that, though there is an estate called A., yet the whole is not in B.'s occupation;² or, where an estate is devised to a person whose surname or Christian name is mistaken, or whose description is imperfect or inaccurate: in these cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence.³ Thus, a devise of all the testator's freehold houses in Aldersgate Street, where, in fact, he had no freehold, but had leasehold houses, was held to pass the latter, the word "freehold" being rejected;⁴ the rule being, that, where *any property described in a will is sufficiently ascertained by the description, it passes under the devise, although *all* [*493] the particulars stated in the will with reference to it may not be true.⁵ In other words, *nil facit error nominis cum de corpore vel persona constat*. "It is fit, and therefore required," observes Mr. Preston,⁶ "that things should be described by their proper names; but, though this be the general rule, it admits of many exceptions, for things may pass under any denomination by which they have been usually distinguished."

In a recent case,⁷ where property was devised to the second son of Edward W., of L., this devise was held, upon the context of the

¹ Doe d. Smith v. Galloway, 5 B. & Ad. 48; E. C. L. R. 27; Beaumont v. Field, 1 B. & Ald. 247; 3 Preston, Abstr. Tit. 206; Doe d. Roberts v. Parry, 13 M. & W. 356. (*)

² Goodtitle v. Southern, 1 M. & S. 299; E. C. L. R. 28.

³ Judgment, Miller v. Travers, 8 Bing. 248; E. C. L. R. 21; Doe d. Hiscocks v. Hiscocks, 5 M. & W. 363; (*) Bishton v. Cobb, 5 My. & Cr. 145.

⁴ Day v. Trig, 1 P. Wms. 286; Doe d. Dunning v. Cranstoun, 7 M. & W. 1. (*) See Parker v. Marchant, 6 Scott, N. R. 485. If upon the whole will it plainly appear that the testator meant to pass leasehold property under the description of real estate, the Court will give effect to his intention: Goodman v. Edwards, 2 My. & K. 759; Hobson v. Blackburn, 1 My. & K. 571.

⁵ Per Parke, B., Doe d. Dunning v. Cranstoun, 7 M. & W. 10; (*) Newton v. Lucas, 1 My. & Cr. 391.

⁶ 3 Prest., Abstr. Tit. 206; 6 Rep. 66.

⁷ Blundell v. Gladstone, 1 Phill. 279.

will, and upon extrinsic evidence as to the state of the W. family, and the degree of the testator's acquaintance with the different members of it, to mean a devise to the second son of *Joseph W.*, of L., although it appeared that there was in fact a person named *Edward Joseph W.*, the eldest son of *Joseph W.*, who resided at L., and who usually went by the name of *Edward* only; and it was remarked, that, according to the general rule of law and of construction, if there had been two persons, each fully and accurately answering the whole description, evidence might be received, or arguments from the language of the will, and from circumstances, might be adduced, to show to which of those persons the will applied; but that where one person, and one only, fully and accurately answers the whole description, the Court is bound to apply the will to that person. It was, however, further observed, that an exception would occur in [*494] applying the above rule, where *it would lead to a construction of a devise manifestly contrary to what was the intention of the testator, as expressed by his will, and that the rule must be rejected as inapplicable to a case in which it would defeat instead of promoting the object for which all rules of construction have been framed.¹

In accordance with the spirit of the maxim under consideration, where a judge's order for the admission of documents in evidence referred to a "document mentioned in a certain notice served by the defendant's attorney or agent, dated the 4th day of March, 1845," and the notice produced at the trial was dated the 1st of March, but the plaintiff's attorney stated that it was the only notice served in the cause, the judge at the trial allowed the document to be read; and the Court held that it was admissible, on the ground that, as only one notice had been served, the misdescription was merely *falsa demonstratio quæ non nocet*.²

But, although an averment to take away surplusage is good, yet it is not so to increase that which is defective in the will of the testator;³ and there is a diversity where a certainty is added to a thing which is uncertain, and where to a thing certain; for instance, if I release all my right in all my lands in Dale, which I have by descent on the part of my father, and I have lands by descent on the

¹ 1 Phill. R. 285, 286.

² *Bittleston v. Cooper*, 14 M. & W. 399. (*)

³ Per *Anderson, C. J.*, *Godbolt, R.* 181, recognised 8 Bing. 258; E. C. L. R. 21; per *Lord Eldon, C.*, 6 Ves. jun. 397. See the cases cited, 2 Phil. Evid. 9th ed. 290 et seq., particularly the remarks on *Beaumont v. Fell*, 2 P. Wms. 141.

part of my mother, but no lands by descent on the part of my father, there the release is void. But if the release had been of Whiteacre in Dale, which I have by descent *on the part of my father, [*495] and I had it not by descent on the part of my father, but otherwise, yet the release is good, for the thing was certainly expressed by the first words, in which case the addition of another certainty is not necessary but superfluous.¹

In a leading case on this subject,² the testator devised all his freehold and real estates in the county of L. and city of L. It appeared that he had no estates in the county of L.—a small estate in the city of L., inadequate to meet the charges in the will,—and estates in the county of C., not mentioned in the will. It was held that parol evidence was inadmissible to show the testator's intention, that his real estates in the county of C. should pass by his will. For it was observed, that this would be not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it was to be collected from the will itself, to the existing state of his property: it would be calling in aid extrinsic evidence to introduce into the will an intention not apparent upon the face of it. It would be not simply removing a difficulty arising from a defective or mistaken description, it would be making the will speak upon a subject on which it was altogether silent, and would be the same thing to effect as the filling up a blank which the testator might have left in his will: it would amount, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he was supposed to have omitted.³ If, then, with all the light which can be thrown upon the instrument by evidence as to the meaning of the description, there appears to be no person or thing *answering in any respect thereto, it seems, that, to admit evidence of a different [*496] description being intended to be used by the writer, would be to admit evidence for the substitution of one person or thing for another, in violation of the rule, that an averment is not good to increase that which is defective in a written instrument;⁴ and consequently the instrument, not admitting of explanation, would be void.⁵

¹ Per Lord Ellenborough, C. J., *Doe d. Harris v. Greathed*, 8 East, 103, citing *Plowd.* 191. See *Hob. R.* 172.

² *Miller v. Travers*, 8 Bing. 244; E. C. L. R. 21; and the observations on this decision by Sir James Wigram, in the treatise already referred to.

³ 8 Bing. 249, 250; E. C. L. R. 21.

⁴ *Phill. Evid.*, 8th ed. 715 et seq.

⁵ *Richardson v. Watson*, 4 B. & Ad. 787, 796; E. C. L. R. 24. See *Doe d. Spencer v. Pedley*, 1 M. & W. 662. (*)

Included in the maxim as to *falsa demonstratio*, is the rule laid down by Lord Bacon, in these words: *Præsentia corporis tollit errorem nominis et veritas nominis tollit errorem demonstrationis*;¹ and which is thus illustrated by him:—"If I give a horse to J. D., when present, and say to him, 'J. S., take this,' it is a good gift, notwithstanding I call him by a wrong name. So, if I say to a man, 'Here, I give you my ring with the ruby,' and deliver it, and the ring is set with a diamond, and not a ruby, yet this is a good gift. In like manner, if I grant my close called 'Dale,' in the parish of Hurst, in the county of Southampton, and the parish extends also into the county of Berks, and the whole close of Dale lies, in fact, in the last-mentioned county, yet this false addition will not invalidate the grant. Moreover, where things are particularly described, as, 'My box of ivory lying in my study, sealed up with my seal of arms,' 'My suit of arras, with the story of the nativity and passion;' inasmuch as of such things there can only be a detailed and circumstantial description, so the precise truth of *all* the recited [*497] circumstances is not required; but in *these cases, the rule is, *ex multitudine signorum colligitur identitas vera*; therefore, though my box was not sealed, and though the arras had the story of the Nativity, and not of the Passion embroidered upon it, yet, if I had no other box and no other suit, the gifts would be valid, for there is certainty sufficient, and the law does not expect a precise description of such things as have no certain denomination. Where, however, the description applies accurately to some portion only of the subject-matter of the grant, but is false as to the residue, the former part only will pass; as, if I grant all my land in D., held by J. S., which I purchased of J. N., specified in a demise to J. D., and I have land in D., to a part of which the above description applies, and have also other lands in D., to which it is in some respects inapplicable, this grant will not pass all my land in D., but the former portion only."² So, if a man grant all his estate in his own occupation in the town of W., no estate can pass, except what is in his own occupation, and is also situate in that town.³

¹ Bac. Max., reg. 24; 6 Rep. 66; 1 Ld. Raym. 303; 6 T. R. 675; Doe v. Huthwaite, 3 B. & Ald. 640; E. C. L. R. 5; per Gibbs, C. J., 8 Taunt. 313; E. C. L. R. 4.

² Bac. Works, vol. 4, pp. 73, 75, 77, 78; Bac. Abr. "Grants," (H. 1); Toml. Law Dict. "Gift;" Noy, Max., 9th ed., p. 50. As to a devise, see Doe d. Benow v. Ashley, 16 L. J., Q. B. 356; 2 Phill. Ev., 9th ed. 329.

³ 7 Johns. R. (U. S.) 224.

The rules, it has been remarked,¹ which govern the construction of grants have been settled with the greatest wisdom and accuracy. Such effect is to be given to the instrument as will effectuate the intention of the parties, if the words which they employ will admit of it, *ut res magis valeat quam pereat*. Again, if there are certain particulars once sufficiently ascertained which designate the thing intended to be granted, the addition of a circumstance, false *or mistaken, will not frustrate the grant.² But when the [*498] description of the estate intended to be conveyed included several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass, except such as will agree with the description in every particular.³

It is, moreover, a rule, which may be here noticed, that, *non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*,⁴—if it be doubtful upon the words, whether they import a false reference or description, or whether they be words of restraint, limiting the generality of the former name, the law will not intend error or falsehood.⁵ If, therefore, “I have some land wherein all these demonstrations are true, and some wherein part of them are true and part false, then shall they be intended words of true limitation, to pass only those lands wherein all those circumstances are true;”⁶ and, if a man pass lands, describing them by particular references, all of which references are true, the Court cannot reject any one of them.⁷

Before concluding these remarks, it may be useful to state shortly the rules respecting ambiguity and *falsa demonstratio* in connexion with the exposition of wills, and which seem to be applicable to four classes of cases:—

1. Where the description of the thing devised, or of the devisee, is clear upon the face of the will, but, upon the *death of the [*499] testator, it is found that there is more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will; in this case parol

¹ Jackson v. Clark, 7 Johns. R. (U. S.) 223, 224; recognised, 18 Id. 84.

² Blayne v. Gold, Cro. Car. 447, 473, where the rule was applied to a devise.

³ 8 Atk. 9; Dyer, 50.

⁴ Bac. Max., reg. 13.

⁵ Bac. Max., reg. 13, cited, 8 East, 104.

⁶ Bac. Max., reg. 13, ad finem; cited, per Parke, J., Doe d. Ashforth v. Bower, 8 B. & Ad. 459, 460; E. C. L. R. 23; Doe d. Chichester v. Oxenden, 3 Taunt. 147.

⁷ Per Le Blanc, J., Doe v. Lyford, 4 M. & S. 557; E. C. L. R. 30.

evidence is admissible to show what thing was intended to pass, or who was intended to take.¹

2. Where the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular; in which class of cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is a sufficient indication of intention appearing on the face of the will to justify the application of the evidence.²

3. A third class of cases³ may arise, in which a judge, knowing *aliunde* for whom or for what an imperfect description was intended, would discover a sufficient certainty to act upon; although, if ignorant of the intention, he would be far from finding judicial certainty in the words of the devisee; and here it would seem that evidence of intention would not be admissible, the description being, *as it stands*, so imperfect as to be useless unless aided thereby.⁴

4. It may be laid down as a true proposition, which is indeed included within that secondly above given, that, if the description of the person or thing be wholly inapplicable to the subject intended or [*500] said to be intended by it, *evidence is inadmissible to prove whom or what the testator really intended to describe.⁵

Lastly, we may observe that the maxim, *falsa demonstratio non nocet*, which we have been considering, obtained in the Roman law; for we find it laid down in the Institutes, that an error in the proper name or in the surname of the legatee, should not make the legacy void, provided it could be understood from the will what person was intended to be benefitted thereby. *Si quidem in nomine, cognomine, prænominis legatarii testator erraverit, cum de persona constat, nihilominus valet legatum.*⁶ So, it was a rule akin to the preceding, that *falsâ demonstratione legatum non perimitur*,⁷ as if the testator bequeathed his bondman, Stichus, whom he bought of Titius, whereas Stichus had been given to him or purchased by him of some other

¹ 8 Bing. 248; E. C. L. R. 21. See also the Law Mag., No. 55, p. 80 et seq.

² 8 Bing. 248; E. C. L. R. 21; Doe d. Gains v. Roast, C. P., January 15, 1848.

³ Of this class the case of Beaumont v. Fell (2 P. Wms. 141) is an example. See *Pariente, app., Luckett, resp.*, 2 C. B., 177; E. C. L. R. 52.

⁴ See this subject considered, *Wigram, Extrin. Ev.*, 8d ed. 166, 167.

⁵ *Wigram, Extrin. Ev.*, 8d ed. 168.

⁶ I. 2, 20, 29; compare D. 80, 1, 4; also, 2 Domat., Bk. 2, tit. 1, s. 6, § 10, 19; *Ib.* s. 8, § 11.

⁷ I. 2, 20, 80. See *Whitfield v. Clemment*, 1 Mer. 402.

person;¹ in such a case the misdescription would not avoid the bequest.²

It is evident that the maxims above cited, and others to a similar purport which occur both in the civil law and in our own reports, are, in fact, deducible from those very general principles with the consideration of which we commenced this chapter—*benignè factendæ sunt interpretationes, et verba intentioni non e contra debent inservire.*³

*VERBA GENERALIA RESTRINGUNTUR AD HABILITATEM REI [*501]
VEL PERSONAM.
(Bac. Max., reg. 10.)

General words shall be aptly restrained according to the subject-matter or person to which they relate.

“It is a rule,” observes Lord Bacon,⁴ “that the king’s grant shall not be taken or construed to a special intent. It is not so with the grants of a common person, for they shall be extended as well to a foreign intent as to a common intent, but yet with this exception, that they shall never be taken to an impertinent or repugnant intent; for all words, whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person.”

Thus, if I grant common “in all my lands” in D., if I have in D. both open grounds and several, it shall not be stretched to common in my several grounds, much less in my garden or orchard. So, if I grant to J. S. an annuity of 10*l.* a year, “*pro concilio, impenso et impendendo*” (for past and future counsel), if J. S. be a physician, this shall be understood of his advice in physic, and if he be a lawyer, of his counsel in legal matters.⁵

In accordance, likewise, with the above maxim—the subject-matter of an agreement is to be considered in construing the terms of it, and they are to be understood in the sense most agreeable to the

¹ I. 2, 20, 30.

² Id. Wood, Inst. 8d ed. 165.

³ It may probably be unnecessary to remind the reader that the cases decided with reference to the rule of construction considered in the preceding pages are exceedingly numerous, and that such only have been noticed as seemed peculiarly adapted to the purposes of illustration. A similar remark is equally applicable to the other maxims commented on in this chapter.

⁴ Bac. Max., reg. 10; 6 Rep. 62.

⁵ Bac. Works, vol. 4, p. 46. See Com. Dig., “Condition,” (K. 4.)

nature of the agreement.¹ If a deed relates to a particular subject only, general words in it shall be confined to that subject, otherwise they must *be taken in their general sense.² The words of [*502] the condition of a bond "cannot be taken at large, but must be tied up to the particular matters of the recital,"³ unless, indeed, the condition itself is manifestly designed to be extended beyond the recital;⁴ and, further, it is a rule, that what is generally spoken shall be generally understood, *generalia verba sunt generaliter intelligenda*,⁵ unless it be qualified by some special subsequent words, as it may be;⁶ and that general words are sufficient where the certainty lies within the defendant's knowledge.⁷

In construing the words of any instrument, then, it is proper to consider, 1st, what is their meaning in the largest sense which, according to the common use of language, belongs to them;⁸ and, if it should appear that that sense is larger than the sense in which they must be understood in the instrument in question, then, 2dly, what is the object for which they are used. They ought not to be extended beyond their ordinary sense in order to comprehend a case within their object, for that would be to give effect to an intention not expressed; nor can they be so restricted as to exclude a case both within their object and within their ordinary sense, without violating the fundamental rule, which requires that effect should be given to such intention of the parties as they have used fit words to express.⁹

[*503] Thus, in a settlement, the preamble usually *recites what it is which the grantor intends to do, and this, like the preamble to an act of Parliament, is the key to what comes afterwards. It is very common, moreover, to put in a sweeping clause, the use and object of which are to guard against any accidental omission; but in such cases it is meant to refer to estates or things of the same nature and description with those which have been already mentioned, and

¹ 1 T. B. 708.

² *Thorpe v. Thorpe*, 1 Ld. Raym. 235; S. C., Id. 662.

³ *Per Eyre, J.*, Gilb. Cas. 240. See *Seller v. Jones*, 16 M. & W. 112, 118; (*) *Stoughton v. Day*, Aley, 10; *Arlington v. Merrick*, 2 Saunds. 414; *Napier v. Bruce*, 8 Cl. & Fin. 470.

⁴ *Sansom v. Bell*, 2 Camp. 89; Com. Dig., "Parols," (A. 19.)

⁵ 3 Inst. 76.

⁶ *Shep. Touch.* 88; Co. Litt. 42, a; Com. Dig., "Parols," (A. 7.)

⁷ Com. Dig. "Pleader," C. 26; cited, *per Tindal, C. J.*, 1 *Scott*, N. R. 324.

⁸ 3 Inst., 76.

⁹ *Per Maule, J.*, *Borradaile v. Hunter*, 5 *Scott*, N. R. 431, 432. See in illustration of these remarks, *Moseley v. Motteux*, 10 M. & W. 533. (*)

such general words are not allowed to extend further than was clearly intended by the parties.¹

So, in construing a will, a court of justice is not by conjecture to take out of the effect of general words property which those words are always considered as comprehending; the best rule of construction being that which takes the words to comprehend a subject which falls within their usual sense, unless there is something like declaration plain to the contrary.² Thus, it is a certain rule, that reversions are held to be included in the general words of a devise, unless a manifest intention to the contrary appears on the face of the will.³

Again, it is a well-known rule, that a devise of an indefinite estate by will prior to the 1st January, 1838, without words of limitation, is *primâ facie* a devise for life only; but this rule will give way to a different intention, if such can be collected from the instrument, and the estate may be accordingly enlarged.⁴ So, words which *would [**504*] *primâ facie* give an estate-tail, may be cut down to a life estate, if it plainly appear that they were used as words of purchase only, or if the other provisions of the will show a general intent inconsistent with the particular gift.⁵

The doctrine, however, that the general intent must overrule the particular intent, observes Lord Denman, C. J., has, when applied to the construction of wills, been much and justly objected to of late, as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results. In its origin it was merely descriptive of the operation of the rule in Shelley's case;⁶ and it has since been laid down in other cases where technical words of limitation have been used, and other words, showing the intention of the testator that the objects of his bounty, should take in a different way from that which the law allows, have been rejected; but in the latter cases the more correct mode of stating the rule of con-

¹ Per Lord Mansfield, C. J., *Moore v. Magrath*, 1 Cowp. 12; *Shep. Touch.*, by Atherley, 79, n.

² Per Lord Eldon, C., *Church v. Mundy*, 15 Ves. 396; adopted per Tindal, C. J., *Doe d. Howell v. Thomas*, 1 Scott, N. R. 371.

³ 1 Scott, N. R. 371.

⁴ *Doe d. Sams v. Garlick*, 14 M. & W. 698; (*) *Doe d. Atkinson v. Fawcett*, 3 C. B. 274; *E. C. L. R.* 54; *Lewis v. Puxley*, 16 L. J., Exch. 216. See stat. 1 Vict. c. 26, s. 28, ante, p. 433. In *Hogan v. Jackson*, 1 Cowp. 299, S. C., affirmed 3 Bro. P. C., 2d ed. 388, the effect of general words in a will was much considered.

⁵ *Fetherston v. Fetherston*, 3 Cl. & Fin. 75, 76; ante, p. 434.

⁶ Ante, p. 428.

struction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense. The doctrine of general and particular intent, thus explained, should be applied to all wills,¹ in conjunction with the rules already considered, viz., that every part of that which the testator meant by the words he has used should be [*505] *carried into effect as far as the law will permit, but no further; and that no part should be rejected, except what the law makes it necessary to reject.²

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.

(Co. Litt. 210, a.)

The express mention of one thing implies the exclusion of another.

The above rule, or, as it is otherwise worded, *expressum facit cessare tacitum*,³ enunciates one of the first principles applicable to the construction of deeds;⁴ for instance, an implied covenant is in all cases controlled within the limits of an express covenant.⁵ Where, therefore, a lease contains an express covenant on the part of the tenant to repair, there can be no implied contract to repair arising from the relation of landlord and tenant.⁶ So, although the word "demise" in a lease implies a covenant for quiet enjoyment, yet both branches of such implied covenant are restrained by an express [*506] covenant for quiet enjoyment.⁷ And as a *general rule, it is true that where parties have entered into written engagements

¹ Judgment, *Doe d. Gallini v. Gallini*, 5 B. & Ad. 621, 640; E. C. L. R. 27; *Jesson v. Wright*, 2 Bligh, 57; cited, *Argument, Doe d. Littlewood v. Green*, 4 M. & W. 288. (*)

² Judgment, 5 B. & Ad. 641; E. C. L. R. 27.

³ Co. Litt. 210, a; 188, b.

⁴ See per Lord Denman, C. J., 5 Bing. N. C. 185; E. C. L. R. 85.

⁵ *Nokes' case*, 4 Rep. 80; S. C., Cro. Eliz. 674; *Merrill v. Frame*, 4 Taunt. 329; *Gainsford v. Griffith*, 1 Saund. R. 58; *Vaugh. R. 126*; *Deering v. Farrington*, 1 Ld. Raym. 14, 19.

⁶ *Standen v. Christmas*, 16 L. J., Q. B. 264.

⁷ *Line v. Stephenson*, 5 Bing. N. C. 183; E. C. L. R. 85; *Merrill v. Frame*, 4 Taunt. 329. See *Earl of Cardigan v. Armitage*, 2 Bing. N. C. 197; E. C. L. R. 29; *Easterby v. Sampson*, 1 Cr. & J. 105. By stat. 8 & 9 Vict. c. 106, s. 4, it is enacted, that the word "give" or "grant" in a deed executed after the 1st of October, 1845, shall not imply any covenant in law in respect of any hereditament, except by force

with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is, that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument.¹

It will, however, be proper to observe, before proceeding to give instances in illustration of the maxim *expressio unius est exclusio alterius*, that great caution² is always requisite in its application; thus, where *general words* are used in a written instrument, it is necessary in the first instance, to determine whether those general words are intended to include other matters besides such as are specifically mentioned, or to be referable exclusively to them, in which latter case only can the above maxim be properly applied.³ Where, moreover, an expression which is *primâ facie* a word of qualification, is introduced, the true sense and meaning of the word can only be ascertained by an examination of the entire instrument, reference being had to those ordinary rules of construction to which we have heretofore adverted.⁴

*In illustration of the very general rule of construction which we have above proposed for consideration, the following [*507] cases may be mentioned:—In an action of covenant on a charter-party, whereby the defendant covenanted to pay so much freight for “goods delivered at A.,” it was held, that freight could not be recovered *pro rata itineris*, the ship having been wrecked at B. before her arrival at A., although the defendant accepted his goods at B.;

of some act of Parliament. A covenant for quiet enjoyment, however, is also implied by the word “demise” in a lease for years; and this implication is not taken away by either of the recent stats. (7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106.) In every contract for the sale of leaseholds there is, in the absence of an express stipulation to the contrary, an *implied* undertaking on the vendor’s part to make out the lessor’s title to demise, *Hall v. Betty*, 5 Scott, N. R. 508; recognising *Souter v. Drake*, 5 B. & Ad. 992; *E. C. L. R. 27*. See also *Sutton v. Temple*, 12 M. & W. 52; (*) *Hart v. Windsor*, *Id.* 68; *Messent v. Reynolds*, 3 C. B. 194; *E. C. L. R. 54*. As to the difference between covenants in law and express covenants, see *Williams v. Burrell*, 1 C. B. 427; *E. C. L. R. 50*.

¹ Judgment, *Aspdin v. Austin*, 5 Q. B. 683, 684; *E. C. L. R. 48*; *Dunn v. Sayles*, *Id.* 685; *M’Guire v. Scully*, *Beatt.* 370.

² To show the caution necessary in applying the above rule may be cited, *Price v. The Great Western Railway Company*, 16 L. J., *Exch.* 87; *Dimes v. The Grand Junction Canal Company*, 16 L. J., Q. B. 107, 112; *Attwood v. Small*, 6 Cl. & Fin. 482.

³ See *Petch v. Tutin*, 15 M. & W. 110. (*)

⁴ In *Doe d. Lloyd v. Ingleby*, 15 M. & W. 465, 472, (*) the maxim was applied by Parke, B. *diss.*, to a proviso for re-entry in a lease, and this case will serve to illustrate the above remark.

for, the action being on the original agreement, the defendant had a right to say in answer to it, *non hæc in fœdera veni*.¹ In order to recover freight *pro ratâ itineris*, the owner must, in such a case, proceed on the new agreement implied by law from the merchant's behaviour.²

Again, on a mortgage of dwelling-houses, foundries, and other premises, "together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses and the brewhouses thereunto belonging;" it was held, that, although, without these words, the fixtures in the foundries would have passed, yet that, by them, the fixtures intended to pass were confined to those in the dwelling-houses and brewhouses.³ So, where in an instrument there are general words first, and an express exception afterwards, the ordinary principle of law has been said to apply—*expressio unius exclusio alterius*.⁴

[*508] The very recent case of *Doe d. Spilsbury v. Burdett*,⁵ *furnishes a good illustration of the above maxim. In that case, lands were limited to such uses as S. should appoint by her last will and testament, in writing, to be by her signed, sealed, and published, in the presence of and attested by three or more credible witnesses. S. (prior to the stat. 7 Will. 4 & 1 Vict. c. 26⁶) signed and sealed an instrument, containing an appointment, commencing thus: "I, S., do publish and declare this to be my last will and testament;" and concluding, "I declare this only to be my last will and testament; in witness whereof I have to this my last will and testament set my hand and seal, this 12th of December, 1789." And then followed

¹ *Cook v. Jennings*, 7 T. R. 381.

² *Per Lawrence, J.*, 7 T. R. 385; *Mitchell v. Darthez*, 2 Bing. N. C. 555, 571; *E. C. L. R. 29*.

³ *Hare v. Horton*, 5 B. & Ad. 715; *E. C. L. R. 27*. See *Ringer v. Cann*, 3 M. & W. 343; (*) *Cooper v. Walker*, 4 B. & C. 36, 49; *E. C. L. R. 10*.

⁴ *Spry v. Flood*, 2 Curt. 365.

⁵ 7 *Scott*, N. R. 66, 79, 101, 104; *S. C.*, 9 *Ad. & E.* 936; *E. C. L. R. 36*; 4 *Ad. & E.* 1; *E. C. L. R. 31*. The decision of the House of Lords in the above case went upon the principle, *expressio unius exclusio alterius* (per Sir H. Jenner *Fust*, *Barnes v. Vincent*, 9 *Jur.* 261,) and the opinions delivered in it by the judges will also be found to illustrate the importance of adhering to precedents, *ante*, p. 108; the argument *ab inconvenienti*, p. 139, and the general principle of construing an instrument *ut res magis valeat quam pereat*, p. 413.

⁶ Sect. 9 enacts, that every will shall be in writing, and signed by the testator in the presence of two witnesses at one time; and sect. 10, that appointments by will shall be executed like other wills, and shall be valid, although other required solemnities are not observed, *ante*, p. 349.

the attestation, thus: "Witness, C. B., E. B., A. B." It was decided by the House of Lords that the power was well executed; and this case was distinguished from several,' in which the attestation clause, in terms, stated the performance of one or more of the required formalities, but was silent as to the others, and in which, consequently, the power was held to have been badly exercised, on the ground, that legal reasoning would necessarily infer the non-performance of such others in the presence of the witnesses, but that a general attestation clause imported an attesting of *all* the requisites.

*The operation of the principle under consideration is, [*509] moreover, the same, whether the contract be under seal or by parol. For instance, in order to prevent a debt being barred by the Statute of Limitations, a conditional promise to pay "as soon as I can," or "as soon as convenient," is not sufficient, unless proof be given of the defendant's ability to perform the condition; and the reason is, that, upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, then the rule, *expressum facit cessare tacitum*, applies.³ In like manner, where the drawer of a bill, when applied to for payment, does not state that he had received no notice of dishonour, but, instead of doing so, sets up some other matter in excuse of non-payment, from this conduct the jury may infer an admission that the valid ground of defence does not in fact exist.³

The above cases will sufficiently show the practical application and utility of the maxim or principle of construction, *expressum facit cessare tacitum*; and several of them will likewise serve to illustrate the general rule, which will be considered more in detail when we come to treat of the mode of varying and dissolving written contracts,⁴ viz., that parol evidence is inadmissible to show terms upon

¹ See particularly *Wright v. Wakeford*, 17 Ves. jun. 454; S. C., 4 Taunt. 218; *Doe d. Mansfield v. Peach*, 2 M. & S. 576; E. C. L. R. 28; *Doe d. Hotchkiss v. Pearse*, 2 Marsh. 102; S. C., 6 Taunt. 402; E. C. L. R. 1. See per Patteson, J., 7 Scott, N. R. 120, 121; per Tindal, C. J., *Id.* 126.

² Judgment, *Tanner v. Smart*, 6 B. & C. 609; E. C. L. R. 18; *Edmunds v. Downes*, 2 Cr. & M. 459. (*) See *Irving v. Veitch*, 3 M. & W. 90, 112; (*) *Lobb v. Stanley*, 5 Q. B. 574; E. C. L. R. 48. See an application of this maxim to a guarantee, *Rogers v. Warner*, 8 Johns. R. (U. S.) 119; cited, 3 Wheaton, R. 150, note.

³ *Campbell v. Webster*, 2 C. B. 258, 266; E. C. L. R. 52.

⁴ See the maxim, *Nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eodem ligamine quo ligatum est*, post.

[*510] which a written instrument is silent; or, in other words, that, *where there is an express contract between parties, none can be implied.¹ The following cases may, however, here properly be noticed in further illustration of this rule:—Where the rent of a house was specified, in a written agreement, to be 26*l.* a year, and the landlord, in an action for use and occupation, proposed to show, by parol evidence, that the tenant had also agreed to pay the ground-rent, the Court refused to admit the evidence.²

By an agreement between plaintiff and defendant for the purchase by the former of the manor of S., it was agreed that, on the completion of the purchase, the purchaser should be entitled to the “rents and profits of such parts of the estate as were let” from the 24th day of June, 1843; it was held, that the plaintiff was not, by virtue of this agreement, entitled to recover from the defendant the amount of a fine received by the latter on the admittance of a tenant of certain copyhold premises, part of the said manor, this admittance, after being postponed from time to time, having taken place on the 1st of July, 1843, and the fine having been paid in the December following; for the condition above mentioned was held applicable to such parts of the estate only as might be “let” in the ordinary sense of that word, and *expressio unius est exclusio alterius*; the lands in question not having been let, it could not be *said that the [*511] plaintiff was entitled to the sum of money sought to be recovered, the agreement binding the vendor to pay over the *rents* only, and not extending to the casual profits.³

On the same principle, where the conditions of sale of growing timber did not state anything as to *quantity*, parol evidence, that the auctioneer at the time of sale warranted a certain quantity, was held inadmissible.⁴ And here we may observe, that it is a general rule, that, whatever particular *quality* a party warrants, he shall be bound

¹ Per Bayley, J., *Grimman v. Legge*, 8 B. & C. 326; E. C. L. R. 15; *Moorsom v. Kymar*, 2 M. & S. 316, 320; E. C. L. R. 28; *Cook v. Jennings*, 7 T. R. 383, 385; per Lord Kenyon, C. J., *Id.* 187; *Cowley v. Dunlap*, *Id.* 568; *Cutter v. Powell*, 6 T. R. 320; per Buller, J., *Toussaint v. Martinnant*, 2 T. R. 105; per Parke, B., *Bradbury v. Anderton*, 1 Cr., M. & R. 490; (*) *Mitchell v. Darthez*, 2 Bing. N. C. 555; E. C. L. R. 29; *Lawrence v. Sydebotham*, 6 East, 45, 52.

² *Preston v. Merceau*, 2 W. Bla. 1249; *Rich v. Jackson*, 4 Bro. C. C. 515. See *Sweetland v. Smith*, 1 Cr. & M. 585, 596; (*) *Doe d. Rogers v. Pullen*, 2 Bing., N. C. 749, 753; E. C. L. R. 29, where the maxim considered in the text is applied by Tindal, C. J., to the case of a tenancy between mortgagor and mortgagee.

³ *Earl of Hardwicke v. Lord Sandys*, 12 M. & W. 761. (*)

⁴ *Powell v. Edwards*, 12 East, 6.

to make good to the letter of the warranty, whether such quality be otherwise material or not; and it is only necessary for the buyer to show that the article sold is not according to the warranty. Where, however, an article is sold by description merely, and the buyer afterwards discovers a *latent* defect, in this case *expressum facit cessare tacitum*: he must, therefore, go further, and show that the description was false within the knowledge of the seller. Thus, where a warranty of a horse was in these terms—"Received of B. 10*l.* for a gray four-year-old colt, warranted sound,"—it was held, that the warranty was confined to soundness; and that, without proving fraud, it was no ground of action that the colt was only three years old.¹ So, upon a sale of hops by sample, with a warranty that the bulk of the commodity answered the sample, although a fair merchantable price was given, it was held, that the seller was not responsible for a latent defect (which existed both in the sample and the bulk) unknown to him, *but arising from the fraud of the grower from whom he purchased.² In this case, the general warranty implied [*512] by law, that the goods were merchantable, was excluded by the express warranty of the vendor.

This distinction must, however, be taken, that, where the warranty is one which the law implies, it is clearly admissible in evidence, notwithstanding there is a written contract, if such contract be entirely silent on the subject. For instance, the defendant sold to the plaintiff a barge, and there was a contract in writing between the parties: but it was held, that a warranty was *implied* by law that the barge was *reasonably fit* for use, and that evidence was admissible to show, that, in consequence of the defective construction of the barge, certain cement, which the plaintiff was conveying therein, was damaged, and that the plaintiff incurred expense in rendering her fit for the purpose of his trade—a purpose to which the defendant knew, at the time of the contract, that she was intended to be applied.³

A marked distinction will at once be noticed between cases similar to that just cited and those in which it has been held, that, where a warranty or contract of sale has reference to a certain specified

¹ *Budd v. Fairmaner*, 8 Bing. 48, 52; E. C. L. R. 21. See per Parke, B., *Mondel v. Steel*, 8 M. & W. 865; (*) and the cases cited under the maxim *caveat emptor*, post.

² *Parkinson v. Lee*, 2 East, 314, recognised, 8 Bing. 52; E. C. L. R. 21. See, also, *Laing v. Fidgeon*, 6 Taunt. 108; E. C. L. R. 1; *Chanter v. Hopkins*, 4 M. & W. 399; (*) recognised, *The Pacific Steam Navigation Company v. Lewis*, 16 L. J., Exch. 212, 216.

³ *Shepherd v. Pybus*, 4 Scott, N. R. 484; *Gardiner v. Gray*, 4 Camp. 144.

chattel, the purchaser will be liable for the price agreed upon, on proof that the particular chattel specified has been duly sent according to the order, and will not be permitted to engraft any additional terms upon the contract. If, for instance, a "two-colour printing-machine," being a known and ascertained article, has *been [*513] ordered by the defendant, he cannot excuse himself from liability to pay for it, by showing that the article in question does not answer his purpose, because the sole undertaking in this case on the part of the vendor was to supply the particular article ordered, and that undertaking has been performed by him. If, on the other hand, the article ordered by the defendant were not a known and ascertained article, as if he had merely ordered, and plaintiff had agreed to supply, a machine for printing two colours, the defendant would not be liable unless the instrument were reasonably fit for the purpose for which it was ordered.¹ As we shall, in the ensuing chapter, have occasion to revert to the subject of implied warranty, we shall for the present content ourselves with the single instance just given as sufficiently showing the distinction to which allusion has above been made.

But although the maxim, *expressio unius est exclusio alterius*, ordinarily operates to exclude evidence offered with the view of annexing incidents to written contracts² in matters with respect to which they are silent, yet it has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible for this purpose. The same rule has, moreover, been applied to contracts in other transactions of life, especially to those between landlord and tenant,³ in which known usages have been established and [*514] prevailed; and this has been done *upon the principle of presuming that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages.⁴

¹ *Ollivant v. Bayley*, 5 Q. B. 288; E. C. L. R. 48, and cases cited, post, under the maxim *caveat emptor*.

² See *Cutter v. Powell*, 6 T. R. 320; 2 Phill. Ev., 9th ed. 388; *Pettitt v. Mitchell*, 5 Scott, N. R. 721; *Moon v. Whitney Union*, 3 Bing. N. C. 814, 818; E. C. L. R. 32; *Reg. v. Stoke-upon-Trent*, 5 Q. B. 303; E. C. L. R. 48. It is a general rule, that, upon a mercantile instrument, evidence of usage may be given in explanation of an ambiguous expression; *Bowman v. Horsey*, 2 Man. & Ry. 85.

³ Ante, p. 307.

⁴ Per Parke, B., *Smith v. Wilson*, 3 B. & Ad. 728; E. C. L. R. 23. See this subject considered at length, 2 Phill. Ev., 9th ed., c. 7, s. 3.

Whether such a relaxation of the strictness of the common law was wisely applied where formal instruments have been entered into, and particularly leases under seal, may, it has been observed, well be doubted; but this relaxation has been established by such authority, and the relations of landlord and tenant have been so long regulated upon the supposition that all customary obligations, not altered by the contract, are to remain in force, that it is too late to pursue a contrary course, since it would be productive of much inconvenience if the practice were now to be disturbed.¹ As an instance of the admissibility of evidence respecting any special custom, may be mentioned the ordinary case in which an agreement to farm according to the custom of the country is held to apply to a tenancy where the contract to hold as tenant is in writing, but is altogether silent as to the terms or mode of farming.²

Every demise, indeed, between landlord and tenant in respect of matters as to which the parties are silent, may be fairly open to explanation by the general usage and custom of the country, or of the district where the land lies; for all persons under such circumstances, are supposed to be cognisant of the custom, and to contract with a tacit reference to it.³

It is, however, a settled rule, that, although in certain *cases evidence of custom or usage is admissible to annex incidents [*515] to a written contract, it can in no case be given in contravention thereof;⁴ and the principle of varying written contracts by the custom of trade has been, in several very recent cases, distinctly repudiated.⁵

A statute, it has been said,⁶ is to be so construed, if possible, as to give sense and meaning to every part; and the maxim was never more applicable than when applied to the interpretation of a statute,

¹ Judgment, *Hutton v. Warren*, 1 M. & W. 475, 478.(*)

² Judgment, 4 Scott, N. R. 446.

³ Per Story, J., 2 Peters, R. (U. S.) 148.

⁴ *Yeats v. Pym*, 6 Taunt. 446; E. C. L. R. 1; *Clarke v. Roystone*, 13 M. & W. 752.(*). See *Palmer v. Blackburn*, 1 Bing. 61; E. C. L. R. 8. As to the right to an away-going crop, ante, p. 306.

⁵ *Johnston v. Usborne*, 11 Ad. & E. 549; E. C. L. R. 39; *Truman v. Loder*, Id. 589; *Jones v. Littledale*, 6 Ad. & E. 486; E. C. L. R. 38; *Magee v. Atkinson*, 2 M. & W. 440.(*). See *Stewart v. Aberdeen*, 4 M. & W. 211.(*). This subject will be stated more at length when we have to consider the mode of dissolving contracts, and the application of evidence to their interpretation.

⁶ Per Cur., 9 Johns. R. (U. S.) 849.

that *expressio unius est exclusio alterius*.¹ The sages of the law, according to Plowden, have ever been guided in the construction of statutes by the intention of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and sound discretion.²

Thus, it sometimes happens, that, in a statute, the language of which may fairly comprehend many different cases, some only are expressly mentioned by way of example merely, and not as excluding others of a similar nature. So, where the words used by the legislature are *general*, and the statute is only declaratory of the common [*516] law, it shall extend to other persons and things besides *those actually named, and, consequently, in such cases, the ordinary rule of construction cannot properly apply. Sometimes, on the contrary, the expressions used are restrictive, and intended to exclude all things which are not enumerated. Where, for example, certain specific things are taxed, or subjected to any charge, it seems probable that it was intended to exclude everything else even of a similar nature, and, *à fortiori*, all things different in *genus* and description from those which are enumerated. So, it is agreed that mines in general are not rateable to the poor within the stat. 43 Eliz. c. 2, and that the mention in that statute of coal-mines is not by way of example, but in exclusion of all other mines.³

By stat. 2 Will. 4, c. 45, s. 27, the right of voting in boroughs is given to every person who occupies, either as owner or tenant, "any house, warehouse, counting-house, shop, or other building, either separately or jointly with any land within such city or borough, occupied therewith by him under the same landlord, of the clear yearly value of not less than 10*l.*;" it was held, that, under this section, two distinct buildings cannot be joined together in order to constitute a borough qualification. "The rule, *expressio unius est exclusio alterius*," observed Tindal, C. J., "is, I think, applicable here. I cannot see why the legislature should have provided for the joint occupation of a building and land, and not for that of two different build-

¹ See Gregory v. Des Anzes, 3 Bing., N. C. 85, 87; E. C. L. R. 82; Atkinson v. Fell, 5 M. & S. 240; Cates v. Knight, 3 T. R. 442, 444; cited, Argument, Albon v. Pyke, 5 Scott, N. B. 245; Rex v. North Nibley, 5 T. R. 21; per Tindal, C. J., Newton v. Holford (in error), 6 Q. B. 926; E. C. L. R. 51.

² Plowd. 205, b.

³ See Argument, Rex v. Woodland, 2 East, 166; and in Rex v. Bell, 7 T. R. 600; Rex v. Cunningham, 5 East, 478; per Lord Mansfield, C. J., Governor of Company for Smelting Lead v. Richardson, 3 Burr. 1844.

ings, if it had been intended that the latter should confer the franchise.”¹

*Lastly, where a general act of Parliament confers immunities which expressly exempt certain persons from the effect [*517] and operation of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law; for the introduction of the exemption is necessarily exclusive of all other independent extrinsic exceptions.²

The following remarks of an eminent legal authority, which show the importance of the maxim considered in the preceding pages, when regarded as a rule of evidence rather than of construction, will form a fitting conclusion to the brief attempt which has been made to illustrate its meaning and application:—

“It is a sound rule of evidence, that you cannot alter or substantially vary the effect of a written contract by parol proof. This excellent rule is intended to guard against fraud and perjuries; and it cannot be too steadily supported by courts of justice. *Expressum facit cessare tacitum—vox emissa volat—litera scripta manet*, are law axioms in support of the rule; and law axioms are nothing more than the conclusions of common sense, which have been formed and approved of by the wisdom of ages. This rule prevails equally in a court of equity and a court of law; for, generally speaking, the rules of evidence are the same in both courts. If the words of a contract be intelligible, says Lord Chancellor Thurlow,³ there is no instance where parol proof has been admitted to give them a different sense. ‘Where there is a deed in writing,’ he observes in another place,⁴ ‘it will admit of no contract *which is not part of the deed.’ You can introduce nothing on parol proof that adds to, or deducts [*518] from, the writing. If, however, an agreement is by *fraud* or *mistake* made to speak a different language from what was intended, then, in those cases, parol proof is admissible to show the fraud or mistake. These are cases excepted from the general rule.”⁵

We do not propose to dwell longer upon the maxim, *expressum facit cessare tacitum*; but we trust that even a cursory glance at the contents of the preceding pages will show it to be of important and

¹ Dewhurst, app., Fielden, resp., 8 Scott, N. R. 1013, 1017.

² 2 Dwar. Stats. 712, 718; Rex v. Cunningham, 5 East, 478; 8 T. R. 442.

³ Shelburne v. Inchiquin, 1 Bro. C. C. 841.

⁴ Lord Irnham v. Child, 1 Bro. C. C. 98.

⁵ Per Kent, C. J., 1 Johns. B. (U. S.) 571, 572.

extensive practical application, both in the construction of written instruments and verbal contracts, as also in determining the inferences which may fairly be drawn from expressions used or declarations made with reference to particular circumstances. It is, indeed, a principle of logic and of common sense, and not merely a technical rule of construction, and may, therefore, be illustrated by decided cases from probably every branch of the legal science.

EXPRESSIO EORUM QUÆ TACITE INSUNT NIHIL OPERATUR.

(2 Inst. 365.)

The expression of what is tacitly implied is inoperative.

“The expression of a clause which the law implies works nothing.”¹ For instance, if land be let to two persons for [*519] *the term of their lives, this creates a joint tenancy; and if the words “and the survivor of them” are added, they will be mere surplusage, because, by law, the term would go to the survivor.² So, upon a lease reserving rent payable quarterly, with a proviso, that if the rent were in arrear twenty-one days next after the day of payment, being lawfully demanded, the lessor might re-enter, it was held, that, five years being in arrear, and no sufficient distress on the premises, the lessor might re-enter without a demand, and the above maxim was held to apply; for previous to the stat. 4 Geo. 2, c. 28, a demand was necessary as a consequence of law, whether the lease contained the words “lawfully demanded,” or not. Then the statute says, that, “in all cases where half a year’s rent shall be in arrear, and the landlord has a right of entry,” the remedy shall apply, provided there be no sufficient distress; that is, the statute has dispensed with the demand which was required at the common law, whether expressly provided for by the stipulation of the parties, or not.³ In like manner, if there be a devise of “all and singular my effects,” followed by the words “of what nature or kind soever,” the latter words are comprehended in the word “all,” and only show that the testator meant to use “effects” in its largest natural

¹ 4 Rep. 73; 5 Rep. 11; Wing. Max., p. 235; Finch, Law, 24; D. 50, 17, 81. In Hobart, R. 170, it is said that this rule “is to be understood having respect to itself only, and not having relation to other clauses.”

² Co. Litt. 191, a, cited Argument, 4 B. & Ald. 806; E. C. L. R. 6; 2 Prest. Abst. Tit. 68. See, also, per Lord Langdale, M. R., Seifferth v. Badham, 9 Beav. 874.

³ Doe d. Scholefield v. Alexander, 2 M. & S. 525; E. C. L. R. 28.

sense: this devise, therefore, will not pass real property, unless it can be collected from the will itself that such was the testator's intention.¹

*Again, every interest which is limited to commence, and is capable of commencing on the regular determination of the prior particular estate, at whatever time the particular estate may determine, is, in point of law, a vested estate; and the universal criterion for distinguishing a contingent interest from a vested estate is, that a contingent interest cannot take effect immediately, even though the former estate were determined, while a vested estate may take effect immediately, whenever the particular estate shall determine. Hence it often happens, that a limitation expressed in words of contingency, is in law treated as a vested estate, according to the rule, *expressio eorum quæ tacite insunt nihil operatur*. If, for instance, a limitation be made to the use of A. for life, and if A. shall die in the lifetime of B., to the use of B. for life, this limitation gives to B. a *vested* estate, because the words expressive of a contingency are necessarily implied by the law as being in a limitation to A. for life, and then to B.; and without those words a vested interest would clearly be given.²

In accordance with the same principle, where a person makes a tender, he always means that the amount tendered, though less than the plaintiff's demand, is all that he is entitled to in respect of it. Where, therefore, the person making the tender said to plaintiff, "I am come with the amount of your bill," upon which plaintiff refused the money, saying, "I shall not take that, it is not my bill," and nothing more passed, the tender was held sufficient; and in answer to the argument, that a tender made in such terms would give to its acceptance the effect of an admission, and was consequently bad, it was observed, that *the plaintiff could not preclude himself from recovering more by accepting an offer of part, accompanied by expressions which are implied in every tender.³

The above instances, taken in connexion with the remarks appended to the maxim, *expressio unius est exclusio alterius*, will serve to show that an expression, which merely embodies that which would

¹ See *Doe v. Dring*, 2 M. & S. 448, 459; E. C. L. R. 28; *Doe d. Scruton v. Snaith*, 8 Bing, 146, 154; E. C. L. R. 21; *Attorney-General v. The Ironmongers' Company*, 2 My. & K. 576, 588.

² See per Willes, C. J., 3 Atk. 188; 1 Prest. Abst. Tit. 108, 109.

³ *Henwood v. Oliver*, 1 Q. B. 409, 411; E. C. L. R. 41; recognised *Bowen v. Owen*, 17 L. J., Q. B. 5.

in its absence have been by law implied, is altogether inoperative; such an expression, when occurring in a written instrument, is denominated by Lord Bacon, *clausula inutilis*; and, according to him, *clausula vel dispositio inutilis per præsumptionem vel causam remotam ex post facto non fulcitur*; a rule which he thus explains,—*clausula vel dispositio inutilis* is when the acts or the words work or express no more than the law by intendment would have supplied; and such a clause or disposition is not supported by any subsequent matter which might give effect to the particular words or acts.¹

VERBA RELATA HOC MAXIME OPERANTUR PER REFERENTIAM UT
IN EIS INESSE VIDENTUR.

(Co. Litt. 359, a.)

Words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them.

It is important to bear in mind, when reading any particular portion of a deed or written instrument, that regard must be paid not only to the language of the clause in question, but to that also of any other clause or covenant *which may by reference be in- [*522] corporated with it; and, since the application of this rule, so simple in its terms, is occasionally attended with difficulty, it has been thought desirable in this place briefly to examine it.

In *assumpsit* by endorsee against endorser of a bill of exchange, plaintiff declared that A. B. accepted, and by that acceptance appointed the money in the bill specified to be paid at the house of G. & Co., and averred that the bill “was in due manner presented to the said G. & Co., and also to the said A. B. for payment, and the said G. & Co., and also the said A. B. were then and there required to pay the same to the plaintiff according to the tenor and effect of the said bill and acceptance thereof and said endorsement.” Defendant demurred specially, on the ground that it did not appear that the bill was presented at the house of G. & Co.; but the averment of presentment, according to the tenor and effect of the acceptance, was held sufficient, as being tantamount to an adoption and repetition of all the words set forth on the special acceptance as to the place of payment, and, therefore, as good as if the very words were to be found in it.²

¹ Bac. Max., reg. 21.

² *Bush v. Kinnear*, 6 M. & S. 210.

In like manner, where a question arose respecting the sufficiency of an affidavit, Heath, J., observed, "The Court generally requires, and it is a proper rule, that the affidavit shall be entitled in the cause, that it may be sufficiently certain in what cause it is to admit of an indictment for perjury; but this affidavit refers to the annexed plea, and the annexed plea is in the cause, and *verba relata inesse videntur*; therefore, it amounts to the same thing as if the affidavit were entitled; and the plaintiff could prosecute for perjury on this affidavit."¹

*So, where, by articles under seal, the defendant bound himself under a penalty to deliver to the plaintiff by a certain day "the whole of his mechanical pieces as per schedule annexed;" the schedule was held to form part of the deed, for the deed without it would be insensible and inoperative.²

In like manner, if a contract, or an act of Parliament, refer to a plan, such plan will form a part of the contract or act, for the purpose for which the reference is made.³

In a recent case, a deed recited a contract for the sale of certain lands, by a description corresponding with that subsequently contained in the deed, and then proceeded to convey them, with a reference for that description to three schedules. The portion of the particular schedule relating to the piece of land in question stated, in one column, the number which this piece was marked on a certain plan, and, in another column, under the heading, "description of premises," it was stated to be "a small piece marked on the plan;" and by applying the maxim, *verba illata inesse videntur*, the Court of Exchequer considered on the above state of facts, that it was the same thing as if the map or plan referred to in the schedule had been actually inserted in the deed, since it was by operation of the above principle, incorporated with it.⁴

In accordance with the principle under consideration, it is a rule connected with pleadings in equity, that every *book, letter, memorandum, or paper referred to by answer, is a part of [^{*524}]

¹ Per Heath, J., *Prince v. Nicholson*, 5 Taunt. 337; E. C. L. R. 1.

² *Weeks v. Maillardet*, 14 East, 568, 574; cited and distinguished *Dyer v. Green*, 1 Exch. Rep. 71; (*) and in *Dains v. Heath*, 16 L. J., C. P. 117; *Llewellyn v. Earl of Jersey*, 11 M. & W. 183, 189. (*)

³ *The North British Railway Company v. Tod*, 12 Cl. & Fin. 722, 731. See *Galway v. Baker*, 5 Cl. & Fin. 157.

⁴ *Llewellyn v. Earl of Jersey*, 11 M. & W. 183, 188. (*) See, also, as to the admissibility of parol evidence to identify a plan referred to in an agreement for a lease, *Hodges v. Horsfall*, 1 Russ. & My. 116.

the answer; and where the Court orders letters and papers to be produced, it proceeds upon the principle, that those documents are by reference incorporated in the answer, and become a part of it; where, moreover, a defendant, in his answer, states a document shortly or partially, and for the sake of greater caution refers to the document, in order to show that the effect of the document has been accurately stated, in such a case the Court will order the document to be produced.¹

The above rule is also applied to the interpretation of wills,² although the Court will not construe a will with the same critical precision which would be prescribed to a grammarian; for instance, where the words "the said estates" occurring in a will, seemed in strictness to refer to certain freehold lands, messuages, and tenements, before devised, on which construction the devisee would only have taken an estate for life, according to the strict rule which existed prior to the stat. 1 Vict. c. 26; yet it was observed by Lord Ellenborough, that, in cases of this sort, unless the testator uses expressions of absolute restriction, it may in general be taken for granted that he intends to dispose of the whole interest; and in furtherance of this intention, courts of justice have laid hold of the word "estate" as passing a fee, wherever it is not so connected with mere local description as to be cut down to a more restrained signification.³

[*525] *Another important application of the same maxim occurs where reference is made in a will to extrinsic documents, in order to elucidate or explain the testator's intention, in which case such document will be received as part of the will, from the fact of its adoption thereby, provided it be clearly identified as the instrument to which the will points.⁴ But parol evidence is inadmissible to show an intention to connect two instruments together, where there is no reference to a foreign instrument, or where the description of

¹ *Hardman v. Ellames*, 2 My. & K. 758; cited *Adams v. Fisher*, 8 My. & Cr. 548; per Lord Eldon, C., *Marsh v. Sibbald*, 2 Ves. & B. 376. And see *Evans v. Richard*, 1 Swanst. 8.

² See *Doe d. Earl of Cholmondeley v. Maxey*, 12 East, 589; *Wheatly v. Thomas*, Sir T. Raym. 54.

³ *Roe d. Allport v. Bacon*, 4 M. & S. 366, 368; E. C. L. R. 30. See stat. 1 Vict. c. 26, ss. 26, 28. In *Doe d. Woodall v. Woodall*, 3 C. B. 349; E. C. L. R. 54, the question was as to the meaning of the words "in manner aforesaid" occurring in a will.

⁴ *Molineux v. Molineux*, Cro. Jac. 144; 1 Jarman on Wills, 88; 2 Phill. Ev., 9th ed. 298. As to incorporating in the probate of wills of personalty papers referred to thereby, but not per se testamentary, see *Sheldon v. Sheldon*, 1 Robert. 81.

it is insufficient.¹ A further illustration, moreover, of the general principle presents itself where a question arises as to whether the execution of a will is intended to apply to the several papers in which the will is contained, or is confined to that with which it is more immediately associated, and whether an attested codicil communicates the efficacy of its attestation to an unattested will or prior codicil.²

Without adducing further instances of the application of the maxim, *verba illata inesse videntur*—it will be proper to notice a difficulty which sometimes arises where an *exception*³ or *proviso*⁴ either occurs in, or is by reference *imported into a general clause in a written instrument; the difficulty⁵ being in determining [*526] whether the party who relies upon the general clause should aver that the particular case does not fall within the exceptive provision, or whether it should be left to the party who relies upon that provision, to avail himself of it.

Now the rule usually laid down upon this subject is, that where matter is introduced by way of *exception* into a general clause, the plaintiff must show that the particular case does not fall within such exception, whereas a *proviso* need not be noticed by the plaintiff, but must be pleaded by the opposite party.⁶

“The difference is, where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause and leave it to the adversary to show the proviso.”⁷

¹ See *Clayton v. Lord Nugent*, 13 M. & W. 200. (*) ² 1 *Jarman on Wills*, 105.

³ Logically speaking, an *exception* ought to be of that which would otherwise be included in the category from which it is excepted, but there are a great many examples to the contrary; per Lord Campbell, *Gurly v. Gurly*, 8 Cl. & Fin. 764.

⁴ The office of a proviso in an act of Parliament is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview; per Story, J., delivering judgment, 15 *Peters, R.* (U. S.) 445.

⁵ An analogous difficulty may also arise with reference to the repeal or modification of a prior by a subsequent statute (see *Bowyer v. Cook*, 16 L. J., C. P. 177); and with reference to the restriction of general by special words, see *Howell v. Richards*, 11 East, 633, ante, p. 497.

⁶ *Spieres v. Parker*, 1 T. R. 141; *Rex v. Jukes*, 8 T. R. 542; per Lord Mansfield, C. J., *Rex v. Jarvis*, cited, 1 East, 646, note.

⁷ Per Treby, C. J., 1 Lord Raym. 120; cited 7 T. R. 81; *Russell v. Ledsam*, 14 M. & W. 574. (*) See *Crow v. Falk*, 15 L. J., Q. B. 183; *Jenney v. Brook*, 6 Q. B. 323; *E. C. L. B.* 51.

The embarrassment often felt in applying the rule here stated arises in practice from the difficulty in determining whether any given clause, or portion of a clause, is in truth an exception or a proviso; and therefore it becomes necessary to consider in detail some of the more important cases which have recently been decided with reference to this distinction. The general rule then is, that if an act [*527] of Parliament or a private instrument contain in it, *first, a general clause, and afterward a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception. If, on the other hand, the exception itself be incorporated in the general clause, then the party relying upon the general clause must in pleading state it with the exception, and if he state it as containing an absolute unconditional stipulation without noticing the exception, it will be a variance.¹

In accordance with the first of the above rules, where one section of a penal statute creates an offence, and a subsequent section specifies certain exceptions thereto, the exceptions need not be negatived by the party prosecuting.² So, where the exception is created by a distinct subsequent act of Parliament, as well as where it occurs in a subsequent section of the same act, the above remark applies;³ and this rule has likewise been held applicable where an exception was introduced by way of proviso in a subsequent part of a section of a statute which imposed a penalty, and on the former part of which section the plaintiff suing for the penalty relied.⁴ "There is," remarked Alderson, B., in the case referred to, "a manifest [*528] distinction between a proviso and an exception. If an exception occurs in the description of the offence in the statute, the exception must be negatived or the party will not be brought within

¹ *Vavasour v. Ormrod*, 6 B. & C. 430; E. C. L. R. 18; cited, *Argument, Tucker v. Webster*, 10 M. & W. 373; (*) per Lord Abinger, C. B., *Grand Junction Railway Company v. White*, 8 M. & W. 221; (*) *Thibault q. t. v. Gibson*, 12 M. & W. 94. (*) See *Roe v. Bacon*, 4 M. & S. 366, 368; E. C. L. R. 30; *Paddock v. Forrester*, 3 Scott, N. R. 715; 1 Wms. Saunds. 262, b. (1); *Rex v. Jukes*, 8 T. R. 542.

² *In re Van Boven*, 16 L. J., M. C. 4. See 15 M. & W. 318. (*)

³ See per Lord Abinger, C. B., *Thibault v. Gibson*, 12 M. & W. 94. (*)

⁴ *Simpson v. Ready*, 12 M. & W. 786; (*) (as to which case, see per Alderson, B., *Mayor of Salford v. Akers*, 16 M. & W. 92); (*) per Parke, B., *Thibault v. Gibson*, 12 M. & W. 96. (*)

the description. But, if the exception comes by way of proviso and does not alter the offence, but merely states what persons are to take advantage of it, then the defence must be specially pleaded, or may be given in evidence under the general issue, according to circumstances."¹

The latter of the two rules above mentioned may be illustrated by the following cases:—Where an exception was introduced into the reservation of rent in a demise, not in express terms, but by reference only to some subsequent matter in the instrument, viz., by the words "except as hereinafter mentioned," and the plaintiff in his declaration stated the reservation without the exception, referring to a subsequent proviso, this was held, according to the above rule, to be a fatal variance.²

So, if there be an exception contained in a covenant, and the declaration state the covenant as an absolute one, without noticing the exception, the variance may be taken advantage of under a plea of *non est factum*.³

Lastly, it has been held, that the provision inserted in the latter part of the 2d sect. of the stat. 7 & 8 Vict. c. 110, with reference to companies for making railways and other works, "which cannot be carried into execution without obtaining the authority of Parliament," is in legal effect an exception; and that a party who seeks to excuse himself from liability for the proceeds of the sale [*529] of *shares in a railway company, on the ground that such transaction was by virtue of the above act illegal, must show that such company did not, in fact, require the aid of Parliament for carrying out its operations, that is to say, must negative the exception in the section above mentioned.⁴

¹ Per Alderson, B., *Simpson v. Ready*, 12 M. & W. 740;(*) S. C., 11 Id. 344; per Lord Mansfield, C. J., *Spires v. Parker*, 1 T. R. 144, and in *Rex v. Jarvis*, 1 East, 644 (d).

² *Vavasour v. Ormrod*, 6 B. & C. 430; E. C. L. R. 18, and cases cited n. 1, p. 430.

³ 1 Wms. Saund., 6th ed., 233 b, note (d). See *Ireland v. Harris*, 14 M. & W. 482.(*)

⁴ *Bousfield v. Wilson*, 16 M. & W. 185.(*) See *Young v. Smith*, 15 M. & W. 121;(*) *Lawton v. Hickman*, 16 L. J., Q. B. 20.

AD PROXIMUM ANTECEDENS FIAT RELATIO NISI IMPEDIATUR
SENTENTIA.

(Noy, Max., 9th ed., p. 4.)

Relative words refer to the next antecedent, unless by such a construction the meaning of the sentence would be impaired.

Relative words generally must be referred to the next antecedent, where the intent upon the whole deed does not appear to the contrary,¹ and where the matter itself doth not hinder it.² The "last antecedent" being the last word which can be made an antecedent so as to have a meaning.³

For instance, in a declaration containing several counts on different bills of exchange, each count, after describing the bill, referred to it as "the said" bill of exchange, and this was held to be sufficiently certain, even on special demurrer, inasmuch as the word "said" ought to be referred to the next antecedent.⁴ The rule above mentioned *likewise holds in the case of an indictment; in which, however, if there be no necessary ambiguity, the Court is not bound, it has been observed, to create one by reading the indictment in the only way which will make it unintelligible.⁵

It has been held, that the words "the said E. R." occurring in the second count of an indictment, merely mean that E. R. is the same person as was mentioned in the first count; but those words do not import into the second count the description of E. R., with respect to the age previously stated.⁶ But, although the above general proposition is true in strict grammatical construction, yet there are numerous examples in the best writers to show that the context may often require a deviation from this rule, and that the relative may be connected with nouns which go before the last antecedent, and either take from it or give to it some qualification.⁷

¹ Com. Dig. "Parols," (A. 14, 15); Jenk. Cent. 180; Dyer, 46 b; Wing. Max., p. 19.

² Finch, Law, 8.

³ Per Tindal, C. J., 1 Ad. & E. 445; E. C. L. R. 28.

⁴ Esdaille v. Maclean, 15 M. & W. 277. (*) See Williams v. Newton, 14 M. & W. 747; (*) Peake v. Screech, 7 Q. B. 608; E. C. L. R. 58; Reg. v. Inhabitants of St. Margaret, Westminster, Id. 569; Ledsham v. Russell (in error), 16 L. J., Exch. 145, 150.

⁵ Noy, Max., 9th ed., p. 4; Rex v. Wright, 1 Ad. & E. 448; E. C. L. R. 28; Rex v. Richards, 1 M. & Rob., 177. See the cases cited, Dickins. Qu. Sess., 5th ed. 176.

⁶ Rex v. Martin, 9 C. & P. 215; E. C. L. R. 38; Reg. v. Dent, 1 Car. & K. 249; E. C. L. R. 47.

⁷ Judgment, Staniland v. Hopkins, 9 M. & W. 192; (*) in which case a difficulty arose as to the proper mode of construing a statute.

For instance, an order of magistrates was directed to the parish of W., in the county of R., and also to the parish of M., in the county of L., and the words "county of R." were then written in the margin, and the magistrates were, in a subsequent part of the order, described as justices of the peace for the county aforesaid: it was held, that it thereby sufficiently appeared that they were justices for the county of R.¹

In pleading, also, in favour of a reasonable intendment, [*581] *even the strict grammatical construction will not always be regarded. Thus, in *assumpsit* on a bill of exchange, the declaration stated that the drawer required the defendant to pay a sum of money "to his order;" and the Court held, on special demurrer, that they would refer the word "his" to the drawer, and not to the defendant, though the word "defendant" was the last antecedent.²

A declaration in debt stated, that the defendant was indebted to the plaintiff for goods sold and delivered to the defendant by the plaintiff at *his* request. The defendant having demurred specially to this declaration, on the ground of ambiguity, the Court set the demurrer aside as frivolous, observing, that it was sufficient, if a declaration is certain to a common intent in general, and that, judging by the context, the word "his" clearly referred to "defendant."³

The above rule of grammar is, of course, applicable to wills as well as to other written instruments; and a reference to one very recent case will be sufficient to show the truth of this remark. A testator devised the whole of his *property* situated in P., and also his farm called S., to his adopted child, M. He left to his nephew W. all his other lands, situated in H. and M.; and the will contained this subsequent clause: "And should M. have lawful issue, *the said property* to be equally divided between her lawful issue." It was held, that these words, "the said property," did not comprise the lands in H. and M. devised to the nephew, although it was argued that they must, according to the true grammatical construction of the will,

¹ *Rex v. St. Mary's, Leicester*, 1 B. & Ald. 327; *Reg. v. The Inhabitants of Casterton*, 6 Q. B. 507; *E. C. L. R.* 51; *Baring v. Christie*, 5 East, 398; *Rex v. Chilverscotton*, 8 T. R. 178.

² *Spyer v. Thelwall*, 1 Tyr. & Gr. 191; *S. C.*, 2 C., M. & R. 692.(*). See *Branoker v. Molyneux*, 1 Scott, N. R. 553, where a question was raised, on a motion for a new trial, as to the meaning of the word "last mentioned" in a new assignment. See *Ashton v. Brevitt*, 14 M. & W. 106.(*).

³ *Deriemer v. Fenna*, 7 M. & W. 439.(*); per Parke, B., *Spyer v. Thelwall*, 2 C., M. & R. 693.(*).

[*532] either *comprise *all* the property before spoken of, or must refer to the next antecedent.¹

CONTEMPORANEA EXPOSITIO EST OPTIMA ET FORTISSIMA IN LEGE.
(2 Inst. 11.)

The best and surest mode of expounding an instrument is by referring to the time when, and circumstances under which, it was made.

There is no better way of interpreting ancient words, or of construing ancient grants, deeds, and charters, than by usage;² and the uniform course of modern authorities fully establishes the rule, that, however general the words of an ancient grant may be, it is to be construed by evidence of the manner in which the thing granted has always been possessed and used; for so the parties thereto must be supposed to have intended.³ Thus, if it be doubtful on the face of an instrument whether a present demise or future letting was meant, the intention of the parties may be elucidated by the conduct they have pursued;⁴ and where the words of the instrument are ambiguous, the *Court will call in aid acts done under it as a clue to the [*533] intention.⁵

Upon the same principle, also, depends the great authority which, in construing a statute, is attributed to the construction put upon it by judges who lived at the time when the statute was made, or soon after, as being best able to determine the intention of the legislature, not only by the ordinary rules of construction, but especially from knowing the circumstances to which it had relation;⁶ and where the

¹ *Peppercorn v. Peacock*, 3 Scott, N. R. 651. See, also, *Doe d. Gore v. Langton*, 2 B. & Ad. 680, 691; E. C. L. R. 22; *Cheney's case*, 5 Rep. 68; and the cases collected in *Rex v. Richards*, 1 M. & Rob. 177; *Owen v. Smith*, 2 H. Bla. 594; *Galley v. Barrington*, 2 Bing. 387; E. C. L. R. 9.

² Per Lord Hardwicke, C., *Attorney-General v. Parker*, 3 Atk. 576, and 2 Inst. 282, cited, 4 T. R. 819; per Parke, B., *Clift v. Schabe*, 3 C. B. 469; E. C. L. R. 64; and in *Jewison v. Dyson*, 9 M. & W. 556; (*) *Rex v. Mashiter*, 6 Ad. & E. 158; E. C. L. R. 83; *Rex v. Davie*, Id. 374; *Senhouse v. Earle*, Amb. 288; Co. Litt. 8, b; *Lockwood v. Wood*, 6 Q. B. 81; E. C. L. R. 51; per Lord Eldon, C., *Attorney-General v. Forster*, 10 Ves., jun. 388.

³ *Weld v. Hornby*, 7 East, 199; *Rex v. Osbourne*, 4 East, 327.

⁴ *Chapman v. Bluck*, 4 Bing., N. C. 187, 196; E. C. L. R. 38; ante, p. 417.

⁵ Per Tindal, C. J., *Doe d. Pearson v. Ries*, 8 Bing. 181; E. C. L. R. 21.

⁶ 2 Phill. Ev., 9th ed. 847; *The Bank of England v. Anderson*, 3 Bing., N. C. 666; E. C. L. R. 32. See the resolutions in *Heydon's case*, 3 Rep. 7; cited, ante, p. 59, and Lord Camden's Judgment in *Entick v. Carrington*, 19 How. St. Trials, 1043 et seq.

words of an act are obscure or doubtful, and where the sense of the legislature cannot, with certainty, be collected by interpreting the language of the statute according to reason and grammatical correctness, considerable stress is laid upon the light in which it was received and held by the contemporary members of the Profession. "Great regard," says Sir E. Coke, "ought, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time when the law was made."¹

Usage, however, it has been observed,² can be binding and operative upon parties only as it is the interpreter of a doubtful law, for, as against a plain statutory law, no usage is of any avail. Where, indeed, the statute, speaking *on some points, is silent as to others, usage may well supply the defect, especially if it is [*584] not inconsistent with the statutory directions, where any are given; and in like manner, where the statute uses a language of doubtful import, the acting under it for a long course of years may well give an interpretation to that obscure meaning, and reduce that uncertainty to a fixed rule; in such a case the maxim hereafter illustrated is applicable,—*optimus legis interpres consuetudo*.³

QUI HÆRET IN LITERA HÆRET IN CORTICE.

(Co. Litt. 288, b.)

He who considers merely the letter of an instrument goes but skin-deep into its meaning.

The law of England respects the effect and substance of the matter, and not every nicety of form or circumstance.⁴ The reason, therefore, and spirit of cases make law, and not the letter of particular precedents.⁵ Hence it is, as we have already seen, a general and comprehensive rule connected with the interpretation of deeds and written instruments, that, where the intention is clear, too minute a

¹ Cited, 2 Dwarr. Stats. 698, 708; 2 Inst. 11, 186, 181; per Holt, C. J., Comb. R. 210; Corporation of Newcastle v. Attorney-General, 12 Cl. & Fin. 419.

² Per Lord Brougham, Magistrates of Dunbar v. Duchess of Roxburghe, 8 Cl. & Fin. 354; cited, Argument, 13 M. & W. 411. (*)

³ Post, chap. 10, where the admissibility of usage to explain an instrument is considered, and some additional authorities are cited.

⁴ Co. Litt. 288; Wing. Max., p. 19. See, per Coltman, J., 2 Scott, N. R. 800.

⁵ Per Lord Mansfield, C. J., 3 Burr. 1864.

stress should not be laid on the strict and precise signification of words.¹ For instance, by the grant of a remainder, a reversion will pass, and *e converso*;² and if a lessee covenants to leave all the timber which was growing on the land when he took it, the covenant will be broken, if, at the end of the term, he cuts it down, but leaves [*585] it *there; for this would be defeating the intent of the covenant, although a literal performance of it.³

In accordance with this principle, it is a further rule, that *mala grammatica non vitiat chartam*⁴—the grammatical construction is not always, in judgment of law, to be followed; and neither false English nor bad Latin will make void a deed when the meaning of the party is apparent.⁵ Thus, the word “and” has, as already stated, in many cases, been read “or,” and *vice versa*, when this change was rendered necessary by the context.⁶ Where, however, a proviso in a lease was altogether ungrammatical and insensible, the Court declared that they did not consider themselves bound to find out a meaning for it.⁷

An indictment against husband and wife for an assault and battery set forth that they *vi et armis insultum fecit, verberaverunt, vulneraverunt, &c.*, and it was moved in arrest of judgment that the *insultum fecit* being in the singular number, could refer only to one of the defendants, and that it was therefore uncertain by whom the assault charged had been committed; but, inasmuch as the words immediately following applied to both the defendants, the count was held good, an offence sufficient to sustain the indictment being well laid without referring to that part of the count which was ungrammatically worded.⁸

[*536] *Lastly, in interpreting an act of Parliament, it is not in general, a true line of construction to decide according to the strict letter of the act; but the Courts will rather consider what is

¹ 2 Bla. Com. 379; ante, p. 418.

² Hobart, 27; 2 Bla. Com. 379.

³ Woodf., L. & T. 5th ed. 489; citing 1 Esp., N. P. 271.

⁴ 9 Rep. 48; 6 Rep. 40; Wing. Max., p. 18; Vin. Abr. “Grammar,” (A.); Lofft, 441.

⁵ 2 Bla. Com. 379; Co. Litt. 228, b; Osborn's case, 10 Rep. 188; 2 Show. 384. See Reg. v. Inhabitants of Wooldale, 6 Q. B. 565; E. C. L. R. 51.

⁶ Chapman v. Dalton, Plowd. 289; 1 Jarm., Wills, 443, et seq; Harris v. Davis, 1 Coll. 416; ante, p. 455.

⁷ Doe d. Wyndham v. Carew, 2 Q. B. 817; E. C. L. R. 42; Berdoe v. Spittle, 16 L. J., Exch. 258. See Moverley v. Lee, 2 Ld. Raym. 1223, 1224.

⁸ Reg. v. Ingram, 1 Salk. 884; cited, per Lord Denman, C. J., O'Connell v. Reg. (ed. by Leahy), pp. 87, 88.

its fair meaning,¹ and will expound it differently from the letter, in order to preserve the intent.² The meaning of particular words, indeed, in acts of Parliament, as well as in other instruments, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion in which they are used, and the object that is intended to be attained.³ "Such is the imperfection of human language," remarks Sir W. Jones, "that few written laws are free from ambiguity, and it rarely happens that many minds are united in the same interpretation of them;" and hence it is that fixed rules of interpretation, which the wisdom of ages has sanctioned and established, become necessary for our guidance whensoever the sense of the words used is in any way ambiguous or doubtful. In the preceding pages we have endeavoured to place before the reader such of those rules and maxims as seemed most valuable for the purpose here indicated; such, indeed, as seemed best adapted, in the language of the eminent jurist already quoted, to serve as stars whereby the practitioner may steer his course in the construction of all public and private writings.⁴

*CHAPTER IX.

[*537]

THE LAW OF CONTRACTS.

A VERY cursory glance at the contents of the preceding pages will show that we have not unfrequently had occasion to refer to the Law of Contracts, in illustration of maxims heretofore submitted to the reader. Most, indeed, if not all, of our leading principles of law have necessarily a direct and important bearing upon the law mer-

¹ Per Lord Kenyon, C. J., 7 T. R. 196; *Fowler v. Padget*, Id. 609; 11 Rep. 78; Litt., s. 67, with Sir E. Coke's Commentary thereon, cited 3 Bing., N. C. 525; E. C. L. R. 82; Co. Litt. 881, b. See *Vincent v. Slaymaker*, 12 East, 872; *Argument, Bignold v. Springfield*, 7 Cl. & Fin. 109, and cases there cited.

² 8 Rep. 27. According to the Roman law, *semper in obscuris quod minimum est sequimur*, D. 50, 17, 9, which is a safe maxim for guidance in our own; see per Maule, J., *Williams v. Crossling*, 16 L. J., C. P. 113.

³ *Judgment, Rex v. Hall*, 1 B. & C. 128; E. C. L. R. 8; cited 2 C. B. 66; E. C. L. R. 52.

⁴ *Life of Sir Wm. Jones*, by Lord Teignmouth (ed. 1804), p. 262.

chant, and must, therefore, be constantly borne in mind when the attention is directed more especially to that subject. The following pages have been devoted to a review of such maxims as are peculiarly, though by no means exclusively, applicable to contracts, and an attempt has been made by the arrangement adopted, to show, as far as practicable, the connexion which exists between them, and the relation in which they stand to each other. The first of these maxims expresses the general principle, the parties may, by express agreement *inter se*, and subject to certain restrictions, acquire rights or incur liabilities which the law would not otherwise have conceded to or imposed upon them. The maxims subsequently considered show that a man may renounce a privilege or right which the law has conferred upon him; that one who enjoys the benefit must likewise bear the inconvenience or loss resulting from his contract; that, where the right or where the delinquency on each side is equal in [*538] degree, the title of the *party in actual possession shall prevail. Having thus stated the preliminary rules applicable to the conduct and position of the contracting parties, I have proceeded to examine the nature of the consideration essential to a valid contract—the liabilities attaching respectively to vendor and purchaser—the various modes of payment and receipt of money—and the effect of contracting, or, in general, of doing any act through the intervention of a third party as agent, together with the legal consequences which flow from the subsequent ratification of a prior act. Lastly, I have stated in what manner a contract may be revoked or dissolved, and how a vested right of action may be affected by the Statutes of Limitation, or by the negligence or death of the party possessing it. It will be evident, from the above brief outline of the principles set forth in this chapter, that some of them apply to actions of tort, as well as to those founded in contract; and when such has been the case, the remarks and illustrations appended have not been in any way confined to actions of the latter description. The general object, however, has been to exhibit the most important elementary rules relative to *contracts*, and to show in what manner the law may, through their medium, be applied to regulate and adjust the infinitely varied and complicated transactions of a mercantile community.

MODUS ET CONVENTIO VINCUNT LEGEM.

(2 Rep. 73.)

The form of agreement and the convention of parties overrule the law.

The above may, in fact, be considered as the most elementary principle of law relative to contracts, and may be thus stated in a somewhat more comprehensive form:—The *conditions annexed to a grant or devise, the covenants inserted in a conveyance or lease, and the agreements, whether written or verbal, entered into between parties, have, when duly executed and perfected, and subject to certain restrictions, the force of law over those who are parties to such instruments or agreements.¹

Where, for instance, a man seized of a reversion expectant on an estate for life grants an *interesse termini* to A. for ninety-nine years, if he shall so long live, to commence after the tenant for life, reserving a heriot on the death of A., and A. dies in the lifetime of the tenant for life, the lessor is entitled to the heriot reserved on the death of A., although he never enjoyed the estate, by reason of the express contract between the parties.² In like manner, where the tenant of a house covenanted in his lease to pay a reasonable share and proportion of the expenses of supporting, repairing, and amending all party-walls, &c., and to pay all taxes, duties, assessments, and impositions, parliamentary and parochial,—“it being the intention of the parties that the landlord should receive the clear yearly rent of 60*l.* in net money without any deduction whatever,”—and during the lease the proprietor of the adjoining house built a party-wall, between his own house and the house demised, under the provisions of the stat. 14 Geo. 3, c. 78: it was held, that the tenant, and not the landlord, was bound to pay the moiety of the expense *of the party-wall; “for,” observed Lord Kenyon, “the covenants in the lease render it unnecessary to consider which of the parties would have been liable under the act of Parliament; *modus et conventio vincunt legem.*”³ So, where a tenant enters into possession

¹ A “contract” is defined to be “*une convention par laquelle les deux parties, ou seulement l'une des deux, promettent et s'engagent envers l'autre à lui donner quelque chose ou à faire ou à ne pas faire quelque chose.*” Pothier, Oblig., pt. 1, chap. 1, art. 1 s. 1. As to the obligatory force of a contract, see the arguments in *Ogden v. Saunders*, 12 Wheaton R. (U. S.) 213; *omne jus aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo*: D. 1, 3, 40.

² Per Kelynge, C. J., *Lanyon v. Carne*, 2 Saund. R. 167. See *Doe d. Douglass v. Lock*, 2 Ad. & E. 705; *E. C. L. R.* 29; *Winch*, R. 48.

³ *Barrett v. Duke of Bedford*, 8 T. R. 602, 605.

under an agreement which does not comply with the Statute of Frauds, he becomes tenant from year to year,¹ subject to the right to quit without notice, or to the liability to be turned out without notice at the end of the term; if, however, the tenant continues in possession, paying the same rent, the presumption of law is, that a tenancy from year to year is created, commencing from the period when the original tenancy commenced; but this presumption of law may, no doubt, be varied by the agreement of the parties.² Again, a tenancy at will is a kind of holding not favoured nor readily implied by the law. If, however, an agreement be made to let premises so long as both parties like, and a compensation accruing *de die in diem*, and not referable to a year or any aliquot part of a year, be thereby reserved, such an agreement does not create a holding from year to year, but a tenancy at will strictly so called; for two persons may agree to make a tenancy at will, according to the maxim, *modus et conventio vincunt legem*.³

In an action on the case for not carrying away tithe corn, the plaintiff alleged, that it was "lawfully and in due manner" set out: [*541] it was held, that this allegation was *satisfied by proof that the tithe was set out according to an agreement between the parties, although the mode thereby agreed to varied from that prescribed by the common law, the tithe having been set out in shocks, and not in sheaves, as the law directs.⁴

The same comprehensive principle applies, also, to agreements having immediate reference to mercantile transactions: thus, the stipulations contained in articles of partnership may be enforced and must be acted on as far as they go, although their terms will be explained, and their deficiencies supplied, by reference to the general principles of law. Although, therefore, a new partner cannot at law be introduced without the consent of every individual member of the firm, yet the executors of a deceased partner will be allowed to occupy his place, if there be an express stipulation to that effect in

¹ Doe d. Tilt v. Stratton, 4 Bing, 446; E. C. L. R. 18, 15.

² Per Coltman, J., Berrey v. Lindley, 4 Scott, N. R. 74; Mayor of Thetford v. Tyler, 15 L. J., Q. B. 33, 34.

³ Richardson v. Langridge, 4 Taunt. 128; recognised Doe d. Hull v. Wood, 14 M. & W. 687. (*) The same principle equally applies with reference to the period at which a notice to quit may be given, see Doe d. Clarke v. Smaridge, 7 Q. B. 957; E. C. L. R. 53; Doe d. Monck v. Geekie, 5 Q. B. 841; E. C. L. R. 48.

⁴ Facey v. Hurdorn, 3 B. & C. 213; E. C. L. R. 10. See Halliwell v. Trappes, 1 Taunt. 55.

the agreement of partnership.¹ Again, the lien which a factor has upon the goods of his principal arises from a tacit agreement between the parties, which the law implies; but, where there is an express stipulation to the contrary, it puts an end to the general rule of law.² The general lien of a banker, also, is part of the law merchant, and will be upheld by courts of justice, unless there be some agreement between the banker and the depositor, either express or implied, inconsistent with such right.³ So, it has been remarked, that, in the ordinary case of a sale of chattels, time is not of the *essence* of the contract, *unless* it be made so by express agreement, and this may be effected with facility by introducing conditional *words [^{*542}] into the bargain; the sale of a specific chattel on credit, therefore, although that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods if they remain in his possession till that price be paid.⁴

The doctrine relative to specific performance will here simply be mentioned, as showing that courts of equity fully acknowledge the efficacy of contracts, where bonâ fide entered into in accordance with those formalities, if any, required by the statute law. Equity, indeed, from its peculiar jurisdiction, has power for enforcing the fulfilment of contracts which a court of law does not possess, and in exercising this power, it obviously acts upon the principle that express stipulations prescribe the law, *quoad* the contracting parties. For instance, money was devised to be laid out in land to the use of B. in tail, remainder to the use of C. in fee. B., having no issue, agreed with C. to divide the money; but before the agreement was executed, B. died, whereupon C. becoming, as he supposed, entitled to the whole fund, refused to complete the agreement. The Court, however, upon bill filed by B.'s personal representatives, decreed a specific performance;⁵ acting thereby in strict accordance with the above maxim, *modus et conventio vincunt legem*.⁶

¹ Smith's Mercantile Law, 2d ed. 27, 34.

² Per Lord Kenyon, C. J., Walker v. Birch, 6 T. R. 262.

³ Brandao v. Barnett, 12 Cl. & Fin. 787. See Hawthorn v. Newcastle and N. S. Railway Company, 3 Q. B. 734; E. C. L. R. 43; n. (a); Steadman v. Hockley, 15 M. & W. 558. (*)

⁴ Martindale v. Smith, 1 Q. B. 395; E. C. L. R. 41. See Strutt v. Smith, 1 C., M. & R. 312; (*) Lilley v. Barnesley, 1 Car. & K. 344; E. C. L. R. 47.

⁵ Carter v. Carter, Cas. temp. Talb. 271.

⁶ See, also, Frank v. Frank, 1 Chanc. Cas. 84.

Without venturing further into the wide field which is here opening upon us, we may properly observe, that it does sometimes happen, notwithstanding an express agreement between parties, that peculiar [*543] circumstances present *themselves which afford grounds for the interference of a court of equity, in order that the contract entered into may be so modified as to meet the justice of the case. For instance, where an attorney, whilst he lay ill, received the sum of 120 guineas by way of premium or apprentice fee with a clerk who was placed with him, and died three weeks afterwards, the Court decreed a return of 100 guineas, although the articles provided that if the attorney should die within the year, 60*l.* only should be returned.¹ With respect to this case, Lord Kenyon, indeed, observed,² that in it the jurisdiction of a court of equity had been carried "as far as could be;" but the decision seems, from the facts stated in the pleadings,³ to be clearly supportable upon a plain ground of equity, viz., that of mutual mistake, misrepresentation, or unconscious advantage,⁴ and, consequently, not really opposed to the spirit of the maxim, *modus et conventio vincunt legem*.

The rule under consideration, however, is subject to restriction and limitation, and does not apply where the express provisions of any law are violated by the contract, nor where the interests of the public generally, or of third parties in particular, would be injuriously affected by its fulfilment:—*Pacta quæ contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere, indubitati juris est;*⁵ and *privatorum conventio juri publico non derogat.*⁶ "If the thing stipulated for is in itself contrary to law, the paction by which the execution of the illegal act is stipulated must be held as [*544] intrinsically null, **pactis privatorum juri publico non derogatur*. It is impossible to compel one who is unwilling to disobey the law to contravene it. He is entitled to plead freedom from a contract into which he should never have entered, and to be protected in maintaining an obedience to the law which the law would of itself have interposed to enforce, had the act come otherwise within its cognizance."⁷

¹ *Newton v. Rowse*, 1 Vern., 3d ed. 460.

² *Hale v. Webb*, 2 Bro. Chan. Rep. 80.

³ See 1 Vern., 3d ed. 460 (2).

⁴ 1 Story, Eq. Jurisp., 4th ed. 519.

⁵ C. 2, 3, 6.

⁶ D. 50, 17, 45, § 1; D. 2, 14, 38; 9 Rep. 141.

⁷ Per Dr. Lushington arguendo, *Phillips v. Innes*, 4 Cl. & Fin. 241; Argument, *Swan v. Blair*, 3 Cl. & Fin. 621.

Not only is the consent or private agreement of individuals ineffectual in rendering valid any direct contravention of the law, but it will altogether fail to make just, sufficient, or effectual that which is unjust or deficient in respect to any matter which the law declares to be indispensable and not circumstantial merely.¹ Therefore, an agreement by a married woman, that she will not avail herself of her coverture as a ground of defence to an action on a personal obligation which she has incurred, would not be valid or effective in support of the plaintiff's claim and by way of answer to a plea of coverture; for a married woman is under a total disability, and her contract is absolutely void, unless where it can be viewed as a contract on behalf of the husband through her agency.²

So, with reference to a provision in a foreign policy of insurance against all perils of the sea, "*nullis exceptis*," it was observed, that, although there was an express exclusion of any exception by the terms of the policy, yet the reason of the thing engrafts an implied exception even upon words so general as the above; as, for example, in the case of damage occasioned by the fault of the assured: it being a general rule that the insurers shall not be liable when the loss or damage happen by the fault or fraudulent *conduct of [*545] the assured, from which rule it is not allowed to derogate by any pact to the contrary; for *nullâ pactione effici potest ut dolus præstetur*—I cannot effectually contract with any one that he shall charge himself with the faults which I shall commit.³

It is equally clear that an agreement entered into between two persons cannot, in general, affect the rights of a third party, who is altogether a stranger to it; thus, if it be agreed between A. and B. that B. shall discharge a particular debt due from A. to C. such an agreement can in no way prejudice C.'s right to sue A. for its recovery; *debitorum pactionibus creditorum petitio nec tolli nec minui potest*;⁴ and according to the rule of Roman law—*privatis pactionibus non dubium est non lædi jus cæterorum*.⁵

In the above and similar cases, then, as well as in some others relative to the disposition of property, which have been noticed in the preceding Chapter,⁶ another maxim emphatically applies; *for-*

¹ Bell, Dict. and Dig. of Scotch Law, 694.

² *Ib.*; *Loyd v. Lee*, 1 Stra. 94; *Mayer v. Haworth*, 8 Ad. & E. 467; E. C. L. R. 85.

³ *Judgment*, *Cullen v. Butler*, 5 M. & S. 466; 3 Kent, Com. 4th ed. 291; D. 2, 14, 27, 8.

⁴ 1 Pothier, oblig. 108, 109.

⁵ D. 2, 15, 3, pr.

⁶ See, also, per Lord Kenyon, C. J., *Doe d. Mitchinson v. Carter*, 15 East, 178.

*tior et potentior est dispositio legis quàm hominis*¹—the law in some cases overrides the will of the individual and renders ineffective and futile his expressed intention or contract.²

[*546] For instance, “surrender” is the term applied in the law *to “an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist:” as in the case of a lessee taking a second lease from the lessor, or a tenant for life accepting a feoffment from the party in remainder, or a lessee accepting a rent-charge from his lessor. In all these cases the surrender is not the result of *intention*; for, if there was no intention to surrender the particular estate, or even if there was an express intention to keep it unsurrendered, the surrender would be the act of the law, and would prevail in spite of the intention of the parties :³ *fortior et potentior est dispositio legis quam hominis*.⁴

Subject to the above, however, and similar exceptions, the general rule of the civil law holds equally in our own: *paeta conventa quæ neque contra leges neque dolo malo inita sunt omnimodo observanda sunt*⁵—compacts which are not illegal, and do not originate in fraud, must in all respects be observed.

QUILIBET POTEST RENUNCIARE JURI PRO SE INTRODUCTO.

(Wing. Max. p. 488.)

*Any one may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour.*⁶

[*547] According to the well-known principle expressed in the above maxim, any person may decline to avail himself *of a

¹ Co. Litt. 234, a, cited, 15 East, 178.

² For instance, a man cannot, by his own acts or words, render that irrevocable, which, in its own nature, and according to established rules of law, is revocable, as in the case of a will. As to a lease or appointment under a power, where the lessor or person making the appointment has also an interest, see Judgment, *Roe d. Earl of Berkeley v. Archbishop of York*, 6 East, 108, and the cases cited; Argument, *Perry v. Watts*, 4 Scott, N. R. 370. See, also, *Denn v. Roake*, 5 B. & C. 731, 732; E. C. L. R. 11; and stats. 7 Will. 4 & 1 Vict. c. 26, s. 27, ante, 428, n. (5).

³ *Lyon v. Reed*, 13 M. & W. 285, 306; (*) commented on, *Nicholls v. Atherston*, 16 L. J., Q. B., 371. See *Doe d. Hull v. Wood*, 14 M. & W. 682. (*)

⁴ Similarly applied in 8 Johns. R. (U. S.) 401; Co. Litt. 338, a.

⁵ C. 2, 3, 29.

⁶ Bell, Dict. and Dig. of Scotch Law, 545; 1 Inst. 99 a; 2 Inst. 183; 10 Rep. 101.

defence which would be at law a valid and sufficient answer to the plaintiff's demand, as of his bankruptcy and certificate, infancy, or the Statute of Limitations;¹ and not only may he, in many cases, waive his right to insist upon the specific defence, but he may even renew his liability, and by his own act or acknowledgment render himself clearly responsible, if this be done in such manner as by law required.² So, a man may not merely relinquish a particular line of defence, but he may also renounce a claim which might have been substantiated, or release a debt which might have been recovered by ordinary legal process; or he may, as we have already seen, by his express contract or stipulation, exclude some more extensive right, which the law would otherwise have impliedly conferred. In all these cases, the rule holds, *omnes licentiam habere his, quæ pro se indulta sunt, renunciare*³—every man may renounce a benefit or waive a privilege which the law has conferred upon him. For instance, whoever contracts for the purchase of an estate in fee-simple, without any exception or stipulation to vary the general right, is in equity entitled to call for a conveyance of the fee, and to have a good title to the legal estate made out. But, upon the principle under consideration, a man may, by express stipulation, or by contract, or even by consent testified by acquiescence or otherwise, bind himself to accept a title *merely equitable, or a title subject to some incumbrance; and whatever defect there may be, which is [*548] covered by this stipulation, must be disregarded by the conveyancer to whom the abstract of title is submitted, as not affording a valid ground of objection.⁴

According to the same principle, if a man being tenant for life, has a power to lease for twenty-one years for his own benefit, he may renounce a part of the right so given, and grant a lease for any number of years short of the twenty-one, *i. e.*, he may either exercise his right to the utmost extent of the power, or he may stop short of

¹ See *Tanner v. Smart*, 6 B. & C. 608; E. C. L. R. 18; per Parke, B., *Hart v. Prendergast*, 14 M. & W. 748. (*)

² Per Bayley, J., *Bovill v. Wood*, 2 M. & S. 25; E. C. L. R. 28; in connexion with which case, see 3 & 4 Will. 4, c. 42, s. 9; *Argument, Short v. M'Carthy*, 3 B. & Ald. 629; E. C. L. R. 5. A bankrupt may bind himself by a promise to pay personally made *before* certificate, *Kirkpatrick v. Tattersall*, 18 M. & W. 766. (*) An insolvent may plead his discharge to an action on a renewed debt, 7 Geo. 4, c. 57, s. 61; 1 & 2 Vict. c. 110, s. 91.

³ C. 1, 3, 51; C. 2, 3, 29; *Invito beneficium non datur*, D. 50, 17, 69.

⁴ 8 Prest. Abs. Tit. 221.

that; and then every part of which he abridged himself would be for the benefit of the next in remainder: he would throw back into the inheritance that portion which he did not choose to absorb for his own use.¹

Again, the right to estovers is incident to the estate of every tenant for life or years (though not to the estate of a strict tenant at will), unless he be restrained by special covenant to the contrary, which is usually the case; so that here the above maxim, or that relating to *modus et conventio*, may be applied.²

Another familiar instance of the application of the same principle occurs in connexion with the law of bills of exchange. The general rule is, that payment must be demanded of the acceptor, in the first instance, on the day when the bill becomes due; and, in case of refusal or default, due notice of such demand and refusal or default must be given to the drawer within a reasonable time afterwards; the reason being, that the acceptor of a bill is presumed to have in his hands effects of the drawer for the *purpose of discharging [*549] the bill; and, therefore, notice to the drawer is requisite, in order that he may withdraw his effects as speedily as possible from the hands of the acceptor. Until these previous steps have been taken, the drawer cannot be resorted to on non-payment of the bill; and the want of notice to a drawer, who has effects in the hands of the acceptor, after dishonour of the bill, is considered as tantamount to payment by him. So, where a bill has been endorsed, and the holder intends to sue any of the endorsers, it is incumbent on him first to demand payment from the acceptor on the day when the bill becomes due, and, in case of refusal, to give due notice thereof within a reasonable time to the endorser; the reason being, that the endorser is in the nature of a surety only, and his undertaking to pay the bill is not an absolute, but a conditional undertaking, that is, in the event of a demand made on the acceptor (who is primarily liable), at the time when the bill becomes due, and refusal on his part, or neglect to pay.³ As, however, the rule requiring notice was introduced for the benefit of the party to whom such notice must be given, it may,

¹ Per Lord Ellenborough, C. J., *Isherwood v. Oldknow*, 3 M. & S. 392; E. C. L. R. 30. See, also, Co. Litt. 223, b.

² Co. Litt. 41, b; Woodf., L. & T., 5th ed. 522.

³ See Byles on Bills, 5th ed. 219; where the drawer has no effects in the drawee's hands, he is not in general entitled to notice; *Bickerdike v. Bollman*, 1 T. R. 405; *Carter v. Flower*, 16 L. J., Exch. 199; *Bailey, v. Porter*, 14 M. & W. 44; (*) *Thomas v. Fenton*, 16 L. J., Q. B. 362.

in accordance with the above maxim, be waived by that party.¹ But though a party may thus waive the consequences of laches in respect of himself, he cannot do so in respect of antecedent parties; for that would be in violation of another legal principle which we shall directly mention, and which limits the application of the maxim now under consideration to those cases in which *no injury is inflicted, by the renunciation of a legal right, upon a third party. [*550]

Again, persons sharing in the profits of an adventure may, by express agreement, exclude the relation of partnership from arising as between themselves, though they cannot thereby affect the rights of third persons; and a private regulation between the members of a trading company to limit the personal liability of individuals, although valid as between themselves, will be wholly nugatory *quoad* strangers.² The rights of partners *inter se* have, indeed, been created and upheld by the law for their own convenience, and may, therefore, by express stipulation, be renounced. Thus, it is a rule, that all property bought with the cash and for the purposes of a trading partnership concern, must, in equity, be looked upon as personal; and that a partner's share and interest therein will, on his death, pass to his personal representatives; but partners may stipulate between themselves, that freehold lands purchased by them shall not be subject to the application of this equitable doctrine, but shall follow the ordinary rules respecting property of that description; and, in such a case, the rule of equity yields to the ordinary course of law, coupled with the express intention of the parties.³

It will be observed from some of the preceding instances, that the rule which enables a man to renounce a right which he might have otherwise enforced, must be applied with this qualification, that, in general, a private compact or agreement cannot be permitted to derogate *from the rights of third parties,⁴ or, in other words, although a party may renounce a right or benefit *pro se in-* [*551] *troductum*, he cannot renounce that which has been introduced for the benefit of another party; thus, the rule that a child within the

¹ See *Steele v. Harmer*, 14 M. & W. 831; (*) *Mills v. Gibson*, 16 L. J., C. P. 249; *Burgh v. Legge*, 5 M. & W. 418. (*)

² See *Waugh v. Carver*, 2 H. Bla. 285; *Judgment*, 1 My. & K. 76.

³ See the cases cited, *ante*, p. 343. As to the effect of a partnership agreement, to consider land as personalty with reference to the right of voting for a member of Parliament, see *Judgment*, *Baxter, app.*, *Newman, resp.*, 8 Scott, N. R. 1084.

⁴ 7 Rep. 28; *ante*, p. 545.

age of nurture cannot be separated from the mother by order of removal, has been established for the benefit and protection of the child, and therefore cannot be dispensed with by the mother's consent.¹

One case may, however, be mentioned to which the rule applies, without the qualification—that, viz., of a release by one of several joint creditors, which, in the absence of fraud and collusion, will operate as a release of the claims of the other creditors, and may be pleaded accordingly. On the other hand, the debtee's discharge of one joint or joint and several debtor is a discharge of all;² and a release of the principal debtor will discharge the sureties, unless, indeed, there be an express reservation of remedies as against them.³

It is also a well-known principle of law, that, where a creditor gives time to the principal debtor, there being a surety to secure payment of the debt, and does so without consent of or communication with the surety, he discharges the surety from liability, as he thereby places him in a new situation, and exposes him to a risk and contingency to which he would not otherwise be liable;⁴ and this [*552] seems to afford a further illustration of the remark already made, that a renunciation of a right cannot be made to the injury of a third party.

Where, however, a husband, whose wife was entitled to a fund in court, signed a memorandum after marriage, agreeing to secure half her property on herself, it was held, that it was competent to the wife to waive this agreement, and that any benefit which her children might have taken under it was defeated by her waiver.⁵

Lastly, it is clear that the maxim *quilibet potest renunciare juri pro se introducto*, is inapplicable where an express statutory direction enjoins compliance with the forms which it prescribes; for instance, a testator cannot dispense with the observance of those formalities which are essential to the validity of a testamentary instru-

¹ Reg. v. Inhabitants of Birmingham, 5 Q. B. 210; E. C. L. R. 48.

² Nicholson v. Revill, 4 Ad. & E. 675, 683; E. C. L. R. 31, recognising Cheetham v. Ward, 1 B. & P. 630, and cited in Keersley v. Cole, *infra*, and Thompson v. Lack, 3 C. B. 540; E. C. L. R. 54; Co. Litt. 232, a; Clayton v. Kynaston, 2 Salk. 573; 2 Roll. Abr. 410, D. 1; 412, G., pl. 4. See Craib v. D'Aeth, 7 T. R. 670, n; and Bain v. Cooper, 9 M. & W. 701. (*)

³ Keersley v. Cole, 16 M. & W. 128; (*) Thompson v. Lack, 3 C. B. 540; E. C. L. R. 54.

⁴ Per Lord Lyndhurst, Oakeley v. Pasheller, 4 Cl. & Fin. 233.

⁵ Fenner v. Taylor, 2 Russ. & My. 190.

ment; for the provisions of the Statute of Frauds, or of the recent Wills Act, were introduced with a view to the public benefit, not that of the individual, and therefore, must be regarded as positive ordinances of the legislature, binding upon all.¹

QUI SENTIT COMMODUM SENTIRE DEBET ET ONUS.

(2 Inst. 489.)

He who derives the advantage ought to sustain the burthen.

The above rule applies in every case where an implied covenant runs with the land, and whenever the present *owner or occupier of land is bound by the express covenant of a prior occupant; whenever, indeed, the ancient maxim, *transit terra cum onere*, holds true.² The burden of repairs, has, we may observe, always been thrown as much as possible, by the spirit of the common law, upon the occupier or tenant, not only in accordance with the principle contained in the above maxim, but also because it would be contrary to all justice, that the expense of accumulated dilapidation should, at the end of the period of tenancy, fall upon the landlord, when a small outlay of money on the part of the tenant in the first instance would have prevented any such expense becoming necessary; to which we may add, that, generally, the tenant alone has the opportunity of observing from time to time when repairs become necessary.³ In one of the leading cases on this subject the facts were, that a man demised a house by indenture for years, and the lessee, for him and his executors, covenanted with the lessor to repair the house at all times necessary; the lessee afterwards assigned it over to another party, who suffered it to decay; it was adjudged that covenant lay at suit of the lessor against the assignee, although the lessee had not covenanted for him and his assigns; for the covenant to repair, which extends to the support of the thing demised, is *quodammodo* appurtenant to it, and goes with it: and, inasmuch as the lessee had taken upon himself to bear the charges of the repara-

¹ See, per Wilson, J., *Habergham v. Vincent*, 2 Ves., jun. 227; cited, *Countess of Zichy Ferraris v. Marquis of Hertford*, 3 Curt. 493, 498; S. C., affirmed 4 Moore, P. C. C. 389.

² Co. Litt. 231, a. See per Holroyd, J., *Burnett v. Lynch*, 5 B. & C. 607; E. C. L. R. 11; cited and explained, 7 M. & W. 580; (*) per Best, J., 3 B. & Ald. 687; E. C. L. R. 5.

³ Woodf., L. & T., 5th ed. 411.

tions, the yearly rent was the less, which was to the benefit of the assignee, and *qui sentit commodum sentire debet et onus*.¹

[*554] *The following case will also serve to illustrate the same principle:—A company was empowered under a local act to make the river Medway navigable, to take tolls, and “to amend and alter such bridges or highways as might hinder the passage or navigation, leaving them or others as convenient, in their room.” The company, in prosecuting the work, destroyed a ford across the river, in the common highway, by deepening its bed, and built a bridge over the river at the same place. It was held, on an indictment brought against the company, forty years afterwards, that they were bound to keep the bridge in repair, as under a continuing condition to preserve a new passage in lieu of the old one which they had destroyed for their own benefit.² So, the undertakers of the Aire and Calder Navigation, who were empowered by act of Parliament to make certain drains in lieu of those previously existing, were held bound to cleanse the drains substituted by them in pursuance of the act, the power to make such substitution having been conferred on them for their own benefit.³ In the two preceding cases, as well as in others of a like character, the maxim under consideration is directly applicable.⁴

On the same principle depends also the general rule respecting the constitution of a partnership *quoad* third persons; viz., that an agreement to share, in equal or unequal proportions, the *profits* of a concern, decisively fixes the joint responsibility of all the participators as partners, for he who enjoys a part of the profits ought to be liable, as he lessens that fund on which the creditor relied for payment.⁵

[*555] *A further important illustration of the rule occurs, where a party adopts a contract which was entered into without his authority, in which case he must adopt it altogether. He cannot ratify that part which is beneficial to himself, and reject the remainder: he must take the benefit to be derived from the transaction *cum onere*.⁶ Where, therefore, the real principal, who was undis-

¹ Dean and Chapter of Windsor's case, 5 Rep. 25; cited per Tindal, C. J., *Tre-meeze v. Morison*, 1 Bing., N. C. 98; E. C. L. R. 27.

² *Rex v. Inhabitants of Kent*, 18 East, 220.

³ *Priestley v. Foulds*, 2 Scott, N. R. 205.

⁴ Per Tindal, C. J., 2 Scott, N. R. 225.

⁵ Per Eyre, C. J., *Waugh v. Carver*, 2 H. Bla. 246, 247; Judgment, *Pott v. Eyton*, 3 C. B. 82; E. C. L. R. 54; *Barry v. Nesham*, 16 L. J., C. P. 21.

⁶ *Smith, M. L.*, 8d ed. 138; per Lord Ellenborough, C. J., 7 East, 166.

closed at the time of contracting, subsequently interferes and sues upon the contract, justice requires, that, if the defendant has credited and acquired a set-off against the agent before the principal interposed, the latter should be bound by the set-off, in the same way that the agent would have been had he been the plaintiff on the record;¹ and that the defendant should be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been in truth the principal.² This right of set-off, however, could not be maintained, if the purchaser had either express notice, or the means of knowing that the vendor was a mere agent in effecting the sale before the completion of the contract.³

An innkeeper was requested by his guest to allow him the use of a private room for the purpose of showing his goods in; and to this request the innkeeper acceded, at *the same time telling the guest that there was a key, and that he might lock the door, [*556] which, however, the guest neglected to do; it was held, that the jury were justified in concluding that plaintiff received the favour *cum onere*, that is, that he accepted the chamber to show his goods in upon condition of taking the goods under his own care, and that by so taking them under his own care the innkeeper was exonerated from responsibility.⁴

Again, it is a very general and comprehensive rule, to which we have already adverted, and which likewise falls within the scope of the maxim now under consideration, that the assignee of a chose in action takes it subject to all the equities to which it was liable in the hands of the assignor; and the reason and justice of this rule, it has been observed, are obvious, since the holder of property can only alienate or transfer to another that beneficial interest in it which he himself possesses.⁵ If, moreover, a person accepts anything which he knows to be subject to a duty or charge, it is rational to conclude

¹ *George v. Claggett*, 7 T. R. 359; *Carr v. Hinchliff*, 4 B. & C. 547; E. C. L. R. 10; *Taylor v. Kymer*, 3 B. & Ad. 334; E. C. L. R. 23; *Warner v. M'Kay*, 1 M. & W. 591. (*) See *Gordon v. Ellis*, 8 Scott, N. R. 290.

² Judgment, *Sims v. Bond*, 5 B. & Ad. 398; E. C. L. R. 27; and in *Bonzi v. Stewart*, 5 Scott, N. R. 1. See *Bastable v. Poole*, 1 C., M. & R. 410, 418. (*)

³ *Moore v. Clementson*, 2 Camp. 22; *Maans v. Henderson*, 1 East, 335; *Estcott v. Milward*, cited, 7 T. R. 361; *Warner v. M'Kay*, 1 M. & W. 591. (*) See stats. 6 Geo. 4, c. 94, s. 4, and 5 & 6 Vict. c. 39, ss. 1, 3; *Hatfield v. Phillips*, 12 Cl. & Fin. 343.

⁴ *Burgess v. Clements*, 4 M. & S. 306, 313; E. C. L. R. 30; *Richmond v. Smith*, 8 B. & C. 9; E. C. L. R. 15; *Dawson v. Chamney*, 5 Q. B. 164, 169; E. C. L. R. 48; *Calye's case*, 8 Rep. 32, is a leading case as to the liability of innkeepers.

⁵ 1 Johns. R. (U. S.) 552, 553; 11 Id. 80.

that he means to take such duty or charge upon himself, and the law may very well imply a promise to perform what he has so taken upon himself.¹

The above maxim may also be applied² in support and explanation of that principle of the law of estoppel in accordance with which the record of a verdict, followed by a judgment in a suit *inter partes*, will estop, not only the original parties, but likewise those claiming under them. A man will be bound by that which would have bound those *under whom he claims *quoad* the subject-matter of the [*557] claim; for, *qui sentit commodum sentire debet et onus*: and no man can, except in certain cases, which are regulated by the statute law and the law merchant, transfer to another a better right than he himself possesses;³ the grantee shall not be in a better condition than he who made the grant;⁴ and, therefore, privies in blood, law, and estate shall be bound by, and take advantage of, estoppels.⁵

In administering equity, the maxim, *qui sentit commodum sentire debet et onus*, may properly be said to merge in that yet more comprehensive rule that *equality is equity*, upon the consideration of which it is not, however, within the scope of our present plan to enter; we may, nevertheless, give a few instances to which the more limited form, which is familiar in courts of common law, seems peculiarly applicable. It has been held, for example, that the legatee of a house, held by the testator on lease at a reserved rent, higher than it could be let for after his death, cannot reject the gift of the lease and retain an annuity under the will, but must take the benefit *cum onere*.⁶

A testator gives a specific bequest to A., and directs that, in consideration of the bequest, A. shall pay his debts, and makes A. his residuary legatee and executor, the payment of the debts is, in this case, a condition annexed to the specific bequest, and if A. accepts the bequest he is bound to pay the debts, though they should far exceed the amount of the property bequeathed to him.⁷

We may here further observe, that the Scotch doctrine of "approbate and reprobate," is strictly analogous to that *of election [*558] in our own law, and may, consequently, be properly referred

¹ Abbott, Shipp., 5th ed. 286; cited, *Lucas v. Nockells*, 1 Cl. & Fin. 457.

² 2 Smith, L. C. 440, 441.

³ Ante, p. 352, et seq.

⁴ *Mallory's case*, 5 Rep. 118.

⁵ Co. Litt. 352, a; *Outram v. Morewood*, 3 East, 346.

⁶ *Talbot v. Earl of Radnor*, 3 My. & Ky. 252.

⁷ *Messenger v. Andrews*, 4 Russ. 478.

to the maxim now under consideration. The principle on which this doctrine depends is, that a person shall not be allowed at once to benefit by and to repudiate an instrument, but that, if he chooses to take the benefit which it confers, he shall likewise discharge the obligation or bear the *onus* which it imposes. "It is," as was remarked in an important case upon this subject, "equally settled in the law of Scotland as of England, that no person can accept and reject the same instrument. If a testator gives his estate to A., and give A.'s estate to B., courts of equity hold it to be against conscience that A. should take the estate bequeathed to him, and at the same time refuse to give effect to the implied condition contained in the will of the testator. The Court will not permit him to take that which cannot be his but by virtue of the disposition of the will, and at the same time keep to what, by the same will, is given or intended to be given to another person. It is contrary to the established principles of equity that he should enjoy the benefit, while he rejects the condition of the gift."¹ Where, therefore, an express condition is annexed to a bequest, the legatee cannot accept and reject, approve and reprobate the will containing it. If, for example, the testator possessing a landed estate of small value, and a large personal estate, bequeaths by his will the personal estate to the heir, who was not otherwise entitled to it, upon condition that he shall give the land to another, the heir must either comply with the condition, or forego the benefit intended for him.² We may add, that the above rule as expressed by the maxim—*quod approbo non reprobo*, likewise holds where the condition is implied merely, [*559] *provided there be clear evidence of an intention to make the bequest conditional; and in this case, likewise, the heir will be required to perform the condition, or to renounce the benefit³—*qui sentit commodum sentire debet et onus*.

The converse of the above maxim also holds, and is occasionally cited and applied; for instance, inasmuch as the principal is bound by the acts of his authorized agent, so he may take advantage of them,⁴ *qui sentit onus sentire debet et commodum*.⁵

In like manner, it has been observed,⁶ that, wherever a grant is

¹ Kerr v. Wauchope, 1 Bligh. 21.

² Shaw, on Obligations, s. 184.

³ *Ib.*, s. 187.

⁴ Seignior v. Wolmer, Godb. 360; Judgment, Higgins v. Senior, 8 M. & W. 844. (*)

⁵ 1 Rep. 99.

⁶ Per Story, J., 11 Peters, R. (U. S.) 630, 681.

made for a valuable consideration, which involves public duties and charges, the grant shall be construed so as to make the indemnity co-extensive with the burthen—*qui sentit onus sentire debet et commodum*. In the case, for instance, of a ferry, there is a public charge and duty. The owner must keep the ferry in good repair, upon the peril of an indictment. He must keep sufficient accommodation for all travellers, at all reasonable times. He must content himself with a reasonable toll—such is the *jus publicum*.¹ In return, the law will exclude all injurious competition, and deem every new ferry a nuisance, which subtracts from him the ordinary custom and toll.² The franchise is, therefore, construed to extend beyond the local limits, and to be exclusive within a reasonable distance, this being indispensable to the fair enjoyment of the right of toll; and the same principle applies equally to the grant of a bridge, for the duties attaching to the [*560] grantee are, in this case, also *publici juris*, and pontage and *passage are but different names for exclusive toll for transport.³

We may add, that the maxim to which we have above mainly adverted likewise applies to throw the burthen of partnership debts upon the partnership estate, which is alone liable to them in the first instance, for the joint estate has shared the profits of the concern and must be made available, as far as it will suffice, to discharge the partnership liabilities,⁴ but the converse of the maxim holds with regard to the partnership creditor.

Lastly, as the practical application of the maxim, *qui sentit commodum sentire debet et onus*, has been in part explained by reference to equity decisions, so the converse of that maxim may likewise be illustrated from the same source. Thus, a *feme sole* having made a mortgage, and afterwards married, the mortgage was transferred during coverture, the husband joining in the transfer, and covenanting to pay the mortgage money; during the coverture the husband reduced the money due upon the mortgage by gradual payments; he also made a disposition by will of the mortgaged premises, and died in the wife's lifetime. Upon a bill by the wife, who claimed to be entitled by survivorship to redeem the mortgage, the redemption was decreed upon the terms, that the husband's estate should stand in the place of the mortgagee for the sums paid by him out of his own property in reduction of the mortgage debt;⁵ and this decision is in

¹ Paine v. Patrick, 3 Mod. 289, 294.

² Com. Dig. Pischary, (B.)

³ Charles River Bridge v. Warren Bridge, 11 Peters, R. (U. S.) 680, 681.

⁴ Ante, p. 554.

⁵ Pitt v. Pitt, 1 T. & R. 180.

strict accordance with the principle just mentioned—*Quod sentit onus sentire debet et commodum*. It is equity that *that should have the satisfaction which sustained the loss*.¹

*IN ÆQUALI JURE MELIOR EST CONDITIO POSSIDENTIS. [*561]
(Plowd. 296.)

Where the right is equal, the claim of the party in actual possession shall prevail.

The general rule is, that possession constitutes a sufficient title against every person not having a better title. "He that hath possession of lands, though it be by *disseisin*, hath a right against all men but against him that hath right;"² for, "till some act be done by the rightful owner to divest this possession and assert his title, such actual possession is *prima facie* evidence of a legal title in the possessor, and it may, by length of time and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title."³

It is, therefore, a familiar rule, that, in ejectment, the party controverting my title must recover by his own strength, and not by my weakness;⁴ and that, "when you will recover anything from me, it is not enough for you to destroy my title, but you must prove your own better than mine; for, without a better right, *melior est conditio possidentis*."⁵

And, accordingly, mere possession will support trespass *qu. cl. fr.*, against any one who cannot show a better *title.⁶ To the [*562] like effect, also, are the rules of the civil law,—*Non possessori incumbit necessitas probandi possessiones ad se pertinere,*⁷ and *in pari causâ possessor potior haberi debet*.⁸

¹ Francis, Max. 5.

² Doct. & Stud. 9. "I take it to be a sound and uncontroverted maxim of law, that every plaintiff or demandant in a court of justice must recover upon the strength of his own title, and not because of the weakness of that of his adversary; that is, he shall not recover without showing a *right*, although the adverse party may be unable to show any. It is enough for the latter that he is in possession of the thing demanded until the right owner calls for it. This is a maxim of common justice as well as of law." Per Parker, C. J. *Goodwin v. Hubbard*, 15 Tyng., R. (U. S.) 204.

³ 2 Bla. Com. 196.

⁴ Hobart, 103, 104; Jenk. Cent. 118.

⁵ Vaughan, R. 58, 60; Hobart, 103.

⁶ *Whittington v. Boxall*, 5 Q. B. 139; E. C. L. R. 48. See *Young v. Hichens*, 6 Q. B. 606; E. C. L. R. 51.

⁷ C. 4, 19, 2.

⁸ D. 50, 17, 123, § 1.

In like manner it is a rule laid down in the Digest, that the condition of the defendant shall be favoured rather than that of the plaintiff, *favorabiliores rei potius quam actores habentur*,¹ a maxim which admits of very simple illustration in the ordinary practice of our own courts; for, if, on moving in arrest of judgment it shall appear from the whole record that the plaintiff had no cause of action, the Court will never give judgment for him, for *melior est conditio defendentis*.²

So, if a loss must fall upon one of two innocent persons, both parties being free from blame, and justice being thus *in equilibrio*, the application of the same principle will turn the scale.³

"We may lay it down," says Ashhurst, J.,⁴ "as a broad, general principle, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

The application of the principle above laid down must, however, be made with great caution, and after a careful consideration of the particular circumstances of the case, because it frequently happens, that where money has been paid and received, without fault on either side, it may, notwithstanding the above maxim, be recovered back, either as *paid under a mistake of fact,⁵ or on the [*563] ground of a failure of consideration,⁶ or in consequence of the express or implied terms of the contract. Thus, in *Cox v. Prentice*, the defendant received from his principal abroad a bar of silver, and took it to the plaintiffs, who melted it, and sent a piece to an assayer to be assayed at defendant's expense. They subsequently purchased the bar, paying for a certain number of ounces of silver, which by the assay it was calculated to contain, and which was afterwards discovered to exceed the true number: it was held, that the plaintiffs, having offered to return the bar of silver, were entitled to recover the difference in value between the supposed and true weight as money had and received to their use, for this was a case of mutual innocence and equal error,—the mistake having been occasioned by

¹ D. 50, 17, 125. As to which maxim, vide *Argument*, 8 *Wheaton*, R. (U. S.) 195, 196.

² See *Hobart*, 199.

³ Per *Bayley, J.*, *East India Company v. Tritton*, 3 B. & C. 289; E. C. L. R. 10; *Argument*, 3 *Bing*. 408; E. C. L. R. 11.

⁴ 2 T. R. 70.

⁵ *Ante*, p. 194.

⁶ See *Jones v. Ryde*, 5 *Taunt.* 488, 495; E. C. L. R. 1.

the assay-master, who was properly to be considered as the agent for both parties.¹

It is seldom the case, however, that the scale of justice is exactly *in equilibrio*; it usually happens, that some degree of laches,² negligence, or want of caution, causes it to preponderate in favour either of the plaintiff or defendant. In illustration of which remark, we may refer to the doctrine which formerly existed with reference to bills of exchange and promissory notes, when received, not fraudulently, but under circumstances indicating negligence, in the holder. For instance, the defendants, who were bankers in a small town, gave notes of their own to a stranger, of whom they asked no questions, in exchange for a 500*l.* Bank of England note:—and it was held, that the plaintiffs, from *whom the 500*l.* note had been stolen, and who had duly advertised their loss, might recover [*564] the note from the defendants; and it was observed, that, even if the loss of the note had *not* been duly advertised, yet, if it had been received under circumstances inducing a belief that the receiver knew that the holder had become possessed of it dishonestly, the true owner would be entitled to recover its value from the receiver, the negligence of the owner being no excuse for the dishonesty of the receiver; but it was further remarked, that cases might occur in which the negligence of the one party would be an excuse for the negligence of the other, and might authorize the receiver to defend himself according to the above maxim.³

The rule, however, upon this subject, as above intimated, has, by several more recent decisions, been materially altered, and now is, that where a party has given consideration for a bill or note, gross negligence alone will not be sufficient to disentitle him to recover upon it; “gross negligence,” it has been observed, “may be evidence of *male fides*, but is not the same thing.”⁴

In equity, likewise, where two persons, having an equal equity, have been equally innocent and equally diligent, the rule generally applicable is, *melior est conditio possidentis* or *defendentis*. For instance, a court of equity constantly refuses to interfere either for

¹ Cox v. Prentice, 3 M. & S. 344; E. C. L. R. 30.

² This test was applied, per Tindal, C. J., Keele v. Wheeler, 8 Scott, N. R. 333. And see the maxim *caveat emptor*, post.

³ Snow v. Peacock, 3 Bing. 406; E. C. L. R. 11; commented on, Foster v. Pearson, 1 C., M. & R. 855. (*)

⁴ Goodman v. Harvey, 4 Ad. & E. 876; E. C. L. R. 31; Uther v. Rich, 10 Ad. & E. 790; E. C. L. R. 37.

relief or discovery against a bonâ fide purchaser of the legal estate for a valuable consideration, and without notice of the adverse title, provided he chooses to avail himself of the defence at the proper time and in the proper manner; for in such a case the defendant [*565] has the same claim upon the Court to protect his title, as *the plaintiff has for the assertion of it; and, therefore, the Court, acting upon the above rule, will decline to interpose upon either side.¹

Not only *in æquali jure*, but likewise *in pari delicto*, is it true that *potior est conditio possidentis*; where each party is equally in fault, the law favours him who is actually in possession,—a well-known rule of law, which is, in fact, included in that more comprehensive maxim to which the present remarks are appended.

“If,” said Buller, J., “a party come into a court of justice to enforce an illegal contract, two answers may be give to his demand: the one, that he must draw justice from a pure fountain, and the other, that *potior est conditio possidentis*.”² Agreeably to this rule, where money is paid by one of two parties to such a contract to the other, in a case where both may be considered as *participes criminis*, an action cannot be maintained after the contract is executed to recover the money.³ If A. agree to give B. money for doing an illegal act, B. cannot, although he do the act, recover the money by an action; yet, if the money be paid, A. cannot recover it back.⁴ So, the premium paid on an illegal insurance, to cover a trading with an enemy, cannot be recovered back, though the underwriter cannot be compelled to make good the loss.⁵ In the *above and [*566] similar cases, the party actually in possession has the advantage,—*Cum par delictum est duorum semper oneratur petitor et melior habetur possessoris causa*.⁶

¹ 1 Story, Eq. Jurisp., 4th ed., p. 74.

² Munt v. Stokes, 4 T. R. 564; 2 Inst. 391. See Fitzroy v. Gwillim, 1 T. R. 153; observed upon by Tindal, C. J., 7 Bing. 98; E. C. L. R. 20; Argument, 10 B. & C. 684; E. C. L. R. 21; 2 Ad. & E. 13; E. C. L. R. 29; per Lord Mansfield, C. J., 2 Burr. 926. See, also, Gordon v. Howden, 12 Cl. & Fin. 241, note, and cases cited in the Argument.

³ 1 Selw., N. P., 10th ed. 90; 1 Phill. on Evidence, 8th ed. 760, n. (1).

⁴ Webb v. Bishop, cited 1 Selw., N. P., 10th ed. 92, n. (42); Browning v. Morris, Cowp. 792; per Park, J., Richardson v. Mellish, 2 Bing. 250; E. C. L. R. 9.

⁵ Vandyok v. Hewitt, 1 East, 96; Lowry v. Bourdieu, Dougl. 468; Andree v. Fletcher, 3 T. R. 266; Lubbock v. Potts, 7 East, 449; Palyart v. Leckie, 6 M. & S. 290; Cowie v. Barber, 4 M. & S. 16; E. C. L. R. 30. See Edgar v. Fowler, 3 East, 222; Thistlewood v. Cracraft, 1 M. & S. 500; E. C. L. R. 28.

⁶ D. 50, 17, 154.

Prior to the recent stat. 8 & 9 Vict. c. 109, the maxim as to *par delictum* was frequently applied in determining the right to recover back money deposited with a stakeholder to abide the result of a wager between two parties; and although, by the 18th section of that act, all wagers are now rendered absolutely void, and money deposited under the circumstances stated, cannot be recovered back, yet some of the decisions alluded to, as well as others not affected by the statute, may properly be cited in support of the proposition, that if an illegal contract be executory, and if the plaintiff dissent from or disavow the contract before its completion, he may, on disaffirmance thereof, recover back money whilst *in transitu* to the other contracting party, there being in this case a *locus penitentiae*, and the *delictum* being incomplete.¹

Where, however, money has been actually paid over in pursuance of an illegal contract, it cannot be recovered back, for the Court will not assist such a transaction in any way.² So, where property has been placed in the hands of another for illegal purposes, as for smuggling, if the latter refuses to account for the proceeds, and fraudulently or unjustly withholds them, the party aggrieved must abide by his loss, for *in pari delicto melior est conditio possidentis*, which, it has been said, is a maxim of public policy, equally respected in courts of law and equity.³

Upon the whole, then, it seems that the true test for determining whether or not the objection that the plaintiff and defendant were *in pari delicto* can be sustained, is by considering whether the plaintiff can make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party. For instance, A. laid an illegal wager with B., in which C. agreed with A. to take a share; B. lost the wager, and A., in expectation

¹ Per Lord Ellenborough, C. J., *Edgar v. Fowler*, 8 East, 225; *Tappenden v. Randall*, 2 B. & P. 467; 2 Dougl. R., 4th ed. 697, a, n. (F. 7.) In *Hastelow v. Jackson*, 8 B. & C. 221; E. C. L. R. 15; cited *Hodson v. Terrill*, 1 Cr. & M. 804, (*) it was held that money deposited with a stakeholder might be recovered *after* the event was decided, notice having been given before payment over; but as to this case, see *Mearing v. Hellings*, 14 M. & W. 713. (*) See, also, *Cotton v. Thurland*, 5 T. R. 405; *Howson v. Hancock*, 8 T. R. 575; per Kent, C. J., *Vischer v. Yates*, 11 Johns. R. (U. S.) 80; *Smith v. Bickmore*, 4 Taunt. 474.

² *Edgar v. Fowler*, *supra*; *Ex parte Bell*, 1 M. & S. 751; E. C. L. R. 28; cited, *Judgment, McCallan v. Mortimer*, 9 M. & W. 642; (*) *Goodall v. Lowndes*, 6 Q. B. 464; E. C. L. R. 51. See *Keir v. Leeman* (in error), 15 L. J., Q. B. 360; S. C., 6 Q. B. 808; E. C. L. R. 51; per Gibbs, C. J., 8 Taunt. 497; E. C. L. R. 4.

³ 1 Story, Eq. Jurisp., 4th ed., p. 69.

that B. would pay the amount on a certain day, advanced to C. his share of the winnings. B. died insolvent before the day, and the bet was never paid; it was held, that A. could not recover from C. the sum thus advanced. "The plaintiff," observed Gibbs, C. J., "says the payment was on a condition which has failed, but that condition was that B., who was concerned with the plaintiff and defendant in this illegal transaction, should make good his part by paying the whole bet to the plaintiff, and it is impossible to prove the failure of this condition without going into the illegal contract, in which all the parties were equally concerned. We think, therefore, that the plaintiff's claim is so mixed with the illegal transaction, in which he and the defendant, and B., were jointly engaged, that it cannot be established without going into proof of that transaction, *and, therefore, cannot be enforced in a court of law."¹

[*568] So, in a recent case, it was held, that one of two parties to an agreement to suppress a prosecution for felony, cannot maintain an action against the other for an injury arising out of the transaction in which they had thus been illegally engaged; and this case was decided on the short ground, that the plaintiff could not establish his claim as stated upon the record, without relying upon the illegal agreement originally entered into between himself and the defendant.²

Thus far we have considered the effect of *par delictum* as between the immediate parties to the illegal transaction: we must add that the maxim respecting it does not seem to apply where an action is brought by one of such parties for the recovery of money received by a third party in respect of the illegal contract. Where, for instance, A. received money to the use of B. on an illegal contract between B. & C., it was held that A. could not set up the illegality of the contract as a defence in an action brought by B. for money had and received.³ It seems, however, clear, according to a principle already mentioned, that if A. enter into an illegal agreement with B., and money is received by the latter party in pursuance thereof, inasmuch as A. could not sue for its recovery, so, neither could those who may subsequently have succeeded to A.'s rights, maintain an action for the same.⁴

¹ *Simpson v. Bloss*, 7 Taunt. 246, 250; E. C. L. R. 2; recognised and followed in *Fivaz v. Nicholls*, 2 C. B. 501, 513; E. C. L. R. 52.

² *Fivaz v. Nicholls*, *supra*.

³ *Tenant v. Elliott*, 1 B. & P. 3; *Farmer v. Russell*, Id. 296; *Bousfield v. Wilson*, 16 M. & W. 185. (*)

⁴ See *Belcher v. Sambourne*, 6 Q. B. 414; E. C. L. R. 51; cited *Ellis v. Russell*, 16 L. J., Q. B. 428.

It is, in the next place, material to observe, that the maxim which we are considering does not apply unless *both* the litigating parties are *in delicto*—it cannot be insisted *upon as a defence, either [*569] by or against an innocent party. Where, for instance, there were two plaintiffs in an action for money had and received, and the defendant set up a receipt, which had been fraudulently obtained by him, with the privity of one of the plaintiffs, the Court observed, that the maxim now under consideration was inapplicable; for, one of the plaintiffs not being *in delicto*, the defendant ought not, as against him, to be allowed to set up his own fraud.¹ Where, also, money was paid by an underwriter to a broker for the use of the assured, on an illegal contract of insurance, it was held, that the assured might recover the money from the broker, on the ground, that the broker could not insist on the illegality of the contract as a defence, the obligation on him arising out of the fact, that the money was received by him to the use of the plaintiff, which created a promise in law to pay.² Where defendant entered into a composition-deed, together with the other creditors of plaintiff, under an agreement that plaintiff should give defendant his promissory notes for the remainder of the debt, which were accordingly given, and the amount thereof ultimately paid by plaintiff, it was held, that he might recover such amount from defendant in an action for money paid and money had and received; for, as observed by Lord Ellenborough, this was not a case of *par delictum*; it was oppression on one side and submission on the other; it never can be predicated as *par delictum*, when one holds the rod, and the other bows to it.³

*To the above maxim respecting *par delictum* may, however, properly be referred the general rule, that an action [*570] for contribution cannot be maintained by one of several joint wrongdoers against another, although the one who claims contribution may have been compelled to pay the entire damages recovered as compensation for the tortious act.⁴ It is, however, expressly laid down,

¹ Skaife v. Jackson, 3 B. & C. 421; E. C. L. R. 10. See Tregoning v. Attenborough, 7 Bing. 97; E. C. L. R. 20.

² Tenant v. Elliott, 1 B. & P. 3. See M'Gregor v. Lowe, Ry. & M. 57, and cases cited in note 3, p. 568.

³ Smith v. Cuff, 6 M. & S. 160; Turner v. Hoole, Dow. & Ry., N. P. C. 27; E. C. L. R. 16; Alsager v. Spalding, 4 Bing., N. C. 407; E. C. L. R. 33; Horton v. Riley, 11 M. & W. 492; (*) 2 Dougl. R., 4th ed. 697, a, n. (F. 7.) See Browning v. Morris, Cowp. 790.

⁴ Merryweather v. Nixon, 8 T. R. 186. See per Lord Lyndhurst, C. B., Colburn v. Patmore, 1 C., M. & R. 83; (*) Farebrother v. Ansley, 1 Camp. 342; cited, Shackell

that this rule does not extend to cases of indemnity, where one man employs another to do acts not unlawful in themselves, for the purpose of asserting a right.¹ Moreover, the rule as to non-contribution between wrongdoers must be qualified in this manner, that, where one party induces another to do an act which is not legally supportable, and yet is not clearly in itself a breach of law, the party so inducing shall be answerable to the other for the consequences.²

In equity, as at law, the general rule undoubtedly is, that relief will not be granted where both parties are *in pari delicto*, unless in cases where public policy requires the interference of the Court.³ Before proceeding, however, to apply this maxim, it is very necessary to ascertain whether, under the given circumstances, the delinquency attaching to each of the principal parties is really equal in degree. Equity, for instance, has refused to treat as *in pari delicto* the parties to a private agreement, entered into between father and son, which was illegal, as being a fraud upon the Post-office; and in this case Sir W. Grant, after observing that the question was, whether the [*571] general rule, **in pari delicto melior est conditio possidentis*, should prevail, and the Court should refuse relief—both parties to the agreement, which was impeached by the bill, having been guilty of a violation of the law,—remarked, that “Courts both of law and equity have held, that two parties may concur in an illegal act without being deemed to be in all respects *in pari delicto* ;” and his Honour thought, under the circumstances before him, that the *par delictum* between the parties had not been in fact established, the agreement being substantially the mere act of the father.⁴ The above case, therefore, serves to show that there may be different degrees of guilt, which will, in a court of equity, prevent the operation of the general maxim, even where both parties have concurred in the same illegal and criminal act; and the result of the decision and remarks of Sir W. Grant in *Osborne v. Williams* may, perhaps, be accurately stated thus, that “where both parties intend to act illegally, and both act illegally, and are *in pari situ*, the Court will not interfere; but where no illegality is intended or contemplated,

v. *Rosier*, 2 Bing., N. C. 647; E. C. L. R. 29. See, also, *Campbell v. Campbell*, 7 Cl. & Fin. 166.

¹ Per Lord Kenyon, C. J., 8 T. R. 186; cited, 8 Bing. 72; E. C. L. R. 21.

² Per Lord Denman, C. J., *Betts v. Gibbins*, 2 Ad. & E. 75; E. C. L. R. 29.

³ 1 Story, Eq. Jurisp., 4th ed., s. 298.

⁴ *Osborne v. Williams*, 18 Ves. 379; cited, *Argument, Clough v. Ratcliffe*, 16 L. J., Chanc. 476, 477.

and where they are not *in pari delicto*, the Court will decide between them."¹

EX DOLO MALO NON ORITUR ACTIO.

(Cowp. 848.)

A right of action cannot arise out of fraud.

It has been thought convenient to place the above maxim in close proximity to that which precedes it, because these two important rules of law are intimately *related to each other, and the cases [*572] which have already been cited in illustration of the rule as to *par delictum* may be referred to generally as establishing and justifying the position, that an action cannot be sustained which is founded in fraud, or which springs *ex turpi causâ*. The connexion which exists between these maxims may, indeed, be satisfactorily shown by reference to a case which has been cited in the preceding pages. In *Fivaz v. Nicholls*,² an action on the case was brought for an alleged conspiracy between B. the defendant, and a third party, C., to obtain payment of a bill of exchange accepted by the plaintiff in consideration that B. would abstain from prosecuting C. for embezzlement; and it was held that the action would not lie, inasmuch as it sprung out of an illegal transaction, in which both plaintiff and defendant had been engaged, and of which proof was essential in order to establish the plaintiff's claim as stated upon the record. In this case, therefore, the maxim, *ex dolo malo non oritur actio*, was evidently applicable, and, not less so with regard either to the original corrupt agreement, or to the subsequent alleged conspiracy, was the general principle of law, *in pari delicto potior est conditio defendentis*. To the class of cases also which establish that contribution cannot be enforced amongst wrong-doers, and that a person who has committed an act declared by the law to be criminal, will not be permitted to recover compensation from one who has knowingly participated with him in the commission of the crime,³ a similar remark seems equally to apply. Bearing in mind, then, this connexion between the two kindred maxims aforesaid, we shall in the ensuing pages proceed to consider briefly the important and very compre-

¹ Argument, *Clough v. Ratcliffe*, 16 L. J., Chanc. 477.

² 2 C. B. 501, 512, 515; E. C. L. R. 52.

³ Per Lord Lyndhurst, *Colburn v. Patmore*, 1 Cr., M. & R. 83; (*) per Maule, J., 2 C. B. 509; E. C. L. R. 52.

[*573] hensive *principle, *ex dolo malo*, or more generally *ex turpi causâ, non oritur actio*.

In the first place, then, we may observe, that the word *dolus*, when used in its more comprehensive sense, was understood by the Roman jurists to include "every intentional misrepresentation of the truth made to induce another to perform an act which he would not else have undertaken;"¹ and a marked distinction accordingly existed in the civil law between *dolus bonus* and *dolus malus*: the former signifying that degree of artifice or dexterity which a person might lawfully employ to advance his own interest, in self-defence, against an enemy, or for some other justifiable purpose;² and the latter including every kind of craft, guile, or machination, intentionally employed for the purpose of deception, cheating, or circumvention.³ As to the latter species of *dolus* (with which alone we are now concerned), it was a general and fundamental rule, that, *dolo malo pactum se non servaturum*;⁴ and, in our own law, it is a familiar principle, that no valid contract can arise out of a fraud; and that any action brought upon a supposed contract, which is shown to have arisen from fraud, may be successfully resisted.⁵ It is, moreover, a general proposition, that an agreement to do an unlawful act cannot be supported at law,—that no right of action can spring out of an [*574] illegal contract;⁶ and this rule, *which applies not only where the contract is expressly illegal, but whenever it is opposed to public policy, or founded on an immoral consideration,⁷ is expressed by the well-known maxim, *ex turpi causâ non oritur actio*,⁸ and is in accordance with the doctrine of the civil law, *pacta quæ turpem causam continent non sunt observanda*,⁹ "wherever the consideration which is the ground of the promise, or the promise, which is the consequence or effect of the consideration, is unlawful, the whole

¹ Mackeldey, Civ. Law, 165.

² *Ib.* 165; Bell, Dict. and Dig. of Scotch Law, 319; D. 4, 3, 3. Brisson, ad verb. "Dolus;" Tayl. Civ. Law, 4th ed. 118.

³ D. 4, 3, 1, § 2; *Id.* 50, 17, 79; *Id.* 2, 14, 7, § 9. ⁴ D. 2, 14, 7, § 9.

⁵ Per Patteson, J., 1 Ad. & E. 42; E. C. L. R. 28; per Holroyd, J., 4 B. & Ald. 34; E. C. L. R. 6; Per Lord Mansfield, C. J., 4 Burr. 2300.

⁶ Per Lord Abinger, C. B., 4 M. & W. 657; (*) per Ashhurst, J., 8 T. R. 98. See *Jones v. Waite*, 5 Scott, N. R. 951; S. C., 5 Bing., N. C. 841; E. C. L. R. 35; and 1 Bing., N. C. 656; E. C. L. R. 27.

⁷ *Allen v. Rescous*, 2 Lev. 174; *Walker v. Perkins*, 3 Burr. 1568; *Wetherell v. Jones*, 3 B. & Ad. 225, 226; E. C. L. R. 23.

⁸ Judgment, *Bank of United States v. Owens*, 2 Peters, R. (U. S.) 539.

⁹ D. 2, 14, 27, § 4.

contract is void."¹ A court of law will not, then, lend its aid to enforce the performance of a contract which appears upon the face of the record to have been entered into by both of the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land; and this objection to the validity of a contract must, from authority and reason, be allowed in all cases to prevail. No legal distinction can be supported between the application of this objection to parol contracts, and to contracts under seal; it would be inconsistent with reason and principle to hold, that, by the mere ceremony of putting a seal to an instrument, that is, by the voluntary act of the parties themselves, a contract, which was void in itself, as being a violation of the law of the land, should be deemed valid, and an action maintainable thereon in a court of justice.²

In *Collins v. Blantern*,³ which is a leading case to show *that illegality may be pleaded as a defence to an action on a [*575] bond, the bond was alleged to have been given to the obligee as an indemnity for a note entered into by him, for the purpose of inducing the prosecutor of an indictment for perjury to withhold his evidence; for the plaintiff, it was contended that the bond was good and lawful, the condition being singly for the payment of a sum of money, and that no averment should be admitted, that the bond was given upon an unlawful consideration not appearing upon the face of it; but it was held, that the bond was void *ab initio*, and that the facts might be specially pleaded; and it was observed by Wilmot, C. J., delivering the judgment of the Court, that "the manner of the transaction was to gild over and conceal the truth; and whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish and show the transactions in their true light." And again, "this is a contract to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law: and the reason why the common law says such contracts are void, is for the public good: *you shall not stipulate for*

¹ 1 Bulstr. 38; Hobart, 72; Dyer, 356.

² Judgment, *Gas Light and Coke Company v. Turner*, 5 Bing., N. C. 675; E. C. L. R. 35.

³ 2 Wils. 341. See *Ward v. Lloyd*, 7 Scott, N. R. 499; *Ex parte Critchley*, 15 L. J., Q. B. 124. In *Keer v. Leeman* (in error), 15 L. J., Q. B. 360; S. C., 6 Q. B. 308; E. C. L. R. 51; where the compromise of a misdemeanour was held to be illegal, the cases upon this subject are collected.

iniquity. All writers upon our law agree in this—no polluted hand shall touch the pure fountains of justice.”¹

It is, then, a general rule, that an agreement cannot be made the subject of an action if it can be impeached on the ground of dishonesty, or as being opposed to public policy,—if it be either *contra bonos mores*, or forbidden by the *law.* In answer to an [*576] action founded on such an agreement, the maxim may be urged, *ex maleficio non oritur contractus*²—a contract cannot rise out of an act radically vicious and illegal: those who come into a court of justice to seek redress must come with clean hands, and must disclose a transaction warranted by law;³ and “it is quite clear, that a court of justice can give no assistance to the enforcement of contracts which the law of the land has interdicted.”⁴

It does not fall within the plan of this work to enumerate, much less to consider at length, the different grounds on which a contract may be invalidated for illegality.⁵ We shall, therefore, merely cite the two following cases in illustration of the above remarks. In strict accordance with them, it has been held, that no action could be maintained on a bond given to a person in consideration of his doing, and inducing others to do, something contrary to the terms of letters-patent; and that the obligee was equally incapable of recovering, whether he knew or did not know the terms of the letters-patent

¹ See, also, *Prole v. Wiggins*, 8 Bing., N. C. 230; *E. C. L. R.* 32; *Paxton v. Popham*, 9 East, 408; *Pole v. Harrobin*, *Id.* 417, n; *Gas Light and Coke Company v. Turner*, 5 Bing, N. C. 666; *E. C. L. R.* 35; *Cuthbert v. Haley*, 8 T. R. 390.

² Per Lord Kenyon, C. J., 6 T. R. 16. See per Holroyd, J., 2 B. & Ald. 103.

³ Judgment, 1 T. R. 734; *Parsons v. Thompson*, 1 H. Bla. 322; 8 Wheaton, R. (U. S.) 152.

⁴ Per Lord Kenyon, C. J., *Petrie v. Hannay*, 3 T. R. 422.

⁵ Per Lord Eldon, C., *Ex parte Dyster*, 2 Rose, 351. See *Jaques v. Witby*, 1 H. Bla. 65. Money won at play, or lent for the purpose of gambling, in a country where the games in question are not illegal, may be recovered in the courts of this country: *Quarrier v. Colston*, 1 Phil. 147. See, also, per Lord Abinger, C. B., *Pallecat v. Angell*, 2 C., M. & R. 313; (*) and the remarks of the Court in *Spence v. Chadwick*, 16 L. J., Q. B. 313; *Benham v. Earl of Mornington*, 8 C. B. 133; *E. C. L. R.* 54.

⁶ The following cases may, however, be mentioned with reference to this subject, in addition to those already cited: *Simpson v. Lord Howden*, 9 Cl. & Fin. 61; *Jones v. Waite*, *Id.* 101; *Mittleholzer v. Fullarton*, 6 Q. B. 989, 1022; *E. C. L. R.* 51; *Bousfield v. Wilson*, 16 M. & W. 185. (*) As to the defence of usury, see *Washbourne v. Burrows*, 1 Exch. 107. (*) In the great case of *Attwood v. Small*, 6 Cl. & Fin. 232, the effect of fraud on a contract of sale was much considered; but this case properly falls under the maxim, *caveat emptor*, to which, therefore, the reader is referred.

—the ignorance, if in fact it existed, *resulting from his own fault.¹ “The question,” says Lord Tenterden, in the case [*577] here alluded to, “comes to this; can a man have the benefit of a bond by the condition of which he undertakes to violate the law? It seems to me that it would not be according to the principles of the law of England, which is a law of reason and justice, to allow a man to maintain an action under such circumstances; it would be to hold out an encouragement to any man to induce others to become dupes, and to pay their money for that from which they could derive no advantage.”

In *scire facias* against the defendant as a member of a certain steam-packet company, the plea stated that the original action was for a demand in respect of which neither the defendant in the *sci. fa.*, the packet company, nor the defendant in the original action (the public officer of the company,) was by law liable, as plaintiff at the commencement of the action well knew; and that such registered officer and the plaintiff well knowing the premises, the said officer fraudulently and deceitfully, and by connivance with plaintiff, suffered the judgment in order to charge the defendant in *sci. fa.* The Court held the plea to be good, and further observed, that *fraud no doubt vitiates everything*;² and upon being satisfied of such fraud, they possessed power to vacate, and would vacate, their own judgment.³

Further, it is an indisputable proposition, that, as against *an innocent party, “no man shall set up his own iniquity as [*578] a defence any more than as a cause of action.”⁴ Where, however, a contract or deed is made for an illegal purpose, a defendant against whom it sought to be enforced may show the turpitude of both himself and the plaintiff, and a court of justice will decline its aid to enforce a contract thus wrongfully entered into. For instance, money cannot be recovered which has been paid *ex turpi causâ, quum dantis æque et accipientis turpitudine versatur*.⁵ An unlawful agreement, it

¹ *Duvergier v. Fellowes*, 1 Cl. & Fin. 39.

² A copyright, for instance, may be defeated on the ground of fraud: *Wight v. Tallis*, 1 C. B. 893; *E. C. L. R.* 50. As to the jurisdiction of equity, where probate of a will was obtained by fraud, see *Allen v. M'Pherson*, 11 Jur. 785.

³ *Philipson v. Earl of Egremont*, 6 Q. B. 587, 605; *E. C. L. R.* 51; recognising *Fowler v. Rickerby*, 2 M. & Gr. 760; *E. C. L. R.* 40; *Harvey v. Scott*, Q. B., 12 Jur. 12.

⁴ Per Lord Mansfield, C. J., *Montefiori v. Montefiori*, 1 W. Bla. 364; cited per Abbott, C. J., 2 B. & Ald. 368. It is a maxim, that *jus ex injuriâ non oritur*; see *Argument*, 4 Bing. 639; *E. C. L. R.* 13-15.

⁵ 1 Pothier, *Traité de Vente*, 186.

has been said, can convey no rights in any court to either party; and will not be enforced at law or in equity in favour of one against the other of two persons equally culpable.¹

The principle on which the rule here laid down depends is, as above stated by Chief Justice Wilmot, the public good. "The objection," says Lord Mansfield,² "that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff—by accident, if I may so say. The principle of public policy is; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own *stating or otherwise, the cause of action appear to arise [*579] *ex turpi causâ*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio defendentis*."³

It may here be proper to observe, that although a Court will not assist in giving effect to a contract which is "expressly or by implication forbidden by the statute or common law," or which is "contrary to justice, morality, and sound policy;" yet where the consideration and the matter to be performed are both legal, a plaintiff will not be precluded from recovering by an infringement of the law in the performance of something to be done on his part; such infringement not having been contemplated by the contracting parties.⁴

In determining, moreover, the effect of a penal statute⁵ upon the

¹ Per Lord Brougham, C., *Armstrong v. Armstrong*, 3 My. & K. 64.

² *Holman v. Johnson*, Cowp. 843; *Jackson v. Duchaire*, 3 T. R. 551, 553; cited, *Spencer v. Handley*, 5 Scott, N. R. 558.

³ See, also, *Argument*, 15 Peters, R. (U. S.) 471; per Tindal, C. J., 2 C. B. 512; *E. C. L. B.* 52.

⁴ *Wetherell v. Jones*, 3 B. & Ad. 225, 226; *E. C. L. R.* 23. See *Redmond v. Smith*, 8 Scott, N. R. 250.

⁵ With reference to a breach of the Revenue Laws, Lord Stowell observes, "It is sufficient if there is a contravention of the law—if there is a *fraus in legem*. Whether

validity of a contract entered into by one who has failed in some respect to comply with its provisions, it is necessary to consider whether the object of the statute was merely to inflict a penalty on the offending party for the benefit of the revenue, or whether the legislature intended to prohibit the contract itself. In the *former case, an action will lie upon the contract; but in the [*580] latter, the maxim under consideration will apply, and even if the contract be prohibited for revenue purposes only, it will be altogether illegal and void, and no action will be maintainable upon it.¹

It must be observed, however, that a contract, although illegal and void as to part, will not necessarily be void *in toto*. Thus, if there be a bond, with condition to do several things, some of which are agreeable to law and some against the common law, the bond shall be good as to the former, and void as to the latter only;² and this rule is generally true with respect to a contract which may be void and illegal in part as against public policy, and yet good as to the residue. Where, for instance, the defendant covenanted that he would not, during his life, carry on the trade of a perfumer "within the cities of London and Westminster, or within the distance of 600 miles from the same respectively," the Court held that the covenant was divisible, and was good so far as it related to the cities of London and Westminster, though void as to the residue.³

It seems, then, upon the whole, a true proposition, that if any part of a contract is valid, it will avail *pro tanto*, although another part of it may be prohibited by statute, provided the statute does not expressly or by necessary implication render the whole void, and provided also that *the sound part can be separated from the unsound.⁴ Where, however, a particular proceeding, though not in itself [*581]

that may have arisen from mistaken apprehension, from carelessness, or from any other cause, it is not material to inquire. In these cases it is not necessary to prove actual and personal fraud." *The Reward*, 2 Dods. Adm. R. 271.

¹ *Smith v. Mawhood*, 14 M. & W. 452; (*) recognising *Johnson v. Hudson*, 11 East, 180. See per Holt, C. J., *Bartlett v. Viner*, Carth. 252; cited, *Judgment, De Begnis v. Armistead*, 10 Bing. 110; E. C. L. R. 25; and in *Fergusson v. Norman*, 5 Bing., N. C. 85; E. C. L. R. 35.

² *Chesman v. Nainby*, 2 Ld. Raym. 1456, 1459; *Pigot's case*, 11 Rep. 27.

³ *Price v. Green* (in error), 16 M. & W. 346; (*) S. C. 13 Id. 695; following *Malan v. May*, 11 M. & W. 653, (*) and *Chesman v. Nainby*, supra. See, also, as to restraint of trade, *Hartley v. Cummings*, C. P., 12 Jur. 57; *Pilkington v. Scott*, 15 M. & W. 657; (*) *Rannie v. Irvine*, 8 Scott, N. R. 674; *Pemberton v. Vaughan*, 16 L. J., Q. B. 161. *Mitchell v. Reynolds*, 1 P. Wms. 186, is the leading case upon this subject. See *Nicholls v. Stretton*, Q. B., 11 Jur. 1008.

⁴ *Amer. Jur.*, vol. 28, p. 5, where the reader will find a learned article upon unlawful contracts generally.

illegal, is inseparably connected with another which is so, in such a manner that both form parcels of one transaction—*ex. gr.*, of one trading adventure—such transaction becomes altogether illegal, because bottomed in and originating out of that which was in itself illegal; and in this wide and comprehensive sense must therefore be understood the rule, *ex pacto illicito non oritur actio*.¹

An agreement between the plaintiff and defendant recited that the plaintiff had for a long time carried on business as a law-stationer, and also had been a sub-distributor of stamps and collector of assessed taxes, and it then stated, “that in consideration of £300 payable by instalments, the plaintiff agreed to sell, and the defendant agreed to purchase, the business of a law-stationer, theretofore carried on by the plaintiff; and it was thereby further agreed between them that the plaintiff should not after the 1st of March then next carry on the business of a law-stationer, or collect any of the assessed taxes, &c., but that he, the plaintiff, would use his utmost endeavours to introduce the defendant to the said business and offices, &c. :” the Court held that this agreement was for the sale of an office within the 5 6 Edw. 6, c. 16, that it formed one entire contract, though embracing several distinct acts, and that the declaration was consequently bad.²

Again, an agreement to take a message, and to pay for alterations in it to be made by the plaintiff, is required by the Statute of Frauds, inasmuch as it relates to an interest in land, to be in writing; and since the main object of the agreement concerns such interest, [*582] the other stipulations contained *in it cannot be severed from the principal subject-matter, and the agreement consequently, being verbal only, will not sustain an action;³ and this case, although not involving an application of the doctrine as to *illicit* contracts, has been here mentioned as an additional simple illustration of the rule respecting divisibility above stated. It remains to add, that, where a party to a contract, which might be impugned on the ground of fraud, knowing of the fraud, nevertheless elects to treat the transaction as a contract, he thereby loses his right of rescinding it. If, for instance, a party be induced to purchase an article by fraudulent misrepresentations of the seller respecting it, and, after discovering the fraud continue to deal with the article as his own, he cannot recover back the money paid from the seller; nor does there seem any authority

¹ See *Stewart v. Gibson*, 7 Cl. & Fin. 729.

² *Hopkins v. Prescott*, 16 L. J., C. P. 258, and cases there cited.

³ *Vaughan v. Hancock*, 16 L. J., C. P. 1.

for saying that a party must, in such a case, know all the incidents of a fraud before he deprives himself of the right of rescinding: the proper and safe course is to repudiate the whole transaction at the time of discovering the fraud.¹ Lastly, when the act which is the subject of the contract may, according to the circumstances, be lawful or unlawful, it will not be presumed that the contract was to do the unlawful act; the contrary is the proper inference.² Thus, where an act is required to be done by a person, the omission of which would make him guilty of a criminal neglect of duty, the law presumes that he has duly performed it, and throws the burthen of proving the negative on the party who may be interested in doing so.³

*Having in the preceding pages directed attention to some leading points connected with the *illegality* of the considera- [*583] tion for a promise or agreement, and having selected from very many cases, those only which seemed peculiarly adapted to throw light upon the maxim, *ex dolo malo non oritur actio*, we may further pray in aid of the above very cursory remarks upon so copious and comprehensive a subject of inquiry, the observations already made upon the yet more general principle, that *a man shall not be permitted to take advantage of his own wrong*,⁴ and shall at once proceed to offer some remarks upon the necessity for a consideration generally where two parties enter into a contract, and upon the sufficiency and essential requisites thereof.

EX NUDO PACTO NON ORITUR ACTIO.

(Noy, Max., 24.)

No cause of action arises from a bare agreement.

Nudum pactum may be defined in the words of Ulpian, to be where *nulla subest causa propter conventionem*,⁵ i. e., where there is no consideration for the promise or undertaking of one of the con-

¹ *Campbell v. Fleming*, 1 Ad. & E. 40; E. C. L. R. 28.

² *Lewis v. Davison*, 4 M. & W. 654; (*) 1 B. & Ald. 463; Judgment, *Garrard v. Harday*, 6 Scott, N. R. 477. See per Parke, B., *Jackson v. Cobbin*, 8 M. & W. 797; (*) *Harrison v. Heathorn*, 6 Scott, N. R. 735; 10 Rep. 56; C. 2, 21, 6.

³ *Williams v. East India Company*, 3 East, 192; cited, per Lord Ellenborough, C. J., 2 M. & S. 561; E. C. L. R. 28.

⁴ Ante, p. 209.

⁵ D. 2, 14, 7, § 4; Plowd. 309, n; Vin. Abr. "Nudum Pactum," (A.) See 1 Powell, Contracts, 380 et seq. As to the doctrine of *nudum pactum* in the civil law, see *Pillans v. Van Mierop*, 3 Burr. 1670 et seq; 1 Foub. Eq., 5th ed. 335(a).

tracting parties; and it is a fundamental principle in our system of law, that from such an agreement or undertaking no cause of action can arise. "A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay anything on one side, without any compensation on the other, is totally void in law, and a man cannot be compelled to perform it."¹ A valid and *sufficient consideration [584] or recompense for making, or motive or inducement to make, the promise upon which a party is sought to be charged, is of the very essence of a simple contract. There must be, in the language of Pothier, *une cause d'où naissent l'obligation*,² and without this no action can be maintained upon it. Accordingly, if one man promises to give another £100, there is no consideration moving from the promisee, and therefore there is nothing binding on the promisor.³ A gratuitous undertaking may indeed form the subject of a moral obligation, and may be binding in honour, but it does not create a legal responsibility.⁴ Nor will a mere voluntary courtesy or service uphold an *assumpsit*, unless moved by a previous request.⁵ In these and similar cases the rule is, *nuda pactio obligationem non parit*.⁶

We must, however, state, *in limine*, that where a promise is made under seal, the solemnity of that mode of delivery is held to import, at law, that there was a sufficient consideration for the promise, so that the plaintiff is not in this case required to prove such consideration; nor can the deed be impeached by merely showing that it was made without consideration, unless proof be given that it originated in fraud.⁷ Neither is a consideration necessary for the validity of a conveyance operating at common law; but, unless a use is expressly [585] limited thereby, or it appears to *be the intention of the grantor to part with the estate without a consideration, the use will result in his favour. If, however, such should not be the

¹ Bla. Com. 445; Noy, Max., 9th ed. p. 348.

² 1 Pothier, Oblig. 5.

³ 2 Bla. Com. 445; Vin. Abr. "Contract," (K.)

⁴ Judgment, 1 H. Bla. 327. But a gratuitous bailee will be liable for gross negligence, *Coggs v. Bernard*, 2 Ld. Raym. 909. See *Elsee v. Gatward*, 5 T. R. 143, 149.

⁵ *Lampleigh v. Brathwait*, Hob. R. 105; per Park, J., *Reason v. Wirdman*, 1 C. & P. 434; E. C. L. R. 12; *Bartholomew v. Jackson*, 20 Johns. R. (U. S.) 28. Physicians and counsel have no legal title to remuneration, unless an express agreement or actual contract be shown: *Veitch v. Russell*, 3 Q. B. 928; E. C. L. R. 43; where the authorities are cited.

⁶ D. 2, 14, 7, § 4; C. 4, 65, 27; Brisson, *ad verb.* "Nudus."

⁷ 2 Bla. Com. 16th ed. 446, n. (4). Per Parke, B., *Wallis v. Day*, 2 M. & W. 277. (*)

intention of the grantor, and yet an express limitation of the use should prevent the estate from resulting at law, there would still be in equity a resulting trust in his favour. Even in the case of a deed, moreover, it is necessary to observe the distinction between a *good* and a *valuable* consideration; the former is such as that of blood, or of natural love and affection, as when a man grants an estate to a near relation, being influenced by motives of generosity, prudence, and natural duty. Deeds made upon this consideration are looked upon by the law as merely *voluntary*, and, although good as between the parties, are frequently set aside in favour of creditors and *bonâ fide* purchasers.¹ On the other hand, a valuable consideration is such as money, marriage, or the like; and this is esteemed by the law as an equivalent given for the grant, and makes the conveyance good as against a subsequent purchaser.²

When, therefore, a question arises between one who has paid a valuable consideration for an estate, and one who has given nothing, it is a just presumption of law, that such voluntary conveyance, founded only on considerations of affection and regard, if coupled with a subsequent sale, was meant to defraud those who should afterwards become purchasers for a valuable consideration, it being, upon the whole, more fit that a voluntary grantee should be disappointed, than that a fair purchaser should be defrauded.³

A *consideration* for a simple contract has been defined [*586] *thus:—"Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or such inconvenience suffered, by the plaintiff with the consent, either express or implied, of the defendant."⁴ And again, "Consideration means something which is of *some* value in the eye of the law moving from the plaintiff. It may be some benefit to the defendant or some detriment to the plaintiff, but, at all events, it must be moving from the plaintiff."⁵ For instance, where plaintiff

¹ 2 Bla. Com. 297, 444; per Lord Tenterden, C. J., *Gully v. Bishop of Exeter*, 10 B. & C. 606; E. C. L. R. 21. See *Bac. Max.*, reg. 18.

² 2 Bla. Com. 297, 444; 10 B. & C. 606; E. C. L. R. 21.

³ Judgment, *Doe d. Otley v. Manning*, 9 East, 66, where the prior cases are fully considered. See 2 Q. B. 860; E. C. L. R. 42.

⁴ 1 Selw., N. P., 10th ed. 41.

⁵ Per Patteson, J., *Thomas v. Thomas*, 2 Q. B. 859; E. C. L. R. 42; *Price v. Easton*, 4 B. & Ad. 438; E. C. L. R. 24; *Edwards v. Baugh*, 11 M. & W. 641; (*) *Wade v.*

stipulated to discharge A. from a portion of a debt due to himself, and to permit B. to stand in his place as to that portion, defendant stipulating, in return, that B. should give plaintiff a promissory note; the consideration moving from plaintiff, and being an undertaking detrimental to him, was held sufficient to sustain the promise by defendant.¹ Where, however, A. being indebted to plaintiff in a certain amount, and B. being indebted to A. in another amount, the defendant, in consideration of being permitted by A. to sue B. in his name, promised to pay A.'s debt to the plaintiff, and A. gave such permission, whereupon defendant recovered from B., judgment [*587] was arrested, on the ground that plaintiff was a mere *stranger to the consideration for the promise made by defendant, having done nothing of trouble to himself or of benefit to the defendant.²

So, where in an action of *assumpsit* the consideration for the defendant's promise was stated to be the release and conveyance by the plaintiff of his interest in certain premises, at the defendant's request, but the declaration did not show that the plaintiff had any interest in the premises except a lien upon them, which was expressly reserved by him, the declaration was held bad, as disclosing no legal consideration for the alleged promise.³

In debt, for money had and received, &c., the defendant pleaded the execution and delivery to the plaintiff of a deed securing to the plaintiff a certain annuity, and acceptance of the same by the plaintiff in full satisfaction and discharge of the debt; replication, that no memorial of the annuity deed had been enrolled pursuant to the statute; that the annuity being in arrear, the plaintiff brought an action to recover the amount of the arrears; that defendant pleaded in bar the non-enrolment of the memorial; and that plaintiff thereupon elected and agreed that the indenture should be null and void,

Simeon, 2 C. B. 548; E. C. L. R. 52; Llewellyn v. Llewellyn, 15 L. J., Q. B. 4; Clutterbuck v. Coffin, 4 Scott, N. R. 509; Crow v. Rogers, 1 Stra. 592; Lilly v. Hays, 5 Ad. & E. 548; E. C. L. R. 31; Galloway v. Jackson, 3 Scott, N. R. 753, 763; Thornton v. Jenyns, 1 Scott, N. B. 52; Jackson v. Cobbin, 8 M. & W. 790; (*) Cowper v. Green, 7 M. & W. 633; (*) 1 Roll. Abr. 28, pl. 29; Fisher v. Waltham, 4 Q. B. 889; E. C. L. R. 45.

¹ Peate v. Dicken, 1 Cr., M. & R. 422; (*) Tipper v. Bicknell, 3 Bing., N. C. 710; E. C. L. R. 32; Harper v. Williams, 4 Q. B. 219; E. C. L. R. 45.

² Bourne v. Mason, 1 Ventr. 6.

³ Kaye v. Dutton, 8 Scott, N. R. 495; recognising Edwards v. Baugh, 11 M. & W. 641. (*)

and discontinued the action. The replication was held to be a good answer to the plea, since it showed that the accord and satisfaction thereby set up had been rendered nugatory and unavailing by the defendant's own act.¹

It will be evident from the cases just cited, and from the additional authorities referred to below and in the course of these remarks, that, in defining *nudum pactum* to be, **ubi nulla subest causa propter conventionem*, the word *causa* must be taken to [*588] mean a consideration which confers that which the law regards as a benefit on the party; it must not be confounded with the *motive* which induces or disposes a person to enter into a contract.²

For instance, an agreement was entered into between plaintiff, who was the widow, and defendant and S. T., who were the executors of J. T., by which, after reciting that J. T. had verbally expressed his desire that plaintiff should have a certain house, &c. during her life, and reciting, also, that defendant and S. T. were desirous that such intention should be carried into effect: it was witnessed, that, "in consideration of such desire, and of the premises," the executors would convey the house, &c. to the plaintiff for her life; "provided nevertheless, and it is hereby further agreed and declared," that the plaintiff should, during her possession, pay to the executors 1*l.* yearly towards the ground-rent, payable in respect of the said house and adjoining premises, and should keep the said house, &c., in repair: it was held, that the agreement so to pay, and to keep the premises in repair, was a consideration for the agreement by the defendant and S. T., and that respect for the wishes of the testator formed no part of the legal consideration for their agreement, and need not be stated in the declaration.³ This case, therefore, is illustrative of the position, that the motive which actuates a man is quite distinct from, and forms no part of, the legal consideration for his promise, and serves likewise to illustrate the remark of Pothier, who says, [*589] **La cause de l'engagement que contracte l'une des parties*

¹ *Turner v. Browne*, 3 C. B. 157; E. C. L. R. 54. See, also, *Harris v. Watson*, 1 Peake, 72; *Stilk v. Myrick*, 2 Camp. 317, which also turned on the absence of consideration; *Wade v. Simeon*, 2 C. B. 548; E. C. L. R. 52.

² Per Lord Denman, C. J., and Patteson, J., 2 Q. B. 859; E. C. L. R. 42; *Id.* 861 (a).

³ *Thomas v. Thomas*, 2 Q. B. 851; E. C. L. R. 42; possibly such an agreement as the above would be held to be a mere voluntary conveyance as against a subsequent purchaser for value. Per Patteson, J., *Id.* 860. See, also, per Coleridge, J., *Id.* 861.

*est ce que l'autre des parties lui donne ou s'engage de lui donner ou le risque dont elle se charge.*¹

Notwithstanding some conflict in the decisions and dicta² respecting the sufficiency of a mere *moral* obligation, it may now be considered as established that such a consideration will not support a subsequent promise. "Mere moral feeling," says Lord Denman, C. J., in a recent case, "is not enough to affect the legal rights of parties;³ nor can a subsequent express promise convert into debt that which of itself was not a legal debt;⁴ and although the mere fact of giving a promise creates a moral obligation to perform it, yet the enforcement of such promises by law, however plausibly justified by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors."⁵

A good and sufficient consideration is, then, essential to the validity of a simple contract, whether such contract be written or verbal.

The law of England, indeed, does not *recognise any other [*590] distinction than that between agreements by specialty and those by parol. If agreements are merely written, and not specialties, they are parol agreements, and a consideration must be proved. "The law of this country," it has been observed,⁶ "supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration. Such agreement is *nudum pactum ex quo non oritur actio*; and, whatsoever may be the sense

¹ 1 Pothier, Oblig. 52.

² See per Lord Tenterden, C. J., delivering judgment in *Littlefield v. Shee*, 2 B. & Ad. 818; E. C. L. R. 22. Judgment, *Monkman v. Shepherdson*, 11 Ad. & E. 416, 416; E. C. L. R. 39; and in *Eastwood v. Kenyon*, Id. 450; *Meyer v. Haworth*, 8 Ad. & E. 467; E. C. L. R. 35. See, also, *Lee v. Muggeridge*, 5 Taunt. 86; E. C. L. R. 1; the doctrine laid down in which case is qualified, 2 B. & Ad. 812; E. C. L. R. 22; 11 Ad. & E. 450; E. C. L. R. 39; 2 Wms. Saund. 5th ed. 137 c. note (b).

³ *Beaumont v. Reeve*, 15 L. J., Q. B. 141; *Eastwood v. Kenyon*, 11 Ad. & E. 488; E. C. L. R. 39; *Wenall v. Adney*, 8 B. & P. 247, 249 (a). See, also, Judgment, *Cooking v. Ward*, 1 C. B. 870; E. C. L. R. 50. In *Jennings v. Brown*, 9 M. & W. 501, (*) Parke, B., observes, in reference to *Binnington v. Wallis* (4 B. & Ald. 650); E. C. L. R. 6; that the giving up the annuity was "a mere moral consideration, which is nothing."

⁴ Per Tindal, C. J., *Kaye v. Dutton*, 8 Scott, N. R. 499.

⁵ Judgment, 11 Ad. & E. 450, 451; E. C. L. R. 39.

⁶ Per Skynner, C. B., *Rann v. Hughes*, 7 T. R. 850, n. (a). See per Kenyon, C. J., 8 T. R. 421; Judgment, *Bank of Ireland v. Archer*, 11 M. & W. 889. (*)

of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law."

For instance, by the Statute of Frauds, no person can be charged to pay the debt of another,¹ unless the agreement upon which the action is brought, or some note or memorandum thereof, be in writing; by which word "agreement" must be understood the consideration for the promise, as well as the promise itself. Therefore, where one promised, in writing, to pay the debt of a third person, without stating on what consideration, it was held, that parol evidence of the consideration was inadmissible by the Statute of Frauds; and, consequently, such promise appearing to be without consideration upon the face of the written engagement, it was *nudum pactum*, and gave no cause of action.²

*It has, we may observe, been very recently held, that an action of debt may be maintained on a promissory note by [*591] payee against maker, or on a bill of exchange by drawer, being also payee, against acceptor, although the instrument do not express that it is for value received, or for any consideration; for, in each case, the words "value received" express only what the law must imply from the nature of the instrument, and the relation of the parties apparent upon it,³ and then the maxim, *expressio eorum quæ tacitè insunt nihil operatur*, is applicable.⁴ Also, whenever an action

¹ The Statute of Frauds applies only to promises made to the person to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty, by that other person *towards the promisee*; Judgment, *Hargreaves v. Parsons*, 18 M. & W. 570; (*) citing *Eastwood v. Kenyon*, 11 Ad. & E. 488; E. C. L. R. 39; *Thomas v. Cook*, 8 B. & C. 728; E. C. L. R. 15.

² *Wain v. Warlters*, 5 East, 10, the doctrine in which case was expressly recognised and affirmed in *Saunders v. Wakefield*, 4 B. & Ald. 595; E. C. L. R. 6; and has been followed in many subsequent cases. See 1 *Smith*, L. C. 186; *French v. French*, 3 Scott, N. R. 121; *Birkmyr v. Darnell*, 1 Salk. 27; *Johnson v. Nicholls*, 1 C. B. 251; E. C. L. R. 50; *Sweet v. Lee*, 4 Scott, N. R. 77; *Sears v. Brink*, 3 Johns. B. (U. S.) 210. In *Nelson v. Serle*, 4 W. & M. 795, (*) a plea in an action on a promissory note, that the note was given in payment of the debt of a third party, and that there was no consideration for it, except as aforesaid, was held a good answer to the declaration. In an action on a guarantee, it need not be expressly stated that the consideration moved from the plaintiff, if this can fairly be intended: *Dutchman v. Tooth*, 5 Bing. N. C. 577; E. C. L. R. 35.

³ *Hatch v. Trayes*, 11 Ad. & E. 702; E. C. L. R. 39; *Watson v. Kightley*, Id.; per Lord Ellenborough, C. J., *Grant v. Da Costa*, 3 M. & S. 352; E. C. L. R. 30. See *Jones v. Jones*, 6 M. & W. 84; (*) *Shenton v. James*, 5 Q. B. 199; E. C. L. R. 48. In *Watkins v. Wake*, 7 M. & W. 488, (*) it was held that debt is maintainable on a bill of exchange by endorsee against his immediate endorser.

⁴ Ante, p. 518.

upon a bill or note is between the *immediate* parties thereto, as between the drawer and acceptor of the bill, the payee and maker of the note, or between the endorsee of either of such instruments and his endorser, the consideration may be inquired into; and, if it be proved that the plaintiff gave, and the defendant received no value, the action will fail.¹ But a bill of exchange, or a promissory [*592] note, is, in all cases, *presumed* to be made upon a good and valuable consideration; and, in actions not between immediate parties, some suspicion must be cast upon the plaintiff's title before he can be compelled to prove what consideration he has given for it.² If, for instance, a promissory note were proved to have been obtained by fraud, or affected by illegality, such proof affords a presumption that the person guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it, and consequently casts upon the plaintiff the burden of showing that he was a bona fide endorsee for value.³

As it appears unnecessary to cite additional cases in support or illustration of a maxim so comprehensive and so well established as that now under review, we shall proceed to observe, that, not only must the consideration for a promise be sufficient in contemplation of law, but it must, as above stated, move from the plaintiff, that is to say, there must be a legal *privity* between the parties to the contract alleged. Where, therefore, B., the country attorney of A., sent a sum of money to the defendants, who were his London agents, to be paid to C. on account of A., and the defendants promised B. to pay the money according to his directions, but afterwards, being applied to by C., refused to pay it, claiming a balance due to themselves from B. on a general account between them, it was held that

¹ 1 Selw., N. P., 10th ed. 321, and cases there cited; *Jackson v. Warwick*, 7 T. R. 121; *Abbot v. Hendricks*, 2 Scott, N. R. 183. See, also, *Judgment, Atkinson v. Davies*, 11 M. & W. 241; (*) cited 8 Scott, N. R. 307; *Stoughton v. Lord Kilmorey*, 2 C., M. & R. 72; (*) *Cowper v. Garbett*, 13 M. & W. 33; (*) *Bailey v. Bidwell*, Id. 78; *Leaf v. Robson*, Id. 651; *King v. Phillips*, 12 M. & W. 705; (*) *Sison v. Kidman*, 4 Scott, N. R. 420; *Burton v. Penton*, 16 L. J., Q. B. 353; *Baker v. Walker*, 14 M. & W. 465. (*)

² 1 Selw., N. P., 10th ed. 320; *Argument*, 11 Ad. & E. 706; E. C. L. R. 39; *Edmunds v. Groves*, 2 M. & W. 642; (*) per *Abbott, C. J.*, *Holliday v. Atkinson*, 5 B. & C. 508; E. C. L. R. 11. See, also, *Arboin v. Anderson*, 1 Q. B. 498; E. C. L. R. 41; *Bingham v. Stanley*, 2 Q. B. 117; E. C. L. R. 42; commented on per *Alderson, B.*, *Carter v. James*, 13 M. & W. 144; (*) *Robinson v. Reynolds* (in error), 2 Q. B. 196; E. C. L. R. 42.

³ Per *Parke, B.*, *Bailey v. Bidwell*, 13 M. & W. 78. (*)

an action for money had and received would not lie against the defendants at the suit of A.¹ "The general rule," *observed Lord Denman, C. J., in delivering judgment, "undoubtedly [*593] is, that there is no *privity* between the agent in town and the client in the country; and the former cannot maintain an action against the latter for his fees, nor the latter against the former for negligence." In accordance with the same principle, also, it has been held, that the attorney who engages the service of the bailiff, and not the client, is the party liable to the bailiff for the fees usually allowed on taxation for the execution of process.²

Having thus sufficiently illustrated for our present purpose the nature of the *consideration* and the *privity* which are necessary to a valid contract, we shall proceed to state briefly the important distinctions which exist between considerations executed, concurrent, continuing, and executory; and, in the first place, we must observe that a bygone, or completely executed, consideration, unless supported by an antecedent request, either express or implied, will not suffice in law to sustain a subsequent promise. If, for example, a man disburse money about the affairs of another without request, and then the latter promise that, in consideration that the former had disbursed the money for him, he will pay him 20*l.*, this is not a good consideration, because it is executed;³ but, if, in such a case, there were a previous request to pay the money, then the subsequent promise would not be a bare or named one, but would couple itself with the precedent request, and with *the merits of the party which were procured by that request, and would, therefore, be [*594] founded upon a good consideration.⁴

In the case of guarantees especially, the distinguishing between a past and a future consideration is often attended with considerable difficulty. In one leading case upon this subject, the guarantee was

¹ *Cobb v. Becke*, 6 Q. B. 930; E. C. L. R. 51; *Robbins v. Fennell*, 12 Jur. 157; *Robbins v. Heath*, Id. 158; *Bluck v. Siddaway*, 15 L. J., Q. B. 359; *Hooper v. Treffry*, 16 L. J., Exch. 238. A person is bound to know with whom he contracts: *Turner v. The Mayor of Kendal*, 18 M. & W. 171; (*) *Bonfield v. Smith*, 12 M. & W. 405; (*) *Heath v. Chilton*, Id. 682.

² *Walbank v. Quarterman*, 8 C. B. 94; E. C. L. R. 54.

³ Per *Tindal, C. J.*, *Thornton v. Jenyns*, 1 Scott, N. R. 74, citing *Hunt v. Bate*, *Dyer*, 272, and 1 Roll. Abr. 11. See particularly *Roscorla v. Thomas*, 3 Q. B. 234; E. C. L. R. 43.

⁴ *Lampleigh v. Brathwait*, Hob. R. 106; per *Park, J.*, *Reason v. Wirdnam*, 1 C. & P. 434; E. C. L. R. 12; 1 Wm. Saund. 264 (1).

thus worded: "Messrs. H. In consideration of your being in advance to L. in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf.—J. B." It was held that this guarantee did not necessarily imply a *past* advance; that, on a trial, the plaintiffs might have offered evidence to show that *future* advances had been contemplated; and that there was, consequently, a sufficient consideration for the promise declared upon.¹ In a subsequent case, it appeared that B. gave to A. a guarantee in these words: "As you are about to enter upon transactions in business with C., with whom you have already had dealings, in the course of which C. may, from time to time, become largely indebted to you, in consideration of your doing so, I hereby agree to be responsible to you for, and guarantee to you the payment of, any sums of money which C. now is or may at any time be indebted to you, so that I am not called upon to pay more than the sum of 2000*l.*" It appeared that there had been considerable dealings between A. and C. prior to the date of the guarantee, consisting of loans of money, payments made for, and goods supplied to C. by A., the credit for [*595] which *had not then expired, and those dealings had been to a small extent since continued. It was held that the guarantee disclosed a sufficient consideration for the payment as well of the past as of the future debt;² and Earle, J., observed with reference to this point, viz., whether there was a sufficient consideration for the defendant's promise expressed or necessarily to be implied upon the face of the instrument: "It is contended that there is not, inasmuch as the promise extends to past as well as to future debts. The argument, however, goes to show, not the *absence* of a consideration, but rather its *inadequacy*. But that is not a question for us: we have nothing to do with the prudence or imprudence of the bargain." And again: "The written guarantee, explained as it is in the declaration and by the parol evidence, shows an ample consideration for the defendant's promise."

A declaration in *assumpsit* stated that in consideration of the plaintiff's *agreeing* to stay proceedings in an action against B., the defendant promised to pay the amount upon a certain event; at the

¹ Haigh v. Brooks, 10 Ad. & E. 309; E. C. L. R. 37; S. C. (in error), Id. 323; Goldshede v. Swan, 1 Exch. 154; (*) commented on, 12 Jur., p. 12; Price v. Richardson, 15 M. & W. 539; (*) Martin v. Wright, 6 Q. B. 917; E. C. L. R. 51.

² Johnston v. Nicholls, 1 C. B. 251; E. C. L. R. 50; Chapman v. Sutton, 2 C. B. 634; E. C. L. R. 52; Boyd v. Moyle, Id. 644.

trial the following agreement was proved: "In consideration of the plaintiff's *having agreed* to stay proceedings against B. &c.;" it was held that the contract was an executory contract, and a continuing agreement to stay proceedings, and that there was therefore no variance.¹

But although in general a past consideration will not support a promise at law, there are, nevertheless, cases in which a past or executed consideration will be supported *by an *implied* antecedent request. Where, for instance, the party sought to be [*596] charged has derived benefit from that which is alleged to be the consideration for his promise, the acceptance and enjoyment of this benefit will, in legal contemplation, be deemed sufficient to support the averment of defendant's promise and request, because from such subsequent enjoyment the law will imply a previous request; thus, if a man pays money, or buys goods for me, without my knowledge or request, and afterwards I agree to the payment, or receive the goods; my conduct, as showing a ratification of the contract, will have a retrospective operation, and will be held tantamount to a previous request,² according to a maxim, which will be hereafter considered, *omnis rati habitio retrò trahitur et mandato priori æquiparatur*.

In *Paynter v. Williams*,³ the facts were these:—A pauper, whose settlement was in the parish of A., resided in the parish of B., and, whilst there, received relief from the parish of A., which relief was afterwards discontinued, the overseers objecting to pay any more, unless the pauper removed into his own parish. The pauper was subsequently taken ill, and attended by the plaintiff, an apothecary, who, after continuing to attend him for nine weeks, sent a letter to the overseers of A., upon the receipt of which they directed the allowance to be renewed, and it was accordingly continued till the time of the pauper's decease: it was held, that the overseers of A. were liable to *pay so much of the apothecary's bill as was incurred after the letter was received, for they knew of the [*597]

¹ *Tanner v. Moore*, 15 L. J., Q. B. 391; recognised *Goldshede v. Swan*, 16 M. & W. 154, 161; (*) *Roscorla v. Thomas*, 3 Q. B. 234; E. C. L. R. 43. As to want of consideration, see *Semple v. Pink*, 1 Exch. 74, (*) ante, p. 590.

² 1 Wms. Saund. 261 (1); *King v. Sears*, 2 Cr., M. & R. 48; (*) per Parke, B., Id. 58; *Streeter v. Horlock*, 1 Bing. 34; E. C. L. R. 8. See *Fishmonger's Company v. Robertson*, 6 Scott, N. R. 56, 106; *Oatfield v. Waring*, 14 Johns. R. (U. S.) 188. See, also, *Naish v. Tatlock*, 2 H. Bla. 319; *Stokes v. Lewis*, 1 T. R. 20; which are instances of the necessity of an express promise. *Dietrichsen v. Giubilei*, 14 M. & W. 845. (*)

³ 1 Cr. & M. 810. (*)

plaintiff's attendance, which knowledge amounted, under the circumstances of the case, to an acceptance, retainer, or adoption of the plaintiff's services, and created a legal liability.¹

The law will also imply an antecedent request where the consideration consists in this—that the plaintiff has been compelled to do that to which the defendant was legally compellable—on which principle depends the right of a surety, who has been damnified, to recover an indemnity from his principal,² or contribution from a co-surety or joint contractor.³

Where, moreover, the consideration is past, it appears to be unnecessary to *allege a request*, if the act stated as the consideration cannot, from its nature, have been a gratuitous kindness, but *imports a consideration per se*.⁴ Thus in a very recent case, which was an action of assumpsit for money lent, it was held unnecessary to allege that the money was lent at the defendant's request; for there cannot be a claim for money lent unless there be a loan, and a loan implies an obligation to pay.⁵ In the case of money paid, however, the [*598] above doctrine will not apply, *because a gratuitous payment would not create a legal obligation; and "no man can be a debtor for money paid unless it was paid at his request."⁶

In assumpsit for work and labour done by the plaintiff for the defendant, in consideration whereof the latter promised to pay, after judgment by default and error brought, it was objected, that this was a past consideration, and, not being laid to be done at the defendant's request, it could be no consideration to raise an assumpsit; and the Court said, they took the rule of law to be, that a past consideration is not sufficient to support a subsequent promise, unless there was a request of the party, either express or implied, at the

¹ 1 Cr. & M. 819; (*) Wing v. Mill, 1 B. & Ald. 104; Atkins v. Banwell, 2 East, 505.

² Toussaint v. Martinnant, 2 T. R. 100.

³ Per Lord Kenyon, C. J., 8 T. R. 186; Decker v. Pope, 1 Selw., N. P., 10th ed. 72, n. (28); Holmes v. Williamson, 6 M. & S. 158; Blackett v. Weir, 5 B. & C. 387; E. C. L. R. 11. A surety may recover contribution from his co-surety in an action for money paid: Kemp v. Finden, 12 M. & W. 421; (*) Edger v. Knapp, 6 Scott, N. R. 707; Davies v. Humphreys, 6 M. & W. 158, 168; (*) Browne v. Lee, 6 B. & C. 689; E. C. L. R. 13; Cowell v. Edwards, 2 B. & P. 268. But where the joint contractors are partners, there the rule intervenes, that one partner cannot sue his co-partner at law. Sadler v. Nixon, 5 B. & Ad. 936; E. C. L. R. 27; Pearson v. Skelton, 1 M. & W. 504. (*)

⁴ See 1 Man. & Gr. 265, note; cited per Parke, B., 12 M. & W. 759. (*)

⁵ Victoria v. Davies, 12 M. & W. 758. (*)

⁶ Per Parke, B., 12 M. & W. 760; (*) Brittain v. Lloyd, 14 M. & W. 762. (*)

time of performing the consideration, and the judgment was accordingly reversed.¹

A distinction will be noted between cases like the above, and those in which it has been held that an express promise may effectually revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, as in the cases of bankruptcy² and infancy, or where a debt is barred by the Statute of Limitations.

"The cases," says Lord Denman, C. J., delivering judgment in a recent case,³ "in which it has been held, that, under certain circumstances, a consideration insufficient to raise an implied promise will, nevertheless, support an express one, will be found collected and reviewed in the note (a) to *Wennall v. Adney*,⁴ and in the case of **Eastwood v. Kenyon*.⁵ They are cases of *voidable* contracts [*599] subsequently ratified, of debts barred by operation of law subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise."

With reference to the above class of cases, we must remark that the distinction is, of course, very material between a *void* and a *voidable* contract. For instance, in the case of infancy, the original contract is voidable only, not absolutely void, and the liability of the contracting party may accordingly be renewed without any fresh consideration;⁶ whereas the contract of a married woman is absolutely void; and, therefore, if the record states that goods were supplied to a married woman, who after her husband's death, promised to pay, this is not sufficient, because the debt was never owing from her.⁷

A recent case may be adverted to as showing that a contract, which could not originally have been made the ground of an action, may be converted by a subsequent express promise, into a cause of

¹ *Hayes v. Warren*, 2 Stra. 933, cited 1 Wms. Saund. 264 (1).

² See *Kirkpatrick v. Tattersall*, 13 M. & W. 766. (*)

³ *Roscorla v. Thomas*, 3 Q. B. 237; E. C. L. R. 48.

⁴ 3 B. & P. 249.

⁵ 11 Ad. & E. 438; E. C. L. R. 39.

⁶ Per *Patterson, J.*, 8 Ad. & E. 470; E. C. L. R. 35. See the note (a) to *Wennall v. Adney*, 3 B. & P. 249.

⁷ *Meyer v. Haworth*, 8 Ad. & E. 467, 469; E. C. L. R. 35. In *Traver v. —*, 1 Sid. 57, a woman, after her husband's death, promised the plaintiff, a creditor, that, if he would prove that her husband had owed him 20*l.*, she would pay the money. This was held a good consideration, "because it was a trouble and charge to the creditor to prove his debt."

action which the law will recognise as valid. A verbal agreement was entered into between the plaintiff and defendants respecting the transfer of an interest in land. The transfer was effected, and nothing remained to be done but to pay the consideration; it was held, that the agreement not being in writing, as required by the Statute of Frauds, could not be enforced by action, but that, the transferee, after the transfer, having *admitted to the transferor [*600] that he owed him the stipulated price, the amount might be recovered upon the count upon an account stated in the declaration.¹

We must, in the next place, observe that the subsequent promise, like the antecedent request, may, in many cases, be implied. For instance, a promise to pay interest will be implied by law from the forbearance of money at the defendant's request;² but where the consideration has been executed, and a promise would, under the circumstances, be implied by law, it is clearly established that no express promise made in respect of that prior consideration, differing from that which by law would be implied, can be enforced;³ for, were it otherwise, there would be two co-existing promises on one consideration.⁴ It has, however, been said, that the cases establishing this proposition may have proceeded on another principle, viz., that the consideration was exhausted by the promise implied by law from the very execution of it, and that, consequently, any promise made afterwards must be *nudum pactum*, there remaining no consideration to support it. "But the case may perhaps be different where there is a consideration from which *no* promise would be implied by law, that is, where the party suing has sustained a detriment to himself, or conferred a benefit on the defendant, at his request, under circumstances which would not raise any implied promise. In such cases it appears to have been held, in some instances, that the act done at the request of the party charged, is a sufficient consideration to render [*601] binding *a promise afterwards made by him in respect of the act so done."⁵

But however this may be, it is, as previously stated, quite clear, that, where the consideration is past, the promise alleged, even if express, must be identical with that which would have been implied

¹ *Cocking v. Ward*, 1 C. B. 858; E. C. L. R. 50. See *Souch v. Strawbridge*, 15 L. J., C. P. 170, as to the 4th section of the Statute of Frauds.

² *Nordenstrom v. Pitt*, 18 M. & W. 723.(*)

³ *Judgment, Kaye v. Dutton*, 8 Scott, N. R. 502, where the cases on this subject are cited.

⁴ Per Maule, B., *Hopkins v. Logan*, 5 M. & W. 249.(*)

⁵ *Judgment*, 8 Scott, N. R. 502, 503.

by law from the particular transaction ; thus, in *assumpsit*, the declaration stated, that, in consideration that plaintiff, at the request of defendant, *had bought* a horse of defendant at a certain price, defendant promised that the horse was *free from vice*, but deceived the plaintiff in this, to wit, that the said horse was vicious. On motion in arrest of judgment, this declaration was held bad ; for the executed consideration, though laid with a request, neither raised by implication of law the promise charged in the declaration, nor would support such promise if express ; the Court in this case observing, that the only promise which would result from the consideration, as stated, and be co-extensive with it, would be to deliver the horse upon request.¹

In an action against the public officer of an insurance and loan company, the second count of the declaration stated, that it was agreed between the company and the plaintiff, that, from the 1st of January then next, the plaintiff, as the attorney of the said company, should receive a salary of £100 per annum, in lieu of rendering an annual bill of costs for general business ; and in consideration that the plaintiff had promised to fulfil the agreement on his part, the company promised to fulfil the same on their part, *and to retain and employ the plaintiff as such attorney* : the Court held the count to be bad. “It is,” said Maule, J., “founded on an executed consideration, which can only *sustain such a promise as the law [*602] implies ; thus, if goods sold and delivered are the consideration, the promise is to pay the value for them. The agreement here is—the plaintiff is to do certain work at a certain rate of payment, and certain other work at a certain other rate of payment ; the defendant is to pay at such rates. The promise alleged is a promise to pay, *and to retain and employ* ; the latter part of such promise is not warranted by the terms of the agreement, and there is no consideration to support it.” The judgment was accordingly arrested on the above count of the declaration.²

A concurrent consideration is where the act of the plaintiff and the promise of the defendant take place at the same time ; and here the law does not, as in the case of a bygone transaction, require that, in order to make the promise binding, the plaintiff should have acted at the request of the defendant ;³ as, where it appeared from

¹ *Roscorla v. Thomas*, 3 Q. B. 234, 237 ; E. C. L. R. 43.

² *Elderton v. Emmens*, 16 L. J., C. P. 209, 215.

³ *Per Tindal, C. J.*, 3 Bing. N. C. 715 ; E. C. L. R. 32.

the whole declaration taken together, that, at the same moment, by a simultaneous act, a promise was made, that, on the plaintiff's accepting bills drawn by one of the parties then present, the defendants should deliver certain deeds to the plaintiff when the bills were paid, it was held, that a good consideration was disclosed for the defendant's promise.¹ So, where the promise of the plaintiff and that of the defendant are simultaneous, the one will be a good consideration for the other, provided they are reciprocally binding;² as, where [*603] two parties, upon the same occasion, *and at the same time, mutually promise to perform a certain agreement not then actually entered into, the consideration moving from the one party is sufficient to support the promise by the other.³

Again, where by one and the same instrument, a sum of money is agreed to be paid by one of the contracting parties, and a conveyance of an estate to be at the same time executed by the other, the payment of the money and the execution of the conveyance may very properly be considered concurrent acts; and, in this case, no action can be maintained by the vendor to recover the money, until he executes, or offers to execute, a conveyance.⁴ It may, indeed, be stated generally, that neither party can sue on such an entire contract without showing a performance of, or an offer, or, at least, a readiness to perform, his part of the agreement, or a wrongful discharge or prevention of such performance by the other party;⁵ in which latter case the party guilty of the wrongful act shall not, in accordance with a maxim already considered, be allowed to take advantage of it, and thereby to relieve himself from liability for breach of contract.⁶

¹ *Tipper v. Bicknell*, Id. 710.

² Even if there be a want of mutuality at the inception of the contract, an action will nevertheless lie when the consideration has become executed *quoad* one of the contracting parties. See the *Law Mag.* No. 9, N. S., pp. 264, 265, citing *The Fishmongers' Company v. Robertson*, 6 Scott, N. R. 56; *Arnold v. The Mayor of Poole*, 5 Scott, N. R. 776.

³ *Thornton v. Jenynes*, 1 Scott, N. R. 52. See *Tucker v. Wood*, 12 Johns. R. (U. S.) 190; *King v. Gillett*, 7 M. & W. 55; (*) *Harrison v. Cage*, 1 Ld. Raym. 386; 2 Steph. Com. 114.

⁴ Per Lord Tenterden, C. J., *Spiller v. Westlake*, 2 B. & Ald. 157; E. C. L. R. 22.

⁵ See *Atkinson v. Smith*, 14 M. & W. 695; (*) per Lord Kenyon, C. J., *Rawson v. Johnson*, 1 East, 208.

⁶ Ante, p. 209 et seq. *Lovelock v. Franklin*, 15 L. J., Q. B. 146; *Short v. Stone*, Id. 148. "If a party does all he can to perform the act which he has stipulated to do, but is prevented by the wrongful act of the other party, he is in the same situation as if the performance had been performed." Per Holroyd, J., *Studdy v. Sanders*, 5 B. & C. 639; E. C. L. R. 11; *Caines v. Smith*, 15 M. & W. 189. (*)

In addition to cases in which the consideration is concurrent, or is altogether past and executed, others occur wherein the consideration is *continuing* at the time of *making the promise; thus, it [*604] has been held, that the mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in a husbandlike manner.¹ Among promises made on a continuing consideration, may also be noticed that class which are founded on *legal liabilities*; as, where in consideration of a sum of money being legally due, the debtor makes an express promise to pay. This, it may be observed, has no immediate reference to any reciprocal act done, or to be done, by the other party, or consideration strictly so called; yet it is not a *nudum pactum*, the legal duty being in the nature of a consideration: indeed, it is a promise which (even where nothing is expressed between the parties) the law will imply.²

Lastly, "Whenever the consideration of a promise is executory, there must," it has been observed,³ "*ex necessitate rei*, have been a request on the part of the person promising; for if A. promise to remunerate B., in consideration that B. will perform something specified, that amounts to a request to B. to perform the act for which he is to be remunerated." Here the consideration constitutes a condition precedent to be performed by B. before his right of action accrues; and such performance must be laid in the declaration with certainty, and proved at the trial;⁴ but whether or not, in any given case, one *promise* be the consideration of another, or whether the **performance*, and not the mere promise, be the considera- [*605] tion, must be gathered from, and depends entirely upon, the words and nature of the agreement, and the intention of the contracting parties.⁵

¹ Powley v. Walker, 5 T. R. 373; recognised Beale v. Sanders, 3 Bing. N. C. 850; E. C. L. R. 82.

² Steph. Com. 114. In Bac. Abr. "Assumpsit" (D.) which treats of considerations executed and continuing, will be found other cases illustrating this species of consideration. See, also, Jackson v. Cobbin, 8 M. & W. 790, 797; (*) Cotton v. Westcott, 3 Bulstr. 187; Pearle v. Unger, Cro. Eliz. 94; Jones v. Clarke, 2 Bulstr. 78.

³ 1 Smith, L. C. 70.

⁴ 1 Chit. Plead., 6th ed. 296.

⁵ Thorpe v. Thorpe, 1 Lord Raym. 662; S. C., 1 Salk. 171, is a leading case on this subject.

CAVEAT EMPTOR.

(Hob. 99.)

Let a purchaser beware.

It seems clear, that, according to the civil law, a warrantee of title was, as a general rule, implied on the part of the vendor of land, so that in case of eviction an action for damages lay against him at the suit of the vendee, *sive tota res evincatur, sive pars, habet regressum emptor in venditorem*;¹ and again, *non dubitatur, etsi specialiter venditor evictionem non promiserit, re evicta ex empto competere actionem*.² With us, however, the negative of the above proposition holds, and it is accordingly laid down, that, "if a man buy lands whereunto another hath title, which the buyer knoweth not, yet ignorance shall not excuse him."³ By the civil law, as observed by Sir E. Coke, every man is bound to warrant the thing that he sells or conveys, albeit there be no express warranty; but the common law binds him not, unless there be a warranty, either in deed or in law; for *caveat emptor*,⁴ *qui ignorare non debuit quod jus alienum emit*⁵—let a purchaser, who ought not to be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution.

[*606] *The following examples will perhaps suffice to show generally the mode in which the maxim *caveat emptor* has been applied in practice to the sale of realty; and since it would be incompatible with the plan of this volume to enter at length into an examination of the very numerous cases which have been decided at law and in equity with respect to the operation of the above rule, we must content ourselves with referring below to several works of high authority in which this important subject will be found minutely treated.⁶

Where, on the sale of an estate, certain woods were falsely represented as actually producing £250 per annum, on an average of the fifteen preceding years, but it appeared that the manner of making the calculation was explained at the sale, that a paper was exhibited,

¹ D. 21, 2, 1.² C. 8, 45, 6.³ Doct. and Stud., bk. 2, ch. 47.⁴ Co. Litt. 102, a. "I have always understood that in purchases of land the rule is *caveat emptor*," per Lawrence, J.: *Gwithin v. Stone*, 3 Taunt. 489.⁵ Hobart, 99.⁶ Sugd. V. & P., 11th ed. 377 et seq; 1 Story, Eq. Jurisp., 4th ed., ch. 6.

showing that the woods had not been equally cut, and that the purchaser likewise sent down his own surveyors, who thought that the woods had been cut in an improper manner, Lord Thurlow refused to give the purchaser relief by ordering an allowance to be made, and held that the maxim *caveat emptor*, applied; but he observed, that if the representation were made generally, and it was distinctly proven that the fact stated, though literally true, yet was made out by racking the woods beyond the course of husbandry, that would be a fraud in the representation, which might be relieved against; and he further remarked, that the maxim, *caveat emptor*, does not apply "where there is a positive representation essentially material to the subject in question, and which, at the same time, is false in fact," provided proper diligence be used by the purchaser in the course of the transaction.¹

*By agreement for the purchase of a piece of land, entered [*607] into between the defendants, who were the assignees of B., and the plaintiff, it was stipulated on behalf of the defendants that they should not be obliged to make any warranty of title, the plaintiff having agreed to accept a conveyance of such right or title as might be the defendants', with all faults and defects if any. Before any conveyance was executed, the plaintiff asked the defendants whether any rent had ever been paid for the land, and they replied that none had been paid by the bankrupt, nor by any person under whom he claimed, whereas, in fact, rent had been paid by the person who had sold the land to the bankrupt. The plaintiff having been evicted sued the defendants for recovery of his purchase-money, and the judge having left to the jury the question whether the non-communication of the fact of payment of rent was fraudulent or not, a verdict was found for the defendants. This verdict the Court in banc refused to set aside, and Bayley, J. observed, "I make no distinction between an active and a passive communication; if a seller fraudulently conceal that which he ought to communicate, it will render the contract null and void. But the authorities establish that the concealment must be fraudulent."² The case just cited is a direct authority in support of the general rule of law laid down by Sir E. Sugden, who says, "If, at the time of the contract, the vendor himself was not

¹ *Lowndes v. Lane*, 2 Cox, 368.

² *Early v. Garrett*, 9 B. & C. 928, 932; *E. C. L. R.* 17; *Duke of Norfolk v. Worthy*, 1 Camp. 387; *White v. Cuddon*, 8 Cl. & Fin. 766; *Turner v. Harvey*, 1 Jac. 169, 178; *Phillips v. Duke of Bucks*, 1 Vern. 227.

aware of any defect in the estate, it seems that the purchaser must take the estate with all its faults, and cannot claim any compensation for them."¹

[*608] *Where, however, a particular description of the estate is given, which turns out to be false, and the purchaser cannot be proved to have had a distinct knowledge of its actual state and condition, he will be entitled to compensation, although a court of equity will compel him to perform his contract. The rule of *caveat emptor*, indeed, has no application where the defect is a *latent* one, and of such a nature that the purchaser cannot by the greatest attention discover it, and if, moreover, the vendor be cognizant of it, and do not acquaint the purchaser with the fact of its existence; for in this case the contract would not be considered binding at law, and equity would not enforce a specific performance.² It appears, however, to be settled, that if the subject-matter of the contract of sale be agreed to be taken "with all faults," the insertion of this condition will excuse the vendor from stating those within his knowledge, although he will not be justified in using any artifice to conceal them from the purchaser. And even if the purchaser might, by exercise of proper precaution, have discovered the defect, equity will not assist the vendor in case he has *industriously* concealed it.³ So, from the important case of *Attwood v. Small*, the principle is clearly deducible, that if a purchaser, choosing to judge for himself, does not effectually avail himself of the knowledge or means of knowledge accessible to him or his agents, he cannot afterwards be permitted to say that he was deceived and misled by the vendor's misrepresentation; for the rule in such a case is *caveat emptor*, and the knowledge of his agents is as binding on him as his own knowledge. It is his own folly and laches not to use the means of knowledge within his reach, and he may properly impute [*609] any loss or *injury in such a case to his own negligence and indiscretion.⁴

Where the defects are *patent*, and such as might have been discovered by a vigilant man, or where the contract was entered into with

¹ 1 Sugd., V. & P. 11th ed. 2.

² Id. 381, 383.

³ Id. 386, 388.

⁴ *Attwood v. Small*, 6 Cl. & Fin. 232, 233; 1 Story, Eq. Jurisp., 4th ed. 228. Equity will not "interpose in favour of a man who wilfully was ignorant of that which he ought to have known,—a man who, without exercising that diligence which the law would expect of a reasonable and careful person, committed a mistake, in consequence of which alone the proceedings in court have arisen," per Lord Campbell, *Duke of Beaufort v. Neeld*, 12 Cl. & Fin. 248, 286.

full knowledge of them, equity will not afford relief; for, in the former case the rule is, *vigilantibus non dormientibus jura subveniunt*, and in the latter, *scientia utrinque par pares contrahentes facit*—the law will not assist an improvident purchaser, nor will it interpose where both the contracting parties were equally well informed as to the actual condition of the subject-matter of the contract.¹

It will appear from the preceding brief observations that the maxim *caveat emptor* applies, with certain specific restrictions and qualifications, both to the *title* and *quality* of the land sold. We may further remark, that, as to the title, it applies equally, whether the vendor is in or out of possession, for he cannot hold the lands without *some* title; and the buyer is bound to see it, and to inspect the title-deeds at his peril. He does not use common prudence, if he relies on any other security.² The ordinary course, indeed, which is adopted on the sale of real estate is this: the seller submits his title to the inspection of the purchaser, who exercises his own or such other judgment as he confides in, on the goodness of the title; and if it should *turn out to be defective, the purchaser has [*610] no remedy, unless he take a special covenant or warranty, provided there be no fraud practised on him to induce him to purchase.³ Thus, if a regular conveyance is made, containing the usual covenants for securing the buyer against the acts of the *seller* and his ancestors only, and his title is actually conveyed to the buyer, the rule of *caveat emptor* applies against the latter, so that he must at his peril, perfect all that is requisite to his assurance; and as he might protect his purchase by proper covenants, none can be added.⁴ An administrator found, among the papers of his intestate, a mortgage deed, purporting to convey premises to him, and without arrears of interest. Not knowing it to be a forgery, he assigned it, covenanting, not for good title in the mortgagor, but only that nothing had been done by himself or the deceased mortgagee to encumber the property; and as this precluded all presumption of any further security, the assignee was held bound to look to the goodness

¹ See 1 Sugd., V. & P., 11th ed. 2.

² 3 T. R. 56, 65; *Roswal v. Vaughan*, Cro. Jac. 196; per Holt, C. J., 1 Salk. 211; *Law Mag.*, No. lxii., p. 299.

³ Per Lawrence, J., 2 East, 328; *Judgment, Stephens v. De Medina*, 4 Q. B. 428; *E. C. L. R.* 45.

⁴ See note 2, *supra*; *Judgment, Johnson v. Johnson*, 3 B. & P. 170; *Argument*, 3 East, 446; 4 Rep. 26; 5 Rep. 84.

of the title, and failed to recover the purchase-money.¹ The case of an ordinary mortgage, however, differs from that of a conveyance because the mortgagor covenants that, at all events, he has a good title.²

In cases respecting the demise³ of land, any question as to the conditions of the demise must, in the absence of fraud, be determined by considering both the express contract, and likewise the warranty, which may, according to *circumstances, either arise by im-
 [*611] plication of law, or be inferred from the contract of the parties. Several very recent decisions will peculiarly serve to illustrate this subject. For instance, in *Sutton v. Temple*,⁴ A. agreed in writing to take the eatage (that is, the use of the herbage to be eaten by cattle) of twenty-four acres of land from B. for seven months, at a rent of 40%, and stock the land with beasts, several of which died a few days afterwards from the effects of a poisonous substance, which had accidentally been spread over the field without B.'s knowledge. It was held by the Court of Exchequer, that A., nevertheless, continued liable for the whole rent, and was not entitled to throw up the land. In this case it was not suggested that the plaintiff, B., had the least knowledge of that which caused the injury when the land was let; but it was contended, that, under the above circumstances, there was an implied warranty on the part of the plaintiff that the eatage was wholesome food for cattle; the rule of law was, however, stated to be, that if a person contract for the use and occupation of land for a specific time, and at a specific rent, he will be bound by his bargain, even though he take it for a particular purpose, and that purpose be not attained. The word "demise" it was observed, certainly does not carry with it any such implied undertaking as that above mentioned; the law merely annexes to it a condition, that the party demising has a good title to the premises, and that the lessee shall not be evicted during the term.⁵ *In
 [*612] the subsequent case of *Hart v. Windsor*,⁶ the Court also held

¹ *Bree v. Holbeck*, Dougl. 655; cited, 6 T. R. 606; per Gibbs, C. J., 1 Marsh. R. 168.

² Per Lord Kenyon, C. J., *Cripps v. Reade*, 6 T. R. 607.

³ As to a sale by an administrator of a "pretended right or title" to the residue of a term, see *Doe d. Williams v. Evans*, 1 C. B. 717; *E. C. L. R. 50*.

⁴ 12 M. & W. 52. (*)

⁵ *Id.* 62, 64. (*) An objection was raised by the plaintiff, that, as the contract was in writing, the condition contended for by the defendant could not, even if implied by law, be set up against the written contract; but it was observed by Parke, B., that a parol undertaking like the above might be imported into it, unless excluded by necessary implication; ante, p. 501.

⁶ 12 M. & W. 68. (*)

it to be clear, upon the old authorities, that there is no implied warranty on a lease of a house or of land that it is, or shall be, reasonably fit for habitation or cultivation; and still less is there a condition implied by law on the demise of real property only, that it is fit for the purpose for which it is let. "The principles of the common law do not warrant such a position; and though, in the case of a dwelling-house taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes,—for building upon, or for cultivation,—and there would be no limit to the inconvenience which would ensue. It is much better to leave the parties in every case to protect their interests themselves by proper stipulations; and, if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning."¹ A distinction was, moreover, drawn between the preceding case and that of *Smith v. Marrable*,² in which it was held, that in letting a ready-furnished house, there *is* an implied condition or obligation that the house is in a fit state to be inhabited, and that, therefore, a tenant may quit without notice if the premises are unfit for habitation.

We may add, that the principle laid down in *Hart v. Windsor* above cited, viz., that there is no implied warranty [*613] on the demise of a house, that it is, or shall be, reasonably fit for habitation, was fully confirmed and acted upon in the subsequent case of *Surplice v. Farnsworth*,³ where it was held, that assumpsit for use and occupation would lie against a tenant who held under a parol agreement, by which the landlord was to do the necessary repairs, and who quitted, because the premises, owing to the landlord's default, were in an untenable state, although there had not been and could not be any actual beneficial occupation during the period for which the rent was claimed.

We shall, in the next place, consider how far the maxim *caveat emptor* applies in the case of a sale of goods and chattels, first, in regard to the *quality* of the goods, and secondly, in regard to the

¹ Judgment, *Hart v. Windsor*, 12 M. & W. 86, 87, 88. (*) This was an action of debt for rent due under an agreement to let a house and garden ground with certain fixtures; and the plea alleged that the house was infested with bugs, and was consequently unfit for habitation, and that the defendant accordingly quitted before any part of the rent became due.

² 11 M. & W. 5. (*) As to this case, see 12 M. & W. 60, 87; (*) and per Coltman, J., 8 Scott, N. R. 316.

³ 8 Scott, N. R. 307; recognising *Izon v. Gorton*, 5 Bing., N. C. 501; E. C. L. R. 35.

title to them. Now, with respect to the *quality*, we find the following general rule laid down for our guidance by Tindal, C. J., in a recent case: "If," observed that learned judge, "a man purchase goods of a tradesman, without, in any way, relying upon the skill and judgment of the vendor, the latter is not responsible for their turning out contrary to his expectation; but, if the tradesman be informed at the time the order is given of the purpose for which the article is wanted, the buyer relying upon the seller's judgment, the latter impliedly warrants that the thing furnished shall be reasonably fit and proper for the purpose for which it is required."¹ Accordingly, where an agreement is for a specific chattel in its *then state*, [*614] there is no implied warranty of its fitness or *merchantable quality;² but if a person is employed to *make* a specific chattel, there the law implies a contract on his part that it shall be fit for the purpose for which it is ordinarily used.³

In *Ollivant v. Bayley*,⁴ a patent printing machine, for printing in two colours, was ordered by the defendant, who subsequently declined to pay the price claimed, on the ground that the machine had been found useless for the proposed purpose. The learned judge charged the jury, that if the patent printing machine was a known ascertained article, the defendant, having ordered one, must pay for it, whether it answered his purpose or not; but that, if it was not a known ascertained article, and the defendant ordered a machine for printing two colours, and the plaintiff undertook to supply it, he could not recover the price unless the machine supplied was reasonably fit for the purpose for which it was ordered; and this direction was held to be correct by the Court in banc on a motion for a new trial.

So, where the defendant, a broker, bought of the plaintiff certain

¹ *Brown v. Edgington*, 2 Scott, N. R. 504; recognised per Parke, B., 12 M. & W. 64; (*) *Jones v. Bright*, 5 Bing. 533; E. C. L. R. 15; recognised 4 M. & W. 406; (*) per Abbott, C. J., *Gray v. Cox*, 4 B. & C. 108, 115; E. C. L. R. 10; *Wright v. Crookes*, 1 Scott, N. R. 685.

² *Parkinson v. Lee*, 2 East, 814; recognised 8 Bing. 52; E. C. L. R. 21; and 12 M. & W. 64; (*) *Chanter v. Hopkins*, 4 M. & W. 399; (*) *Laing v. Fidgeon*, 6 Taunt. 108; E. C. L. R. 1; *Power v. Barham*, 4 Ad. & E. 478; E. C. L. R. 31; and cases cited *infra*.

³ *Shepherd v. Pybus*, 4 Scott, N. R. 484, and cases there cited. See *Mondel v. Steel*, 8 M. & W. 858; (*) *ante*, p. 508.

⁴ 5 Q. B. 288; E. C. L. R. 48. See *Camac v. Warriner*, 1 C. B. 356; E. C. L. R. 50; and cases there cited; *Chanter v. Hopkins*, 4 M. & W. 399; (*) *Parsons v. Sexton*, 16 L. J., C. P. 181; *Street v. Blay*, 2 B. & Ad. 496; E. C. L. R. 22; *Keele v. Wheeler*, 8 Scott, N. R. 323; *ante*, p. 508.

scrip certificates in a certain railway company, which turned out to be spurious, but which were, in fact, the only certificates which passed current in the market, in an action brought to recover the price paid for them from the defendant, the proper question for the jury was held *to be, whether the plaintiff had or had not obtained [*615] for his money, that particular thing which he desired to purchase.¹

It will, of course, be evident from what we have already had occasion to observe, that the vendor of a chattel may in all cases expressly limit his responsibility in respect of the quality of the thing sold, or, in other words, he may, by express stipulation, exclude that contract which the law would otherwise have implied; and, referring the reader to the remarks heretofore made and authorities cited upon this subject,² we shall proceed to observe, that a warranty will not necessarily be implied by law from a simple commendation of the quality of goods by the vendor; for in this case the rule of the civil law—*simplex commendatio non obligat*³—has been adopted by our own, and such *simplex commendatio* will, in most cases, be regarded merely as an invitation to custom, since every vendor will naturally affirm that his own wares are good,⁴ unless it appear on the evidence, or from the words used, that the affirmation at the time of sale was intended to be a warranty, or that such must be its necessary meaning;⁵ it is, therefore, laid down, that, in a purchase without warranty, *a man's eyes, taste, and senses must be his protection;⁶ and [*616] that where the subject of the affirmation is mere matter of opinion,⁷ and the vendee may himself institute inquiries into the truth of the assertion, the affirmation must be considered a "nude asser-

¹ Lamert v. Heath, 15 M. & W. 486. (*) See Mitchell v. Newhall, 15 L. J., Exch. 292; Chanter v. Dewhurst, 12 M. & W. 823. (*)

² Ante, p. 507; Sharp v. The Great Western Railway Company, 9 M. & W. 7. (*)

³ D. 4, 3, 37.

⁴ See per Sir Jas. Mansfield, C. J., Vernon v. Keyes, 4 Taunt. 488, 493; Chandelor v. Lopus, Cro. Jac. 4. A. bought a wagon at sight of B., which B. affirmed to be worth much more than its real value: Held, that no action would lie against B. for the false affirmation, there being no express warranty nor any evidence of fraud; Davis v. Meeker, 5 Johns. R. (U. S.) 354.

⁵ Per Buller, J., 3 T. R. 57; Shepherd v. Kain, 5 B. & Ald. 240; E. C. L. R. 7; Freeman v. Baker, 5 B. & Ad. 797; E. C. L. R. 27; Budd v. Fairmaner, 8 Bing. 52; E. C. L. R. 21; Coverley v. Burrell, 5 B. & Ald. 257; E. C. L. R. 7. See Chapman v. Murch. 19 Johns. R. (U. S.) 290; Swett v. Colgate, 20 Id. 196.

⁶ Fitz., Nat. Brev. 94; 1 Roll. Abr. 96.

⁷ See Power v. Barham, 4 Ad. & E. 473; E. C. L. R. 81; Jendwine v. Slade, 2 Esp., N. P. C. 572.

tion," and it is the vendee's fault from his own laches that he is deceived.¹ Either party may, therefore, be innocently silent as to grounds open to both to exercise their judgment upon; and in this case, *aliud est celare, aliud tacere*—silence is by no means equivalent to concealment.²

Where, moreover, goods have been sold to a party who subsequently repudiates them, on the ground that he was labouring under some misconception as to their quality, two questions will have substantially to be submitted to the jury: first, what was the bargain actually made between the parties? and, secondly, did the vendor, by his fraud, or by any preponderance of laches on his part, mislead the purchaser as to the subject-matter of the sale? If fraud be negatived, but it is found that the contract declared upon was not that in fact made according to the real understanding between the parties, the defendant will not, *primâ facie*, be fixed with the character of *emptor*, and the maxim, *caveat emptor*, will not therefore apply; and in this case, both parties being innocent, the question [*617] will simply *be, whose conduct has exhibited the greater laches, since on him should fall the loss.³

Where the vendor affirms that the thing sold has not a defect, which is a visible one, and obvious to the senses, the rule, *caveat emptor*, is without doubt applicable—*ea quæ commendandi causâ in venditionibus dicuntur, si palam appareant, venditorem non obligant*.⁴ It is, indeed, laid down by the older authorities, that defects, apparent at the time of a bargain, are not included in a warranty, however general, because they can form no subject of deceit or fraud; and, originally the mode of proceeding for breach of warranty was by an

¹ Per Grose, J., 8 T. R. 54, 55; Bayly v. Merrel, Cro. Jac. 886; S. C., 3 Bulstr. 94; Risney v. Selby, 1 Salk. 211; S. C., 2 Ld. Raym. 1118; recognised Dobell v. Stevens, 3 B. & C. 625; E. C. L. R. 10; per Tindal, C. J., Shrewsbury v. Blount, 2 Scott, N. R. 594.

² Per Lord Mansfield, C. J., 8 Burr. 1910; cited, per Best, C. J., 3 Bing. 77; E. C. L. R. 11; Argument, Jones v. Bowden, 4 Taunt. 851. See Laidlaw v. Organ, 2 Wheaton, R. (U. S.) 178; Argument, 9 Id. 631, 632; per Abbott, C. J., Bowring v. Stevens, 2 C. & P. 341.

³ Keele v. Wheeler, 8 Scott, N. R. 323. See Gregson v. Ruck, 4 Q. B. 737; E. C. L. R. 45; where specified work is contracted for but not completed, that party whose default occasioned the non-completion will fail in an action by the contractor for not being permitted to proceed with the work: Pontifex v. Wilkinson, 2 C. B. 349; E. C. L. R. 52; S. C., 1 C. B. 75; E. C. L. R. 50.

⁴ D. 18, 1, 43, pr. As to concealment *ex industria*, see also the Argument, 9 Wheaton, R. (U. S.) 631, 632.

action of deceit, grounded on a supposed fraud; and it may be presumed, that there can be no deceit where a defect is so manifest that both parties discuss it at the time of the bargain. A party, therefore, who should buy a horse, *knowing* it to be blind in both eyes, could not sue on a general warranty of soundness.¹ However, if, without such knowledge on the part of the purchaser, a horse is warranted sound, which, in reality, wants the sight of an eye, though this seems to be the object of one's senses, yet, as the discernment of such defects is frequently matter of skill, it has been held that an action on the case lies to recover damages for this imposition.²

*We have already, in noticing the maxim as to *dolus malus*,³ had occasion to observe generally the effect of *fraud* [*618] in vitiating every kind of contract, and, certainly, the remarks then made apply with peculiar force to the contract of sale; for not only may such contract, before its completion, be repudiated on the ground of fraud, but, if the price of the goods sold has been actually paid, an action on the case will lie at suit of the purchaser to recover damages from the vendor. "If," it has been said in a case already cited,⁴ "two parties enter into a contract, and if one of them, for the purpose of inducing the other to contract with him, shall state that which is not true in point of fact, which he knew at the time he stated it not to be true, and if, upon that statement of what is not true, and what is known by the party making it to be false, this contract is entered into by the other party, then, generally speaking, and unless there is more than that in the case, there will be at law an action open to the party entering into such contract, an action of damages grounded upon the deceit; and there will be a relief in equity to the same party to escape from the contract which he has so been inveigled into making by the false representation of the other contracting party." In the common law reports, accordingly, many cases are to be found noticed, of which *Pasley v. Freeman*⁵ is usually cited as the leading decision, which sufficiently establish that

¹ Per Tindal, C. J., *Margetson v. Wright*, 7 Bing. 605; E. C. L. R. 20; 2 Bla. Com. 166. See *Liddard v. Kain*, 2 Bing. 183; E. C. L. R. 9.

² *Butterfields v. Burroughs*, 1 Salk. 211; 3 Bla. Com. 166. In an action for breach of warranty, the plaintiff cannot recover for a good bargain lost by re-sale of the horse: *Clare v. Maynard*, 6 Ad. & E. 519; E. C. L. R. 33; *Cox v. Walker*, Id. 523, note (a).

³ Ante, p. 571.

⁴ *Attwood v. Small*, 6 Cl. & Fin. 444.

⁵ 3 T. R. 51; Com. Dig., "Action upon the Case for a Deceit," (A 1); *Moens v. Heyworth*, 10 M. & W. 147. (*) See *Pontifex v. Bignold*, 3 Scott, N. R. 390.

a false affirmation made by the defendant, with intent to defraud the plaintiff, whereby the plaintiff *receives damage, is the [*619] ground of an action upon the case in the nature of deceit; and this proposition may, in fact, be considered as included in one yet more general, viz., that, where there is fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of that fraud is responsible to the party injured.¹ Therefore, where A. sold a gun, with a fraudulent warranty, to B. for the use of C., to whom such warranty was either directly or indirectly communicated, and who was injured by the bursting of the gun; it was held, that A. was liable to B. on the warranty, by reason of the privity of contract, and to C. for the injury resulting from the false representation.² In order, however, to entitle a person to recover for damage sustained in consequence of misrepresentation, it must appear that the communication, or false affirmation, which occasioned the damage, was made *wilfully*. Where a party, who is applied to for his opinion, gives an honest, although mistaken, one, it is all that can be expected; it is not enough to show that the representation is false, and that it turned out to be altogether unfounded, if the party making it acted upon a fair and reasonably well-grounded belief that it was true.³

It must, however, be observed, that there may be a [*620] fraudulent representation sufficient to avoid a contract, or to form the ground of an action, without actual active declaration from the party contracting; there may be a sort of tacit acquiescence in a representation fraudulent within the party's knowledge, or in the communication of a falsehood by a third person, originally flowing from himself.⁴ In cases belonging to this class, a maxim applies, which is well known, and admitted to be correct, in many of the or-

¹ Judgment, *Langridge v. Levy*, 2 M. & W. 532; (*) affirmed in error, 4 M. & W. 337; (*) *Pilmore v. Hood*, 5 Bing., N. C. 97; E. C. L. R. 35; *Taylor v. Ashton*, 11 M. & W. 401. (*) See *Mummery v. Paul*, 1 C. B. 816; E. C. L. R. 50.

² *Langridge v. Levy*, 2 M. & W. 519, 529, 532. (*) See *Winterbottom v. Wright*, 10 M. & W. 109; (*) *Priestley v. Fowler*, 3 M. & W. 1. (*)

³ *Haycroft v. Creasy*, 2 East, 92; cited per Best, C. J., delivering judgment in *Adamson v. Jarvis*, 4 Bing. 73, 74; E. C. L. R. 13, 15; *Shrewsbury v. Blount*, 2 Scott, N. R. 588; per Parke, B., 11 M. & W. 413. (*) In connexion with this subject, see also *Coxhead v. Richards*, 2 C. B. 569; E. C. L. R. 52; and cases cited, ante, p. 235, n. 5.

⁴ See per Coltman, J., 5 Bing., N. C. 109; E. C. L. R. 35; *Wright v. Crookes*, 1 Scott, N. R. 685.

dinary occurrences of life—*qui tacet consentire videtur*¹—silence implies consent; and such consent may be inferred from the party's subsequent conduct.² For instance, defendant, being about to sell a public house, falsely represented to B., who had agreed to purchase, that the receipts were £180 per month, and B., to the knowledge of defendant, communicated this representation to plaintiff, who became the purchaser instead of B.; it was held, that an action lay against defendant at suit of the plaintiff, who had sustained damage in consequence of having acted on the representation.³

Before proceeding further, it may be proper to observe the difference which exists between a warranty and a representation. Where there is a written contract, the warranty forms a part of the contract, but the representation is collateral to the contract, and may be made verbally, though the contract be in writing; and if it be of a fact, without which the other party would not have entered *into the contract at all, or at least on the same terms, it is [*621] equally effectual, if untrue, to avoid the contract, or to give an action of damages on the ground of fraud. For instance, in the case of an action by the purchaser of a public house, who has been induced to buy or give a greater price for the goodwill of a house, by a representation of the extent of its business, if that representation turns out to be false, it has never been doubted that the contract is void, and that the buyer may recover back his money in an action for money had and received to his use.⁴

It is further material to observe, with reference to the distinction between an action upon the case for a false representation and one upon warranty, that, to support the former, three circumstances must combine: first, it must appear that the representation was contrary to the fact; secondly, that the party making it knew it to be contrary to the fact; and, thirdly, that it was the false representation which gave rise to the contracting of the other party.⁵

¹ Jenk. Cent. 32. See in illustration of this maxim, *Morrish v. Murrey*, 18 M. & W. 52; (*) *Morgan v. Evans*, 3 Cl. & Fin. 205.

² Jenk. Cent. 32, 68, 226; *Hunsden v. Cheney*, 2 Vern. 150, is an illustration of this maxim. See, also, 1 Bla. Com. 430; 2 Inst. 305; *Richardson v. Dunn*, 2 Q. B. 218; E. C. L. R. 42; *Wright v. Crookes*, 1 Scott, N. R. 685.

³ *Pilmore v. Hood*, 5 Bing., N. C. 97; E. C. L. R. 35; per Parke, B., *Vane v. Cobbold*, Exch., 12 Jur. 61. (*)

⁴ See per Lord Abinger, C. B., 6 M. & W. 378; (*) per Parke, B., *Id.* 373; *Pickering v. Dowson*, 4 Taunt. 779, 786; cited, *Kain v. Old*, 2 B. & C. 684; E. C. L. R. 9; *Mummery v. Paul*, 1 C. B. 316; E. C. L. R. 50; *Pilmore v. Hood*, *supra*.

⁵ Per Lord Brougham, *Attwood v. Small*, 6 Cl. & Fjn. 444, 445.

In the latter case above specified, viz. that of an action for breach of warranty, it is not necessary that all those three circumstances should concur, in order to ground an action for damages at law or a claim for relief in a court of equity; for where a warranty is given, by which the party undertakes that the article sold shall, in point of fact, be such as is described, no question can be raised upon the *scienter*, upon the fraud or wilful misrepresentation.¹

[*622] *With respect to actions upon the case for false representations, although the declaration always imputes to the defendant fraud and an intent to deceive the plaintiff, and although it is expressly laid down, that "fraud and falsehood must concur to sustain this action,"² yet the law will infer an improper motive, if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff.³ In *Polhill v. Walter*,⁴ a bill was presented for acceptance at the office of the drawee, who was absent. A., who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on the bill an acceptance, as by the procuration of the drawee, believing that the acceptance would be sanctioned and the bill paid by the latter. The bill was dishonoured when due, and the endorsee having, on proof of the above facts, been non-suited in an action against the drawee, sued A. for falsely, fraudulently, and deceitfully representing that he was authorized to accept by procuration; the jury, on the trial, negatived all fraud in fact, yet the defendant was held to be liable, because he had made a representation untrue to his own knowledge; and the plaintiff, acting upon the faith of that representation, and giving credit to the acceptance, which, in the ordinary course of business, was its natural and necessary result, had in consequence thereof sustained damage. It was observed, in this case, that the defendant must be taken to have *intended* that *all* persons should give *credit to the acceptance to whom the bill might be offered in the course of circulation, and that the plaintiff was one of those persons.

The case just cited will perhaps suffice to show that there may be

¹ 6 Cl. & Fin. 444, 445.

² Per Gibbs, C. J., *Ashlin v. White*, Holt, N. P. C. 387.

³ Per Tindal, C. J., *Foster v. Charles*, 6 Bing. 483; E. C. L. R. 19; S. C., 7 Bing. 106; E. C. L. R. 20; *Crawshay v. Thompson*, 5 Scott, N. R. 562, and the cases there cited; *Rodgers v. Nowill*, 17 L. J., C. B. 52.

⁴ 3 B. & Ad. 114; E. C. L. R. 23; cited *Smout v. Ilbery*, 10 M. & W. 10, (*) and 5 Scott, N. R. 596, 599.

legal fraud, without proof of any morally fraudulent *motive* for the particular act, from which it is inferred; and we may observe generally, that it is fraud in law if a party makes representations which he knows to be false, and from which injury ensues, although the motive from which the representations proceeded may not have been bad; and that the person making them will nevertheless be responsible for the consequences.¹ Fraud may, moreover, consist as well in the *suppressio veri*—the suppression of what is true, as in the *suggestio falsi*—the representation of what is false,² of which one familiar instance presents itself in the case of a policy of insurance, which is made upon an implied contract between the parties, that everything material known to the assured shall be disclosed by him, and which instrument will be invalidated if any material fact be withheld. “When a policy of insurance,” observes Lord Abinger,³ “is said to be a contract *uberrimæ fidei*, this only means that the good faith, which is the basis of all contracts, is more especially required in that species of contract, in which one of the parties is necessarily less acquainted with the details of the *subject of the contract than the other. Now, nothing is more certain, than that the [*624] concealment or misrepresentation, whether by principal or agent, by design or by mistake, of a material fact, however innocently made, avoids the contract on the ground of a legal fraud.”

The above remark, as to the effect of a mistake in avoiding a contract, is, it will be observed, confined in the preceding passage to one particular species of contract, viz. a policy of insurance, to which the maxim, *caveat emptor*, has no application.⁴ It seems, indeed, clearly established by some very recent decisions, that the proposition laid down by Lord Mansfield,⁵ viz., that, in a representation to induce a party to make a contract, it is equally false for a man to affirm that of which he knows nothing, as it is to affirm that to be true which he knows to be false, cannot on any sound legal principle

¹ Per Tindal, C. J., 7 Bing. 107; E. C. L. R. 20; cited, Judgment, Rawlings v. Bell, 1 C. B. 959, 960; E. C. L. R. 50.

² Per Chambre, J., Tapp v. Lee, 3 B. & P. 371; cited 6 Bing. 403; E. C. L. R. 19.

³ 6 M. & W. 379; (*) Carter v. Boehm, 3 Burr. 1905; Lindensau v. Desborough, 8 B. & C. 586; E. C. L. R. 15; per Story, J., M'Lanahan v. Universal Insurance Company, 1 Peters, R. (U. S.) 185; Elkin v. Janson, 18 M. & W. 655; (*) Geach v. Inghall, 14 M. & W. 100. (*) A fact known to the underwriter need not be mentioned by the assured, for *scientia utrinque par pares contrahentes facit*. See Mackintosh v. Marshall, 11 M. & W. 116. (*) Pim v. Reid, 6 Scott, N. R. 982.

⁴ 2 Kent, Com., 4th ed. 489 (d).

⁵ Pawson v. Watson, Cowp. 785.

be supported. Nevertheless, as the necessity of showing "moral fraud," and of proving the *scienter* in an action on the case for misrepresentation, has been, on several recent occasions, much discussed; and as the subject in itself possesses considerable interest, it may be desirable to enter upon it briefly in this place, and to direct attention to the more important of those cases to which we have alluded.

In *Cornfoot v. Fowke*,¹ the plaintiff declared in *assumpsit* for the nonperformance of an agreement to take a ready-furnished house. The defendant pleaded that he had been induced to enter into the contract by the fraud and covin of the plaintiff, and on this plea issue was joined. It appeared on the trial, that the plaintiff, being the owner of the house *in question, employed an agent to let [*625] it, and the defendant, being in treaty with such agent for hiring it, asked him, if there was "anything objectionable about the house?" upon which the agent replied, "nothing whatever." On the day after signing the agreement, the defendant discovered that the adjoining house was a brothel, and on that ground declined to fulfil the contract. It further appeared, that the plaintiff was fully aware of the existence of the brothel, but that the agent was not. It was held by the majority of the Court of Exchequer (*dissentiente* Lord Abinger, C. B.), that it was not sufficient to support the plea that the representation turned out to be untrue, but that, for that purpose, it ought to have been proved to be *fraudulently* made; whereas, the principal, though he knew the fact, was not cognizant of the representation being made, and never directed the agent to make it. The agent, though he made a misrepresentation, yet did not know it to be one at the time he made it, but gave his answer *bonâ fide*.

In *Fuller v. Wilson*, which was an action on the case for a fraudulent misrepresentation of the value of a house, the defendant, being the owner of a house in the city, employed her attorney to put it in a course of being sold by auction; he described it to the auctioneer as being free from rates and taxes, and it was bought by the plaintiff, on that representation, for £600. It was, in fact, subject to rates and taxes, amounting to above £16 on a rent of £100, and would have been sold for no more than £470, if that representation had not been made. The plaintiff brought his action for this difference of price. It appeared that the defendant had, in fact, made no representation at all, and that her attorney, who made the represen-

¹ 6 M. & W. 358. (*) Compare *Cornfoot v. Fowke*, *supra*, the judgment in *Smout v. Ilbery*, 10 M. & W. 1. (*) from which some extracts are given, post.

tation, did not know it to be false. The action was, nevertheless, held to *be maintainable, on this express ground, that, whether there was moral fraud or not, if the purchaser was [*626] actually deceived in his bargain, the law would relieve him from it; that the principal and his agent were, for this purpose completely identified, and that the question to be considered was, not what was passing in the mind of either but whether the purchaser was, in fact, deceived by them, or either of them.¹

It seems, however, clear that the principle on which the judgment given by the Court of Queen's Bench in the above case was founded, is at variance with that which must now be considered as established; for, in the subsequent case of *Collins v. Evans*,² it is expressly laid down that "a mere representation, untrue in fact, but honestly made," will not suffice to form the groundwork of an action on the case for misrepresentation; and in *Ormrod v. Huth*,³ where all the authorities on this subject are collected, and the question as to "moral fraud" was discussed in all its bearings, it was held that case for a false and fraudulent misrepresentation respecting the quality of goods sold by sample, was not maintainable without showing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith*in making it. "The rule," said Tindal, C. J., in delivering the judgment [*627] of the Court of Exchequer Chamber, "which is to be derived from all the cases, appears to us to be, that where, upon the sale of goods, the purchaser is satisfied, without requiring a warranty (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud. If, indeed, the representation was false to the knowledge of the party making it, this would in general be conclusive evidence of fraud; but if the representation

¹ *Fuller v. Wilson*, 3 Q. B. 58; E. C. L. R. 43. The facts of this case were afterwards turned into a special verdict; and on the facts so stated the judgment of the Court of Queen's Bench was reversed in the Exchequer Chamber; S. C., 3 Q. B. 68 and 1009; E. C. L. R. 43. The court of error did not, however, enter into the principle on which the decision below was founded, nor into the question discussed in *Cornfoot v. Fowke*, supra. See, also, *Humphrys v. Pratt*, 5 Bliqh, N. S. 154, which may be supported on another ground, as pointed out by Tindal, C. J., 5 Q. B. 829; E. C. L. R. 48; *Railton v. Matthews*, 10 Cl. & Fin. 984. As to statements by an agent under a misconception of facts, see particularly *Smout v. Ilbery*, 10 M. & W. 1.(*)

² In error, 5 Q. B. 820; E. C. L. R. 48; reversing judgment in *Evans v. Collins*, Id. 804. ³ 14 M. & W. 651.(*)

was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of *caveat emptor* applies, and the representation itself does not furnish a ground of action."

Further, we find that the principle laid down in *Collins v. Evans*, above cited, was recognised by the Court of Queen's Bench in the subsequent case of *Barley v. Walford*,¹ where it was held, that if A. knowingly utter a falsehood to B., with intent to defraud B., and with a view to his own profit, and B., giving credit to the falsehood, is injured thereby, he may maintain an action against A. for the false representation.

So, in another very recent case, to which we shall again refer in connexion with the law of principal and agent, Parke, B., observed, that, to make out fraud, some wilful misrepresentation must be shown, and that a mere untruth innocently told is not sufficient.²

[*628] *On the whole, therefore, after reviewing the preceding cases, we must conclude that *moral* fraud must be proved in order to support an action on the case for misrepresentation. We may, however, add, that it has been expressly held by the Court of Exchequer, that victuallers, brewers, and other common dealers in victuals, who, in the ordinary course of their trade sell provisions unfit for the food of man, are civilly liable to the vendee, without proof of fraud on their part, and in the absence of any express warranty of the soundness of the thing sold, though this liability would not attach to a private person, not following any of the above trades, who sells an unwholesome article for food.³

The remarks immediately preceding will, perhaps, suffice to show some of the most important qualifications of the rule of *caveat emptor*, as that rule is applicable more particularly to the *quality* and description of the goods sold. It is now proposed to consider briefly how far this maxim holds with reference to the *title* of the vendor in goods which form the subject-matter of a sale or contract. According to the civil law, it is clear, that a warranty of title was implied

¹ 15 L. J., Q. B. 869.

² *Atkinson v. Pocock*, Exch., 12 Jur. 60; referring to *Chandelor v. Lopus*, Cro. Jac. 4, and *Cornfoot v. Fowke*, 6 M. & W. 358. (*) "It seems to us that a statement false in fact, but not false to the knowledge of the party making it, as in *Polhill v. Walter*, nor made with any intention to deceive, will not support an action, unless from the nature of the dealing between the parties a contract to indemnify can be implied." Judgment, *Rawlings v. Bell*, 1 C. B. 969, 960; E. C. L. R. 50.

³ *Burnby v. Rollitt*, 11 Jur., Exch. 827.

on every sale of a chattel;¹ and this doctrine of the civil law has been partially adopted by the American courts of judicature.² In our own law, however, it seems, that, in the absence of fraud, and of any assertion of title, *or representation amounting to a warranty, the maxim, *caveat emptor*, strictly applies as between [*629] the vendor and purchaser of a chattel. Before, however, referring to the authorities which support this proposition, it will be convenient to observe, that, as a general rule, no man can acquire a title to chattels from a person who has himself no title to them except only by a bonâ fide sale in market overt.³ The second vendee of a chattel cannot stand in a better situation than his vendor.⁴ For instance, if a master intrusts his servant with the care of plate, or other valuables, and the servant sells them, still, unless they are sold in market overt, the master may recover them from the purchaser.⁵ If, however, the real owner of goods suffer another to have possession of his property, and of those documents which are the *indicia* of property, and thus enable him to hold himself out to the world as having not the possession only, but the property, then, perhaps, a sale by such a person would bind the true owner.⁶

Moreover, where parties contract with a known agent or factor intrusted with goods for their purchase, even with notice of his being such agent, and pay for the same in pursuance of the contract, it is enacted that such contract and payment shall be binding upon and good against the real owner, if made in the ordinary course of business, and without notice that the agent is not authorized to sell,⁷ and the like protection has been *extended to bona fide ad- [*630] vances upon goods and merchandise in the hands of an agent

¹ D. 21, 2, 1. Voet ad Pand., 6th ed., 1, p. 922. "By the civil law," says Sir E. Sugden, "vendors were bound to warrant both the title and estate against all defects, whether they were or were not cognisant of them." 1 Sugd., V. & P., 11th ed., p. 2; this doctrine was however qualified as there stated.

² See Defreeze v. Trumper, 1 Johns., R. (U. S.) 274; Rew v. Barber, 3 Cowen, R. (U. S.) 272.

³ Peer v. Humphrey, 2 Ad. & E. 495; E. C. L. R. 29; per Abbott, C. J., Dyer v. Pearson, 8 B. & C. 42; E. C. L. R. 10; White v. Spettigue, 13 M. & W. 603. (*)

⁴ Per Littledale, J., Dixon v. Yates, 5 B. & Ad. 339; E. C. L. R. 27; ante, p. 352 et seq.

⁵ Per Abbott, C. J., Baring v. Corrie, 2 B. & Ald. 143; per Holroyd, J., Id. 149; Cro. Jac. 197.

⁶ Per Abbott, C. J., 8 B. & C. 42; E. C. L. R. 10; per Bayley, J., 6 M. & S. 28, 24; per Best, C. J., 3 Bing. 145; E. C. L. R. 11. See, also, Gordon v. Ellis, 8 Scott, N. R. 290.

⁷ 6 Geo. 4, c. 94, ss. 2, 4.

when made under similar circumstances.¹ It has been held, that, in order to bring a case within the protection of the second section of the stat. 6 Geo. 4, c. 94, there must be not only a possession by the factor of the document upon which the advance is made, but an actual intrusting of him with such document by the owner of the goods, or a possession under such circumstances as that an actual intrusting may be inferred therefrom.²

A sale of goods, even by a party who has himself only the possession, and not the property, as a thief or a finder, will be valid against the rightful owner, provided it be made in market overt during the usual market hours, unless such goods were the property of the king,³ or unless the buyer knew that the property was not in the seller, or there was any other fraud in the transaction.⁴

Market overt, we may likewise observe, is defined to be a fair or market held at stated intervals in particular places, by virtue of a charter or prescription.⁵ In the city of London, however, the custom is, that every shop is, except on Sunday, market overt in regard to the goods usually and publicly sold therein;⁶ and a sale within the city of London, in an open shop, of goods usually dealt in there, [*631] is a sale in market overt, though the premises are described in evidence as a warehouse, and are not sufficiently open to the street for a person on the outside to see what passes within.⁷ By stat. 1, c. 21, it is enacted, that the sale of any goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property; for this, being usually a clandestine trade, is therefore made an exception to the general rule.⁸

With respect to stolen goods, the stat. 7 & 8 Geo. 4, c. 29, s. 57, enacts, that, if any person, guilty of any such felony or misdemeanour, as is before mentioned in that act, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable

¹ 5 & 6 Vict. c. 39, ss. 1, 3; *Learoyd v. Robinson*, 12 M. & W. 745. (*)

² *Hatfield v. Phillips*, 14 M. & W. 665; (*) S. C., 12 Cl. & Fin. 343.

³ 2 Bla. Com. 449. The doctrine of our law as to the effect of a sale in market overt, is not recognised in the United States, see *Ventress v. Smith*, 10 Peters, R. (U. S.) 175, 176; per Kent, C. J., *Wheelwright v. Depeyster*, 1 Johns. R. (U. S.) 479, 480.

⁴ 2 Bla. Com. 450; 2 Inst. 713; *Hilton v. Swan*, 5 Bing., N. C. 413; E. C. L. R. 35.

⁵ *Jacob, Law Dict.*, tit. "Market;" 2 Inst. 713. Case of *Market-Overt*, 5 Rep. 84; 2 Bla. Com. 449.

⁶ *Id.*, *Harris v. Shaw*, Cas. temp. Hardw. 349.

⁷ *Lyons v. De Pass*, 11 Ad. & E. 326; E. C. L. R. 39.

⁸ See stat. 39 & 40 Geo. 3, c. 99; *Chit. & Hulme, Statutes*, 790.

security, or other property whatsoever, shall be indicted by or on behalf of the owner, his executor or administrator, and convicted, in such case the property shall be restored to the owner or his representative, and the Court shall have power to award writs of restitution in a summary manner. But this statute does not extend to charge a person who purchased the goods in market overt after the felony, and had disposed of them again before the conviction.¹ Where, however, a purchase of stolen property was made *bonâ fide*, but *not* in market overt, and the plaintiff gave notice to the defendant, who subsequently sold the goods in market overt, after which the plaintiff prosecuted the felon to conviction, the plaintiff was held entitled to recover from the defendant the value of the property in trover.²

*The same section of the act above cited likewise contains a proviso that restitution shall not be awarded in the case of [^{*632}] any valuable security which shall have been *bonâ fide* paid or discharged by the party liable to the payment thereof, or in that of a negotiable instrument taken by transfer or delivery for a just and valuable consideration, without notice or cause to suspect that the same had been stolen: and here it is convenient to observe, that negotiable instruments form the most important exception to the rule, that a valid sale cannot be made except in market overt of property to which the vendor has no right. In the leading case on this subject, it was decided, that property in a bank-note passes, like that in cash, by delivery, and that a party taking it *bonâ fide*,³ and for value is entitled to retain it as against a former owner from whom it has been stolen.⁴ It is, however, a general rule, that no title can be obtained through a forgery, and hence a party from whom a promissory note was stolen, and whose endorsement on it was subsequently forged, was held entitled to recover the amount of the note from an innocent holder for value.⁵ It should further be observed, that every

¹ Horwood v. Smith, 2 T. R. 750; Smith, Mer. Law, 3d ed. 435.

² Peer v. Humphrey, 2 Ad. & E. 495; E. C. L. R. 29; White v. Spettigue, 18 M. & W. 603. (*) See, also, Parker v. Patrick, 5 T. R. 175, which was decided under stat. 21 Hen. 8, c. 11, repealed by 7 & 8 Geo. 4, c. 27, s. 1. As to the statutes respecting stolen horses, 2 P. & M. c. 7, and 81 Eliz. c. 12; see 2 Bla. Com. 450.

³ See Hilton v. Swan, 5 Bing., N. C. 413; E. C. L. R. 35; and the following note.

⁴ Miller v. Race, 1 Burr. 452. The reader is referred for full information on this subject, and also on that of *bonâ fides* in the holder, to the note appended to the above case, Smith, L. C., vol. 1. See, also, the Law Mag., No. lxii., p. 294; Uther v. Rich, 10 Ad. & E. 784, 790; E. C. L. R. 37; and Goodman v. Harvey, 4 Ad. & E. 870; E. C. L. R. 81; cited ante, p. 564.

⁵ Johnson v. Windle, 8 Bing., N. C. 225, 229; E. C. L. R. 82.

negotiable instrument, being in its nature precisely analogous to a bank-note payable to bearer, is subject to the same rule of law; whoever is the holder of such an instrument has power to give title to any person honestly acquiring it.¹

[*683] *One peculiar case may here be mentioned, which is not only illustrative of the general legal doctrines which regulate the rights of purchasers, but likewise of another principle,² which we have already considered in connexion with criminal law; viz., where a man buys a chattel which, unknown to himself and to the vendor, contains valuable property. In a recent case³ on this subject, a person purchased, at a public auction, a bureau, in a secret drawer of which he afterwards discovered a purse containing money, which he appropriated to his own use. It appeared that, at the time of the sale, no person knew that the bureau contained anything whatever. The Court held that, although there was a delivery of the bureau, and a lawful property in it thereby vested in the purchaser, yet that there was no delivery so as to give him a lawful possession of the purse and money, for the vendor had no intention to deliver it, nor the vendee to receive it; both were ignorant of its existence; and when the purchaser discovered that there was a secret drawer containing the purse and money, it was a simple case of finding,⁴ and then the law applicable to all cases of finding would apply to this. It was further observed, that the old rule,⁵ that "if one lose his goods, and another find them, though he convert them, *animo furandi*, to his own use, it is no larceny," has undergone, in more recent times, some limitations. One is, that, if the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion constitutes a larceny.

[*684] To this *class of decisions the case under consideration was held to belong, *unless* the plaintiff had reason to believe that he bought the contents of the bureau, if any, and consequently had a *colourable* right to the property.

In the next place, as between vendor and purchaser, we may state the result of the older authorities to be, that, where a person sells

¹ Per Abbott, C. J., *Gorgier v. Mieville*, 3 B. & C. 47; E. C. L. R.-10. See also the cases cited in Smith's Merc. Law, 3d ed. 179, 180.

² *Actus non facit reum nisi mens sit rea*, ante, p. 226.

³ *Merry v. Green*, 7 M. & W. 628. (*)

⁴ See *Armory v. Delamirie*, 1 Stra. 504.

⁵ 8 Inst. 108.

goods to which in fact he has no title, he will not be responsible to the purchaser if the latter be subsequently disturbed in his possession by the true owner, unless there be either a warranty, or a fraudulent misrepresentation as to the property in the goods of the vendor.¹ This doctrine has, however, been very much restricted in its practical operation by holding that a simple assertion of title is equivalent to a warranty, and generally that any representation may be tantamount thereto, if the party making it appear from the circumstances under which it was made to have had an intention to warrant, or to have meant that the representation should be understood as a warranty.²

*There are, indeed, two recent cases which may be thought in some measure irreconcilable with the doctrines just stated, [^{*635}] respecting implied warranty of title, and to which, therefore, reference must here be made. In the first of these it was held that where a person, who has employed an auctioneer to sell goods, is subsequently proved not to be the owner, and the right of some third party intervenes, and is established, the auctioneer having no interest in the goods beyond what he derives from the employer, has no longer any claim upon the property against the rightful owner, and cannot consequently maintain an action against the buyer, even though the latter has expressly promised to pay on being allowed to take the goods away, and has, in pursuance of that arrangement, taken them away.³ Now, the decision in this case has really no bearing upon the application of the maxim which we have been

¹ See *Peto v. Blades*, 5 Taunt. 657; *E. C. L. R. 1*; *Jones v. Bowden*, 4 Taunt. 847; *Sprigwell v. Allen*, Ayleyn, R. 91; and *Paget v. Wilkinson*, cited 2 East. 448, n. (a). In *Early v. Garret*, 9 B. & C. 982; *E. C. L. R. 17*; *Littledale, J.*, observes, "It has been held, that where a man sells a horse as his own (*Sprigwell v. Allen*, supra), when in truth it is the horse of another, the purchaser cannot maintain an action against the seller, unless he can show that the seller knew it to be the horse of the other at the time of the sale; the scienter, or fraud being the gist of the action, where there is no warranty; for there the party takes upon himself the knowledge of the title to the horse, and of his qualities." See *Robinson v. Anderton*, Peake, N. P. C. 94; *Street v. Blay*, 2 B. & Ad. 456; *E. C. L. R. 22*.

² *Crosse v. Gardiner*, Carth. 90; *Medina v. Stoughton*, 1 Salk. 210; *Furnis v. Leicester*, Cro. Jac. 474; *Judgment*, *Adamson v. Jarvis*, 4 Bing. 78; *E. C. L. R. 13, 15*. See per Buller, J., 3 T. R. 57, 58; *Sanders v. Powell*, 1 Lev. 129. As to an express warranty, see per Lord Ellenborough, C. J., *Williamson v. Allison*, 2 East, 451, which was an action on the case for breach of warranty of goods; *Gresham v. Postan*, 2 C. & P. 540; *E. C. L. R. 12*; *Denison v. Ralphson*, 1 Ventr. 365.

³ *Dickenson v. Naul*, 4 B. & Ad. 688; *E. C. L. R. 24*. See, also, *Coppin v. Walker*, 7 Taunt. 237; *E. C. L. R. 2*; *Coppin v. Craig*, Id. 243.

considering, but merely results from and is in strict accordance with a well-known rule connected with the law of principal and agent, viz., that where an agent for the sale of goods has a special property in them, he may sue for the purchase-money, subject to the right of the real owner, or undisclosed principal, to interfere and require payment to himself. In *Allen v. Hopkins*,¹ the principle of the case just cited was fully recognised, and it was further laid down as a general proposition, that, "if goods be sold by a person who is not the owner, and the owner be found out and paid for those goods, the person who sold them under pretended authority has no right to call upon the defendant to pay him also."

Now, *Allen v. Hopkins* was an action of debt for goods sold and delivered, in which the defendant pleaded as to the sum of 17*l.* 15*s.*, [636] parcel, &c., that the same became due *from him to the plaintiff as the price of goods sold, which before and at the time of the sale were part of the estate of one J. A., then lately deceased, who died intestate: that the plaintiff, pretending to be the executor of J. A., and not being executor or administrator, nor having any right or title to the goods, sold the said goods to the defendant, who believed the plaintiff to be such executor; that after the sale, and before the payment of the said sum of 17*l.* 15*s.* to the plaintiff, to wit, on the 13th of December, 1841, letters of administration of the goods, &c., of J. A. were granted to G. N., which said G. N. afterwards and before the payment of the sum of 17*l.* 15*s.*, to wit, on, &c., gave notice of his appointment as such administrator to the defendant, and requested the defendant to pay him the said sum of 17*l.* 15*s.*, whereupon the defendant did then pay to the said G. N. the said sum of 17*l.* 15*s.* To the above plea the plaintiff replied that the said goods were not parcel of the estate and effects of the said J. A., and upon the issue thus raised a verdict was found for the defendant. The Court, upon motion for judgment *non obstante veredicto*, held the plea to be substantially a good defence to the action, and thought that the defendant could not be compelled to resort to a cross action against the plaintiff, grounded on the misrepresentation of which he had been guilty. Now, it is conceived that this decision may be supported without at all impugning the general doctrine as to implied warranty, because the averments in the plea showed a misrepresentation false to the knowledge of the vendor, which, it was in effect

¹ 13 M. & W. 94. (*)

decided, rendered the contract of sale voidable by the other party. It is true that Pollock, C. B., in delivering the judgment of the Court observes that "the doctrine of *caveat emptor* applies not at all to the *title* of the plaintiff, but to the condition of the goods;" *this remark, as we should submit, was irrelevant, reference [*637] being made to the facts as disclosed upon the pleadings, and is directly opposed, as well to those earlier authorities, which we have already cited, as to the judgment subsequently given in the case of *Ormrod v. Huth*,¹ where it is laid down, that the rule of *caveat emptor* applies whenever a representation is made, which, though not true in point of fact, is believed at the time to be true by the party making it; and where it is observed that, "although the cases may in appearance raise some difference as to the effect of a false assertion or representation of *title* in the seller, it will be found on examination that in each of those cases there was either an assertion of title embodied in the contract, or a representation of title which was false to the knowledge of the seller."

In the preceding remarks upon the maxim *caveat emptor* we have confined our attention to those classes of cases to which alone it appears to be *strictly* applicable, and in connexion with which reference to it is, in practice, most frequently made. This maxim may, indeed, be said to have *some* application under circumstances altogether dissimilar from those which present themselves in the various decisions to which we have above alluded; where, for instance, a question arises as to what amounts to an acceptance² of goods, or as to the performance of conditions precedent to the vesting of the property, or to the right of action.³ So, where some specified act must be done by the vendor, in order to perfect the transfer of the thing sold,⁴ or wherever the *right and title to property are disputed as between the original owner and the assignee or bailee [*638] of some subsequent holder,⁵ the principle set forth by the maxim *caveat emptor*, may, perhaps, be thought in some measure applicable. A consideration of the above topics, however, although necessary in a treatise upon contracts generally, would evidently have been out of place in the present volume, and irrelevant to its imme-

¹ 14 M. & W. 651. (*)

² See *Curtis v. Pugh*, 16 L. J., Q. B. 199.

³ *Kingdom v. Cox*, 2 C. B. 661; E. C. L. R. 52.

⁴ See *Wilkinson v. Lloyd*, 7 Q. B. 27; E. C. L. R. 53; *Leeman v. Lloyd*, 14 L. J., Q. B. 165; per Erle, J., *Ross v. Moses*, 1 C. B. 232; E. C. L. R. 50; *Gregory v. The East India Company*, 7 Q. B. 199; E. C. L. R. 53.

⁵ See *Cooper v. Willomatt*, 1 C. B. 672; E. C. L. R. 50; ante, p. 361.

diate design. We have not, therefore, extended our inquiries beyond the subject of warranty on the sale or demise of property, and have examined those decisions only which seemed best calculated to throw light upon the question, whether or not the vendee has a remedy against the vendor for a defect either in the title to or quality of the subject-matter of the sale.

QUICQUID SOLVITUR, SOLVITUR SECUNDUM MODUM SOLVENTIS—
QUICQUID RECIPITUR, RECIPITUR SECUNDUM MODUM RECIPI-
ENTIS.

(Halk. M., p. 149.)

Money paid is to be applied according to the intention of the party paying it; and money received according to that of the recipient.

“According to the law of England, the debtor may, in the first instance, appropriate the payment—*solvitur in modum solventis*; if he omit to do so, the creditor may make the appropriation—*recipitur in modum recipientis*; but if neither make any appropriation, the law appropriates the payment to the earlier debt;”¹ and again, [*639] “where a *creditor receives, without objection, what is offered by his debtor, *solvitur in modum solventis*, and it must be implied that the debtor paid it in satisfaction—where the creditor objects, *recipitur in modum recipientis*, and issue taken on the receipt in satisfaction is impliedly an issue on the payment in satisfaction.”² Thus succinctly is the law relating to the above maxim explained by Tindal, C. J., in two recent cases, and, in accordance with this explanation, it has been held, that, where the defendant being indebted to the plaintiff for goods supplied to his wife *dum sola*, and to himself after coverture, made a payment without any specific appropriation, the plaintiff might apply the money in discharge of the debt contracted by the wife *dum sola*;³ that where part of a debt was barred by the Statute of Limitations, a payment of money made generally might be applied in liquidation of that part,⁴ and that a creditor receiving money without any specific ap-

¹ *Mills v. Fowkes*, 5 Bing., N. C. 461; E. C. L. R. 35; per Bayley, J., 2 B. & C. 72; E. C. L. R. 9; per Sir L. Shadwell, V. C. E., *Greenwood v. Taylor*, 14 Sim. 522; *Toulmin v. Copland*, 2 Cl. & Fin. 681. See *James v. Child*, 2 Cr. & J. 678; *Newmarch v. Clay*, 14 East, 239; *Id.* 243 (c).

² *Webb v. Weatherby*, 1 Bing., N. C. 505; E. C. L. R. 27.

³ *Goddard v. Cox*, 2 Stra. 1194.

⁴ *Mills v. Fowkes*, 5 Bing., N. C. 455; E. C. L. R. 35; *Williams v. Griffith*, 5 M. & W. 300. (*)

appropriation by the debtor, shall be permitted in a court of law to apply it to the discharge of a prior and purely equitable debt.¹ Moreover, it has been held that the creditor is not bound to state at the time when a payment is made, to what debt he will apply it, but that he may make such application at any period before the matter comes under the consideration of a jury.²

But although it is true that where there are distinct accounts and a general payment, and no appropriation made *at the time of such payment by the debtor, the creditor may apply it to [*640] which account he pleases; yet, where the accounts are treated by the parties as one entire account, this rule does not apply.³ For instance, in the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts.⁴ In like manner, where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever.⁵ It must be borne in mind, notwithstanding the preceding remarks, that, although the payment of money on account generally, without making a specific appropriation of it, *would, [*641] in many cases, go to discharge the first part of an account,

¹ *Bosanquet v. Wray*, 6 Taunt. 597; E. C. L. R. 1. In *Goddard v. Hodges*, 1 Cr. & M., 33, (*) it was held that a general payment must be applied to a prior legal, and not to a subsequent equitable demand.

² *Philpott v. Jones*, 2 Ad. & E. 41; E. C. L. R. 29.

³ Per Bayley, J., *Bodenham v. Purchas*, 2 B. & Ald. 45.

⁴ Per Sir Wm. Grant, M. R., *Clayton's case*, 1 Mer. 608; *Bodenham v. Purchas*, 2 B. & Ald. 39; Judgment, *Henniker v. Wigg*, 4 Q. B. 794; E. C. L. R. 45.

⁵ Per Bayley, J., *Simson v. Ingham*, 2 B. & C. 72; E. C. L. R. 9.

yet that rule cannot be taken to be conclusive—it is evidence of an appropriation only; and other evidence may be adduced, as of a particular mode of dealing, or of an express stipulation between the parties which may vary the application of the rule.¹

Where a person has two demands, one recognised by law, the other arising on a matter forbidden by law, and an unappropriated payment is made to him, the law will afterwards appropriate it to the demand which it acknowledges, and not to the demand which it prohibits.²

Again, where a person bought two parcels of goods of a broker, the property of different persons, and paid *generally* to the broker a sum larger than the amount of either demand, but less than the two together, and afterwards the broker stopped payment; it was held that such payment ought to be equitably apportioned as between the several owners of the goods sold, who were only respectively entitled to recover the difference from the buyer.³

The following remarks made in a recent case, will serve to show some additional important limitations of the maxim under consideration. “If, in the course of dealing between A. and B., various debts are from time to time incurred, and payment made by B. to A., and no acknowledgment is made by A., nor inquiry by B. how the payments are *appropriated, the law will presume that the priority of debt will draw after it priority of payment and satisfaction, on the ground that the oldest debt is entitled to be first satisfied. That doctrine is recognised in *Devaynes v. Noble*,⁴ but the principle was never applied to cases where the obligations were *alio jure*, nor to other cases, as, for instance, where in dealings between B. and C. the latter directs B. to receive moneys due to him, the law will not presume an appropriation of these moneys to the payment of a debt due to A. and B. in the absence of any specific directions.”⁵

¹ Judgment, *Wilson v. Hirst*, 4 B. & Ad. 767; E. C. L. R. 24; *Henniker v. Wigg*, 4 Q. B. 792; E. C. L. R. 45.

² Judgment, *Wright v. Laing*, 8 B. & C. 171; E. C. L. R. 10. Payment into Court is an admission of, and will be applied to, a legal demand only: *Ribbans v. Crickett*, 1 B. & P. 264. See *Philpott v. Jones*, 2 Ad. & E. 41; E. C. L. R. 29. Where there had been a running cash and bill account between a bankrupt and a banking company, “the Court will appropriate the early payments to the early items of the account, and to the legal and not the illegal part of the demand:” *Ex parte Randleson*, 2 D. & C. 534, 540.

³ *Favenc v. Bennett*, 11 East, 86.

⁴ 1 Meriv. 608.

⁵ Per Lord Brougham, *C. Nottidge v. Prichard*, 2 Cl. & Fin. 393.

Where a bill of exchange or promissory note has been given by a debtor to his creditor, it is not unfrequently a matter of some difficulty to determine whether the giving of such instrument should be considered as payment, and as operating to extinguish the original debt; or whether it should be regarded merely as security for its payment, and as postponing the period of payment until the bill or note becomes due. Upon this subject, which is one of great practical importance, the correct rule is thus laid down by Lord Langdale, M. R.:—"The debt," says his Lordship, "may be considered as actually paid if the creditor, at the time of receiving the note, has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid; or if, from the conduct of the creditor, or the special circumstances of the case, such a payment is legally to be implied. But in the absence of any special circumstances throwing the risk of the note upon the creditor, his receiving the note in lieu of present payment of the debt, is no more than giving extended credit, postponing the demand for immediate payment, or giving time for payment on a future day, in consideration of receiving *this species of security. While the time runs, [*643] payment cannot legally be enforced, but the debt continues till payment is actually made; and if payment be not made when the time has run out, payment of the debt may be enforced as if the note had not been given. If payment be made at or before the expiration of the extended time allowed, it is then for the first time that the debt is paid."¹

In connexion with the preceding remarks, we may be permitted to remind the reader of the distinction which exists between a payment "on account," and a payment "in satisfaction and discharge" of a debt due,—in the former case the original right of action being suspended merely, and in the latter being altogether extinguished.²

QUI PER ALIUM FACIT PER SEIPSUM FACERE VIDETUR.

(Co. Litt. 258, a.)

He who does an act through the medium of another party is in law considered as doing it himself.

The above maxim enunciates the general doctrine on which the law relative to the rights and liabilities of principal and agent de-

¹ *Sayer v. Wagstaff*, 5 Beav. 415; recognised, *In re Harries*, 13 M. & W. 8; (*) per Lord Kenyon, C. J., *Stedman v. Gooch*, 1 Esp. 5; cited 6 Scott, N. R. 946.

² See *Sibree v. Tripp*, 15 M. & W. 23; (*) *Sard v. Rhodes*, 1 M. & W. 158. (*)

pends. Where a contract is entered into with A., as agent for B., it is, in contemplation of law, entered into with B., and the principal [*644] is, in most cases,¹ the *proper party to sue for a breach of the contract,—the agent being considered simply the medium through which it is effected: *qui facit per alium facit per se*;² and this rule applies equally where the party so contracting is himself guilty of a breach of contract, in which case an action for such breach must be brought against him, and not against his agent.³ For instance, the defendant was employed by the owner to sell a certain farm, and entered into a written agreement to sell the farm to the plaintiff for £2700, without naming the seller. £100 deposit in part of the purchase-money was paid by the plaintiff to the defendant; two days afterwards the former signed a contract for sale by S. (the owner), to himself, whereby he agreed to pay on its execution £100 as a deposit, for which S. undertook to pay interest till the completion of the purchase. For want of a title in S. the contract was subsequently rescinded; but the defendant, before he had notice of the rescission, paid S. £50, retaining the other £50, under an agreement with S. to give him (the defendant) one-half of any sum he might get for the farm over £2600, but the £50 was retained without the consent of S. The Court held, that the plaintiff could not recover in an action against the defendant any part of the £100 paid as above stated.⁴

The following instances, which are both of ordinary occurrence and practical importance, may be mentioned as *illustrations of [*645] the rule, which, for certain purposes, identifies the agent with the principal. Payment to an authorized agent,⁵ as an auctioneer, in the course of his employment, is payment to his principal.⁶

¹ There are cases, however, in which an agent, professing to contract as such, may maintain an action in his own name; as, if he have transferred the property of his principal under circumstances which give a right to recover it back; per Lord Mansfield, C. J., *Stevenson v. Mortimer*, 2 Cowp. 806. So, where a factor has a lien for his balance on the price of goods sold by him: *Drinkwater v. Goodwin*, 1 Cowp. 251, 256; recognised in *Hudson v. Granger*, 5 B. & Ald. 27, 38; E. C. L. R. 7; *Atkyns v. Amber*, 2 Esp. 498. See, also, *Hulse v. Young*, 16 Johns. R. (U. S.) 1.

² Branch, Max., 5th ed., p. 179; *Moore v. Hopper*, 2 N. R. 411.

³ *Chit. Contr.*, 8d ed. 212, 221, 227; 2 Selw., N. P. 10th ed. 1094, 1096; per *Littledale, J.*, *Thomson v. Davenport*, 9 B. & C. 90; E. C. L. R. 17; *Attwood v. Munnings*, 7 B. & C. 278; E. C. L. R. 14; *Davidson v. Stanley*, 3 Scott, N. R. 49.

⁴ *Hurley v. Baker*, 16 M. & W. 26. (*) ⁵ *Bostock v. Hume*, 8 Scott, N. R. 590.

⁶ *Sykes v. Giles*, 5 M. & W. 645; (*) 1 Bla. Com. 430. See *Stephens v. Badcock*, 3 B. & Ad. 354; E. C. L. R. 28; cited, *Argument, Whyte v. Rose*, 3 Q. B. 498; E. C. L. R. 48.

Thus:—M. employed R. & Co., bankers in Edinburgh, to obtain for him payment of a bill drawn on a person resident at Calcutta. R. & Co. accepted the employment and wrote, promising to credit M. with the money when received. R. & Co. transmitted the bill, in the usual course of business, to C. & Co. of London, and by them it was forwarded to India, where it was duly paid. R. & Co. wrote to M., announcing the fact of its payment, but never actually credited him in their books with the amount; the house in India having failed, it was held that R. & Co. were the agents of M. to obtain payment of the bill; that payment having been actually made, they became *ipso facto* liable to him for the amount received, and that he could not be called on to suffer any loss occasioned by the conduct of the sub-agents, as between whom and himself no privity existed. “To solve the question in this case,” said Lord Cottenham, “it is not necessary to go deeper than to refer to the maxim, *qui facit per alium facit per se*. R. & Co. agreed for consideration to apply for payment of the bill, they necessarily employed agents for that purpose who received the amount, their receipt was in law a receipt by them, and subjected them to all the consequences. The appellant with whom they so agreed cannot have anything to do with the conduct of those whom they so employed, or with the state of the account between different parties engaged in this agency.”¹

*The above case shows that the receipt of money by an agent will charge the principal, and, in like manner, a tender [*646] made to an authorized agent will in law be regarded as made to the principal; thus, where the evidence showed that the plaintiff directed his clerk not to receive certain money from his debtor if it should be offered to him, that the money was offered to the clerk, and that he, in pursuance of his master's orders, refused to receive it; upon the principle *qui facit per alium facit per se*, the tender to the servant was held to be a good tender to the master.² So, payment by an agent is equivalent to payment by the principal. Where, for example, a covenant was “to pay or cause to be paid,” it was held, that the breach was sufficiently assigned by stating, that the defendant had not paid, without saying, “or caused to be paid;” for, had the defendant caused to be paid, he had paid, and, in such a case, the

¹ *Mackersy v. Ramsays*, 9 Cl. & Fin. 818, 850. But the doctrine that the receipt of an agent is the receipt of the principal, does not apply to the case of a wrong-doer: *Sharland v. Milton*, 15 L. J., Chanc. 434.

² *Moffat v. Parsons*, 5 Taunt. 307; E. C. L. R. 1.

payment might be pleaded in discharge.¹ On the same principle, the delivery of goods to a carrier's servant is a delivery of them to the carrier,² and the delivery of a cheque to the agent of A. is a delivery to A.³ Railway companies, moreover, are not to be placed in a different condition from all other carriers. They will be bound [*647] in the course of their business as carriers by the *contract of the agent whom they put forward as having the management of that branch of their business. So that, where it appeared from the evidence, that certain goods were undoubtedly received by a railway company, for transmission on some contract or other, and that the only person spoken to respecting such transmission was the party stationed to receive and weigh the goods; it was held, that this party must have an implied authority to contract for sending the goods, and that the company were consequently bound by that contract.⁴

Where an agent for the sale of goods contracts in his own name, and *as a principal*, the general rule is, that an action may be supported, either in the name of the party by whom the contract was made, and privy to it, or of the party on whose behalf and for whose benefit it was made.⁵ So, where the agent is a factor, receiving a *del credere* commission, the principal may, at any period after the contract of sale has been concluded, demand payment of the sum agreed on to himself, unless such payment had previously been made to the factor, in due course, and according to the terms of the contract.⁶ The following rules, respecting the liability of parties on a contract for the purchase of goods, are likewise illustrative of the

¹ Gyse v. Ellis, 1 Stra. 228.

² Dawes v. Peck, 8 T. R. 330; Brown v. Hodgson, 2 Camp. 86; per Lord Ellenborough, C. J., Griffin v. Langfield, 3 Camp. 254; Fragano v. Long, 4 B. & C. 219; E. C. L. R. 10. Moreover a delivery to the carrier is in law (except under special circumstances) a delivery to the consignee; see the above cases; Dunlop v. Lambert, 6 Cl. & Fin. 600. But an acceptance by the carrier is not an acceptance by the consignee; per Parke, B. Johnson v. Dodgson, 2 M. & W. 656. (*)

³ Samuel v. Green, 16 L. J., Q. B. 239.

⁴ Pickford v. The Grand Junction Railway Company, 12 M. & W. 766. (*)

⁵ Per Bailey, J., Sargent v. Morris, 3 B. & Ald. 280; E. C. L. R. 5; Sims v. Bond, 5 B. & Ad. 398; E. C. L. R. 27; Duke of Norfolk v. Worthy, 1 Camp. 337; Cothay v. Fennell, 10 B. & C. 672; E. C. L. R. 21; Bastable v. Poole, 1 Cr., M. & R. 413; (*) per Lord Abinger, C. B., Sykes v. Giles, 5 M. & W. 650; (*) Garrett v. Handley, 4 B. & C. 656; E. C. L. R. 10; Higgins v. Senior, 8 M. & W. 844. (*)

⁶ Hornby v. Lacy, 6 M. & S. 172; Morris v. Cleasby, 4 M. & S. 566, 574; (*) Sadler v. Leigh, 4 Camp. 195; Grove v. Dubois, 1 T. R. 112; Scrimshire v. Alderton, 2 Stra. 1182.

doctrine under consideration, and are here briefly stated on account of their general importance and applicability. First, *an [*648] agent, contracting as principal, is liable in that character; and, if the real principal be known to the vendor at the time of the contract being entered into by the agent, dealing in his own name, and credit be given to such agent, the latter only can be sued on the contract.¹ Secondly, if the principal be unknown at the time of contracting, whether the agent represent himself as such or not, the vendor may, on discovering the principal, debit either at his election.² But, thirdly, if a person act as agent without authority, he is personally and solely liable; and if he exceed his authority, the principal is not bound by acts done beyond the scope of his legitimate authority.³ If A. employs B. to work for C., without warrant from C., A. is liable to pay for the work done;⁴ nor would it in this case make any difference, if B. believed A. to be in truth the agent of C.; for, in order to charge the last-mentioned party, the plaintiff must prove a contract with him, either express or implied, and with him in the character of a principal, directly, or through the intervention of an agent.⁵

The question, how far an agent is personally liable, who *having in fact no authority, professes to bind his principal, [*649] has, on various occasions, been discussed. There is no doubt, it was observed in a recent judgment,⁶ that, in the case of a fraudulent mis-

¹ Paterson v. Gandasequi, 15 East, 62; Addison v. Gandasequi, 4 Taunt. 574; Franklyn v. Lamond, 16 L. J., C. P. 221. See Smith v. Sleep, 12 M. & W. 585, 588. (*)

² Thomson v. Davenport, 9 B. & C. 78; E. C. L. R. 17; per Park, J., Robinson v. Gleadow, 2 Bing., N. C. 161, 162; E. C. L. R. 29; Paterson v. Gandasequi, 15 East, 62; Railton v. Hodgson, 4 Taunt. 576, n; Wilson v. Hart, 7 Taunt. 295; E. C. L. R. 2; Higgins v. Senior, 8 M. & W. 834. (*)

³ Woodin v. Burford, 2 Cr. & M. 391; (*) Wilson v. Barthrop, 2 M. & W. 868; (*) Fenn v. Harrison, 3 T. R. 757; Polhill v. Walter, 8 B. & Ad. 114; E. C. L. R. 23; per Lord Abinger, C. B., Acey v. Fernie, 7 M. & W. 154; (*) Davidson v. Stanley, 3 Scott, N. R. 49; Harper v. Williams, 4 Q. B. 219; E. C. L. R. 45. See Downman v. Williams (in error), 7 Q. B. 108; E. C. L. R. 53; where the question was as to the construction of a written undertaking.

⁴ Per Lord Holt, C. J., Ashton v. Sherman, Holt, R. 309; cited 2 M. & W. 218. (*)

⁵ Thomas v. Edwards, 2 M. & W. 215. (*) See, also, Broom's Parties to Actions, 2d ed. 140-172 h.

⁶ Smout v. Ilbery, 10 M. & W. 1, 9. (*) In this case, which was an action of debt, a man, who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad:—Held, that the wife was not liable for goods supplied to her after his death, but before information of his death had been received.

representation of his authority, with an intention to deceive, the agent would be personally responsible; but, independently of this, which is perfectly free from doubt, there seem to be still two other classes of cases, in which an agent, who, without actual authority, makes a contract in the name of his principal, is personally liable, even where no proof of such fraudulent intention can be given. First, where he has no authority, and knows it, but, nevertheless, makes the contract, as having such authority; in which case, on the plainest principles of justice, he is liable; for he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just, that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. There is also a second class, in which the Courts have held, that, where a party making the contract as agent, *bonâ fide* believes that such authority is vested in him, but has, in fact, no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any fraudulent motives, nor has he made any statement which he knows to be untrue; but still, his liability depends on the same principles as before. It is a wrong, differing only in degree, but not in its essence, from the former *case, to state as true, [*650] what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct,¹ and, if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences. The true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent in order to make him personally liable on a contract made in the name of his principal; in all of them, it will be found, that the agent has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party as would enable him, equally with himself, to judge as to the authority

¹ As to this proposition, see the Argument, *Ormrod v. Huth*, 14 M. & W. 660; (*) *ante*, p. 626.

under which he proposed to act. *Polhill v. Walter*,¹ which has been noticed in another part of this work, is an instance of the first of the two classes of decisions just alluded to; and cases, in which the agent never had any authority to contract at all, but believed that he had, as where he acted on a forged warrant of attorney, which he thought to be genuine, and the like, are instances of the second class.²

In pursuance of these remarks we may observe, that the contract of insurance has been said³ to be a contract *uberrimæ fidei*, *and the principles which govern it are those of an enlight- [*651] ened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any facts material to the risk which he does not disclose, and that no known loss had occurred which, by reasonable diligence, might have been communicated to him. If a party, having secret information of a loss, procures insurance without disclosing it, it is a manifest fraud which avoids the policy. If, knowing that his agent is about to procure insurance, he withholds the same information for the purpose of misleading the underwriter, it is no less a fraud, for, under such circumstances, the maxim applies, *qui facit per alium facit per se*. His own knowledge in such a case infects the act of his agent in the same manner and to the same extent which the knowledge of the agent himself would do. And even if there be no intentional fraud, still the underwriter has a right to a disclosure of all material facts which it was in the power of the party to communicate by ordinary means, and the omission is fatal to the insurance. The true principle deducible from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent as soon as with due and reasonable diligence it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence the information might have been communicated, so as to have countermanded the insurance, the policy is void.

¹ 3 B. & Ad. 114; E. C. L. R. 28; ante, p. 622.

² Judgment, 10 M. & W. 10. (*)

³ Per Story, J., delivering judgment in *M'Lanahan v. The Universal Insurance Company*, 1 Peters, R. (U. S.) 185; per Yates, J., *Hodgson v. Richardson*, 1 W. Bla. 465.

On the maxim, *qui facit per alium facit per se*, depends the liability of copartnership on a contract entered into by an individual member of the firm; for he is considered *as the accredited agent of [*652] the rest, and will, consequently, bind the firm by his act or assurance made with reference to business transacted by it¹ and in the absence of collusion between himself and other contracting party.²

The decision in *Marsh v. Keating* is important with reference to the question of the responsibility incurred by one partner for the act of his copartner, by reason of the implied agency between parties thus situated, and affords a direct and forcible illustration of the maxim, *qui facit per alium facit per se*: in the case referred to the facts were, that F., a partner in a banking firm, caused stock belonging to a customer to be sold out under a forged power of attorney, the proceeds were paid to the account of the bank at the house of the bank's agents, and were appropriated by F. to his own purposes. F. was afterwards executed for other forgeries. It appeared from the special verdict, that F.'s partners were ignorant of the fraud, but might, with common diligence, have known it; and it was held by the House of Lords, in conformity with the unanimous opinion of the judges, that the customer could maintain an action against the partners for money had and received. The general proposition, it was observed, was not disputed, that if the goods of A. are wrongfully taken [*653] *and sold, the owner may bring trover against the wrong-doer, or may elect to consider him as his agent—may adopt the sale and maintain an action for the price; and this general rule was held applicable to fix the innocent partners with liability under the circumstances disclosed upon the special verdict.³ In another and a very

¹ Per Abbott, C. J., *Sandilands v. Marsh*, 2 B. & Ald. 678; *Robinson v. Gleadow*, 2 Bing., N. C. 156; E. C. L. R. 29; *Fox v. Clifton*, 6 Bing. 792; E. C. L. R. 19; *Hawken v. Bourne*, 8 M. & W. 708, 710; (*) *Brown v. Byers*, 16 L. J., Exch. 112. See the cases collected, 2 Selw., N. P., 10th ed. 1128-1138; *Chit. Contr.*, 3d ed. 249-259; *Smith, Merc. Law*, 3d ed. 40; per Alderson, B., *Kirk v. Blurton*, 9 M. & W. 288; (*) *Norton v. Seymour*, 16 L. J., C. P. 100. One partner cannot authorize an attorney to enter an appearance, and submit to judgment for a copartner; *Hambridge v. De La Crouée*, 16 L. J., C. P. 85. As to notice to a partnership, see *Powles v. Page*, 3 C. B. 27; E. C. L. R. 54.

² Per Bayley, J., *Vere v. Ashby*, 10 B. & C. 296; E. C. L. R. 21; *Wintle v. Crowther*, 1 Cr. & J. 816; *Bond v. Gibson*, 1 Camp. 185; *Lewis v. Reilly*, 1 Q. B. 849; E. C. L. R. 41.

³ *Marsh v. Keating*, 2 Cl. & Fin. 250.

recent case,¹ the plaintiffs in equity, who were the executors and trustees of a testator, in the year 1829 employed A. and B., a firm of solicitors, to procure investments for the assets of their testator. A. wrote to the plaintiffs, naming one S. as a proposed mortgagor for a sum of £4500, on the security of freehold property, whereupon the plaintiffs forwarded to A. a check for £4500, to be so invested, and this check was paid into the bank to the partnership account. The necessary mortgage-deeds were prepared, but S. afterwards declined to complete the transaction. In April, 1830, A., however, wrote to the plaintiffs, giving a list of the securities upon which he alleged that the testator's assets were invested, and amongst others, stated "S.'s mortgage £4500, 3d October, 1829." In 1834, A. and B. dissolved partnership, and the plaintiffs continued to employ A. as their solicitor, who regularly paid interest on the £4500, down to 1841. A. became bankrupt in 1844, and the plaintiffs then first discovered that the mortgage to S. had never been effected; on bill by the plaintiffs against B. to recover the sum paid over as above stated, it was held that the fraudulent representation of A. must be taken to be the act of the firm—that the relief was properly in equity, and that the defendant, although morally innocent, was civilly liable for the fraud of his copartner.

Without attempting to enter at length upon the subject *of partnership liabilities, incurred through the act of an indivi- [*654] dual member of the firm, we may observe, that wherever a contract is alleged to have been entered into through the medium of a third person, whether a copartner or not, the real and substantial question is, with whom was the contract made; and in answering this question, the jury will have to consider whether the party, through whose instrumentality the contract is alleged to have been made, had in fact authority to make it. Thus, *assumpsit* for work and labour, in writing certain literary articles, was brought against the defendants, whose names appeared as proprietors of a newspaper in the declaration filed under 6 & 7 Will. 4, c. 76; they had in fact ceased to be so before the contract was entered into, at which time L. was the sole proprietor; the jury found that the contract was made by L. on his own behalf, without any authority from the defendants; and also, that the plaintiff, when he supplied the articles in question, did not know the defendants to be proprietors; it was held, that,

¹ Blair v. Bromley, 16 L. J., Chanc. 106.

although the declaration above mentioned was, under the provisions of the stat. (s. 8), conclusive evidence of the fact, that the defendants were proprietors, yet the real question was with whom the contract had been made, and that upon the finding of the jury the defendants were not liable.¹

In like manner, in the case of an action brought against a member of the managing or provisional committee of a railway company, at suit of a creditor of the company, the question of liability ordinarily resolves itself into the consideration, whether the defendant did or did not authorize the particular contract for which he is sought to be made *responsible; we have therefore deferred all mention [*655] of this subject till the present time, although, in fact, some matters collateral to it may in strictness be referrible to one or other of those maxims relative to the purchase and sale of property, to which the attention of the reader has been previously directed.

In connexion with the above subject, the case of *Barnett v. Lambert*² will be first noticed as a leading authority. The defendant there, in answer to an application from the secretary of a railway company, consented, by letter, that his name should be placed on the list of the provisional committee. His name was accordingly published in the newspapers as a provisional committee-man, and it appeared that on one occasion he attended and acted as chairman at a meeting of the committee. It was held, that the defendant was liable for the price of stationery supplied by the plaintiff on the order of the secretary, and used by the committee after the date of his letter to the secretary,—the question for decision being one of fact, and matter of inference for the jury, to be drawn from the defendant's conduct, as showing that he had constituted the secretary his agent, to pledge his credit for all such things as were necessary for the working of the committee, and to enable it to go on. "Where," observed Alderson, B., "a subscription has been made, and there is a fund, it is not so; because if you give money to a person to buy certain things with, the natural inference is, that you do not mean him to pledge your credit for them."

¹ *Holcroft v. Hoggins*, 15 L. J., C. P. 129. As to action by one partner from whom the consideration moves, see *Jones v. Robinson*, 17 L. J., Exch. 36.

² 15 M. & W. 489, (*) where *Todd v. Emly*, 8 M. & W. 505; (*) *Flemyng v. Hector*, 2 M. & W. 172, (*) and *Tredwen v. Bourne*, 6 M. & W. 461, (*) were cited per Cur. As to the liability of a partner on a contract prior to his joining the concern, see *Beale v. Moulds*, 16 L. J., Q. B. 410.

In the cases of *Reynell v. Lewis* and *Wylde v. Hopkins*,¹ [*656] *decided shortly after that of *Barnett v. Lambert*, the Court of Exchequer took occasion to lay down the principles applicable to cases falling within the particular class under consideration; and it will probably be better to give the substance of this judgment at some length, as it affords throughout important practical illustrations of that maxim, "which," in the words of Tindal, C. J.,² "is of almost universal application," *qui facit per alium facit per se*.

"The question," observed the Court, "in all cases in which the plaintiff seeks to fix the defendant with liability upon a contract, express or implied, is, whether such contract was made by the defendant, by himself or his agent, with the plaintiff or his agent, and this is a question of a fact for the decision of the jury upon the evidence before them. The plaintiff, on whom the burthen of proof lies in all these cases, must, in order to recover against the defendant, show that he (the defendant) contracted *expressly* or *impliedly*; *expressly*, by making a contract with the plaintiff; *impliedly*, by giving an order to him under such circumstances as show that it was not to be gratuitously executed; and if the contract was not made by the defendant personally, it must be proved that it was made by an agent of the defendant properly authorized,³ and that it was made as his contract. In these cases of actions against provisional committee-men of railways, it often happens that the contract is made by a third person, and the point to be decided is, whether that third person was an agent for the defendant for the purpose of making it, and made the contract as such. The agency may be constituted by an express limited authority to make such a contract, or a *larger authority to make all falling within the class or description to [*657] which it belongs, or a general authority to make any; or it may be proved by showing that such a relation existed between the parties as by law would create the authority, as, for instance, that of partners, by which relation, when complete, one becomes by law the agent of the other for all purposes necessary for carrying on their particular partnership, whether general or special, or usually belonging to it, or the relation of husband and wife, in which the law, under certain circumstances, considers the husband to make his wife an agent. In all these cases, if the agent in making the contract acts on that authority, the principal is bound by the contract, and

¹ 15 M. & W. 517; (*) *Barker v. Stead*, 16 L. J., C. P. 160.

² 8 Scott, N. B. 880.

³ See *Cooke v. Tomkin*, 16 L. J., Q. B. 158.

the agent's contract in his contract, but not otherwise. This agency may be created by the immediate act of the party, that is, by really giving the authority to the agent, or representing to him that he is to have it, or by constituting that relation to which the law attaches agency; or it may be created by the representation of the defendant to the plaintiff, that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such; and if the plaintiff really makes the contract on the faith of the defendant's representation, the defendant is bound,—he is estopped from disputing the truth of it with respect to that contract; and the representation of an authority is, *quoad hoc*, precisely the same as a real authority given by the defendant to the supposed agent. This representation may be made directly to the plaintiff, or made publicly so that it may be inferred to have reached him; and may be made by words and conduct. Upon none of these propositions is there, we apprehend, the slightest doubt, and the proper decision of all these questions depends upon the proper application of these principles [*658] with due assistance from the judge." In the course of the judgment from which we have already made so long an extract, the Court further observed, that an agreement to be a provisional committee-man is merely an agreement for carrying into effect the preliminary arrangements for petitioning Parliament for a bill, and thus promoting the scheme, but constitutes no agreement to share in profit or loss, which is the characteristic of a partnership, although if the provisional committee-man subsequently acts he will be responsible for his acts. They likewise remarked that where the list of the provisional committee has appeared in a prospectus, published with the defendant's consent, knowledge, or sanction, the context of such prospectus must be examined, to see whether or not it contains any statement affecting his liability, as, for instance, the names of a managing committee, in which case it will be a question whether the meaning be that the acting committee shall take the whole management of the concern, to the exclusion of the provisional committee, or that the provisional committee-men have appointed the acting committee, or the majority of it, on their behalf and as their agents.¹ In this latter case, moreover, it must further be considered whether the managing and delegated body is authorized to pledge the credit of the provisional committee, or is merely empowered to apply the

¹ See the Judgment, 15 M. & W. 580, 581; (*) *Wilson v. Viscount Curzon*, Id. 532.

funds subscribed to the liquidation of expenses incurred in the formation and carrying out of the concern.¹

In an action at suit of an allottee² for recovery of his *deposit, the main questions for consideration usually are, first, [*659] whether there has been such a failure of consideration as will entitle the plaintiff to treat the supposed contract as a nullity, according to the maxim, *ex nudo pacto non oritur actio*; and, secondly, whether there has been such a degree of fraud or misrepresentation, such *dolus dans locum contractui*, as will nullify the contract into which the allottee has been induced to enter. In *Walstab v. Spottiswoode*,³ the action was brought by an allottee who had not signed the subscription deed, and who was held entitled to recover as money had and received to her use the amount of her deposit, evidence being given which showed conclusively that the project had been finally abandoned before action brought, and that the plaintiff had in vain applied for scrip certificates for her shares; and the Court in this case adopted the words of Holroyd, J., in *Nockells v. Crosby*,⁴ who says: "The concern was never really set agoing, and the expenses incurred in setting a scheme on foot are not to be paid out of the concern unless they are adopted when it is in actual operation. All the steps taken were only preparatory to carrying the project into effect; and as it never was carried into effect, the plaintiff was entitled to have back the whole of the money she advanced." In the very recent case of *Garwood v. Ede*,⁵ the plaintiff had paid the required deposit on his shares, had received the scrip certificates, and had executed the subscribers' agreement, by which the directors were empowered to employ the money which might come into their hands in satisfying all expenses and liabilities which they might incur in relation to *the undertaking. The scheme having failed, with- out any fraud on the part of the directors, and the company [*660] having been dissolved under the stat. 9 & 10 Vict. c. 28, it was held that the plaintiff was not entitled to recover the amount of his deposit, this case being clearly distinguishable from that of *Walstab v. Spottiswoode*, above cited. "In *Walsbab v. Spottiswoode*," said

¹ *Dawson v. Morrison*, 16 L. J., C. P. 240. See *Ricketts v. Bennett*, 17 L. J., C. P. 17, and cases there cited.

² As to the privity of contract between an allottee and the committee, see *Woolmer v. Toby*, 16 L. J., Q. B. 225; *Duke v. Dive*, 16 L. J., Exch. 284; *Duke v. Forbes*, 17 L. J., Exch., 86, which were actions *against* allottees.

³ 15 M. & W. 501. (*)

⁴ 3 B. & C. 814; E. C. L. R. 10.

⁵ 17 L. J., Exch. 29. See, also, *Jones v. Harrison*, Exch., 12 Jur. 122.

Pollock, C. B., "the purpose for which the money was paid had failed, and the plaintiff never was jointly interested with the defendant in anything. Here the plaintiff had obtained his scrip on paying the deposit money, and entered by deed into a new contract, whereby he became associated with the defendant in a common adventure." Again, the plaintiff signed a letter of application for shares, in a railway company provisionally registered, undertaking thereby to sign the subscribers' agreement and parliamentary contract when required. He did not, however, receive any letter of allotment, but, having paid the deposit on 500 shares, he received scrip certificates for them in this form:—"The subscribers' agreement and parliamentary contract having been signed by the person to whom the certificate is issued." The plaintiff never, in fact, signed the subscribers' agreement or the parliamentary contract at all, and the scheme having proved abortive, it was held that he was, nevertheless, in the same position as if he had actually signed those documents, and could not recover the amount of his deposit, as money had and received, from a member of the managing committee.¹

In *Wontner v. Shairp*,² which was an action for return of the deposit money by a shareholder, who, according to the finding of the jury, had been induced to pay it by *a fraudulent misrepresentation, issued through the medium of an advertisement by the managing committee, it was held, that an action for money had and received would lie, and that the payment of the deposit having been thus obtained from the plaintiff by misrepresentation, the deed executed by him under the same belief formed no answer to the action. With respect to the nature of the fraud which will prevent the defendant, being a member of the managing body of a railway company, from availing himself of the provisions of the subscription deed by way of defence in an action for the deposit money, it was observed by Parke, B., in a very recent case, that there must be fraud for which the defendant is responsible, and that such fraud may either be the defendant's own moral fraud, or be committed by his sanctioning some misrepresentation by others, as, for instance, by his receiving money with knowledge of a misrepresentation, in consequence of which it was paid to a third party, from whom he receives it.³

¹ *Clement v. Todd*, 16 L. J., Exch. 81.

² 17 L. J., C. P. 88.

³ Per Parke, B., *Vane v. Cobbold* Exch., 12 Jur. 61; *Atkinson v. Pooock*, Id. 60.

From the above cases it seems clear, on the one hand, that the money deposited by a subscriber to a railway undertaking may (in the absence of special circumstances) be recovered back, 1st, where no deed has been signed and the scheme has proved altogether abortive, and has been definitively abandoned, or 2dly, where the usual deed *has* been signed, provided the money were paid and the deed executed under a misrepresentation of facts within the knowledge of or sanctioned or adopted by the defendant; and, on the other hand, that the entire¹ deposit cannot be recovered where there has been no fraud, and the *subscription deed has been executed, inasmuch as the provisions ordinarily inserted in such deed will [*662] afford a good defence to the action.

We do not propose to dwell at much greater length upon the maxim to the illustration of which our preceding remarks have been applied; we cannot refrain, however, from an enumeration of some few additional cases of much practical importance, which may, perhaps, be useful in still further developing the same principle.

In considering who is liable for repairs done to a ship, the true question is, upon whose credit was the work done? That question will, in most cases, be decided by the fact of legal ownership, the repairs being generally done for the legal owner. But it may so happen that the name of a person may be retained on the register after he has ceased to be beneficially interested in the ship or to interfere with its concerns; and in such a case it will be necessary to determine whether the person by whom the order for the repairs was given had authority to bind such owner.²

Again, where an order was given for the performance of certain work by a bankrupt firm after the act of bankruptcy, but before the issuing of the fiat, and after the fiat the bankrupts received money from the petitioning creditor, who was afterwards appointed the creditors' assignee, in order to bring the work to completion, and received money from him accordingly for that purpose; and part of the work was performed before the fiat, a part after the fiat and before the appointment of the creditors' assignee, and the remainder after the appointment of the creditors' assignee: it was held, that an action would lie in respect of the above-mentioned contract, at suit

¹ The letter of allotment may likewise empower the directors to apply the deposits in discharge of necessary expenses: *Jones v. Harrison*, Exch., 12 Jur. 122.

² *Curling v. Robertson*, 8 Scott, N. R. 12; per *Abbott, C. J.*, *Jennings v. Griffiths*, Ry. & M. 42; *E. C. L. R.* 21.

[*663] of the official and *the creditors' assignees; that in such action the whole amount due was recoverable, the contract being entire, and the evidence showing the work to have been completed by the bankrupts as agents for the plaintiffs. "It is a question of fact," observed Parke, B., "whether the bankrupts acted on their own account, or as the agents of the assignees. If they acted in the latter character, it is clear that the assignees can sue."¹

Again, the liability of the husband for necessaries supplied to the wife results from her authority being implied by law to act as her husband's agent, and to contract on his behalf for this specific purpose.² To the general principle under consideration may also be referred the numerous decisions which establish that the sheriff is liable for an illegal or fraudulent act committed by his bailiff, even if he were not personally cognizant of the transaction;³ and such decisions are peculiarly illustrative of this principle, because there is a distinction to be noticed between the ordinary cases and those in which the illegal act is done under such circumstances as constitute the person committing it the special bailiff of the party at whose suit process is executed; as, where the attorney of the plaintiff in a cause requested of the sheriff a particular officer, delivered the warrant to [*664] that officer, took him in *his carriage to the scene of action, and there encouraged an illegal arrest; it was held, that the sheriff was not liable for a subsequent escape.⁴ Nor will the sheriff be liable if the wrong complained of be neither expressly sanctioned by him, nor impliedly committed by his authority; as where the bailiff derived his authority, not from the sheriff, but from

¹ Whitmore v. Gilmour, 12 M. & W. 808, 812. (*) See Williams v. Chambers, 16 L. J., Q. B. 230; Sayer v. Dufaur, 17 L. J., Q. B. 50.

² Manby v. Scott, 1 Lev. 4; S. C., 1 Sid. 109; Montague v. Benedict, 3 B. & C. 681; E. C. L. R. 10; Seaton v. Benedict, 5 Bing. 28; E. C. L. R. 15; are the leading cases on the subject of the husband's liability. See, also, Smout v. Ilbery, ante, p. 649.

³ Per Ashurst, J., Woodgate v. Knatchbull, 2 T. R. 154; Raphael v. Goodman, 8 Ad. & E. 565; E. C. L. R. 85; Sturmy v. Smith, 11 East, 25; Price v. Peek, 1 Bing., N. C. 380; E. C. L. R. 27; Crowder v. Long, 8 B. & C. 602; E. C. L. R. 15; Smart v. Hutton, 8 Ad. & E. 568, n.; E. C. L. R. 85. See Peshall v. Layton, 2 T. R. 712; Thomas v. Pearce, 5 Price, 578; Jarman v. Hooper, 7 Scott, N. R. 663.

⁴ Doe v. Tyre, 5 Bing., N. C. 573; E. C. L. R. 85; Ford v. Leche, 6 Ad. & E. 699; E. C. L. R. 33; and cases there cited; Alderson v. Davenport, 18 M. & W. 42; (*) per Buller, J., De Moranda v. Dunkin, 4 T. R. 121; Botten v. Tomlinson, 16 L. J., C. P. 188.

the plaintiff, at whose instigation he acted;¹ and although the general rule is, that the act of the officer is, in point of law, the act of the sheriff, yet it is not competent to one whose act produces the misconduct of the bailiff to say, that the act of the officer done in breach of his duty to the sheriff, and which he has himself induced, is the act of the sheriff.²

But, notwithstanding the almost universal application of the legal maxim under consideration, there are cases in which, by reason of the express provisions of the statute law, it does not hold; for instance, it has been held that under the stat. 9 Geo. 4, c. 14, s. 1, an acknowledgment signed by an agent of the debtor will not revive a debt barred by the Statute of Limitations.³ Again, it is laid down as a general rule, that a bill of discovery in aid of a defence to an action at law, cannot be sustained against a person who is not a party to the record, although charged in the bill to be solely interested in the subject of the action; and this rule will be applied even where the plaintiff *in the original action sues as agent for the party from whom this discovery is sought, notwithstanding the [*665] maxim, *qui facit per alium facit per se*, might at first sight appear applicable.⁴

Before terminating our remarks as to the legal consequences which flow from the relation of principal and agent in transactions founded upon contract, it becomes necessary to consider briefly a kindred principle of law, which limits the operation of the maxim *qui facit per alium facit per se*, and will, therefore, most properly be noticed in immediate connexion with it: the principle to which we allude is this, that *a delegated authority cannot be re-delegated—delegata potestas non potest delegari*;⁵ or, as it is otherwise expressed, *vicarius non habet vicarium*⁶—one agent cannot lawfully nominate or appoint another to perform the subject of his agency.⁷ Hence, a notice to

¹ Cook v. Palmer, 6 B. & C. 39; E. C. L. R. 13; Crowder v. Long, 8 B. & C. 598; E. C. L. R. 15; Tompkinson v. Russell, 9 Price, 287; Bowden v. Waithman, 5 Moore, 183; E. C. L. R. 16; Stuart v. Whittaker, R. & M. 810; Higgins v. M'Adam, 3 Y. & J. 1.

² Per Bayley, J., 8 B. & C. 608, 604; E. C. L. R. 15.

³ Hyde v. Johnson, 2 Bing., N. C. 776; E. C. L. R. 29. See, also, Toms, app., Cuming, resp., 8 Scott, N. R. 910; Cuming, app., Toms, resp., Id. 827.

⁴ Queen of Portugal v. Glyn, 7 Cl. & Fin. 466.

⁵ 2 Inst. 597; Argument, Fector v. Beacon, 5 Bing., N. C. 310; E. C. L. R. 35.

⁶ Branch, Max., 5th ed. 88.

⁷ See per Lord Denman, C. J., Cobb v. Becke, 6 Q. B. 986; E. C. L. R. 51; 2 Kent, Com., 4th ed. 638; Combes' case, 9 Rep. 75.

quit, given by an agent of an agent, is not sufficient, without a recognition by the principal. To render such a notice valid, there must be either an authority to give, or a recognition of it.¹ So, a principal employs a broker from the opinion which he entertains of his personal skill and integrity; and the broker has no right, without notice, to turn his principal over to another, of whom he knows nothing; and, therefore, a broker cannot, without authority from his principal, transfer consignments made to him, in his character of a broker, to another broker for sale.² On the same principle, where an [*666] act of Parliament for building a bridge required, that, when any notice was to be given by the trustees appointed and acting under it, such notice should be in writing or in print, signed by three or more of the trustees; it was held, that a notice, signed with the names of the clerks to the trustees, but signed, in fact, not by such clerks, but by a clerk employed by them, was insufficient, as being an attempt to substitute for a deputy his deputy.³ It may, likewise, be well to observe, that delegated jurisdiction, as contradistinguished from proper jurisdiction, is that which is communicated by a judge to some other person, who acts in his name, and is called a deputy; and this jurisdiction is, in law, held to be that of the judge who appoints the substitute, or deputy, and not of the latter party; and in this case the maxim holds, *delegatus non potest delegare*—the person to whom any office or duty is delegated,—for example, an arbitrator, cannot lawfully devolve the duty on another, unless he be expressly authorized so to do.⁴

A magistrate, as observed by Lord Camden, can have no assistant nor deputy to execute any part of his employment. The right is personal to himself, and a trust that he can no more delegate to another, than a justice of the peace can transfer his commission to his clerk.⁵

¹ Doe d. Rhodes v. Robinson, 8 Bing., N. C. 677, 679; E. C. L. R. 32.

² Cockran v. Irlam, 2 M. & S. 301, n. (a); E. C. L. R. 28; Solly v. Rathbone, Id. 298; Catlin v. Bell, 4 Camp. 183; Schmaling v. Thomlinson, 6 Taunt. 147; E. C. L. R. 1; Coles v. Trecothick, 9 Ves. 251; Henderson v. Barnwall, 1 Yo. & J. 387.

³ Miles v. Bough, 3 Q. B. 845; E. C. L. B. 48; cited, Argument, Allan, app., Waterhouse, resp., 8 Scott, N. R. 68, 76.

⁴ See Bell, Diet. and Dig. of Scotch Law, 280, 281, 292; Little v. Newton, 2 Scott, N. R. 509; Reg. v. Jones, 10 Ad. & E. 576; E. C. L. B. 37; Hughes v. Jones, 1 B. & Ad. 388; E. C. L. R. 20; Wilson v. Thorpe, 6 M. & W. 721; (*) Argument, 5 Bing., N. C. 310; E. C. L. R. 35; White v. Sharp, 12 M. & W. 712; (*) Rutter v. Chapman, 8 M. & W. 1. (*) The case of the Master's Clerks, 1 Phill. 650; see, also, Reg. v. Perkin, 7 Q. B. 165; E. C. L. R. 53; Smeeton v. Collier, 17 L. J., Exch. 57.

⁵ Entick v. Carrington, 19 Howell, St. Trials, 1068.

Although, however, a deputy cannot, according to the [*667] *above rule, transfer his entire powers to another, yet a deputy possessing general powers, may, in many cases, constitute another person his servant or bailiff, for the purpose of doing some particular act; provided, of course, that such act be within the scope of his own legitimate authority.

For instance, the steward of a manor, with power to make a deputy, made B. his deputy, and B., by writing under his hand and seal, made C. his deputy, to the intent that he might take a surrender of G., of copyhold lands. It was held, that the surrender taken by C. was a good surrender;¹ and Lord Holt, insisting upon the distinction above pointed out, compared the case before him to that of an under-sheriff, who has power to make bailiffs and to send process all over the kingdom, and that only by virtue of his deputation.²

The rule as to delegated functions must, moreover, be understood with this necessary qualification, that in the particular case, no power to re-delegate such functions has been given.³ Such an authority to employ a deputy may, indeed, be either *express* or *implied* by the recognised usage of trade; as in the case of an architect or builder, who employs a surveyor to make out the quantities of the building proposed to be erected; in which case the maxim of the civil law applies, *in contractus tacitè insunt quæ sunt moris et consuetudinis*⁴—terms which are in accordance with and warranted by custom and usage may, in some cases, be tacitly imported into contracts.

*RESPONDEAT SUPERIOR.

[*668]

(4 Inst. 114.)

Let the principal answer.

The above maxim is, in principle, almost identical with that immediately preceding, but is more usually and appropriately applied with reference to actions *ex delicto*, than to such as are founded in contract. Where, for instance, an agent commits a tortious act, under the direction or with the assent of his principal, each is liable

¹ Parker v. Kett, 1 Ld. Raym. 658.

² 1 Ld. Raym. 659; Leak v. Howell, Cro. Eliz. 533; Hunt v. Burrell, 5 Johns. R. (U. S.) 137.

³ See 2 Prest. Abs. Tit. 276.

⁴ Moon v. Guardians of Whitney Union, 3 Bing., N. C. 814, 818; E. C. L. R. 32.

at suit of the party injured : the agent is liable, because the authority of the principal cannot justify his wrongful act ; and the person who directs the act to be done is likewise liable, according to the maxim, *respondeat superior*.¹ "If," observes Sir W. Blackstone, "a servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful."²

In the case, then, of domestic servants, and such as are selected by the master, and appointed to perform any particular work, although not in his immediate employ or under his superintendence,³ the maxim, *respondeat superior*, is also very often applicable.

[*669] *"Upon the principle that, *qui facit per alium facit per se*," it was said, in a leading case upon this subject, "the master is responsible for the acts of his servant, and that person is undoubtedly liable who stood in the relation of master to the wrongdoer—he who had selected him as his servant, from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey, and whether such servant has been appointed by the master directly or intermediately, through the intervention of an agent authorized by him to appoint servants for him, can make no difference."⁴

Where, for instance, a man is the owner of a ship, he himself appoints the master, and desires the master to appoint and select the crew: the crew thus become appointed by the owner, and are his servants for the management and government of the ship, and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself.⁵ By a policy of insurance, however, the assured makes no warranty to the

¹ 4 Inst. 114; *Sands v. Child*, 3 Lev. 352; *Jones v. Hart*, 1 Ld. Raym. 738; *Britton v. Cole*, 1 Salk. 408; per Littledale, J., *Laugher v. Pointer*, 5 B. & C. 559; E. C. L. R. 11; *Perkins v. Smith*, 1 Wils. 328; cited, 1 Bing., N. C. 418; E. C. L. R. 27; *Stephens v. Elwall*, 4 M. & S. 259; E. C. L. R. 30; Com. Dig., "Trespass," (C. 1.) As to the liability of sheriff and execution creditor, see *Jarman v. Hooper*, 7 Scott, N. R. 668. See, also, ante, p. 211.

² 1 Bla. Com. 429. As to the liability of the master for an injury sustained by the servant in the course of his business, see *Priestley v. Fowler*, 3 M. & W. 1. (*)

³ *Randleston v. Murray*, 8 Ad. & E. 109; E. C. L. R. 35; *Stone v. Cartwright*, 6 T. B. 411; *Matthews v. West London Water-works Company*, 3 Camp. 408.

⁴ *Quarman v. Burnett*, 6 M. & W. 509. (*)

⁵ Per Littledale, J., 5 B. & C. 554; E. C. L. R. 11; *Martin v. Temperley*, 4 Q. B. 298; E. C. L. R. 45; *Dunford v. Trattles*, 12 M. & W. 529. (*)

underwriters that the master and crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against; nor can any distinction be made in this respect between the omission by the master and crew to do an act which ought to be done, and the doing an act which ought not to be done, in the course of the navigation.¹ In the case just supposed, however, if the ship be chartered for the particular voyage, or for a definite period, it is always a question of fact, *under [*670] whose direction and control the vessel was at the time of the occurrence complained of; and this question must be solved by ascertaining whose are the crew, and by considering whether the reasonable interpretation of the charter-party is, that the owners meant to keep the control of the vessel in their own hands, or to make the freighter the responsible owner *pro tempore*;² and a state of facts might perhaps occur in which the charterer would be answerable as well as the owner.³

Again, where the owner of a carriage hires horses of a stable-keeper, who provides a driver, through whose negligence an injury is done, the driver must be considered as the servant of the stable-keeper or job-master against whom, consequently, the remedy must be taken; unless there be special circumstances showing an assent, either express or implied, to the tortious act of the party hiring the horses, or showing that such party had control over the servant, and was, in fact, *dominus pro tempore*.⁴

The maxim respecting delegated authority, which we have already briefly considered with reference to liabilities *ex contractu*, is also

¹ Judgment, *Dixon v. Sadler*, 5 M. & W. 414. (*)

² *Fenton v. City of Dublin Steam Packet Company*, 8 Ad. & E. 885; E. C. L. R. 85; *Fletcher v. Braddick*, 2 N. R. 182; recognised, 5 B. & C. 556; E. C. L. R. 11; *Newberry v. Colvin*, 7 Bing. 190; E. C. L. R. 20; reversing the judgment in S. C., 8 B. & C. 166; E. C. L. R. 15; *Trinity House v. Clark*, 4 M. & S. 288; E. C. L. R. 80.

³ Per Lord Denman, C. J., and Patterson, J., 8 Ad. & E. 842, 848; E. C. L. R. 35.

⁴ The following cases may be referred to on this subject, which can only be briefly noticed in the text:—*M'Laughlin v. Pryor*, 4 Scott, N. R. 655; S. C., 1 Car. & M. 354; E. C. L. R. 41; *Quarman v. Burnett*, 6 M. & W. 499; (*) the judgments of Abbott, C. J., and Littledale, J., in *Laughter v. Pointer*, 5 B. & C. 547; E. C. L. R. 11; *Hart v. Crowley*, 12 Ad. & E. 378; E. C. L. R. 40; *Taverner v. Little*, 5 Bing., N. C. 678; E. C. L. R. 35; *Croft v. Alison*, 4 B. & Ald. 590; E. C. L. R. 6; *Smith v. Lawrence*, 2 Man. & Ry. 1; E. C. L. R. 17; *Sammell v. Wright*, 5 Esp., N. P. C. 263; *Scott v. Scott*, 2 Stark., N. P. C. 438; E. C. L. R. 8; *Brady v. Giles*, 1 M. & Rob. 494; per Patterson, J., 8 Ad. & E. 889; E. C. L. R. 35.

frequently applicable where a question arises as to the liability of a master for the tortious act of *his servant. The liability of [*671] the former for the tort of the servant when acting under his implied authority results, as above stated, from the fact, that servants and agents are hired and selected by the master or principal to do the business required of them, and their acts consequently stand on the same footing as his own;¹ as in the case of coach proprietors, who are answerable for an injury sustained by a passenger through the driver's misconduct.² A difficulty, however, often arises in applying this general and fundamental rule to the particular facts of the case, and in determining between what parties the relationship of master and servant actually subsists;³ for, although that party will usually be liable with whom the act complained of ultimately originates, yet the applicability of this test fails in one case; for where he who does the injury (either in person or by his servant) exercises an *independent* employment, the party employing him is clearly not liable;⁴ as in the instance of a butcher who employs a drover, whose deputy does the mischief by his careless driving;⁵ or of a builder who contracts to make certain alterations in a club-house, [*672] together with the necessary *gas-fittings, and who employs a gas-fitter for the latter purpose under a sub-contract, through the negligence of whom, or of whose servants, the plaintiff sustains an injury:⁶ in these cases the relation of master and servant does not subsist between the principal and the person who occasions the injury, and the former is, therefore, not liable for the misconduct of

¹ Per Littledale, J., *Laugher v. Pointer*, 5 B. & C. 553, 554; E. C. L. R. 11.

² *White v. Boulton, Peake*, N. P. C. 81; *Jackson v. Tollett*, 2 Stark., N. P. C. 37; E. C. L. R. 3. See the cases 2 Selw., N. P. 10th ed. 1097. A master is not liable for an accident sustained by a servant in the course of his employment by the breaking down of a van, *Priestly v. Fowler*, 8 M. & W. 1.(*) See *Winterbottom v. Wright*, 10 M. & W. 109.(*)

³ As between pilot and owner of ship, see *Lucy v. Ingram*. 6 M. & W. 302.(*) *M'Intosh v. Slade*, 6 B. & C. 657; E. C. L. R. 13; *The Agricola*, 2 Robins. Adm. B. 19; *The Fama*, Id. 184; captain of ship and inferior officer, *Nicholson v. Mouncey*, 15 East, 384, and cases there cited; postmaster-general and clerk, *Lane v. Cotton*, 1 Salk. 17; S. C., 15 Mod. 472; per Lord Ellenborough, C. J., 15 East, 392; *Whitfield v. Lord Despencer*, Cowp. 754.

⁴ Per Williams, J., and Coleridge, J., 12 Ad. & E. 742; E. C. L. R. 40.

⁵ *Milligan v. Wedge*, 12 Ad. & E. 737; E. C. L. R. 40.

⁶ *Rapson v. Cubitt*, 9 M. & W. 710.(*) See *Wilson v. Peto*, 6 Moore, 47; E. C. L. R. 17; *Witte v. Hague*, 2 D. & R. 33; E. C. L. R. 16.

the latter,¹ unless he has adopted or sanctioned the particular act by which the injury in respect whereof compensation is sought has been occasioned, or there be evidence to show that he has interfered with or had control over the work, in the performance of which the damage has been caused.² On the principle in accordance with which the cases to which we here refer have been decided, it was held in a very recent case, that the owner of real property is not responsible for a nuisance committed thereon by the occupying tenant, unless, indeed, he has been a party to the creation of the nuisance after the demise, or has demised it with the nuisance existing.³

The principle of *respondet superior* does not, moreover, apply where an injury is committed by a servant *wilfully*, while neither employed in the master's service, nor acting within the scope of his authority:⁴ as if a servant, *authorized merely to distrain cattle damage-feasant, drives cattle from the highway into [*673] his master's close, and there distrains them.⁵ Neither does the rule apply where the relation of principal and agent has terminated before the commission of the act complained of. Thus, the sheriff is not liable in trover for a conversion by his bailiff of goods seized under process of attachment issuing out of the county court after the bailiff has had notice of a *supersedeas*. The ground of the sheriff's liability for the acts of his bailiff is, that he is casting upon another a duty which the law imposes upon him, and, consequently, that he is acting by a servant; but the effect of a *supersedeas* is to render the writ inoperative from the moment it was delivered to the sheriff, and not the writ only, but the warrant also; and the consequence is, that, though the sheriff was responsible for everything that was done up to the time of the *supersedeas*, yet that which was done afterwards was

¹ See the judgment in *Quarman v. Burnett*, 6 M. & W. 509, 510; (*) per Parke, B., 9 M. & W. 713. (*) See also the remarks on *Bush v. Steinman* (1 B. & P. 404), and *Sly v. Edgley* (6 Esp., N. P. C. 6), in 5 B. & C. 559, 560; E. C. L. R. 11; and per Le Blanc, J., *Harris v. Baker*, 4 M. & S. 29; E. C. L. R. 30.

² *Burgess v. Gray*, 1 C. B. 578; E. C. L. R. 50; distinguishing *Bush v. Steinman*, 1 B. & P. 404.

³ *Rich v. Basterfield*, 16 L. J., C. P. 273.

⁴ See *Lyons v. Martin*, 8 Ad. & E. 512; E. C. L. R. 35; *M'Manus v. Crickett*, 1 East, 106; *Lamb v. Palk*, 9 C. & P. 629; E. C. L. R. 38; *Sleath v. Wilson*, Id. 607; *Attorney-General v. Siddon*, 1 Cr. & J. 220; *Joel v. Morison*, 6 C. & P. 501; E. C. L. R. 25; *Goodman v. Kennell*, 3 C. & P. 167; E. C. L. R. 14; per Lord Kenyon, C. J., 8 T. R. 533; per *Ashurst, J.*, *Fenn v. Harrison*, 3 T. R. 760; *Gregory v. Piper*, 9 B. & C. 591; E. C. L. R. 17; *Huzzey v. Field*, 2 C., M. & R. 432. (*)

⁵ *Lyons v. Martin*, 8 Ad. & E. 512; E. C. L. R. 35.

done in defiance of his authority, and to hold him liable for this would be holding him to be a wrong-doer for the act of his servant *after* his authority had been determined.¹

With respect, also, to public functionaries having authority, as judges civil or ecclesiastical, commissioners of bankrupt, magistrates, or persons acting gratuitously, and intrusted with the conduct of public works, these parties are, in general, protected from the consequences of an illegal and wrongful act done by an officer or other person employed in an inferior ministerial capacity, provided that the principal himself acted in the discharge of his duty, and within the scope of his jurisdiction, and of the authority which has been delegated to him. It has, therefore, been **expressly laid down*, [*674] that, if commissioners under an act of Parliament order something to be done which is not within the scope of their authority, or are themselves guilty of negligence in doing that which they are empowered to do, they render themselves liable to an action, but they are not answerable for the acts of those whom they are obliged to employ.²

In an ordinary case, moreover, where such commissioners in execution of their office enter into a contract for the performance of work, it seems clear that the person who contracts to do the work "is not to be considered as a servant, but as a person carrying on an independent business, such as the commissioners were fully justified in employing to perform works which they could not execute for themselves, and who was known to all the world as performing them."³ It is clear, also, that a servant of the Crown, contracting in his official capacity, is not personally liable on the contracts so entered into: in such cases, therefore, the rule of *respondet superior* does not apply. And the above, as well as other similar exceptions, result from motives of public policy; for no prudent person would accept a public situation at the hazard of exposing himself to a multiplicity of suits by parties thinking themselves aggrieved.⁴

¹ *Brown v. Copley*, 8 Scott, N. R. 350.

² Judgment, *Hall v. Smith*, 2 Bing. 159; E. C. L. R. 9; adopted in *Duncan v. Findlater*, 6 Cl. & Fin. 894, 904, where the leading authorities in the English and Scotch law upon this subject are noticed; *Thomson v. Mitchell*, 7 Cl. & Fin. 564.

³ Judgment, *Allen v. Hayward*, 15 L. J., Q. B. 99, 102; S. C., 7 Q. B. 960; E. C. L. R. 53; citing *Randleson v. Murray*, 8 Ad. & E. 109; E. C. L. R. 35; *Quarman v. Burnett*, 6 M. & W. 499; (*) *Milligan v. Wedge*, 12 Ad. & E. 737; E. C. L. R. 40; and *Rapson v. Cubitt*, 9 M. & W. 710. (*)

⁴ Per *Dallas, C. J.*, *Gidley v. Lord Palmerston*, 8 B. & B. 286, 287; E. C. L. R. 7; per *Ashurst, J.*, *Macbeath v. Haldimand*, 1 T. R. 181, 182; per *Best, C. J.*, *Hall v. Smith*, 2 Bing. 159; E. C. L. R. 9.

*Lastly, the rule does not apply in the case of the Crown itself; for, as we have already had occasion to observe, the sovereign is not liable for personal negligence; and, therefore, the principle, *qui facit per alium facit per se*—which is applied to render the master answerable for the negligence of his servant, because this has arisen from his own negligence or imprudence in selecting or retaining a careless servant—is not applicable to the sovereign, in whom negligence or misconduct cannot be implied, and for which, if it occurs in fact, the law affords no remedy. Accordingly, in a recent case, to which we have already alluded, it was observed by Lord Lyndhurst, that instances have occurred of damage occasioned by the negligent management of ships of war, in which it has been held, that, where an act is done by one of the crew without the participation of the commander, the latter is not responsible; but that, if the principle contended for in the case then before the Court were correct, the negligence of a seaman in the service of the Crown would, in such a case, render the Crown liable to make good the damage; a proposition which certainly could not be maintained.¹

OMNIS RATI HABITIO RETROTRAHITUR ET MANDATO PRIORI [*676]

ÆQUIPARATUR.

(Co. Litt. 207, a.)

A subsequent ratification has a retrospective effect, and is equivalent to a prior command.

It is a rule of very wide application, and one which we find repeatedly laid down in the Roman law, that *rati habitio mandato comparatur*,² where *rati habitio* is defined to be “the act of assenting to what has been done by another in my name.”³ “No maxim,” remarks Mr. Justice Story, “is better settled in reason and law than the maxim, *omnis rati habitio retrotrahitur et mandato*

¹ Viscount Canterbury v. The Attorney-General, 1 Phill. 306; ante, p. 44. It seems almost superfluous to observe, that the above remarks upon the maxim *respondeat superior*, are in the main applicable in criminal law. On the one hand, a party employing an innocent agent is liable for an offence committed through this medium; on the other, if the agent had a guilty knowledge, he will be responsible as well as his employer. See Bac. Max., reg. 16. As to the responsibility for a libel, see Reg. v. Cooper, 15 L. J., Q. B. 206.

² D. 46, 3, 12, § 4; D. 50, 17, 60; D. 3, 5, 6, § 9; D. 43, 16, 1, § 14.

³ Brisson, ad verb., “Rati habitio.”

priori æquiparatur,¹ at all events, where it does not prejudice the rights of strangers. And the civil law does not, it is believed, differ from the common law on this subject."²

It is, then, true as a general rule, of which instances have frequently occurred in the preceding pages, and with respect to which we shall merely make a few additional observations in this place,³ that a subsequent assent given to what has been already done has a retrospective effect, and it is equivalent to a previous command. For instance, if the goods of A. are wrongfully taken and sold, the owner *may either bring trover against the wrong-doer, or may [*677] elect to consider him as his agent, may adopt the sale, and maintain an action for the price.⁴ In like manner, with respect to a contract entered into by a bankrupt, it is laid down, that the assignees have the option of adopting or rejecting it, according as it is likely to be beneficial or onerous to the estate; and, if adopted, the bankruptcy has no other effect on such a contract than to put the assignee in the place of the bankrupt, neither rescinding the obligations on either party, nor imposing new ones, nor anticipating the period of performance on either side.⁵ So, if the agent of a vendor misrepresent the subject-matter of the sale to the vendee, it will be proper for the jury to infer from the vendor's subsequent conduct,—as, ex. gr., from his not having repudiated a warranty, when apprised of it,—that he was privy to, or impliedly assented to, the misrepresentation of the agent.⁶ Again, the title of an administrator relates back to the time of the death of the intestate, so as to entitle the personal representative to sue for the price of goods sold by one who intended to act as agent for the person, whoever he might happen to be, who legally represented the intestate's estate,—the sale having been ratified by the plaintiff after he became administra-

¹ Co. Litt. 207, a; 258, a; Wing. Max. 485. Many instances of the application of this maxim are given in 18 Vin. Abr., p. 156, tit. "Ratihabitio."

² Per Story, J., delivering judgment, *Fleckner v. United States Bank*, 8 Wheaton, R. (U. S.) 368. As to the ratification of a promise by an infant under stat. 9 Geo. 4, c. 14, s. 5, see *Harris v. Wall*, 1 Exch. 122; (*) *Harrison v. Cotgreave*, 16 L. J., C. P. 198; *Hartley v. Wharton*, 11 Ad. & E. 984; E. C. L. R. 89.

³ The operation of the maxim as to *ratihabitio* with reference to the law of principal and agent, is considered at length in *Story on Agency*, pp. 202–219.

⁴ Ante, p. 653; *Smith v. Hodson*, 4 T. R. 211; *Rodgers v. Maw*, 15 M. & W. 448. (*) See *Saunderson v. Griffiths*, 5 B. & C. 909; E. C. L. R. 11; *Underhill v. Wilson*, 6 Bing. 697; E. C. L. R. 19; *Kynaston v. Crouch*, 14 M. & W. 266. (*)

⁵ See, per Parke, B., *Gibson v. Carruthers*, 8 M. & W. 881; (*) *Twemlow v. Askey*, 3 M. & W. 495.

⁶ *Wright v. Crookes*, 1 Scott, N. R. 685.

tor; for, when one means to act as agent for another, a subsequent ratification by that other is always equivalent to a prior command; and it is no objection, that the intended principal was unknown at the time to the person who intended to be the agent.¹ H., the managing owner of a *ship, directed an insurance-broker to effect an insurance on the entire ship, upon an adventure in which [*678] all the part-owners were jointly interested; the amount of the entire premium was carried to the ship's account in H.'s books, which were open to the inspection of all the part-owners, who saw the account, and never objected to it. It did not, however, appear that the insurance-broker knew the names of all the part-owners, or whether or not they had given authority to H. to insure. It was observed, that the maxim as to *ratihabitio* well applied to such a case; and it was held, that the jury were warranted in inferring a joint authority to insure, and that the part-owners were jointly liable for the premium to the insurance-broker, although he had debited H. alone, and divided with him the profits of commission, upon effecting the insurance.² Without unnecessarily multiplying instances to the same effect as the preceding, it may be sufficient to state the general proposition, that the subsequent assent by the principal to his agent's conduct not only exonerates the latter from the consequences of a departure from his orders, but likewise renders the principal liable on contracts made in violation of such orders, or even where there has been no previous retainer or employment; and this assent may be inferred from the conduct of the principal.³ The subsequent *sanction is considered the same thing, in effect, as assent at [*679] the time; the difference being, that, where the authority is given beforehand, the party giving it must trust to his agent; if it be given subsequently to the contract, the party knows that all has been done according to his wishes.⁴

¹ *Foster v. Bates*, 12 M. & W. 226; (*) *Hall v. Pickersgill*, 1 B. & B. 282; E. C. L. R. 5. See, also, *Tharpe v. Stallwood*, 6 Scott, N. R. 715.

² *Robinson v. Gleadow*, 2 Bing., N. C. 156, 161; E. C. L. R. 29. See *Prince v. Clark*, 1 B. & C. 186; E. C. L. R. 8; *Clarke v. Pertier*, 2 Freem. 48.

³ *Smith*, Merc. Law, 3d ed. 92, and the cases there cited; judgment, *Wilson v. Tummon*, 6 Scott, N. R. 904. See *Hasleham v. Young*, 5 Q. B. 883; E. C. L. R. 48. The maxim is applied to a notice to quit, given by the agent and subsequently recognised by the lessors, who were joint tenants; per *Abbott, C. J.*, *Goodtitle v. Woodward*, 8 B. & Ald. 689, 692; E. C. L. R. 5. See *Right v. Cuthell*, 5 East, 49; *Story on Agency*, p. 209 (1); 2 *Crabb*, Real Prop. p. 432; as to a policy of insurance, per *Buller, J.*, *Wolf v. Horncastle*, 1 B. & P. 323; argument, 18 East, 280; as to a past consideration, ante, p. 596.

⁴ Per *Best, C. J.*, *Maclean v. Dunn*, 4 Bing. 727; E. C. L. R. 13-15.

The same principle holds, likewise, in actions founded in tort. By the common law, "he that receiveth a trespasser," says Sir E. Coke,¹ "and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use, or for his benefit, and then his agreement subsequent amounteth to a commandment; for, in that case, *omnis ratihabitio retrotrahitur, et mandato æquiparatur.*" A person, therefore, who knowingly receives from another a chattel which the latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use.² In a very recent case, it was held, that, where goods are wrongfully seized by the sheriff under a valid writ of *fi. fa.*, the execution creditor does not, by a subsequent ratification only, become liable in trespass for the original seizure; and it was laid down as the known and well-established rule of law by Tindal, C. J., in delivering the judgment of the Court, that an act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority [*680] whatever, becomes the act of the principal, if subsequently *ratified by him. In this case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent, and with all the consequences which follow from the same act, if done by his previous authority.³

A landlord authorized bailiffs to distrain for rent due to him from the tenant of a farm, directing them not to take anything except on the demised premises. The bailiffs distrained cattle of another person's (supposing them to be the tenant's) beyond the boundary of the farm; the cattle were sold, and the landlord received the proceeds. It was held, that the landlord was not liable in trover for the value of the cattle, *unless* it were found by the jury that he ratified the act of the bailiffs with knowledge of the irregularity, or that he chose, without inquiry, to take the risk upon himself, and to adopt the whole of their acts.⁴

Where, however, a third person commits a tortious act,—as, if he

¹ 4 Inst. 317; cited, per Parke, J., 4 B. & Ad. 616; E. C. L. R. 24; argument, Nicoll v. Glennie, 1 M. & S. 590; E. C. L. R. 28; 6 Scott, N. R. 897. See another application of the maxim to a tort, per Lord Ellenborough, C. J., 9 East, 281.

² Wilson v. Barker, 4 B. & Ad. 614; E. C. L. R. 24.

³ Wilson v. Tummon, 6 Scott, N. R. 894, 904; Walker v. Hunter, 2 C. B. 324; E. C. L. R. 52.

⁴ Lewis v. Read, 13 M. & W. 834. (*)

seize goods, claiming property in them himself,—the subsequent agreement of another party will not amount to a ratification of his authority at the time.¹ So, if two out of three executors contract with another person on their own account, *and as agents* for the third executor, such last-mentioned party may adopt the contract, and all three may sue upon it, although it was made with the two only; but if the contract was with the two *on their own account only*, they could not; for, to such a case, according to the distinction above mentioned, the maxim which we have been illustrating does not apply.²

*NIHIL TAM CONVENIENS EST NATURALI ÆQUITATI QUAM [*681]
UNUMQUODQUE DISSOLVI EO LIGAMINE QUO LIGATUM EST.
(2 Inst. 360.)

Nothing is so consonant to natural equity as that every contract should be dissolved by the same means which rendered it binding.

Every contract or agreement ought to be dissolved by matter of as high a nature as that which first made it obligatory.³ And, again, “It would be inconvenient that matters in writing, made by advice and consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory.”⁴

In the first place, with respect to statutes of the realm, we may remark that these, being created by an exercise of the highest authority which the constitution of this country acknowledges, cannot be dispensed with, altered, amended, suspended, or repealed, but by the same authority by which they were made—*jura eodem modo destituantur quo constituuntur*.⁵ It was, indeed, a maxim of the civi-

¹ Judgment, 6 Scott, N. R. 904.

² Heath v. Chilton, 12 M. & W. 682, 688.(*).

³ Jenk. Cent. 186; Id. 70, 74.

⁴ Countess of Rutland's case, 5 Rep. 26. It would be foreign to our purpose to consider generally the rule according to which parol evidence is inadmissible to vary a written instrument; some remarks have been made in a former chapter as to this subject; see, also, The London Assurance Company v. Bold, 6 Q. B. 514; E. C. L. R. 51; Dwight v. Pomeroy, 17 Tyng. R. (U. S.) 2d ed. 302.

⁵ 2 Dwarr. Stats. 672; Bell, Dict. and Dig. of Scotch Law, 688. In Sydney's Discourse concerning Government, p. 15, we find the following passage:—“*Cujus est instituere ejus est abrogare*. We say, in general, he that institutes may also abrogate, most especially when the institution is not only by, but for himself. If the

[*682] lians that, *as laws might be established by long and continued custom, so they could likewise be abrogated by desuetude, or be annulled by contrary usage,—*ea vero quæ ipsa sibi quæque civitas constituit sæpe mutari solent vel tacito consensu populi vel alid postea lege lata.*¹ The law of England, however, as above stated, follows a different and much safer maxim, viz., that every statute continues in force till repealed by a subsequent act of the legislature.²

We propose, in the next place, to consider the three following species of obligation: viz., by record, by specialty, and by simple contract; as to the first of which, it will suffice to say, that an obligation by record may clearly be discharged by a release under seal.³

In the case of a specialty, no rule of law is better established than that such a contract can only be discharged by an instrument of equal force.⁴ It is clear that a subsequent parol, that is to say, written or verbal agreement, not under seal, dispensing with or varying the time or mode of performance of an act covenanted to be done cannot be pleaded in bar to an action, on an instrument under seal, for non-performance of the act in the manner thereby prescribed;⁵ [*683] for instance, a defeazance, not under seal, cannot *be pleaded to an action on a bond, being a specialty;⁶ nor to an action on a bond conditioned to perform an award, can a parol agreement between the parties to waive and abandon the award be set up successfully in defence.⁷ It has, however, been already observed, and

multitude, therefore, do institute, the multitude may abrogate; and they themselves, or those who succeed in the same right, can only be fit judges of the performance of the ends of the institution.”

¹ I. 1, 2, 11; Irving, Civ. Law, 4th ed. 123.

² The case of *Ashford v. Thornton*, 1 B. & Ald. 405, affords a remarkable instance of the revival of an obsolete law. See, also, per Patteson, J., Reg. v. The Archbishop of Canterbury (not yet reported).

³ Per Parke, B., *Barker v. St. Quintin*, 12 M. & W. 453; (*) Litt., s. 507, and the commentary thereon; *Shep. Touch.*, by Preston, 322; *Farmer v. Mottram*, 7 Scott, N. R. 408. See *Croswell v. Byrnes*, 9 Johns. R. (U. S.) 287.

⁴ Per Bosanquet, J., 3 Scott, N. R. 216; argument, *Childress v. Emory*, 8 Wheaton, R. (U. S.) 649, 650.

⁵ *Heard v. Wadham*, 1 East, 619; *Gwynne v. Davy*, 2 Scott, N. R., 29; *Roe v. Harrison*, 2 T. R. 425; *Blake's case*, 6 Rep. 43; *Peytoe's case*, 9 Rep. 77; *Kaye v. Waghorn*, 1 Taunt. 428; *Jenk. Cent.* 66; *Cocks v. Nash*, 9 Bing. 341; *E. C. L. R.* 28; *Harden v. Clifton*, 1 Q. B. 522; *Rippinghall v. Lloyd*, 4 B. & Ad. 742; *E. C. L. R.* 27, is particularly worthy of perusal in connexion with the above subject.

⁶ *Blemerhasset v. Pierson*, 3 Lev. 284. ⁷ *Braddick v. Thompson*, 8 East, 344.

must be here repeated, that if the performance of the condition be rendered impossible by, or the breach result from, an act of the obligee, undoubtedly he can maintain no action on the bond.¹ The following case² will, it is conceived, show very clearly the application of the general rule of law under consideration:—An action of covenant was brought by the surviving executor of the lessor against the lessee, the breach being, inter alia, the pulling down and removing a greenhouse which had been erected during the term, in contravention of the lessee's covenant to yield up the premises at the expiration of the term, together with all "erections and improvements" which, during the term, should be erected, made, or set up, in or upon the premises. The defendant pleaded, by way of answer to this breach, an agreement by parol between the lessor and one H., to whom the defendant's term in the premises came by assignment, whereby the lessor promised and agreed, that, if H. would erect a greenhouse upon the demised premises, he (H.) should be at liberty to pull down and remove such greenhouse at the expiration of the term, provided no injury was thereby done to the premises. This plea was found by the jury to be true in fact, but it was held bad, on motion to enter judgment for the plaintiff *non obstante veredicto*, as containing no legal answer to the action. "I agree," observed Tindal, C. J., "that, if it amounted to an assertion that the [*684] lessor himself, by active interference, prevented the lessee from performing the covenant, the plea would have been an answer,—not, however, on the footing of an agreement or dispensation, but on the ground that the breach of covenant complained of would, in that case, have been the act of the lessor, and not of the lessee; but that which is here set up is nothing more than a parol license or permission.³ Now, I apprehend, no rule of law is better established than this: that a covenant under seal can only be discharged by an instrument of equal force and validity—*quodque dissolvitur eodem ligamine quo ligatur.*" His Lordship further remarked, that the argument derived from conditions that are waived,⁴ or rendered impossible of performance, seemed not necessarily to be applicable to the case of covenants under seal; that, in the former case, the obligation is

¹ Ante, pp. 184, 218; per Tindal, C. J., 3 Scott, N. R., 216.

² West v. Blakeway, 3 Scott, N. R. 199.

³ See Cocks v. Nash, 9 Bing. 341; E. C. L. R. 28; judgment, Doe d. Muston v. Gladwin, 6 Q. B. 962; E. C. L. R. 51.

⁴ See 3 Scott, N. R. 210.

under seal, but the condition is in *pais*; whereas in the latter, the whole obligation is under the seal of the party, and, therefore, his discharge can only be effected by an instrument of the like nature and validity with that upon which he is sued.¹

Where, however, there has been² a breach of a contract under seal, accord with satisfaction of the damages resulting from such breach will be a good plea to an action on the specialty; for this defence is by no means equivalent to setting up a parol contract in contravention of a prior contract by deed, the action being founded [*685] not merely on *the deed, but on the deed and the subsequent wrong, which wrong is the cause of action, and for which damages are recoverable.³ The preceding remarks may, therefore, be summed up thus: that, in order to relieve a party liable on a specialty, there must either be an agreement under seal, or an accord and satisfaction as to the damages.⁴

With respect to simple contracts, which are neither within the operation of the Statute of Frauds, nor under the control of any act of Parliament, the rule is, that such contracts may be dissolved by parol. And here it must be again remarked, that the term parol must be understood as applicable indifferently to written and verbal contracts.⁵ By the general rules of the common law, and independently of any statutory enactment, if there be a contract which has been reduced into writing, and which is meant in itself to constitute an entire agreement, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify, the written contract;⁶ but, after the instrument has been

¹ See *Harris v. Goodwyn*, 2 Scott, N. R. 459; *Gwynne v. Davy*, Id. 29.

² In covenant for non-payment of rent, the defendant pleaded accord with satisfaction of the covenant *before* any breach:—Held bad, on demurrer, *Snow v. Franklin*, Lutw. 368. See *Kaye v. Waghorn*, 1 Taunt. 428; *Drake v. Mitchell*, 3 East, 251; *Scholey v. Mearns*, 7 East, 147; *Rogers v. Payne*, cited, 1 Selw., N. P., 10th ed., 511. As to the plea of accord and satisfaction in debt on bond before the day of payment, see Id. 541.

³ *Blake's case*, 6 Rep. 48.

⁴ Per Tindal, C. J., *Harris v. Goodwyn*, 2 Scott, N. R. 466. See, also, as to breach by other party, ante, p. 684.

⁵ Ante, p. 590.

⁶ See *Eden v. Blake*, 18 M. & W. 614, (*) which presents a good illustration of this rule; *Adams v. Wordley*, 1 M. & W. 374, 380; (*) *Hughes v. Statham*, 4 B. & C. 187; E. C. L. R. 10; *Hoare v. Graham*, 3 Camp. 57; cited, per Tindal, C. J., 5

reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract, not in writing, either [*686] *altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make it a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement.¹ It will be observed, that the first part of the above rule is confined, and must be restricted in its application, to a contemporaneous verbal agreement. It has been, for instance, expressly decided, that, in an action on a bill or note, a contemporaneous agreement in writing, may be set up to vary the contract evidenced by such instrument.²

In *King v. Gillett*,³ (which may be cited as an instance to show that a contract to marry, founded on mutual promises, is not within the 4th sect. of the Statute of Frauds,) the Court of Exchequer held, that to a declaration on such a contract, it is a good plea that, after the promise, and before any breach thereof, the plaintiff absolved, exonerated, and discharged the defendant from his promise and the performance of the same; and we have here more particularly mentioned this case, because it seems to afford an exact illustration of the rule now under consideration, and which we find laid down in the Digest in these words: *Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est; ideo verborum obligatio verbis tollitur, nudi consensus obligatio contrario consensu dissolvitur.*⁴ So, in *Langden v. Stokes*,⁵ which was recognised and followed *by the Court in deciding the above case, and which was [*687] an action of assumpsit, the defendant pleaded that, before any breach, the plaintiff, on &c. *exoneravit eum* of the alleged promise, and on demurrer, the plea was held good on the ground

Scott, N. R. 254; *Henson v. Coope*, 3 Scott, N. R., 48; *Reay v. Richardson*, 2 Cr., M. & R. 422; (*) per Bayley, J., *Lewis v. Jones*, 4 B. & C. 512; E. C. L. R. 10; per Lord Abinger, C. B., *Allen v. Pink*, 4 M. & W. 140, 144; (*) *Knapp v. Harden*, 1 Gale, 47; *Jeffery v. Walton*, 1 Stark., N. P. C. 267; E. C. L. R. 2; *Soares v. Glyn*, 8 Q. B. 24; E. C. L. R. 55.

¹ Judgment, *Goss v. Lord Nugent*, 5 B. & Ad. 64, 65; E. C. L. R. 27; *Hargreaves v. Parsons*, 18 M. & W. 561; (*) *Taylor v. Hilary*, 1 Cr., M. & R. 741, (*) presents an instance of a substituted agreement. See, also, *Patmore v. Colburn*, Id. 65. See 2 Phill. on Evid. 9th ed. 368.

² *Brown v. Langley*, 5 Scott, N. R., 249; per Gibbs, J., *Bowerbank v. Monteiro*, 4 Taunt. 846.

³ 7 M. & W. 55. (*)

⁴ D. 50, 17, 85.

⁵ Cro. Car. 388.

that as this was a promise by words, it might be discharged by words before breach. In order, however, to sustain such a plea as that just mentioned, if issue be taken thereon, the plaintiff, it has been observed, must prove a proposition to exonerate on the part of the plaintiff, acceded to by himself, and this in effect will be a *rescinding* of the contract previously made.¹

With respect to the proper mode of pleading a contemporaneous or subsequent agreement, varying that entered into between the parties, the rule is thus laid down by Parke, B., in *Heath v. Durant*,² which was an action of assumpsit on a policy of insurance. "If," says that learned judge, "there was an *after* stipulation, by which both parties agreed to *vary* the original policy—the defendants having been already bound by the policy in its original terms—by substituting a different definition of capture, then it would be proper to make that the subject of a special plea, viz., that after the agreement in the declaration mentioned, a new agreement was entered into, by which the policy was altered so far as relates to the term capture; but if it was a contemporaneous agreement, and so formed part of the policy, the general issue is clearly sufficient."

[*688] *"The defendants," remarked Alderson, B., in the same case, "ought not to plead specially, unless they mean to show two things, that is to say, the original policy, and afterwards, the alteration."³

Where a contract is required to be in writing by the statute law, it clearly cannot be *varied* by any subsequent *verbal* agreement between the parties; for, if this were permitted, the intention of the legislature would be altogether defeated.⁴ A contract, for instance, falling within the operation of the 4th section of the Statute of Frauds, cannot be waived and abandoned *in part*; for the object of the statute⁵ was to exclude all oral evidence as to contracts for the

¹ Judgment, 7 M. & W. 59. (*) In *Wood v. Leadbitter*, 13 M. & W. 838, (*) it was held that a parol license to enter and remain for some time on the land of another, even though money were paid for it, is revocable at any time, and without paying back the money. In this case the law respecting the revocation of a license was much considered. As to a surrender by operation of law, see *ante*, p. 545; *Dodd v. Acklom*, 7 Scott, N. R. 415; *Clarke v. Moore*, 1 Jones & Lat. 723.

² 12 M. & W. 438. (*)

³ *Id.* 440. (*)

⁴ With reference to the Statute of Frauds, see *Goss v. Lord Nugent*, 5 B. & Ad. 58; E. C. L. R. 27; per Maule, J., *Pontifex v. Wilkinson*, 2 C. B. 361; E. C. L. R. 52; per Alderson, B., *Eden v. Blake*, 13 M. & W. 616; (*) *Stowell v. Robinson*, 3 B. N. C. 928, 938; E. C. L. R. 32.

⁵ See *Wain v. Warlters*, 5 East, 10, referred to, *ante*, p. 590; *Morley v. Boothby*, 3 Bing. 112; E. C. L. R. 11.

sale of land; and, therefore, any contract sought to be enforced must be proved by writing only; and if such a contract could be verbally waived in part, the new contract between the parties would have to be proved partly by the former written agreement, and partly by the new verbal agreement.¹ And this reasoning applies also to a contract for the sale of goods, falling within the operation of the 17th section of the same statute.² Such a contract cannot be varied or altered by a subsequent verbal agreement. Where, therefore, a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose, must, in order to be valid, be in writing.³

A. entered into the service of B., as clerk, under a written agreement, which specified the salary to be payable "at the following rates, viz., for the first year, £70; for the second, £90; for the third, £110; for the fourth, £130; and £150 for the fifth and following years that you may remain in my employment:" it was held that this agreement was one required by the Statute of Frauds to be in writing, and that, there being a precise stipulation for yearly payments, evidence was inadmissible to show, that, at or after the date of the agreement, it was verbally agreed between the parties, that the salary should be paid quarterly. "This appears to me," said Tindal, C. J., "to be a contract within the Statute of Frauds; it was not to be performed within a year." * * * The question, therefore, is, whether we can supply an alleged defect in the contract by parol evidence of a contemporaneous or subsequent agreement for the payment of the salary quarterly. I think that it would be a direct violation of the statute."⁵

¹ Judgment, *Goss v. Lord Nugent*, 5 B. & Ad. 66; E. C. L. R. 27; recognised, *Marshall v. Lynn*, 6 M. & W. 117; (*) *Earl of Falmouth v. Thomas*, 1 Cr. & M. 89; (*) which cases are recognised, *Harvey v. Graham*, 5 Ad. & E. 74; E. C. L. R. 31; judgment, *Morley v. Boothby*, 3 Bing. 112; E. C. L. R. 11; per Lord Denman, C. J., *Clancey v. Piggott*, 2 Ad. & E. 480; E. C. L. R. 29.

² A contract for the sale of "shares" in a projected railway is not within the above statute, *Tempest v. Kilner*, 3 C. B. 249; E. C. L. R. 54; *Bowlby v. Bell*, Id. 284.

³ *Marshall v. Lynn*, 6 M. & W. 109; (*) cited argument, *Hargreaves v. Parsons*, 13 M. & W. 568; E. C. L. R. 37; *Stead v. Dawber*, 10 Ad. & E. 57; (*) 2 Phill. on Evid. 9th ed. 362. See *Ingram v. Lea*, 2 Camp. 521.

⁴ See, also, as to this point, *Souch v. Strawbridge*, 2 C. B. 808; E. C. L. R. 52.

⁵ *Giraud v. Richmond*, 2 C. B. 885, 840; E. C. L. R. 52; recognising *Goss v. Lord Nugent*, *supra*.

But although a contract which is required to be in writing, cannot be *varied* by a subsequent verbal agreement, it seems that neither the 4th nor the 17th section of the Statute of Frauds can apply to prevent a verbal *waiver* or *abandonment* of a contract within its operation from being set up as a good defence to an action upon the contract. [*690] *Under the former of these sections, indeed, the remedy by action is taken away in certain specified cases if there be no written agreement, and, under the latter, the particular contract is invalidated; but it does not appear that a verbal rescission of the contract would be void as within the language of either section, nor that the policy of the statute would lead to such a conclusion.¹

We may further observe, in connexion with the maxim under consideration, that payment of a portion of a liquidated and ascertained demand, cannot be in law a satisfaction of the whole; for here the contract between the parties consists in reality of two parts, viz., payment, and an agreement to give up the residue; which latter agreement is void, as being made without consideration.² The above rule does not, however, apply if the claim is *bonâ fide* disputable; nor, if there has been an acceptance of a chattel or of a negotiable security in satisfaction of the debt, will the court examine whether that satisfaction were a reasonable one, but it will merely inquire whether the parties actually came to such an agreement. A man, therefore, may give in satisfaction of a debt of £100 a horse of the value of £5, but not £5; and a sum of money payable at a *different* [*691] *time* is a good satisfaction of a larger sum payable *at a future day.³ Moreover, although the obligor of a bond

¹ See judgment, *Goss v. Lord Nugent*, 5 B. & Ad. 65, 66; E. C. L. R. 27; cited, *Harvey v. Grabham*, 5 Ad. & E. 74; E. C. L. R. 81; *Stead v. Dawber*, 10 Ad. & E. 65; E. C. L. R. 37. To an action for breach of a parol contract, accord and satisfaction is a good plea, because damages only are recoverable: see *Selw.*, N. P., 10th ed. 118; per *Cur.*, *Taylor v. Hilary*, 1 C., M. & R. 748; (*) *Griffiths v. Owen*, 18 M. & W. 58; (*) *Carter v. Wormald*, 1 Exch. 81; (*) *Bainbridge v. Lax*, 16 L. J., Q. B. 85; *ante*, p. 587.

² *Sibree v. Tripp*, 15 M. & W. 23; (*) after the decision in which case, *Cumber v. Wane*, 1 Stra. 426, cannot be considered law; *Pinnel's case*, 5 Rep. 117. A person who accepts the amount of a debt in respect of the non-payment of which at the stipulated period he has become entitled to nominal damages, cannot, after the acceptance of the debt, sue for such nominal damages; *Beaumont v. Greathead*, 2 C. B. 494, 498; E. C. L. R. 52.

³ 15 M. & W. 84, 88. (*) The distinction between payment on account and payment in discharge and satisfaction, is pointed out in *Sard v. Rhodes*, 1 M. & W.

cannot, at the day appointed, pay a less sum in satisfaction of the whole, yet if the obligee then receive a part and give his acquittance under seal for the whole, this will be a good discharge, according to the maxim *eodem ligamine quo ligatum est dissolvitur*.¹

Lastly, the maxim which has been here considered has been held to apply in some cases which do not fall within the law of contracts: thus, a donative is a benefice merely given and collated by the patron to a man, without either presentation to, or institution by, the ordinary, or induction by his order. In this case, resignation of the donative by the incumbent must be made to the patron; for a donative begins only by the erection and foundation of the donor, and he has the sole visitation and correction, the ordinary having nothing to do therewith; and, as the incumbent comes in by the patron, so he may restore to him that which he conferred, for *unumquodque eodem modo quo colligatum est dissolvitur*.²

*VIGILANTIBUS, NON DORMIENTIBUS, JURA SUBVENIUNT. [*692]
(2 Inst. 690.)

*The laws assist those who are vigilant, not those who sleep over their rights.*³

We have already, under the maxim *caveat emptor*,⁴ considered cases illustrative of the proposition that courts of justice require and expect that each party to a contract or bargain shall exercise a due degree of vigilance and caution; we shall, therefore, in the following remarks, confine our attention to the important subject of the limitation of actions, which will serve to exemplify that general policy of the law, in pursuance of which "the using of legal diligence is always favoured, and shall never turn to the disadvantage of the creditor."⁵ It may, however, be desirable, in the first place, to give a few instances of this principle, which is one well

158. (*) See, also, *Maillard v. Duke of Argyll*, 6 Scott, N. R. 938; *Baillie v. Moore*, 15 L. J., Q. B. 169; per Parke, B., 15 M. & W. 387; (*) *Fearne v. Cochrane*, 16 L. J., C. P., 161; *Price v. Price*, 16 M. & W. 232. (*)

¹ Co. Litt. 212, b; per Parke, B., 15 M. & W. 84. (*)

² Per Littledale, J., *Rennell v. The Bishop of Lincoln*, 7 B. & C. 160; E. C. L. R. 14; (affirmed in Dom. Proc., 8 Bing. 490; E. C. L. R. 21), citing *Fairchild v. Gaire*, Yelv. 60; S. C., Cro. Jac. 65; 3 Burn. Eccles. Law, 9th ed. 541.

³ See *Wing. Max.*, p. 672; *Hobart, R.* 347, cited, ante, p. 46.

⁴ Ante, p. 605. See, also, the maxim *prior tempore potior jure*, ante, p. 260.

⁵ Per Heath, J., *Cox v. Morgan*, 2 B. & P. 412.

known¹ and of very extensive applicability. Thus, it was held, under the statute 1 Jac. 1, c. 15, s. 14, that, where A. bought goods of a trader who had previously committed an act of bankruptcy, and paid for them *bonâ fide*, without knowing of the bankruptcy, the assignees, under a commission issued against the seller, could not maintain trover for the goods; for when an act of bankruptcy, has been committed, the creditors should, as soon as possible, sue out a commission; but if they might take away goods afterwards sold by the bankrupt, and paid for, and so obtain both the goods and the money, it would be [*693] their interest to postpone their proceedings.² *And in The Case of Bankrupts which was decided shortly after the statute 13 Eliz. c. 7, it was resolved that a commission of bankrupt was matter of record whereof every one may take cognizance, and that the above act was intended to benefit those who would inquire and come in as creditors, and not those who, either out of obstinacy refuse, or through carelessness neglect, to come before the commissioners and pray the benefit of the statute; for *vigilantibus*, &c.; and, otherwise, a debt might be concealed, or a creditor might absent himself, and so avoid all the proceedings of the commissioners by force of the said act. Further, every creditor may take notice of the commission, being matter of record, and so no inconvenience can happen to any creditor who will be vigilant; but great inconvenience would follow, and the whole effect of the act be overthrown if any other construction were made.³ Again, where the right to claim compensation is given by any act of Parliament, as an inclosure act, which also directs that the claim shall be made within a certain specified time, this right will be forfeited by an omission to assert it within the given time, and in such a case the maxim under consideration has been held forcibly to apply;⁴ and without multiplying instances of this rule, we may observe generally, that it ap-

¹ In 2 B. & P. 412, Heath, J., observes, that this is one of the maxims which we learn on our earliest attendance in Westminster Hall.

² *Cash v. Young*, 2 B. & C. 413, 419; E. C. L. R. 9. See *Kay v. Goodwin*, 6 Bing. 576, 585; E. C. L. R. 19; *Payne v. Drew*, 4 East, 523; 6 Geo. 4, c. 16, s. 82. Where a fiat for an extent was granted on the 22d of February, 1832, the Court refused, in Hilary Term, 1834, to grant a rule that an extent might issue, tested of the date of the fiat, observing that the general rule applied to such a case, even against the crown: *Rex v. Maberley*, 2 Cr. & M. 537. (*)

³ 2 Rep. 26. See *Sowerby v. Brooks* (in error), 4 B. & Ald. 523; (*) and the stats. 6 Geo. 4, c. 16, s. 95, and 2 & 3 Vict. c. 29.

⁴ *Doe d. Watson v. Jefferson*, 2 Bing. 118, 125; E. C. L. R. 9.

plies whenever a party debars himself *of a legal right or remedy by his own negligence or laches.¹ [*694]

Relative to the doctrine of limitation of actions,² Mr. Justice Story has observed, "It has often been matter of regret in modern times that in the construction of the Statute of Limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavourable light as an unjust and discreditable defence, it had not received such support as would have made it what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses."³ Sir Wm. Blackstone also remarks, that, in all possessory actions, there is a time of limitation settled, beyond which no man shall avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary; for, if he be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance to recover the possession, both with a view to punish his neglect, *nam leges vigilantibus, non dormientibus, subveniunt*, and also because it is presumed that the supposed wrong-doer has in such a length of time procured a legal title, otherwise he would *sooner have been sued.⁴ It is proposed accordingly to refer [*695] very briefly to those statutes respecting the limitation of actions which are of practical importance at the present day. Under statute 21 Jac. 1, c. 16, s. 1, the plaintiff in ejectment must have proved either actual possession or a right of entry within twenty years, or have accounted for the want of it; for, by force of that statute, an uninterrupted adverse⁵ possession for that period operated

¹ See *Camidge v. Allenby*, 8 B. & C. 373; E. C. L. R. 10; *Robson v. Oliver*, 16 L. J., Q. B. 437. This maxim also applies forcibly with reference to the conduct of a petitioner for a divorce bill. See *Martin's Divorce*, 1 Ho. L. Cas. 79, and cases cited, *Id.* 80, note.

² Which may also be referred to the maxim, *interest reipublicæ ut sit finis litium*; 8 Bla. Com. 308; ante, p. 244.

³ *Bell v. Morrison*, 1 Peters, R. (U. S.) 860.

⁴ 8 Bla. Com. 188. As to the doctrine of Prescription in the Roman Law, see *Mac-keld, Civ. Law*, 290. *Usucapio constituta est ut aliquis litium finis esset*, D. 41, 10, 5; *Wood, Civ. Law*, 3d ed. 123.

⁵ Respecting the doctrine of adverse possession before the stat. 3 & 4 Will. 4, c. 27, see *Taylor d. Atkyns v. Horde*, 1 Burr. 60. And as to the same doctrine since that statute, see *Nepean v. Doe* (in error), 2 M. & W. 894; (*) and also the note to

as a complete bar except in those cases of disability which fell within section 2, viz. infancy, coverture, unsoundness of mind, imprisonment, and absence beyond seas, in which cases the party who was suffering under the disability at the time when the right of entry first accrued was allowed to bring his action at any time within ten years after its removal; and now, by statute 3 & 4 Will. 4, c. 27, s. 2, no person shall make an entry or distress, or bring an action to recover any land or rent,¹ but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued² to some person through whom he claims; or, if such right shall not have accrued to any person [*696] through whom he claims, then within twenty years *next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.³ By section 16 of the same act, it is provided, that persons under disability of infancy, lunacy, or coverture, or beyond seas, and their representatives, shall be allowed ten years from the termination of their disability or death; provided, nevertheless,⁴ that no action shall be brought beyond forty years after the right of action accrued.

Again, by statute 3 & 4 Will. 4, c. 42, s. 3, it is enacted, that all actions of debt for rent upon an indenture of demise, all actions of covenant⁵

these cases, 2 Smith, L. C. 396 et seq. The latter case decides that the doctrine of *non-adverse* possession is done away with by the above act.

¹ As to an annuity being barred under this act, see *James v. Salter*, 3 Bing., N. C. 544, 552; *E. C. L. R. 32*. As to tithes, see *Dean and Chapter of Ely v. Cash*, 15 M. & W. 617. (*)

² Section 8 declares when the right shall be deemed first to have accrued; as to which, see 2 Selw., N. P., 10th ed. 733 et seq.; *Doe d. Davy v. Oxenham*, 7 M. & W. 131. (*)

³ The stat. 3 & 4 Will. 4, c. 27, s. 2, does not apply to rent reserved on a demise: *Grant v. Ellis*, 9 M. & W. 113. (*) As to barring a term to attend the inheritance, under 3 & 4 Will. 4, c. 27, ss. 2, 3, see *Doe d. Jacobs v. Phillips*, 16 L. J., Q. B. 269.

⁴ Sect. 17. As to sect. 7 of this act, see *Doe d. Dayman v. Moore*, 15 L. J., Q. B. 324. As to section 8, see *Doe d. Earl Spencer v. Beckett*, 4 Q. B. 601; *E. C. L. R. 45*; *Doe v. Sumner*, 14 M. & W. 39. (*) As to sections 9 and 15, see *Doe d. Angell v. Angell*, 15 L. J., Q. B. 198. As to section 14, see *Doe d. Groves v. Groves*, 16 L. J., Q. B. 297. As to 3 & 4 Will. 4, c. 27, s. 5, and 8 & 9 Vict. c. 112, see *Doe d. Hall v. Mouldsdale*, 16 L. J., Exch. 169.

⁵ See *Kent v. Gibbons*, 16 L. J., Q. B. 120. Covenant for rent in arrear may be brought within the time prescribed by this section, and is not limited to six years by 3 & 4 Will. 4, c. 27, s. 42. (*Paget v. Foley*, 2 Bing., N. C. 679; *E. C. L. R. 29*; admitted, argument, *Hartshorne v. Watson*, 4 Bing., N. C. 182; *E. C. L. R. 33*;

or debt upon any bond¹ or other specialty, and all actions of debt or sci. fa.² upon any recognisance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estate, or for an *escape, or for money levied on any fi. fa., and all actions for [*697] penalties, damages, or sums of money given to the party grieved by any statute then or thereafter to be in force, that shall be sued or brought at any time after the end of the then session of Parliament, shall be commenced and sued within the time and limitation following; (that is to say), the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, or actions of debt or sci. fa. upon recognisances, within ten years after the end of the then session of Parliament, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year³ after the end of the then session, or within two years after the cause of such actions or suits, but not after; and the said other actions, within three years after the end of the then session, or within six years after the cause of such actions or suits, but not after. It is, however, further provided, that nothing in this act shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited.

By section 4 of the same statute, it is further enacted, that, if any person, entitled to any such action or suit as above mentioned, shall, at the time of such cause of action accruing, be within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person shall be at liberty to bring the same, provided it be commenced within the specified time after coming to, or being of full age, discover, of sound memory, or returned from beyond the seas; and a provision is inserted in the same section, which applies to the case of a defendant similarly circumstanced.

*The doctrine of limitation in the case of simple contracts is founded upon a presumption of payment or release arising [*698]

recognised, 12 Ad. & E. 558; E. C. L. R. 40.) As to a bond for the payment of an annuity, see *Sims v. Thomas and Strachan v. Thomas*, 12 Ad. & E. 536; E. C. L. R. 40.

¹ See *Tuckey v. Hawkins*, 16 L. J., C. P. 201; *Sanders v. Coward*, 13 M. & W. 65; (*) and 15 M. & W. 48. (*)

² A *scire facias* on a judgment is not a mere continuation of a former suit, but creates a new right: *Farrell v. Gleeson*, 11 Cl. & Fin. 702, where the defendant pleaded under stat. 3 & 4 Will. 4, c. 27, s. 40.

³ See stat. 21 Jac. 1, c. 4, s. 1.

from length of time, as it is not common for a creditor to wait so long without enforcing payment of what is due; and, as presumptions are founded upon the ordinary course of things, *ex eo quod plerumque fit*, the laws have formed the presumption, that the debt, if not recovered within the time prescribed, has been acquitted or released. Besides, a debtor ought not to be obliged to take care for ever of the acquittances which prove a demand to be satisfied; and it is proper to limit a time beyond which he shall not be under the necessity of producing them. This doctrine has also been established as a punishment for the negligence of the creditor. The law having allowed him a time within which to institute his action, the claim ought not to be received or enforced when he has suffered that time to elapse.¹ For these reasons, it is enacted, by the statute 21 Jac. 1, c. 16, s. 3, that all actions of account and of assumpsit (other than such accounts² as concern the trade of merchandise between merchant and merchant, their factors or servants), and all actions of debt grounded upon any lending or contract without specialty, and all actions for debt or arrearages of rent,³ shall be commenced and sued within six years next after the cause of such action or suit, [*699] and not after.⁴ And section 7 contains a *proviso,⁵ similar to those already mentioned, with respect to infants, married women,⁶ *non compos mentis*, and persons imprisoned or beyond the seas, viz., that an action may be commenced in the above cases within six years after the particular disability shall have ceased.⁷ The

¹ 1 Pothier, by Evans, 451.

² This exception applies only to accounts current between merchants, but not to accounts stated. (*Webber v. Tivill*, 2 Wms. Saund. 124; *Robinson v. Alexander*, 2 Cl. & Fin. 717, 737. See *Colvin v. Buckle*, 8 M. & W. 680.)(* It likewise applies only to merchants' accounts, or, perhaps, also to an action for not accounting, but not to an action of *indebitatus assumpsit*. (*Inglis v. Haigh*, 8 M. & W. 769; (*) *Cottam v. Partridge*, 4 Scott, N. R. 819, 832.) As to money deposited with a banker, see *Pott v. Clegg*, 16 W. & M. 321.)(*)

³ See 3 & 4 Will. 4, c. 27, s. 42.

⁴ The mere fact of part payment is not of itself sufficient to take the case out of the statute. The circumstances must be such as to warrant the jury in inferring a promise to pay: *Wainman v. Kynman*, 16 L. J., Exch. 232; S. C., Exch. 118; *Worthington v. Grimsditch*, 7 Q. B. 479; E. C. L. R. 53; *Burn v. Boulton*, C. B. 476. See, also, *Martindale v. Falkner*, 2 C. B. 706; E. C. L. R. 52.

⁵ See, also, 4 Ann. c. 16, s. 19; *Fannin v. Anderson*, 7 Q. B. 811; E. C. L. R. 53.

⁶ See *Scarpellini v. Acheson*, 7 Q. B. 864; E. C. L. R. 53.

⁷ If a plaintiff be beyond seas at the time of the action accruing, he may sue under the above section at any time before his return, as well as within the limited time after: *Le Veux v. Berkeley*, 5 Q. B. 836; E. C. L. R. 48.

action of debt for not setting out tithes is not within the above statute;¹ but, by 53 Geo. 3, c. 127, s. 5, no action shall be brought for the recovery of any penalty for not setting out tithes, unless such action be brought within six years from the time when such tithes became due.

With respect to actions *ex delicto*, the period of limitation² in trespass *qu. cl. fr.*, or for taking goods or cattle, as also in trover, detinue, replevin, and case (except for slander), is six years; in trespass for assault, battery, or false imprisonment,³ it is four years; and in case for slander, two years. An action for crim. con., the gist of which is the injury sustained by the husband, should, perhaps, be considered with reference to the statute as essentially an action on the case, and not of trespass, and, therefore, be brought within six years after the injury was committed.⁴

*Lastly, in connexion with this part of the subject, it may be observed, that no judgment in any action shall be reversed [*700] or avoided for any error or defect therein, unless the writ of error be brought and prosecuted with effect within twenty years after such judgment signed or entered on record; provided the party against whom the judgment is given be not an infant, *feme covert*, *non compos mentis*, or in prison or beyond sea; in which cases the writ of error must be brought within twenty years after such disability ceases.⁵

It is not intended, nor would it be consistent with the plan of this work, to consider, in detail, either from what period limitation runs, or the mode in which a claim may be taken out of the operation of the statute, or, when barred by any statute, may be revived by a subsequent promise or acknowledgment.⁶ These subjects will be found minutely treated of in works devoted to an exposition of the law of real property, and of contracts and mercantile transactions. There is, however, one maxim which naturally suggests itself in this place, and which is illustrated by those provisions in the different statutes of limitation, which, in the cases of infancy and coverture,

¹ 2 Selw., N. P. 10th ed. 1303. See, also, 3 & 4 Will. 4, c. 27, s. 43.

² 21 Jac. 1, c. 16, s. 3.

³ See *Coventry v. Apsley*, Salk. 420.

⁴ *Coke v. Sayer*, 2 Wils. 85; cited, *Maofadzen v. Olivant*, 6 East, 888, per Grose, J., 5 T. R. 361. See, however, *Woodward v. Walton*, 2 N. R. 476; *Ditcham v. Bond*, 2 M. & S. 436; E. C. L. R. 28; per Lord Abinger, C. B., 5 M. & W. 517. (*)

⁵ See 1 Chitt. Arch. Pr., 8th ed. 477; per Lord Lyndhurst, C., *Davies v. Lowndes*, 1 Phill. 340.

⁶ See *Hart v. Prendergast*, 14 M. & W. 741; (*) *Tanner v. Smart*, 6 B. & C. 608; E. C. L. R. 18; *Smith*, on Contracts, 818 (a), and cases cited, note 4, p. 698.

and others similar, suspend their operation until removal of such disability. The maxim alluded to is expressed thus: *Contra non valentem agere nulla currit præscriptio*—prescription does not run against a party who is unable to act. For instance, in the case of a debt due, it only begins to run from the time when the creditor has a right to institute his suit, because no delay can be imputed to him [*701] before that time.¹ Where, therefore, a debt is suspended by a condition; as, if the contract be to pay money at a future period, or upon the happening of a certain event, as “when J. S. is married,” the six years are to be dated, in the first instance, from the arrival of the specified period; in the second, from the time when the event occurred.² Where, however, the breach of contract, which, in assumpsit, is the gist of the action, occurred more than six years before the commencement of the proceedings, the statute will afford a good defence, although the plaintiff did not discover the injury resulting from the breach till within the six years.³ So in trover, the six years run from the conversion, though it was not discovered at the time.⁴ Where, however, the statute has once begun to run, *i. e.*, where there is a cause of action, a plaintiff in England capable of suing, and a defendant of being sued, no subsequent disability interrupts it; such, for instance, as the death of the defendant, and the non-appointment of an executor by reason of litigation as to the right to probate.⁵

[*702] *ACTIO PERSONALIS MORITUR CUM PERSONA.

(Noy, Max. 14.)

A personal right of action dies with the person.

The legal meaning and application of this maxim will, perhaps, be shown most clearly, by stating concisely the various actions which

¹ 1 Pothier, by Evans, 451; Hemp v. Garland, 4 Q. B. 519, 524; E. C. L. R. 45; Huggins v. Coates, 5 Q. B. 432; E. C. L. R. 48; Holmes v. Kerrison, 2 Taunt. 323; Cowper v. Godmond, 9 Bing. 748; E. C. L. R. 23. See, also, Davies v. Humphreys, 6 M. & W. 158; (*) Bell, Dict. and Dig. of Scotch Law, 223.

² 1 Pothier, by Evans, 451; Shutford v. Borough, Godb. 487; Fenton v. Emblers, 1 W. Bla. 858.

³ Short v. M'Carthy, 3 B. & Ald. 626; E. C. L. R. 5; Brown v. Howard, 2 B. & B. 73; E. C. L. R. 6; Howell v. Young, 5 B. & C. 259; E. C. L. R. 11; recognised by Wigram, V. C., in Smith v. Fox, 12 Jur. 130; Bree v. Holbech, 2 Dougl. 654.

⁴ Granger v. George, 5 B. & C. 149; E. C. L. R. 11. See Philpot v. Kelly, 3 Ad. & E. 106; E. C. L. R. 30.

⁵ Rhodes v. Smethurst, 4 M. & W. 42; (*) Freake v. Cranefeldt, 3 M. & Cr. 499.

may be maintained by and against executors and administrators, as well as those rights of action which die with the person, and to which alone the above rule may be considered strictly to apply.

The personal representatives are, as a general rule, entitled to sue on all covenants broken in the lifetime of the covenantee; as for rent then due, or for breach of covenant for quiet enjoyment,¹ or to discharge the land from incumbrances.² A distinction must, however, be remarked between a covenant running with the land, and one purely collateral. In the former case, where the formal breach has been in the ancestor's lifetime, but the substantial damage has taken place since his death, the real and not the personal representative is the proper plaintiff; whereas, in the case of a covenant not running with the land, and intended not to be limited to the life of the covenantee, as a covenant not to fell trees, excepted from the demise, the personal representative is alone entitled to sue.³ In a recent case, it was held, that the executor of a tenant for life may recover for a breach of a covenant to repair *committed by the lessee of the testator in his lifetime, without averring a damage to [*703] his personal estate; and, in this case, the rule was stated to be, that, unless the particular covenant be one for breach whereof, in the lifetime of the lessor, the *heir alone* can sue, the executor may sue, unless it be a mere personal contract, to which the rule applies, that *actio personalis moritur cum personâ*.⁴

The personal representative, moreover, may sue, not only for the recovery of all debts due to the deceased by specialty or otherwise, but on all contracts with him, whether broken in his lifetime or subsequently to his death, of which the breach occasions an injury to the personal estate,⁵ and which are neither limited to the lifetime of the

¹ *Lucy v. Levington*, 2 Lev. 26. By 13 Edw. 1, st. 1, c. 23, executors shall have a writ of account; and the stat. 31 Edw. 3, st. 1, c. 11, was the origin of administrators as they at present stand. (1 Chit. Stats. 318, n. (b).)

² *Smith v. Simonds*, Comb. 64.

³ *Raymond v. Fitch*, 2 C., M. & R. 598, 599. (*) Per Parke, J., *Carr v. Roberts*, 5 B. & Ad. 84; *E. C. L. R. 27*; *Kingdon v. Nottle*, 1 M. & S. 855; *E. C. L. R. 28*; 4 M. & S. 53; *E. C. L. R. 30*; *King v. Jones*, 5 Taunt. 518; *E. C. L. R. 1*; affirmed, in error, 4 M. & S. 188; *E. C. L. R. 30*.

⁴ *Ricketts v. Weaver*, 12 M. & W. 718, (*) recognising *Raymond v. Fitch*, supra. As to a covenant respecting a chattel, see per Parke, J., *Doe d. Rogers v. Rogers*, 2 Nev. & Man. 555; *E. C. L. R. 28*; in an indenture of apprenticeship, *Baxter v. Burfield*, 2 Stra. 1266.

⁵ Judgment, 2 C., M. & R. 596, 597; (*) per Tindal, C. J., *Orme v. Broughton*, 10 Bing. 587; *E. C. L. R. 25*; 1 Wms. Saund. 112, n. (1); *Edwards v. Grace*, 2 M. &

deceased, nor, as in the instance of a submission to arbitration containing no special clause to the contrary, revoked by his death.¹ An administrator's title, moreover, relates back to the time of the intestate's death, so that he may sue for goods sold and delivered between the death and the taking out letters of administration.²

An action, however, is not maintainable by an executor or an [*704] administrator for a breach of promise of marriage made *to the deceased, where no special damage is alleged;³ and, generally, with respect to injuries affecting the life or health of the deceased,—such, for instance, as arise out of the unskilfulness of a medical practitioner, or the negligence of an attorney, or a coach proprietor,—the maxim as to *actio personalis* is applicable, unless some damage done to the personal estate of the deceased be stated on the record.⁴ But, where the breach of a contract relating to the person occasions a damage, not to the person only, but also to the personal estate; as, for example, if in the case of negligent carriage or cure there was consequential damage—if the testator had expended his money, or had lost the profits of business, or the wages of labour for a time; or if there were a joint contract to carry both the person and the goods, and both were injured: it seems a true proposition, that, in these cases, the executor might sue for the breach of contract, and recover damages to the extent of the injury to the personal estate.⁵

The personal representatives, on the other hand, are liable, as far as they have assets, on all the covenants and contracts of the deceased broken in his lifetime, and likewise on such as are broken after his death, for the due performance of which his skill or taste was not required,⁶ and which were not to be performed by the

W. 190. (*) As to misjoinder of counts in an action by executrix, see *Webb v. Cowdell*, 14 M. & W. 820. (*)

¹ *Cooper v. Johnson*, 2 B. & Ald. 394; per Bayley, J., *Rhodes v. Haigh*, 2 B. & C. 346, 347; E. C. L. R. 9; *M'Dougall v. Robertson*, 4 Bing. 485; E. C. L. R. 13-15; *Tyler v. Jones*, 3 B. & C. 144; E. C. L. R. 10; *Clarke v. Crofts*, 4 Bing. 148; E. C. L. R. 13-15; *Knights v. Quarles*, 2 B. & B. 102; E. C. L. R. 6; which was an action against an attorney for negligence in investigating a title.

² *Foster v. Bates*, 12 M. & W. 226. (*)

³ *Chamberlain v. Williamson*, 2 M. & S. 408; E. C. L. R. 28.

⁴ *Judgment*, 2 M. & S. 415, 416; E. C. L. R. 28. See *Knights v. Quarles*, 2 B. & B. 104; E. C. L. R. 6.

⁵ *Judgment*, 3 M. & W. 854, 855. (*)

⁶ Per Parke, B., *Siboni v. Kirkman*, 1 M. & W. 428; (*) per Patteson, J., *Wentworth v. Cook*, 10 Ad. & E. 445, 446; E. C. L. R. 87; Bac. Abr. "Executors and Administrators," (P. 1); Com. Dig. "Administration," (B. 14.)

deceased in person.¹ They are also liable on covenant by deceased *for their performance of a particular act, as for payment of [*705] a sum of money;² for building a house left unfinished by the deceased;³ or on his contract for the performance of work by the plaintiff, before the completion of which he died, but which was subsequently completed.⁴ And the same principle was held to apply where an intestate had entered into an agreement to receive from plaintiffs a certain quantity of slate monthly for a certain period, a portion of which, when tendered after his death, but before the expiration of the stipulated period, his administrator refused to accept.⁵

The action of debt on simple contract, except for rent,⁶ did not, however, formerly lie against the personal representative for a debt contracted by the deceased,⁷ unless the undertaking to pay originated with the representative;⁸ and the reason of this was, that executors or administrators, when charged for the debt of the deceased, were not admitted to wage their law, and, consequently, were deprived of a legal defence which the deceased himself might have made use of; but this reason did not apply to assumpsit, which, therefore, might always have been brought.⁹ Now, however, by stat. 3 & 4 Will. 4, c. 42, s. 13, *wager of law is abolished; and by sect. 14 it is [*706] enacted, that an action of debt on simple contract shall be

¹ Hyde v. Dean of Windsor, Cro. Eliz. 552, 553; per Cur., Marshall v. Broadhurst, 1 Cr. & J. 406.

² Ex parte Tindal, 8 Bing. 404, 405; E. C. L. R. 21; and cases there cited; Powell v. Graham, 7 Taunt. 580; E. C. L. R. 2.

³ Quick v. Ludborrow, 8 Bulstr. 80; recognised 1 M. & W. 423. (*) See per Cur., 1 Cr. & J. 405, 406; per Lord Abinger, C. B., 3 M. & W. 853, 854. (*)

⁴ Corner v. Shew, 8 M. & W. 850, 852. (*) See per Alderson, B., Prior v. Hem-brow, 8 M. & W. 889, 890. (*)

⁵ Wentworth v. Cock, 10 Ad. & E. 42; E. C. L. R. 37.

⁶ Norwood v. Read, Plowd. 180. See 1 Selw., N. P., 10th ed. 600; Williams on Executors, 3d ed. 1351, 1518.

⁷ Barry v. Robinson, 1 N. B. 293. See Chit. & H., Statutes, 24, n. (1).

⁸ Riddle v. Sutton, 5 Bing. 206; E. C. L. R. 15.

⁹ 8 Bla. Com., 16th ed. 847, and n. (12); 2 Selw., N. P., 10th ed. 796, 797. In Perkinson v. Gifford, Cro. Car. 539, debt was held to lie against the executors of a sheriff who had levied under a fi. fa., and died without paying over the money. A set-off for money due from the plaintiff to a testator in his lifetime, may be pleaded to a declaration on a cause of action which accrued to the plaintiff from the defendants, as executors after the testator's death: Blakesley v. Smallwood, 15 L. J., Q. B. 185.

maintainable in any court of common law against an executor or administrator.

It is, however, to actions in form *ex delicto* that the rule, *actio personalis moritur cum personâ* is peculiarly applicable; indeed, it has been observed that this maxim is not applied in the old authorities to causes of action on contracts, but to those in tort which are founded on malfeasance or misfeasance to the person or property of another; which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representatives by the statute law;¹ it being a general rule that an action founded on tort, and in form *ex delicto*, was considered as *actio personalis*, and within the above maxim.² However, by statute 4 Edw. 3, c. 7, reciting, that in times past, executors had not had actions for a trespass done to their testators,—as of the goods and chattels of the said testators carried away in their lifetime,—it is enacted, that the executors, in such cases, shall have an action against the trespassers, in like manner as they whose executors they are should have had if they were living.³ This act, moreover, has [*707] always been expounded liberally;⁴ and, by virtue of it, *executors may maintain ejectment, *quare impedit*, trover, or replevin, the conversion or taking having been in the testator's lifetime.⁵ Case also lies by an executor against a sheriff for a false return to a *fi. fa.* made in the lifetime of testator,⁶ or for an escape on final process.⁷

Previously to the statute 3 & 4 Will. 4, c. 42, no remedy was provided for injuries to the real estate of any person deceased committed in his lifetime:⁸ but sect. 2 of that statute enacts, that an

¹ Per Lord Abinger, C. B., 2 C., M. & R. 597. (*)

² *Wheatley v. Lane*, 1 Wms. Saund. 216, n. (1).

³ An administrator is within the equity of this statute (*Smith v. Colgay*, Cro. Eliz. 884); and by stat. 25 Edw. 3, st. 5, c. 5, a similar remedy is extended to the executors of executors.

⁴ See per Lord Ellenborough, C. J., *Wilson v. Knubley*, 7 East, 134, 135; 1 Wms. Saund. 216, n. (1); *Emerson v. Emerson*, 1 Ventr. 187.

⁵ 1 *Williams on Executors*, 8d ed. 622, 626, 697; Bro. Abr. "Executors," 45; *Doe d. Shore v. Porter*, 3 T. R. 13; *Rutland v. Rutland*, Cro. Eliz. 377; Com. Dig. "Administration," (B. 13); 1 Wms. Saund. 217, n. See *Doe d. Stace v. Wheeler*, 15 M. & W. 623, (*) where it was held that two of three co-executors may recover lands of their testators in ejectment on a joint demise.

⁶ *Williams v. Grey*, 1 Ld. Raym. 40; Com. Dig., "Administration," (B. 13.)

⁷ Per Holt, C. J., *Berwick v. Andrews*, 2 Ld. Raym. 973. See *Palgrave v. Windham*, 1 Stra. 212; *Le Mason v. Dixon*, Sir W. Jones, 178.

⁸ 1 Wms. Saund. 217, n.

action of trespass, or trespass on the case, as the case may be, shall be maintainable by the executors or administrators of any person deceased, for any injury to the real estate of such person committed in his lifetime, for which an action might have been maintained by such persons, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person.¹ It has been held that an administrator may maintain trespass for the seizure of goods of the intestate between the death and the grant of the letters of administration.²

*Notwithstanding, however, the statutory exceptions above noticed to the general rule which was recognised by the com- [*708] mon law, this rule still applies where a tort is committed to a man's person, feelings, or reputation, as for assault, libel, slander, or seduction of his daughter: in such cases, no action lies at suit of the executors or administrators, for they represent not so much the person as the personal estate of the testator or intestate, of which they are in law the assignees.³

Again, prior to the recent statute 9 & 10 Vict. c. 93, an action was not maintainable against a person who, by his wrongful act, occasioned the death of another; but by sect. 1 of that act, it is enacted, that "whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." By sect. 2, it is further enacted, "that every such action shall be for the benefit of the wife, husband, parent, and child, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the

¹ See *Adam v. Inhabitants of Bristol*, 2 Ad. & E. 389, 402; E. C. L. R. 29; 1 Williams on Executors, 3d ed. 630; 2 Chit. Arch. Pr., 7th ed. 1180.

² *Tharpe v. Stallwood*, 6 Scott, N. R. 715; recognised, *Foster v. Bates*, 12 M. & W. 226. (*)

³ 3 Bla. Com., 16th ed. 302, n. (9); Com. Dig. "Administration," (B. 13.)

person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit [*709] such action shall be brought; and the amount so recovered, *after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury by their verdict shall find and direct." By sect. 3, the action for damages must be brought within twelve calendar months after the death of such deceased person. It will be observed, that this statute only applies where death ensues from the particular wrongful act, and does not, therefore, affect the class of cases above mentioned, viz., where a tort is committed to the person which does not occasion death.

By the statute 3 & 4 Will. 4, c. 42, s. 2, above mentioned, trespass and case will also lie against personal representatives for any wrong committed by any person deceased, in his lifetime, to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six months after the executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person.¹ Prior to this act, the remedy for a tort to the property of another, real or personal, by an action in form, *ex delicto*,—such as trespass, trover, or case for waste, for diverting a watercourse, or obstructing lights,—could not have been enforced against the personal representatives of the tort-feasor;² and, even now, no action [*710] *can be maintained against them by that statute for a personal tort committed by him.³ Cases, however, do occur where an action

¹ With reference to this statute, see *Richmond v. Nicholson*, 8 Scott, 134; *Powell v. Rees*, 7 Ad. & E. 426; E. C. L. R. 34.

² 1 Wms. Saund. 216, n. (1); 2 Williams on Executors, 3d ed. 1358. See *Bacon v. Smith*, 1 Q. B. 348; E. C. L. R. 41. Where chattels, wrongfully in the possession of testator, continued in specie in the hands of his executor, replevin or detinue would have been maintainable to recover the specific goods. (Ib.; Bro. Abr., "Detinue," pl. 19; *Le Mason v. Dixon*, Sir W. Jones, 178, 174.)

³ 1 Wms. Saund. 216, n. (1); 3 Bla. Com. 302; Com. Dig., "Administration," (B. 15); 2 Inst. 382; *Ireland v. Champneys*, 4 Taunt. 884; 2 Chit. Arch. Pr., 7th ed. 1181. By stats. 30 Car. 2, st. 1, c. 7, and 4 & 5 Will. & M., c. 24, s. 12, the representatives of an executor or administrator who has committed waste are rendered liable: see 2 Wms. on Executors, 3d ed. 1358.

founded in tort may be brought in *assumpsit*, and such an action will, independently of the above act, lie against the executor.¹

In a recent case, where the question arose, whether the reigning sovereign was liable to make compensation for a wrong done by the servants, and during the reign of his predecessor? Lord Lyndhurst, C., observed, that if the case had been between subject and subject, an action could not have been supported, upon the principle that *actio personalis moritur cum personâ*; and although it was contended that a different rule prevails where the sovereign is a party, that some authority should be adduced for such a distinction.²

For a tort committed to the person, it is clear, then, that at common law no action can be maintained against the personal representative of the tort-feasor, nor does it seem that the recent stat. 9 & 10 Vict. c. 93, supplies any remedy against the *executors* or *administrators* of the party who, by his "wrongful act, neglect, or default," has caused the death of another; for the first section of this act renders that person liable to an action for damages, "who would have been liable if death had not ensued," in which case, as already stated, the personal representatives of the tort-feasor would *not* have been liable.

*It may be observed, in concluding this subject, that there are many cases respecting the rights of the assignees of a [*711] bankrupt to sue, and their liability to be sued, on a contract entered into by him; their title to recover damages for a tort sustained by him: and likewise respecting the right of action by or against a feme covert, surviving her husband, for an injury to her person or property, or for her tortious act committed before or during coverture; which cases are exceedingly similar in principle, and analogous to those which have been here cited and commented on. It cannot, however, be said with propriety that the maxim above illustrated is *strictly* applicable to such cases; and it has, therefore, been thought better to confine our attention to those in which the right of action or liability either survives the death of the party, or, in the words of the maxim, *moritur cum personâ*.³

¹ Per Lord Mansfield, C. J., *Hambly v. Trott*, 1 Cowp. 378; recognised, 4 B. & Ad. 829; E. C. L. R. 24. See, also, per Patteson, J., *Bird v. Relph*, 4 B. & Ad. 830; E. C. L. R. 24; *Wise v. Metcalfe*, 10 B. & C. 299, 308; E. C. L. R. 21; *Troup v. Smith's Executors*, 20 Johns. R. (U. S.) 33.

² *Viscount Canterbury v. Attorney-General*, 1 Phill. 322.

³ See the Judgment in *Drake v. Beckman* (in error), 11 M. & W. 315, (*) reversing S. C., 8 M. & W. 846; (*) 9 M. & W. 79; (*) *Bacon v. Smith*, 1 Q. B. 845, 848; E. C.

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*CHAPTER X.

MAXIMS APPLICABLE TO THE LAW OF EVIDENCE.

WE have, in a previous Chapter, investigated those rules of the law of evidence which relate peculiarly to the interpretation of written instruments; it is proposed in these concluding pages, to state some few additional rules which apply to other branches of the same law. Very little, however, has been here attempted beyond a statement and brief illustration of these principles; because, on reflection, it appeared desirable at once to refer the reader to those works of acknowledged authority, which enter at length into the comprehensive and difficult subject of the law of evidence, from which, after a patient consideration of the more important cases there indicated, a clear perception of the extensive applicability of the following maxim can alone be derived.

OPTIMUS INTERPRES RERUM USUS.

(2 Inst. 282.)

Usage is the best interpreter of things.

Custom, *consuetudo*, is a law not written, established by long usage and the consent of our ancestors;¹ and hence, it is said, that usage, *usus*, is the legal evidence of custom.² *Moreover, where a [*713] law is established by an implied consent, it is either common law or custom; if universal, it is *common law*;³ if particular to this or that place, then it is *custom*. When any practice was, in its origin, found to be convenient and beneficial, it was naturally repeated, continued from age to age, and grew into a law, either local or national.⁴ A custom, therefore, or customary law, may be defined

L. R. 41; Com. Dig. "Baron and Feme," (2 A.); per Bosaquet, J., *Vine v. Saunders*, 4 Bing., N. C. 102; E. C. L. R. 33; *Howard v. Crowther*, 8 M. & W. 601; (*) and per Lord Abinger, C. B., 8 M. & W. 843, 844; (*) *Rogers v. Spence*, 12 Cl. & Fin. 700; S. C., 13 M. & W. 571, (*) and 11 Id. 191. See *Sherrington v. Yates*, 12 M. & W. 855; (*) reversing *Judgments in S. C.*, 11 M. & W. 42. (*)

¹ Jacob, Law Dict., tit. "Custom."

² Per Bayley, J., 10 B. & C. 440; E. C. L. R. 21.

³ "In point of fact the common law of England, *lex non scripta*, is nothing but custom;" *Judgment, Nunn v. Varty*, 3 Curt. 368. But the claim of any particular place to be exempt from the obligation imposed by the common law, may also be properly called a custom. Id.

⁴ 3 Salk. 112.

to be an usage which has obtained the force of law, and is in truth, the binding law within a particular district, or at a particular place of the persons and things which it concerns; *consuetudo loci est observanda*.²

There are, however, several requisites to the validity of every custom. First, it must be *certain*, or capable of being reduced to a certainty.³ Therefore, a custom that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. And a custom to pay a year's improved value for a fine on a copyhold estate is good; for, although the value is a thing uncertain, yet it may at any time be ascertained.⁴ Secondly, the custom must be *reasonable* in itself;⁵ it is not, however, unreasonable, merely because it is contrary to a particular maxim or rule of the common law, for *consuetudo ex certâ causâ rationabili usitata privat communem legem*⁶— [*714] custom, when grounded on a certain and reasonable cause, supercedes the common law;⁷ in proof of which may be instanced the customs of gavelkind and borough English,⁸ which are directly contrary to the law of descent; or, again, the custom of Kent, which is contrary to the law of escheats.⁹ Neither is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth: as the custom to turn the plough upon the headland of another, which is upheld in favour of husbandry; or to dry nets on the land of another, which is likewise upheld in favour of fishing and for the benefit of navigation.¹⁰ But, on the other hand, a custom, which is contrary to the public good,

¹ Le Case de Tanistry, Davys, R. 81, 82; cited, Judgment, 9 Ad. & E. 421; E. C. L. R. 36; and in Rogers v. Brenton, 17 L. J., Q. B. 84, 45.

² 6 Rep. 67; 10 Rep. 139. See Busher, app., Thompson, resp., 4 C. B. 48; E. C. L. R. 56.

³ Ante, p. 481.

⁴ 1 Bla. Com. 78; 1 Roll. Abr. 565; Davys, R. 83.

⁵ Co. Litt. 118, a; Tyson v. Smith (in error), 9 Ad. & E. 406, 421; E. C. L. R. 36.

⁶ Litt. s. 169; Co. Litt. 38, b.

⁷ Ib. See Judgment, 5 Bing. 298; E. C. L. R. 15.

⁸ Ante, p. 262. The law takes notice of the custom of borough English, and the nature of this custom need not, therefore, be specially set forth in pleading. (Judgment, Doe d. Hamilton v. Clift, 12 Ad. & E. 579; E. C. L. R. 40.) The same remark applies to the custom of gavelkind. (Co. Litt. 175, b.)

⁹ See 2 Bla. Com. 84.

¹⁰ Judgment (in error), Tyson v. Smith, 9 Ad. & E. 421; E. C. L. R. 36; Co. Litt. 38, b. See Lord Falmouth v. George, 5 Bing. 286, 293; E. C. L. R. 15.

or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason, for it could not have had a reasonable commencement. For example, a custom set up in a manor on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad, for it is injurious to the multitude, and beneficial only to the lord.¹ So, a custom, that the lord of the manor shall have 3*l.* for every pound-breach of any stranger,² or that the lord of the manor may detain a [*715] *distress taken upon his demesnes until fine be made for the damage at the lord's will, is bad.³ In these and many other similar instances, the customs themselves are held to be void, on the ground of their having had no reasonable commencement, but as being founded in wrong and usurpation, and not on the voluntary consent of the people to whom they relate;⁴ for it is a true principle, that no custom can prevail against right, reason, or the law of nature. The will of the people is the foundation of that custom, which subsequently becomes binding on them; but, if it be grounded, not upon reason, but error, it is not the will of the people,⁵ and to such a custom the established maxim of law applies, *malus usus est abolendus*⁶—an evil or invalid custom ought to be abolished. Thirdly, the custom must have existed from time immemorial; so that, if any one can show its commencement, it is no good custom.⁷ And, fourthly, the custom must have continued without any interruption; for any interruption would cause a temporary cessation of the custom, and the revival would give it a new beginning, which must necessarily be within time of memory, and consequently the custom will be void. But this must be understood with regard to an interruption of the *right*; for an interruption of the possession only, for ten or twenty years, will not destroy the custom. As, if the *inhabitants [*716] of a parish have a customary right of watering their cattle

¹ Year-book, 2 H. 4, fol. 24, B. pl. 20; 1 Bla. Com. 77.

² See the reference, 9 Ad. & E. 422, n. (a); E. C. L. R. 36.

³ Ante, p. 85.

⁴ Judgment, 9 Ad. & E. 422; E. C. L. R. 36.

⁵ See Taylor, Civil Law, 8d ed. 245, 246; Noy, Max., 9th ed. p. 59, n. (a); Id. 60.

⁶ Litt. s. 212; 4 Inst. 274; 1 Bla. Com. 76; Hilton v. Earl Granville, 5 Q. B. 701; E. C. L. R. 48; (the question in which is not yet, we believe, finally decided), is an important case with reference to the reasonableness of a manorial custom or prescriptive right. See, also, Clayton v. Corby, 5 Q. B. 415; E. C. L. R. 48; where a prescriptive right to dig clay was held unreasonable: Gibbs v. Flight, 3 C. B. 581; E. C. L. R. 54. In Lewis v. Lane, 2 Myl. & K. 449, a custom inconsistent with the doctrine of resulting trusts was held to be unreasonable.

⁷ 1 Bla. Com. 76.

at a certain pool, the custom is not destroyed though they do not use it for ten years;—it only becomes more difficult to prove; but, if the right be in any way discontinued for a single day, the custom is quite at an end.¹

Where, then, continued usage has acquired the force of an express law, reference must be made to such usage in order to determine the rights and liabilities of parties, arising out of transactions which are affected by it; for *optimus interpret rerum usus*. But this maxim is also applicable to many cases, and under many circumstances, which are quite independent of customary law in the sense in which that term has been here used, and which are regulated by mercantile usage and the peculiar rules thereby recognised.

The law merchant, it has been observed, forms a branch of the law of England, and those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce; and, when so adopted, it is unnecessary to plead and prove them.²

Likewise, in cases relating to mercantile contracts, courts of law will, in order to ascertain the usage and understanding of merchants, examine and hear witnesses conversant with those subjects; for merchants have a style peculiar to themselves, which, though short, yet is understood by them, and of which usage and custom are the legitimate interpreters.³ And this principle is not confined to mercantile *contracts or instruments, although it has been more frequently applied to them than to others;⁴ but it may be stated [*717]

¹ 1 Bla. Com. 77.

² Judgment, 7 Scott, N. R. 827; ante, p. 541.

³ 3 Stark. Ev. 1033; cited, 8 B. & Ad. 733; E. C. L. R. 23; per Lord Hardwicke, C., 1 Ves. sen., 459. See *Startup v. Macdonald*, 7 Scott, N. R. 269, where the question was respecting the reasonableness of the time at which a tender of goods was made, in the absence of any usage of trade on the subject. Evidence of former transactions between the same parties is receivable for the purpose of explaining the meaning of the terms used in their written contract; *Bourne v. Gatliff*, 11 Cl. & Fin. 45. See, also, *Ford v. Yates*, 2 Scott, N. R. 645; *Walker v. Jackson*, 10 M. & W. 161; (*) *Johnston v. Osborne*, 11 Ad. & E. 549; E. C. L. R. 89; *Trueman v. Loder*, Id. 589; *Stewart v. Aberdein*, 4 M. & W. 211; (*) *Baxter v. Nurse*, 7 Scott, N. R. 80; *Caine v. Horsfall*, 17 L. J., Exch. 25, where the question was as to the meaning of the term "net proceeds;" *Reg. v. Stoke-upon-Trent*, 5 Q. B. 303; E. C. L. R. 48; *Robertson v. Jackson*, 2 C. B. 412; E. C. L. R. 52; *Partridge v. Bank of England*, 15 L. J., Q. B. 895.

⁴ Per Parke, J., *Smith v. Wilson*, 8 B. & Ad. 733; E. C. L. R. 23; which case has been repeatedly recognised, and where evidence was held admissible to show, that,

generally, that where the words used by parties have, by the known usage of trade, by any local custom, or amongst other particular classes, acquired a peculiar sense, distinct from the popular sense of the same words, their meaning may be ascertained by reference to that usage or custom.¹

Moreover, the question in such cases usually is, whether there was a recognised practice and usage with reference to the transaction out of which the written contract between the parties arose, and to which it related, which gave a particular sense to the words employed in it, so that the parties might be supposed to have used such words in that particular sense. In these cases "the character and description of evidence admissible for that purpose is *the fact* of a general usage and practice prevailing in the particular trade or business, not the judgment and opinion of the witnesses, for the [718] contract may be safely and correctly interpreted *by reference to the fact of usage, as it may be presumed such fact is known to the contracting parties, and that they contract in conformity thereto; but the judgment or opinion of the witnesses called affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge."²

In connexion with this subject we may further observe, that if there be evidence of an established usage at the stock exchange of a particular town according to which the brokers are responsible for their principals, and by which persons contracting look only to the brokers, a person employing a broker there impliedly empowers him to deal according to the recognised usage of the place, and his knowledge or ignorance of such usage seems to be immaterial.³

There is also another extensive class of cases to which reference has been made in a former chapter,⁴ and in which evidence of usage is admitted to explain and construe ancient grants or charters. Nor is there any difference in this respect between a private deed and the king's charter; in either case, evidence of usage may be given to expound the instrument, provided such usage is not inconsistent

by the custom of the country where the lease was made, the word *thousand*, as applied to rabbits, denoted *twelve hundred*. *Spicer v. Cooper*, 1 Q. B. 424; E. C. L. R. 41; is also in point.

¹ Judgment, *Robertson v. French*, 4 East, 135. See the cases, 2 Phill. Ev., 9th ed. 281, 288, 336.

² Judgment, *Lewis v. Marshall*, 8 Scott, N. R. 498.

³ *Bayliffe v. Butterworth*, Exch., 11 Jur. 1019, and cases there cited. *Mitchell v. Newhall*, 15 M. & W. 308. (*)

⁴ Ante, p. 532.

with, or repugnant to, its express terms.¹ So, the immemorial existence of certain rights or exemptions, as a modus or a claim to the payment of tolls, may be inferred from uninterrupted modern usage.²

*Lastly, evidence of usage is likewise admissible to aid in [*719] interpreting acts of Parliament, the language of which is doubtful; for *jus et norma loquendi* are governed by usage. The meaning of things spoken or written must be such as it has constantly been received to be by common acceptance,³ and that exposition shall be preferred, which, in the words of Sir E. Coke,⁴ is "approved by constant and continual use and experience:" *optima enim est legis interpretis consuetudo*.⁵

We shall conclude these very brief remarks upon the maxim *optimus interpret rerum usus* in the words of Mr. Justice Story, who observes, "The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *à fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or

¹ Per Lord Kenyon, C. J., *Withnell v. Gartham*, 6 T. R. 398; *Rex v. Salway*, 9 B. & C. 424, 485; E. C. L. R. 17; *Stammers v. Dixon*, 7 East, 200; per Lord Brougham, C., *Attorney-General v. Brazen Nose Coll.*, 2 Cl. & Fin. 317; per Tindal, C. J., 8 Scott, N. R. 813; ante, p. 532, n. 2.

² See per Parke, B., *Jenkins v. Harvey*, 1 Cr., M. & R. 894; (*) per Richardson, J., *Chod v. Tilsed*, 2 B. & B. 409; E. C. L. R. 6; *Earl of Egremont v. Saul*, 6 Ad. & E. 924; E. C. L. R. 38; *Rex v. Jolliffe*, 2 B. & C. 54; E. C. L. R. 9; *Brune v. Thompson*, 4 Q. B. 548; E. C. L. R. 45.

³ *Vaughan*, R. 169; *Argument*, *Rex v. Bellringer*, 4 T. R. 819.

⁴ 2 Inst. 18.

⁵ D. 1, 8, 37; per Lord Brougham, 8 Cl. & Fin. 354; cited, ante, p. 538.

[*720] custom; *for that would not only be to admit parol evidence to control, vary, or contradict written contracts; but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate declarations of the parties."¹

CUILIBET IN SUA ARTE PERITO EST CREDENDUM.

(Co. Litt. 125, a.)

Credence should be given to one skilled in his peculiar profession.

Almost all the injuries, it has been observed, which one individual may receive from another, and which are the foundation of numberless actions, involve in them questions peculiar to the trades and conditions of the parties; and, in these cases, the jury must, according to the above maxim, attend to the witnesses, and decide according to their number, professional skill, and means of knowledge. Thus, in an action against a surgeon for ignorance, the question may turn on a nice point of surgery. In an action on a policy of life insurance, physicians must be examined. So, for injuries to a mill worked by running water, and occasioned by the erection of another mill higher up the stream, millwrights and engineers must be called as witnesses. In like manner, many questions respecting navigation arise, which must necessarily be decided by a jury, as in the ordinary case of deviation on a policy of marine insurance, of seaworthiness, or where one ship runs down another at sea in consequence of bad steering.²

[*721] *Respecting matters, then, of science, trade,³ and others of the same description, persons of skill may not only speak as to facts, but are even allowed to give their opinions in evidence,⁴ which is contrary to the general rule, that the opinion of a witness is not evidence. Thus the opinion of medical men is evidence as to the state of a patient whom they have seen;⁵ and, even in cases where they have not themselves seen the patient, but have heard the symptoms and particulars of his state detailed by other witnesses at

¹ The Schooner Reeside, 2 Sumner, R. (U. S.) 567.

² Johnstone v. Sutton (in error), 1 T. R. 588, 589.

³ The importance attached to the *lex mercatoria*, or custom of merchants, may be referred to this maxim. See 1 Bla. Com. 75.

⁴ 1 Stark. Ev., 8d ed. 173, 175.

⁵ 2 Phil. Ev., 8th ed. 899.

the trial, their opinions on the nature of such symptoms have been admitted.¹ In prosecutions for murder, they have, therefore, been allowed to state their opinion, whether the wounds described by witnesses were likely to be the cause of death.²

With respect to the admissibility in evidence of the opinion of a medical man as to the state of mind of a prisoner when on his trial for the alleged offence, the following question was recently proposed to the judges by the House of Lords:³ "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind, at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time?" To the question thus proposed, the majority of the judges returned the following answer, which removes much of the difficulty which formerly existed with reference to this, the most important practical application of the maxim under review, and must be considered as laying down the rule upon this subject: "We think the medical man, under the circumstances supposed, cannot, in strictness, be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

Further, on the principle expressed by the maxim *cuiuslibet in sua arte perito est credendum*, ship-builders have been allowed to state their opinions as to the seaworthiness of a ship from examining a survey which had been taken by others, and at the taking of which they were not present; and the opinion of an artist is evidence as to the genuineness of a picture.³ But, although witnesses conversant with

¹ *Ib.*; Wright's case, Russ. & Ry. Cr. C. 456.

² See 8 Scott, N. R. 608.

³ 2 Phil. Ev., 8th ed. 901. So, evidence as to the genuineness of handwriting given by a witness possessing the requisite experience and skill is admissible, although little or no weight has, by many judges, been thought to be due to testi-

a particular trade may be allowed to speak to a prevailing practice in that trade, and although scientific persons may give their opinion on matters of science, it has been expressly decided, that witnesses are not receivable to state their views of matters of legal or moral obligation, nor on the manner in which others would probably have been influenced if particular parties had acted in one *way [*723] rather than another.¹ For instance, in an action on a policy of insurance, where a broker stated, on cross-examination, that in his opinion certain letters ought to have been disclosed, and that if they had, the policy would not have been underwritten; this was held to be mere opinion, and not evidence.² And, in like manner, it seems, notwithstanding some conflicting decisions, that the opinions of underwriters as to the materiality of facts, and the effect they would have had upon the amount of premium, would not, in general, be admissible in evidence; it being the province of the jury, and not of any witness, to decide what facts ought to be communicated.³ Where, however, the fixing the fair price and value upon a contract to insure is a matter of skill and judgment, and must be effected according to certain general rules and principles of calculation applied to the particular circumstances of each individual case, it seems to be matter of evidence to show whether the fact suppressed would have been noticed as a term of the particular calculation. In some instances, moreover, the materiality of the fact withheld would be a question of pure science: in others, it is very possible, that mere common sense, although sufficient to comprehend that the disclosure was material, would not be so to understand to what extent the risk was increased by that fact; and, in intermediate cases, it seems difficult in principle wholly to exclude evidence of the nature alluded to, although its importance may vary exceedingly according to circumstances.⁴ Thus, it *has been said,⁵ that the time of sailing [*724] *may* be very material to the risk. How far it is so, must

mony of this description. 2 Phil. Ev., 9th ed. 254; 2 Stark. Ev., 3d ed. 512; Doe d. Mudd v. Suckermore, 5 Ad. & E. 708; E. C. L. R. 31; Doe d. Jenkins v. Davies, 16 L. J., Q. B. 218.

¹ Judgment, Campbell v. Rickards, 5 B. & Ad. 846; E. C. L. R. 27; where the previous conflicting decisions are cited: Ramadge v. Ryan, 9 Bing. 333; E. C. L. R. 23. See, however, Chapman v. Walton, 10 Bing. 57; E. C. L. R. 25. Refer also to Greville v. Chapman, 5 Q. B. 781; E. C. L. R. 48.

² Carter v. Boehm, 3 Burr. 1905, 1913, 1914.

³ Per Gibbs, C. J., Durrell v. Bederly, Holt, N. P. C. 285. See note 1, supra; Park on Mar. Insur. 8th ed. 806.

⁴ 3 Stark. Ev., 3d ed. 887, 888.

⁵ Per Story, J., delivering Judgment, M'Lanahan v. The Universal Insurance Company, 1 Peters, R. (U. S.) 188.

essentially depend upon the nature and length of the voyage, the season of the year, the prevalence of the winds, the conformation of the coasts, the usages of trade as to navigation and touching and staying at port, the objects of the enterprise, and other circumstances, political and otherwise, which may retard or advance the general progress of the voyage. The material ingredients of all such inquiries are mixed up with nautical skill, information, and experience, and are to be ascertained in part upon the testimony of maritime persons, and are in no case judicially cognisable as matter of law. The ultimate fact itself, which is the test of materiality, that is, whether the risk be increased so as to enhance the premium, is, in many cases, an inquiry dependent upon the judgment of underwriters and others who are conversant with the subject of insurance.

In a recent and important case will be found a good illustration of the above maxim as it applies to the *legal* knowledge of a party, whose evidence it is proposed to take. In order to prove the law prevailing at Rome on the subject of marriage, a Roman Catholic bishop was tendered as a witness, and was subjected to examination as to the nature and extent of the duties of his office in its bearing on the subject of marriage, with the view of ascertaining whether he had such a peculiar knowledge of the law relative to marriage as would render him competent to give evidence respecting it. It appeared from this examination, that the witness had resided more than twenty years at Rome, and had studied the ecclesiastical law prevailing there on the above subject; that a knowledge of [*725] this law *was necessary in order to the due discharge of an important part of the duties of his office; that the decision of matrimonial cases, so far as they might be affected by the ecclesiastical and canon law, fell within the jurisdiction of the Roman Catholic bishops; and, further, that the tribunals at Rome would respect and act upon his decision or judgment in any particular case if it was unappealed from. It was held, that the witness came within the definition of *peritus*, and was admissible accordingly.¹

¹ The *Sussex Peerage*, 11 Cl. & Fin. 85. The maxim above briefly considered is also often applicable when a question arises as to the degree of weight due to the decision of a court of distinct and independent jurisdiction. See *Bunting v. Lepingwell*, 4 Rep. 29; cited, *Argument, Griffin v. Ellis*, 11 Ad. & E. 749; E. C. L. R. 39; *Burder v. Veley*, 12 Ad. & E. 253; E. C. L. R. 40. See also the remarks of Lord Langdale, M. R., in *Earl Nelson v. Lord Bridport*, 8 Beav. 527; *Baron de Bode v. Reg.*, 10 Jur. 217. "A long course of practice sanctioned by professional men, is often the best expositor of the law." Per Lord Eldon, C., *Candler v. Candler*, 1 Jac. 282.

OMNIA PRÆSUMUNTUR CONTRA SPOLIATOREM.

(Branch, Max., 5th ed., p. 80.)

Every presumption is made against a wrong-doer.

The following case will serve forcibly to illustrate the above maxim. An account of personal estate having been decreed in equity, the defendant charged the plaintiff with a debt as due to the estate. It was proved that the defendant had wrongfully opened a bundle of papers relating to the account, which had been sealed up and left in his hands. It further appeared that he had altered and displaced the papers, and that it could not be known what papers might have been abstracted. The Court, upon *proof of these facts, disallowed [*726] defendant's whole demand against the plaintiff, although the Lord Chancellor declared himself satisfied, as indeed the defendant swore, that all the papers entrusted to the defendant had been produced, the ground of this decision being that, *in odium spoliatoris omnia præsumuntur*.¹

If a man by his own tortious act, withhold the evidence by which the nature of his case would be made manifest, every presumption to his disadvantage will be adopted.² Where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him.³ Thus, where a person who has wrongfully converted property will not produce it, it shall be presumed as against him, to be of the best description.⁴ On the other hand, if goods are sold without any express stipulation as to the price, and the vendor prove the delivery of the goods, but give no evidence to fix their value, they are presumed to be worth the lowest price for which goods of that description sell; but if the vendee himself be shown to have suppressed the means of ascertaining the truth, then a contrary presumption arises, and the goods are taken to be of the very best description.⁵

¹ *Wardour v. Berisford*, 1 Vern. 452; S. C., Francis, M., p. 8. *Sanson v. Rumsey*, 2 Vern. 561, affords another illustration of the maxim. See, also, *Dalston v. Coatsworth*, 1 P. Wms. 731; *Gartside v. Ratcliff*, 1 Chanc. Cas. 292.

² 1 *Smith*, L. C. 158; 1 Vern. 19. The maxim likewise applies to the spoliation of ship's papers: *The Hunter*, 1 Dods. Adm. R. 480, 486.

³ 3 *Stark. Ev.* 8d ed. 987.

⁴ *Armory v. Delamirie*, 1 Stra. 504; followed in *Mortimer v. Cradock*, 12 L. J., C. P. 166.

⁵ *Clunnes v. Pezzey*, 1 Camp. 8. See *Hayden v. Hayward*, 1 Camp. 180.

According to the same principle, if a man withhold an *agreement under which he is chargeable, after a notice to produce, it is presumed, as against him, to have been properly stamped, until the contrary appear.¹ Where a public officer, such as a sheriff, produces an instrument, the execution of which he was bound to procure, as against him it is presumed to have been duly executed.² Moreover, if a person is proved to have defaced or destroyed any written instrument, a presumption arises, that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance, and, accordingly, slight evidence of the contents of the instrument will usually, in such a case, be sufficient.³ A testator made a will, by which he devised certain premises to A., and afterwards made another will, which was lost, and which the jury found, by special verdict, to have been different from the former will, though they did not find in what particular the difference consisted: the Court decided that the devisee under the first will was entitled to the estate; but Lord Mansfield observed, that, in case the devisee under the first will had destroyed the second, it would have been a good ground for the jury to find a revocation.⁴

With reference to the class of cases last mentioned, viz., where a deed or other instrument, which ought to be in the possession of a litigant party, is not produced, the general rule is, that the law excludes such evidence of facts, as, from the nature of the thing, supposes still better evidence in the *party's possession or *power*.^[*728] And this rule is founded on a sort of presumption that there is something in the evidence withheld which makes against the party producing it. But, if such evidence is shown to be unattainable, the presumption ceases, and the inferior evidence is admissible. If, therefore, a deed be in possession of the adverse party, and not produced, or if it be lost and destroyed, no matter whether by the adverse party or not, secondary evidence is clearly admissible; and, if the deed be in the possession of a third person, who is not by law compellable to produce it, and he refuses to do so, the result is the

¹ Crisp v. Anderson, 1 Stark., N. P. C. 85; E. C. L. R. 2.

² Scott v. Waitman, 8 Stark., N. P. C. 168; E. C. L. R. 14; Barnes v. Lucas, 1 Ry. & M. 264; E. C. L. R. 21.

³ 1 Phil. Ev., 9th ed. 447, and cases cited, Id. 448, n. (1); Annesley v. Earl of Anglesey, 17 Howell, St. Tr. 1480; 1 Stark. Ev., 3d ed. 409; Roe d. Haldane v. Harvey, 4 Burr. 2484; Lord Trimlestown v. Kemmis, 9 Cla. & F. 775.

⁴ Harwood v. Goodright, Cowp. 86.

same, for the object is then unattainable by the party offering the secondary evidence.¹

The fabrication of evidence, we may further remark, is calculated to raise a presumption against the party who has recourse to such a practice, even stronger than when evidence has been suppressed or withheld.

A considerable degree of caution should, nevertheless, be applied in cases of this latter description, more especially in criminal proceedings,² for experience shows that a weak but innocent man will sometimes, when appearances are against him, have recourse to falsehood and deception, for the purpose of manifesting his innocence and insuring his safety.³

[*729] *OMNIA PRÆSUMUNTUR SOLENNITER ESSE ACTA.

(Co. Litt. 6, b.)

All acts are presumed to be rightly done.

Where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution. In these cases the ordinary rule is, *omnia præsumuntur ritè et solenniter esse acta donec probetur in contrarium*⁴—everything is presumed to be rightly and duly performed until the contrary is shown.⁵ The following may be mentioned as general presumptions of law illustrating this maxim:—That a man acting in a public capacity, is duly authorized so to do;⁶ that the records of a court of justice

at the head of this section.

¹ Judgment, *Doe d. Gilbert v. Ross*, 7 M. & W. 121; (*) *Marston v. Downes*, 1 Ad. & E. 31; E. C. L. R. 28; *Cooke v. Tanswell*, 8 Taunt. 450; E. C. L. R. 4.

² As to the maxim in such cases, see, per Mounteney, B., 17 Howell, St. Tr. 1430; *Norden's case*, Fost., C. L. 129.

³ 1 Stark. Ev., 3d ed. 564, 565.

⁴ Co. Litt. 282; *Van Omeron v. Dowick*, 2 Camp. 44; *Doe d. Phillips v. Evans*, 1 Cr. & M. 461. (*) *Powell v. Sonnett*, 8 Bing. 381; E. C. L. R. 11, is a good instance of the application of this maxim. Presumption as to signature, *Taylor v. Cook*, 3 Price, 658. The Court will not presume any fact so as to vitiate an order of removal: per Denman, C. J., *Rex v. Stockton*, 5 B. & Ad. 550; E. C. L. R. 27; *See Reg. v. St. Paul, Covent Garden*, 7 Q. B. 282; E. C. L. R. 53; *Reg. v. Justices of Warwickshire*, 6 Q. B. 750; E. C. L. R. 51. As to an award, see per Parke, B., 12 M. & W. 251. (*)

⁵ See per Story, J., delivering judgment, *Bank of the United States v. Dandridge*, 12 Wheaton, R. (U. S.) 69, 70, where the above maxim is illustrated and explained.

⁶ Per Lord Ellenborough, C. J., *Rex v. Verelst*, 3 Camp. 432; *Monke v. Butler*, 1 Roll. R. 83; *M'Gahey v. Alston*, 2 M. & W. 206; (*) *Faulkner v. Johnson*, 11 M. & W. 581; (*) *Doe d. Hopley v. Young*, 15 L. J., Q. B. 9.

have been correctly made,¹ according to the rule, *res judicata pro veritate accipitur* ;² that judges and jurors do nothing causelessly and maliciously ;³ that the decisions of a court of competent jurisdiction are well founded, and their judgments regular ;⁴ and that *facts, without proof of which the verdict could not have been [*730] found, were proved at the trial.⁵ So, if the return to a mandamus be certain on the face of it, that is sufficient, and the Court cannot intend facts inconsistent with it, for the purpose of making it bad.⁶

Where the claimant of an ancient barony, which has been long in abeyance, proves that his ancestor sat as a peer in Parliament, and no patent or charter of creation can be discovered, it is now the established rule to hold that the barony was created by writ of summons and sitting, although the original writ of summons or enrolment of it is not produced.⁷ In the Hastings Peerage, it was proved that A. B. was summoned by special writ to Parliament in the 49th Hen. 3, but there was no proof that he ever sat, there being no rolls or journals of that period. A. B.'s son and heir, C. D., sat in the Parliament of 18 Edw. 1, but there was no proof that he was summoned to that Parliament, there being no writs of summons or enrolments of them extant from 49 Hen. 3 to 23 Edw. 1. It further appeared that C. D. was summoned to the Parliament of 23 Edw. 1, and to several subsequent Parliaments, but there was no proof that he sat in any of them. Held, that it might be well presumed that C. D. sat in the Parliament of the 18th of Edw. 1, in pursuance of a summons, on the principle that *omnia presumuntur legitime facta donec probetur in contrarium*.⁸

The presumption, *omnia ritè esse acta*, applies also to the acts of private individuals, especially where they are of a *formal [*731] character, as writings under seal.⁹ In ejectment, therefore,

¹ Reed v. Jackson, 1 East, 855.

² D. 50, 17, 207; Co. Litt. 108, a; Judgment, Magrath v. Hardy, 4 Bing., N. C. 796; E. C. L. R. 33; per Alderson, B., Hopkins v. Francis, 18 M. & W. 670.

³ Sutton v. Johnstone, 1 T. R. 508.

⁴ Per Bayley, J., 3 B. & C. 327; E. C. L. R. 10; Reg. v. Brennan, 16 L. J. Q. B. 289.

⁵ Per Buller, J., Spieres v. Parker, 1 T. R. 145, 146. See Rex v. Nottingham Water-works Company, 6 Ad. & E. 355; E. C. L. R. 38.

⁷ The Braye Peerage, 6 Cl. & Fin. 757; The Vaux Peerage, 5 Cl. & Fin. 526.

⁸ The Hastings Peerage, 8 Cl. & Fin. 144.

⁹ See the argument and judgment in Ricard v. Williams, 7 Wheaton, R. (U. S.) 59; Strother v. Lucas, 12 Peters, R. (U. S.) 452; S. P., 2 Id. 760. As to the proper custody of a deed more than thirty years old, see Doe d. Jacobs v. Phillips, 8 Q. B. 158; E. C. L. R. 55.

upon the assignment of a term to secure an annuity, a proper enrolment of the annuity deed, in pursuance of 17 Geo. 3, c. 26, has been presumed.¹ Likewise, upon proof of title, everything which is collateral to the title will be intended, without proof; for although the law requires exactness in the derivation of a title, yet, where that has been proved, all collateral circumstances will be presumed in favour of right;² and, wherever the possession of a party is rightful, the general rule of presumption is applied to invest that possession with a legal title.³ On the same principle, it is a general rule, that, where a person is required to do an act, the not doing of which would make him guilty of a criminal neglect of duty, it shall be intended that he has duly performed it, unless the contrary be shown—*stabit præsumptio donec probetur in contrarium*;⁴ negative evidence rebuts this presumption, that all has been duly performed.⁵ [*732] Thus, on an indictment *for the non-repair of a road, the presumption, that an award, in relief of the defendants, was duly made according to the directions of an enclosure act, may be rebutted by proof of repairs subsequently done to the road by the defendants; for, if the fact had been in accordance with such presumption, they ought not to have continued to repair.⁶

It is, however, important to observe, in addition to the above general remarks, that, in inferior courts and proceedings by magistrates, the maxim, *omnia præsumuntur ritè esse acta*, does not apply to give jurisdiction.⁷ Where, for instance, the examination of a soldier, taken before two magistrates, was tendered in evidence to

¹ Doe d. Griffin v. Mason, 8 Camp. 7; Talbot v. Hodson, 7 Taunt. 251; E. C. L. R. 2; 1 Phil. Ev., 9th ed. 451; and the examples of the above maxim, Id. n. (2); Breesford v. Newton, 1 C. M. & B. 901; (*) Doe d. Shelton v. Shelton, 8 Ad. & E. 265; E. C. L. R. 30. As to presumption of evidence of probate, see Doe d. Woodhouse v. Powell, 15 L. J., Q. B. 189.

² 3 Stark. Ev. 3d ed. 986; 2 Wms. Saund., 5th ed. 42, n. (7).

³ Per Lord Ellenborough, C. J., 8 East, 263. See Simpson, app., Wilkinson, resp., 8 Scott, N. R. 814; Doe d. Dand v. Thompson, 7 Q. B. 897; E. C. L. R. 53.

⁴ Wing. Max. 712; Hob. R. 297; 3 Bla. Com. 371; per Sir W. Scott, 1 Dods. Adm. R. 266; Davenport v. Mason, 15 Tyng, R. (U. S.) 2d. ed. 87. "It seems reasonable that presumption which is not founded on the basis of certainty, should yield to evidence which is the test of truth." Id.

⁵ Per Lord Ellenborough, C. J. Rex v. Haslingfield, 2 M. & S. 561; E. C. L. R. 28; recognising, Williams v. East India Company, 8 East, 192.

⁶ Rex v. Haslingfield, 2 M. & S. 558; E. C. L. R. 28; Manning v. Eastern Counties Railway Company, 12 M. & W. 287; (*) Doe d. Nanney v. Gore, 2 M. & W. 321; (*) Heysham v. Forster, 5 Man. & Ry. 277.

⁷ Per Holroyd, J., 7 B. & C. 790; E. C. L. R. 14.

prove his settlement, but it did not appear by the examination itself or by other proof, that the soldier, at the time when he was examined, was quartered in the place where the justices had jurisdiction, it was held not to be admissible.¹ So, in the case of an order by magistrates, their jurisdiction must appear on the face of such order; otherwise, it is a nullity, and not merely voidable.² Where an examination before removing justices left it doubtful whether the examination had been taken by a single justice, or by two, the Court stated that they would look at the document as lawyers, and would give it the benefit of the legal presumption in its favour; and it was observed, that the maxim, *omnia præsumuntur ritè esse acta*, applied in this case with particular effect, since the fault, if there really had been one, was an *irregular assumption of power [733] by a single justice, as well as a fraud of the two, in pretending that to have been done by two which was, in fact, done only by one.³

In a case recently decided, the following remarks were made in reference to this subject, which may be here advantageously inserted:— It cannot be doubted, that, where an inferior court (a court of limited jurisdiction, either in point of place or of subject-matter) assumes to proceed, its judgment must set forth such facts as show that it has jurisdiction, and must show also in what respect it has jurisdiction. But it is another thing to contend that it must set forth all the facts or particulars out of which its jurisdiction arises. Thus, if a power of commitment or other power is given to justices of a county, their conviction or order must set forth that they are two such justices of such county, in order that it may be certainly known whether they constitute the tribunal upon which the statute they assume to act under has conferred the authority to make that order or pronounce that conviction. But, although it is necessary that the jurisdiction of the inferior court should appear, yet there is no particular form in which it should be made to appear. The Court above, which has to examine, and may control, the inferior court, must be enabled, somehow or other, to see that there is jurisdiction such as will support the proceeding; but in what way it shall so see it is not material, provided

¹ Rex v. All Saints, Southampton, 7 B. & C. 785; E. C. L. R. 14.

² Per Bayley, J., 7 B. & C. 790; E. C. L. R. 14; Rex v. Hulcott, 6 T. R. 583; Rex v. Helling, 1 Stra. 8; Rex v. Chilverscoton, 6 T. R. 178; Rex v. Holm, 11 East, 381.

³ Reg. v. Silkstone, 2 Q. B. 520; E. C. L. R. 42; and cases cited, p. 729, note (4).

it does so see it.¹ The rule, therefore, may be stated to be, that, where it appears upon the face of the proceedings that the inferior [*734] court has jurisdiction, it *will be intended that the proceedings are regular; but that, unless it so appears,—that is, if it appear affirmatively that the inferior court has no jurisdiction, or, if it be left in doubt, whether it has jurisdiction or not,—no such intendment will be made.² The rule of pleading, indeed, upon this subject, may be summed up thus:—“The old rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of the *superior* court but that which specially appears to be so; nothing is intended to be within the jurisdiction of an *inferior* court but that which is expressly alleged.”³

In the recent case of *Gosset v. Howard*,⁴ the Court of Exchequer Chamber held, that the warrant of the Speaker of the House of Commons must be construed by the rules applied in determining as to the validity of the warrants and writs issuing from a *superior* court; and they remarked, that, with respect to writs so issued, it must be presumed that they are duly issued, that they have issued in a case in which the Court had jurisdiction, unless the contrary appear on the face of them, and that they are valid of themselves, without any allegation other than that of their issue, and a protection to all officers and others in their aid acting under them. Many of the writs issued by superior courts do, indeed, upon the face of them, recite the cause of their issuing, and show their legality—writs of execution for instance. Others, however, do not, and, though unquestionably valid, are framed in a form which, if they had proceeded from [*735] magistrates or persons having a special jurisdiction *unknown to the common law, would have been clearly insufficient, and would have rendered them altogether void. With respect to the Speaker's warrant, the Court held themselves bound to construe it

¹ Per Lord Brougham, *Taylor v. Clemson*, 11 Cl. & Fin. 610, affirming the judgment of the Exchequer Chamber in S. C., 2 Q. B. 978; E. C. L. R. 42. In this case, many authorities as to the necessity of showing jurisdiction are collected and reviewed. See, also, the cases cited, argument, *Reg. v. Ardsley*, 5 Q. B. 78; E. C. L. R. 48.

² Per Tindal, C. J., *Dempster v. Purnell*, 4 Scott, N. B. 39, citing *Moavia v. Sloper*, Willes, 30, and *Titley v. Foxall*, Id. 688.

³ Argument, *Peacock v. Bell*, 1 Wms. Saund, 73; adopted *Gosset v. Howard*, 16 L. J., Q. B. 349.

⁴ 16 L. J., Q. B. 345, where the cases with respect to the validity of warrants were cited in argument.

with at least as much respect as would be shown to a writ out of any of the courts of Westminster; observing, in the language of Mr. Justice Powys,¹ that the House of Commons is a great court, and that all things done by them must be presumed to have been *rite acta*.²

RES INTER ALIOS ACTA ALTERI NOCERE NON DEBET.

(Wing. Max., p. 327.)

A transaction between two parties ought not to operate to the disadvantage of the third.

Of maxims relating to the law of evidence, the above may certainly be considered as one of the most important and most practically useful; its effect is to prevent a litigant party from being concluded, or even affected, by the evidence, acts, conduct, or declaration of strangers.³ On a principle of good faith and mutual convenience, a man's own acts are binding upon himself,⁴ and are, as well as his *conduct and declarations, evidence against him; but it would not only be highly inconvenient, but also manifestly unjust, [*736] that a man should be bound by the acts of mere unauthorized strangers; and if a party ought not to be bound by the acts of strangers, so neither ought their acts or conduct to be used as evidence against him.⁵

The above rule, then, operates to exclude all the acts, declarations, or conduct of others as evidence to bind a party, either directly or by inference; so that, in general, no declaration, written entry, or affidavit made by a stranger, is evidence against a man; nor can a person be affected, still less concluded, by any evidence,⁶ decree, or judgment to which he was not actually, or, in consideration of law,

¹ Reg. v. Paty, 2 Ld. Raym. 1105, 1108.

² Judgment, Gosset v. Howard, *supra*.

³ The maxim as to *res inter alios acta*, was much considered in Meddowcroft v. Huguenin, 3 Curt. R. 408, where the issue of a marriage which had been pronounced null and void by the Consistorial Court, attempted unsuccessfully to impeach that sentence in the Prerogative Court. See S. C., 4 Moore, P. C. C. 386.

⁴ As between the parties, or as against one party, even a fraudulent deed may be good according to the principle, that "no man can allege his own fraud in order to invalidate his own deed;" Doe d. Roberts v. Roberts, 2 B. & Ald. 367, 369; recognised, Bessey v. Windham, 6 Q. B. 166, 172; E. C. L. R. 51; ante, p. 127. See Doe d. Gaisford v. Stone, 15 L. J., C. P. 234.

⁵ 1 Stark. Evid., 3d ed. 58, 59, from which valuable work many of the remarks appended to the above maxim have been extracted.

⁶ See Humphreys v. Pensam, 1 My. & Cr. 580.

privy. From an important case,¹ immediately connected with this subject, the following remarks are extracted:—It is certainly true, as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding upon a third party, for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous; and, therefore, the depositions of witnesses in another cause in proof of a fact, the verdict of a jury [*737] finding the fact, and the judgment of the *Court upon facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers.

As between the parties to the original suit, it will be merely necessary to observe, that the judgment of a Court of concurrent jurisdiction directly upon the point is as a plea in bar, or as evidence conclusive between *the same parties* upon the same matter directly in question in another court. But, where the judgment of a Court of competent jurisdiction has been pronounced in rem, and has actually operated upon the status of a particular thing, it may happen that some other Court, proceeding likewise in rem, may pronounce a contrary judgment on the same subject-matter, in which case it must be looked upon as arrogating to itself and exercising the functions of a court of appeal, and it is only in this point of view that its decision can be considered as warrantable. It must be further observed, that in no case can a judgment be evidence of any matter which came collaterally in question, though within the jurisdiction of the court, nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment; and the above rule applies not only to the parties to the judgment, but likewise to the privies thereto.²

As regards third persons, it is peculiarly necessary to observe the

¹ See the opinion of the judges in the Duchess of Kingston's case, 11 Howell, State Trials, 261. See, also, Davies, demand., Lowndes, tenant, 7 Scott, N. R., 141; Doe d. Bacon v. Brydges, Id. 333; Lord Trimlestown v. Kemmis, 9 Cl. & Fin. 781. The general rule stated in the text has, however, been departed from in certain cases; for instance, in questions relating to manorial rights, public rights of way, immemorial custom, disputed boundary, disputed modus, and pedigrees. With regard to these exceptions, see the Law Mag., No. 1, N. S., p. 217.

² See the note to the Duchess of Kingston's case, 2 Smith, L. C. 486; Doe d. Lord Downe v. Thompson, Q. B. 11 Jur. 1007; ante, p. 246.

distinction between judgments strictly *inter partes* and those in *rem*; a judgment *inter partes* being, in general, conclusive between the original parties only; whereas a judgment in *rem* renders the thing adjudicated upon, *ipso facto*, such as it is thereby declared to be, and is, therefore, *of effect as between all persons whatever. Thus, [*738] a grant of probate or of administration is in the nature of a decree in *rem*, and actually invests the executor or administrator with the character which it declares to belong to him; and such grant of probate or administration is accordingly (if genuine, unrevoked, and granted by a Court of competent jurisdiction) conclusive as against all the world.¹ So, the sentence of a foreign Court of Admiralty, duly constituted and of competent jurisdiction, decreeing a ship to be lawful prize, is conclusive as to that which is in it, and as to the existence of the ground on which it professes to proceed, against all persons, until reversed by a regular court of appeal; all the world, it has been said, are parties to such a sentence.² And, generally, where any statute or law, decree or judgment, is of a public nature, or operates in *rem*, the rule as to *res inter alios acta* does not apply, for to such proceedings all are privy.³

It is likewise requisite to notice the distinction which exists between the case in which a verdict or judgment *inter partes* is offered in evidence, with a view to establish the mere fact that such a verdict was given, or such a judgment pronounced, and that in which it is offered as a means of proving some fact which is either expressly found by the *verdict, or upon the supposed existence [*739] of which the judgment can alone be supported. In the latter case, as above stated, the evidence will not, in general, be admissible to conclude a third party; whereas, in the former, the judgment itself is invariably not only admissible as the proper legal evidence to prove the fact, but is usually conclusive evidence for that purpose, since it must be presumed that the Court has made a faithful record

¹ See per Buller, J., *Allen v. Dundas*, 8 T. R. 129.

² Per Lord Mansfield, C. S., *Bernardi v. Motteux*, Dougl. 581; *Hughes v. Cornelius*, 2 Show. 232; per Lord Ellenborough, C. J., *Bolton v. Gladstone*, 5 East, 160; 2 Park. Mar. Insur., 8th ed. 718; *Kindersley v. Chase*, cited Id. 743. As to foreign judgments generally, see *Callander v. Dittrich*, 4 Scott, N. R. 682; *Cowan v. Braidwood*, 2 Scott, N. R. 138; *The General Steam Navigation Company v. Gwillou*, 11 M. & W. 877; (*) *Judgment, Henderson v. Henderson*, 6 Q. B. 298; E. C. L. R. 51; *Reynolds v. Fenton*, 8 C. B. 187; E. C. L. R. 54; *Houlditch v. Marquis of Donegal*, 2 Cl. & Fin. 476, 477.

³ 1 Stark. Evid., 8d ed. 61, 62; *Pim v. Curell*, 6 M. & W. 234. (*)

of its own proceedings. Moreover, the mere fact that such a judgment was given, can never be considered as *res inter alios acta*, being a thing done by public authority; neither can the legal consequences of such a judgment be ever so considered, for, when the law gives to a judgment a particular operation, that operation is properly shown and demonstrated by means of the judgment, which is no more *res inter alios* than the law which gives it force.¹

Having thus noticed that the general rule as to *res inter alios acta* is not applicable, first, where a judgment is in rem, and, secondly, where it is offered as evidence merely to show that such a judgment was, in fact, given, we shall proceed to observe briefly on several extensive classes of cases in which, likewise, this rule has no application.

Thus, where the acts or declarations of others have any legal operation material to the subject of inquiry, they must necessarily be admissible in evidence, and the legal consequences resulting from their admission can no more be regarded as *res inter alios acta* than the law itself. For instance, where a question arises as to the right to a personal *chattel, evidence is admissible, even against [*740] an owner who proves that he never sold the chattel, of a subsequent sale of the chattel in market overt; for although he was no party to the transaction, which took place entirely between others, yet as such a sale has a legal operation on the question at issue, the fact is no more *res inter alios* than the law which gives effect to such a sale. So, in actions against the sheriff, it very frequently happens that the law depends wholly on transactions to which the sheriff is personally an entire stranger; as, where the question is as to the right of ownership in particular property seized under an execution; and in these cases all transactions and acts between others are admissible in evidence, which, in point of law, are material to decide the right of property.²

In an action of assumpsit for making and fixing iron railings to certain houses belonging to the defendant, the defence was, that the credit was given to A., by whom they were built under a contract, and not to the defendant. A., who had become a bankrupt since the railing was furnished, was called as a witness for the defendant, and having stated that the order was given by him, he was asked what

¹ 1 Stark. Evid., 3d ed. 252. King v. Norman, 17 L. J., C. P. 23, may be mentioned as a very recent instance of the distinction above stated.

² 1 Stark. Evid. 3d ed. 61.

was the state of the account between himself and the defendant in reference to the building of the houses, at the time of his bankruptcy. To this question A.'s reply was, that the defendant had overpaid him by £350. On the part of the plaintiff it was insisted, that the state of the account between A. and the defendant was not admissible in evidence; that it was *res inter alios acta*, and that the inquiry was calculated improperly to influence the jury. It was held, however, by the court, in banc, that the evidence was properly received; and Erle, J., remarked, that in an *action for goods sold and delivered, a common form of defence is, that the defendant is [*741] liable to pay another person, and that in such cases the jury usually come to the conclusion that the defendant in reality wants to keep the goods without paying for them; that the evidence in question went to show the bona fides of the defence by proving payment to such third person; and that it was not therefore, open to the objection of being *res inter alios acta*.¹

An exception similar to the preceding occurs, where the conduct or declaration of another operates, not by way of admission or mere statement, but as *evidence* which the law admits, as being, under the particular circumstances, not only free from objection, but conducive to the ends of justice. Thus, if A. make a private memorandum of a fact in which B. has an interest, this memorandum, generally speaking, would not be evidence against B. : it would fall within the description of *res inter alios acta*; but, if it were a memorandum of a fact peculiarly within the knowledge of A., and made in the usual course of business, and especially if A. by that entry charged himself, it would be admissible in evidence after the death of A. ;—not that it operates against B. by way of admission of the fact; for, if so, it would be admissible whether A. were living or dead; but because, under the circumstances above stated, the law considers the entry to be a proper medium for communicating the original fact to the jury, the testimony of A. himself being unattainable.²

It has long been an established principle of evidence, that, if a party who has knowledge of a fact, make an entry of it, whereby he charges himself, or discharges another upon whom he would otherwise have had a claim, such entry is admissible after his death in

¹ Gerish v. Chartier, 1 C. B. 18, 17; E. C. L. R. 50.

² 1 Stark. Evid., 8d ed. 62.

[*742] evidence of the fact, *because it is against his own interest ;¹ or, as it has been said, an entry by a man against his own interest is evidence against all the world ;² and, in order to render an entry such as the above admissible, it is only necessary to prove the handwriting and death of the party who made it.³

In the leading case on this subject, it was held, that an entry made by a man-midwife, who had delivered a woman of a child, of his having done so on a certain day, referring to his ledger, in which he had made a charge for his attendance, which was marked as "paid," was evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery.⁴ Here, it will be remarked, the entry was admitted, because the party, by making it, discharged another, upon whom he would otherwise have had a claim. In another case, which was an action of trover by the assignees of a bankrupt, two entries made by an attorney's clerk in a day-book kept for the purpose of minuting his transactions, were [*743] held admissible, by the first *of which the clerk acknowledged the receipt of £100 from his employer for the purpose of making a tender, and in the second of which he stated the fact of tender and refusal ; for, if an action had been brought by the official assignee of the bankrupt against the clerk for money had and received, the plaintiff could have proved by the first entry that the defendant had received the £100 ; and, by the second, he could have shown that the object for which the money was placed in the defendant's hands had not been attained. Consequently, the declaration might be considered as the entry of a fact within the knowledge of

¹ See per Bayley, J., *Doe d. Beece v. Robson*, 15 East, 84.

² Per Bayley, B., *Gleadow v. Atkin*, 1 Cr. & M. 423, (*) *adverting to Middleton v. Melton*, 10 B. & C. 317 ; *E. C. L. R. 21*. In *Doe d. Sweetland v. Webber* (1 Ad. & E. 740), Lord Denman, C. J., observes, "Mere want of interest, not coupled with other circumstances, has never, as far as I know, been held a ground for admitting declarations as evidence."

³ Per Parke, J., 3 B. & Ad. 889 ; *E. C. L. R. 23*.

⁴ *Higham v. Ridgway*, 10 East, 109. See *Musgrave v. Emmerson*, 16 L. J., Q. B. 174 ; *Reg. v. Inhabitants of Worth*, 4 Q. B. 182 ; *E. C. L. R. 45*. In *Higham v. Ridgway*, it should be observed, there was evidence to show that the work for which the charge was made was actually done. (See *Doe d. Gallop v. Vowles*, 1 M. & Rob. 261.) Moreover, it will not be a valid objection to the admissibility of an entry, that it purports to charge the deceased, and afterwards to discharge him ; for such an objection would go to the very root of this sort of evidence. (Per Lord Tenterden, C. J., *Rowe v. Brenton*, 3 Man. & Ry. 267.) In *The Sussex Peerage*, 11 Cl. & Fin. 112, Lord Brougham remarks, that, "The law in *Higham v. Ridgway* has been carried far enough, although not too far."

the deceased, which rendered him subject to a pecuniary demand.¹ And, generally, it may be observed, that the rule as to *res inter alios acta* does not apply to exclude entries made by receivers, stewards, and other agents charging themselves with the receipt of money; such entries being admissible, after their decease, to prove the fact of their receipt of such money.² Nor does this rule operate in other cases to exclude the admission in evidence of declarations against the interest of the deceased. For instance, an occupier proved to be in possession of a piece of land is *primâ facie*, presumed to be owner in fee, and his declaration is receivable in evidence, when it shows that he was only tenant for life or years.³ So, in an issue between A. and B., whether C. died possessed of certain property, her declaration, that she had assigned it to A., was held admissible.⁴ But it is clear, that a person who had parted with his interest in property cannot be allowed *to divest the right of [744] another claiming under him by any statement which he may choose to make;⁵ and, therefore, the declarations of a person who had conveyed away his interest in an estate by executing a settlement, and had subsequently mortgaged the same estate, were, after the death of the mortgagor, held inadmissible, on behalf of the mortgagee, to show that money had actually been advanced upon the mortgage.⁶

An entry will also be admissible in evidence, if made at the time of the transaction to which it relates, in the usual course and routine of business, by a person (since deceased) who has no interest to misstate what had occurred. The case⁷ usually referred to as establishing the above rule, was an action brought by the plaintiff, who was a brewer, against the Earl of Torrington, for beer sold and delivered; and the evidence given to charge the defendant showed, that the usual way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brewhouse, and gave him an

¹ Marks v. Laheë, 3 Bing., N. C. 408; E. C. L. R. 32.

² Per Parke, J., Middleton v. Melton, 10 B. & C. 327; E. C. L. R. 21.

³ Judgment, Crease v. Barrett, 1 C., M. & R. 981; (*) per Mansfield, C. J., Peaceable v. Watson, 4 Taunt. 16; Davies v. Pearce, 2 T. R. 58; Lord Trimlestown v. Kemmis, 9 Cl. & Fin. 780.

⁴ Ivat v. Finch, 1 Taunt. 141.

⁵ Per Lord Denman, C. J., 1 Ad. & E. 740; E. C. L. R. 28.

⁶ Doe d. Sweetland v. Webber, 1 Ad. & E. 738; E. C. L. R. 28. As to declarations against interest, see also The Sussex Peerage, 11 Cl. & Fin. 85; per Lord Denman, C. J., Davis v. Lloyd, 1 Car. & K. 276; E. C. L. R. 47.

⁷ Price v. Earl of Torrington, 1 Salk. 285.

account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen signed their names, and that the drayman was dead whose name appeared signed to an entry stating the delivery of the beer in question. This was held to be good evidence of a delivery.

Another important case on this subject was an action of ejectment, on the trial of which it was proved to be the usual course of practice [^{*745}] in an attorney's office for the clerks *to serve notices to quit on tenants, and to endorse on duplicates of such notices the fact and time of service; that, on one occasion, the attorney himself prepared a notice to serve on a tenant, took it out with him, together with two others, prepared at the same time, and returned to his office in the evening, having endorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant; and two of the notices were proved to have been delivered by him on that occasion. The endorsements so made were held admissible, after the attorney's death, to prove the service of the third notice. It is necessary, however, that the particular entry be contemporaneous with the circumstance to which it relates; that it be made in the course of performing some duty, or discharging some office; and that it be respecting facts necessary to the performance of such duty; for, if the entry contain a statement of other circumstances, however naturally they may be thought to find a place in the narrative, it will not be legal proof of those circumstances.³

In like manner, the declarations of deceased persons, and evidence of reputation in matters of public prescription, pedigree,³ and character, are admissible; not because strangers have any power to conclude a party by what they may choose wantonly to assert upon the subject in question; but because the law considers such evidence to be sufficiently deserving of credit, as a means of communicating the real fact, to be offered to a jury.⁴ So, where declarations accompany an act, they must be either regarded as part of the *res*

¹ Doe d. Patteshall v. Turford, 8 B. & Ad. 890; E. C. L. R. 23; Reg. v. Inhabitants of Worth, 4 Q. B. 182; E. C. L. R. 45. See, also, Poole v. Dicas, 1 Bing., N. C. 649; E. C. L. R. 27.

² Chambers v. Bernasconi (in error), 1 C., M. & R. 347; (*) affirming the judgment in S. C., 1 Cr. & J. 451; per Parke, J., 8 B. & Ad. 897, 898; E. C. L. R. 23.

³ See Doe d. Jenkins v. Davies, 16 L. J., Q. B. 218.

⁴ Thus evidence of reputation is admissible to prove the line of boundary of a reputed manor. Doe d. Molesworth v. Sleeman, 15 L. J., Q. B. 388. Or a right of common *pur cause de vicinage*, Pritchard v. Powell, Id. 166.

gestæ, *or as the best and most proximate evidence of the [*746] nature and quality of the act; the connexion with which either sanctions them as direct evidence, or constitutes them indirect evidence, from which the real motive of the actor may be duly estimated.

Thus, an action was brought by a man on a policy of insurance on the life of his wife;¹ and the question arose as to the admissibility of declarations made by the wife, when lying in bed, apparently ill, as to the bad state of her health, at the period of getting the regular surgical certificate, and down to that time. These declarations were made to the witness, who was produced at the trial to relate the wife's own account of the cause of her being found in bed by witness at an unseasonable hour, and with the appearance of being ill, and were held admissible, on the same ground, that inquiries of patients, by medical men with the answers to them, are evidence of the state of health of the patient at the time; and it was further observed, that this was not only good evidence, but the best evidence which the nature of the case afforded.

Again, where a question arises as to whether a trader ordered himself to be denied when at home, or left his house in order to delay creditors, what he said at the time of the act done must necessarily be admitted to explain it, though not what he said at another time.²

So, where a bankrupt has done an equivocal act, his declarations accompanying the act are admissible to explain his *inten- [*747] tions; and, in order to render them so, it is not requisite that such declarations were made at the precise time of the act in question. In the leading case³ on this point, a declaration by a bankrupt, made the day after the act, was held admissible; and now it is established that the Court will, in each case, consider whether the declaration proposed to be received does or not come within a reasonable time of the disputed act.⁴ As, if the question arise, whether a particular security were given by way of fraudulent preference, the material inquiry will be, what was the situation, conduct, and language of the bankrupt with reference to the whole transaction.⁵

¹ *Aveson v. Ld. Kinnaird*, 6 East, 188. See 1 Phill. Evid., 9th ed. 190.

² *Argument*, 6 East, 191; per *Tindal*, C. J., 9 Bing. 852; E. C. L. R. 28.

³ *Bateman v. Bailey*, 5 T. R. 512.

⁴ Per *Tindal*, C. J., *Ridley v. Gyde*, 9 Bing. 852; E. C. L. R. 23; *Rawson v. Haigh*, 2 Bing. 99; E. C. L. R. 9. See *Smith v. Cramer*, 1 Bing., N. C. 585; E. C. L. R. 27.

⁵ Per *Bosanquet*, J., 9 Bing. 855; E. C. L. R. 28.

So, in cases of treason and conspiracy, it is an established rule, that, where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the plan originally concerted, and with reference to the common object, is, in the contemplation of law, the act of the whole party ;¹ though where a question arises as to the admissibility of documentary evidence, for the purpose of implicating a party and showing his acquiescence in such illegal purpose and common object, it will always be necessary to consider whether the rule *scribere est agere*² applies, or whether the evidence in question is merely the narrative of some third party of a particular occurrence, and, therefore, in its nature hearsay, and not original evidence.

The substance of the preceding remarks, showing the more important limitations of the general rule **res inter alios acta alteri nocere non debet*, may be thus stated in the words of a learned judge :—One great principle in the law of evidence is, that all such facts as have not been admitted by the party against whom they are offered, or some one under whom he claims, ought to be proved under the sanction of an oath (or its equivalent introduced by statute—a solemn affirmation), either on the trial of the issue, or some other issue involving the same question, between the same parties, or those to whom they are privy. To this rule certain exceptions have been recognised, some from very early times, on the ground of necessity or convenience ; such as the proof of the quality and intention of acts by declarations accompanying them, of pedigrees and of public rights by the statement of deceased persons presumably well acquainted with the subject, as inhabitants of the district, in the one case, or relations, within certain limits, in the other ; and another exception occurs, where proof of possession is allowed to be given, by the entries of deceased stewards or receivers charging themselves, or proof of facts of a public nature by public documents.³

¹ Per Bayley, J., *Watson's case*, 32 Howell, State Trials, 7 Reg. v. Blake, 6 Q. B. 126 ; E. C. L. R. 51.

² Ante, p. 229.

³ Per Parke, B., 7 Ad. & E. 884, 885 ; E. C. L. R. 34. For additional information as to the maxim respecting *res inter alios acta*, the reader is referred to 1 Tayl. Ev. 288 et seq.

HAVING thus briefly touched upon some few rules relating chiefly to the admissibility of evidence, and having considerably exceeded the limits which I thought it desirable at the outset of this undertaking to prescribe to myself, I now feel compelled reluctantly to take leave of the reader, trusting that, however slight or disproportioned this attempt may appear, when compared with the extent and *importance of the subject, I have yet, in the language of Lord [*749] Bacon, applied myself, not to that which might seem most for the ostentation of mine own wit or knowledge, but to that which may yield most use and profit to the student ; and have, at least, afforded some materials for acquiring an insight into those conclusions of reason—those *legum leges*—which are essential to the true understanding and proper application of the law.

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