YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS

Published monthly during the Academic year, by students of the Yale Law School.
P. O. Address, Box 893, Yale Station, New Haven, Conn.

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Hon. Macgrane Coxe has been obliged to postpone the completion of his article on Chancellor Kent, the first half of which appeared in the March number of this volume. The concluding portion of Mr. Coxe's article will appear in the June issue.

The Journal takes great pleasure in announcing the appointment of the following men to the Editorial Board: Claude Chesterfield Fogle, Grad.; Harold Espe Drew, '08; Carleton Hickox Stevens, '08; Henry Fleischner, '09; Henry Joseph Calnen, '09; William James Larkin, Jr., '09; Edward Robert McGlynn, '09; Edward Jerome Quinlan, '09; William Webb, '09; George Leroy Weeks, '09.

The German *Reichstag* has recently taken action looking towards the adoption of a uniform law in respect to bills of exchange; and Dr. Felix Meyer of Berlin is now preparing a draft of a bill for this purpose. Dr. Meyer is the Secretary of the Berlin *Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre*, and the author of a treatise on the subject of International Exchange, which appeared in 1906. The plan of the promoters of this movement is to submit the measure, when in proper form, to the German *Handelstag*, and then probably to an international Conference, as a basis of an international convention for a uniform law on the same subject between nations.

The International Law Association formulated certain rules in regard to foreign bills of exchange, in 1881 (Report for 1881, p. 231). The Institute of International Law has done the same (Annuaire, VIII, 96). These efforts will have a new interest, in view of this action of the *Reichstag*. It has been an affair of jurists: it has now become one of governments. As the United States have now, under our Negotiable Instruments Acts, substantially a uniform law for themselves as to bills and notes, our government would naturally be disposed to favor a plan for a universal agreement, if Germany takes the initiative. It is vexatious to merchants to have the same paper pronounced a

good bill of exchange here, and no bill of exchange in Paris or Vienna, as was the case in *Amsinck v. Rogers*, 189 N. Y., 252, 82 Northeastern, 134. There ought to be no serious difficulty in the adoption of one form, good everywhere; though in disposing of the rights of indorsees, there are necessary difficulties, which have embarrassed previous Conferences of nations called to deal with the general subject. Both the present German Statute of Bills and the British Chalmers Act of 1882 have certain rules respecting a conflict of laws, but they can hardly be deemed, even within their restricted fields, to be adequate to the necessities of commerce.

CRIMINAL LAW—CHARGE TO THE JURY.

Although many of our courts are in motion in the right direction, away from the realm of technicalities, only too often we find others taking a backward step. The recent case of *State v. Seaboard Air Line Ry.*, (N. C.) 59 S. E. 1048, is another triumph of mere technicalities. In this case the defendant railroad was indicted under a statute prohibiting the running of freight trains on Sunday between certain hours. There was only one witness at the trial. He testified that he saw two freight trains pass a certain place on Sunday. The defendant introduced no witnesses whatever. The judge charged the jury that "if they believed the evidence" they should bring in a verdict of guilty. This was held to be error.

In nearly all jurisdictions it is error for a judge to direct a verdict of guilty in a criminal case, where the defendant pleads not guilty, even when the evidence is conclusive or uncontradicted. *State v. Wilson*, 62 Kans. 621; *Shaffner v. Com.*, 72 Pa. St. 60. But this has been allowed in a few cases. *People v. Elmer*, 109 Mich. 493. Nor is the judge at liberty in most jurisdictions to express an opinion either as to the weight of evidence or as to facts which might influence the action of the jury. *People v. Cowgill*, 93 Cal. 596; *Hayes v. State*, 58 Ga. 35. In the federal courts, however, the judge is allowed to express an opinion. *Lovejoy v. United States*, 128 U. S. 171. The charge in the North Carolina case under discussion did not infringe upon these general rules.

How then was any injustice done the defendant by the charge that the jury bring in a verdict of guilty if they believed the evidence? The evidence for the prosecution was uncontradicted, was not conflicting and if believed showed the defendant's guilt beyond a reasonable doubt. In cases like this the courts both in England and in this country have recognized that substantial justice is done by a charge containing the expression, "if the jury believe the evidence." *Taylor v. State*, 121 Ala. 24; *Derby v. State*, 60 N. J. L. 258; *State v. Woolward*, 119 N. C. 779. The position taken by these courts is well illustrated by Judge Ligon in *Thompson v. State*, 21 Ala. 48, where he said, "We have repeatedly held, that, where the testimony proceeds altogether from one party, and involves no conflict, the court may draw its

own legal conclusion, and give it in charge to the jury, . . . for, I take it, that no man can be said to believe testimony, when he has a reasonable doubt of its truth." In a similar case, *State v. Vines*, 93 N. C. 493, the court recognized the same charge in these words: "It was insisted on the argument here, that the judge invaded the province of the jury in instructing them that, if they believed the testimony of the witness, the prisoner was guilty of manslaughter.' We do not think so; this contention has not the slightest foundation."

This charge is not proper, however, where a substantial conflict exists in evidence upon any material question of fact, where the incriminating evidence is wholly circumstantial or indefinite and uncertain, or where material inferences are to be drawn therefrom by the jury. *Weil v. State*, 52 Ala. 19; *Perkins v. State*, 50 Ala. 154; *State v. Dixon*, 104 N. C. 704; *State v. Green*, 48 S. C. 136. The distinction between this class of cases and those where the charge was held to do justice is well pointed out by the court in *Duffy v. People*, (N. Y.) 5 Park. Cr. 324, as follows: "It was objected that the court erred in charging the jury, that if they believed the witnesses for the prosecution, it would be their duty to bring in a verdict of guilty. The case of *People v. Pfomer*, 4 Park. Cr. R. 558, is quoted to sustain this objection. But this, and other cases to which reference is made, involved circumstantial as well as positive evidence. It therefore, clearly rested with the jury in those cases to construe the circumstances; and the verdict did not depend exclusively upon the varacity of the witnesses, but also upon the effect which the jury would give to these circumstances. In the case under consideration, the proof was altogether positive; circumstantial proof was nowhere adduced, and the result depended exclusively upon the veracity of the witnesses. The charge was, therefore, correct."

It was claimed, however, in the case under discussion, that the evidence was indefinite and uncertain. The sole witness testified that at about 2:30 P. M. on a Sunday he saw two freight trains pass north through Franklinton, N. C. One train contained eighteen empty freight cars with doors open. The other contained fifteen empties, five cars of lumber and a car of pig iron; all doors open. He could not designate the exact Sunday, but there surely was nothing uncertain about this evidence as to its indication of the defendant's guilt, if the jury believed it. It was not conflicting, nor circumstantial, nor were any material inferences to be drawn from it.

Thus the trial judge seems to have complied, at least in substance, with the State statute which provided as follows: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." This statute had been on the books since the year 1796, and had repeatedly been construed as broad enough to cover

a charge containing the phrase, "if the jury believe the evidence." *State v. Woolard*, 119 N. C. 779; *State v. Riley*, 113 N. C. 648; *State v. McLain*, 104 N. C. 897; *State v. Vines*, 93 N. C. 493. Why then did the court seek to amplify a technicality in order to find error, even though the charge was faulty or technically erroneous? Considering the standard of intelligence of our juries, such a charge would perhaps do justice many more times than a lengthy and complicated exposition of the law such as is often given.

Such decisions as the one under consideration add strength to the cry of those writers who picture the increasing delay and expense of litigation, which encourage defiant criminality and foster the spirit of litigious gambling. In spite of technical error it surely seems as if a new trial ought not to be had unless it appears probable that the jury were misled by the instructions. Rather than elevate technicalities to be an end in themselves, it would be far better to go back to the orthodox English method of giving the judges great latitude in the use of their discretion in granting a new trial. See *Miller v. State*, 3 Wyo. 657. In fact here is found the great criticism of our American criminal procedure; the tendency to amplify technicalities and wrest from our judges the conserving power which they ought to retain and which they had at common law, and to elevate the jury's power beyond anything which is wise and prudent. Judge Nisbet, in *Cook v. State*, 11 Ga. 53, forcefully put the warning in these words: "It is to be feared, in these days, that the judges will be so strictly laced, as to lose all power of vigorous and healthful action. I have but little fear of the judicial power so aggrandizing itself as to endanger any of the powers of other departments of the government; or to endanger the life and liberty of the citizen; or to deprive the jury of their appropriate functions. The danger rather to be dreaded is making the judges men of straw, and thus stripping the courts of popular reverence, and annihilating the popular estimate of the power and sanctity of the law."

PART PAYMENT OF A DEBT AS CONSIDERATION FOR A PROMISE.

A new assault has lately been made upon the established doctrine that a part payment of a debt already due is not a sufficient consideration for a promise by the creditor to forego his right to the residue. As is well known, the rule is based upon what is probably a misinterpretation of a dictum in *Pinnel's Case*, 5 Coke, 117, as followed in *Foakes v. Beer*, 9 App. Cas. 605. See 12 Harv. Law Rev. 521. The supreme court of New Hampshire now holds in *Frye v. Hubbell*, 68 Atl. 325, that such a part payment is a sufficient consideration. That there is a considerable tendency in America toward this result is evidenced by the fact that the former rule has been changed by statute in some ten States and by court decision on common-law grounds in two States besides New Hampshire. *Clayton v. Clark*, 74 Miss. 499; *Dreyfus v. Roberts*, 75 Ark. 354.

While the recent New Hampshire decision is extremely instructive, its reasoning is not in every respect satisfactory. The various theories of consideration are well stated; but the court, following the lead of the House of Lords in *Foakes v. Beer*, gives too much adherence to the erroneous doctrine that a mere benefit to the promisor is a sufficient consideration, whether it amounts to a detriment to the promisee or not. Furthermore it gives definite approval to the theory that one is not bound to perform his contracts. "One may be morally bound to do precisely in terms as he agrees; but he is legally bound to do as a practical proposition, whatever the theory may be, only what he can be compelled by law to do. The common law does not compel men to do as they agree. It gives damages for the failure to perform legal or contractual duties, but except in a few instances only can specific performance of the contract be enforced." And so, the court argues, the part payment by the debtor is an act which he was not bound to perform, and hence is a detriment to him and a sufficient consideration even under the correct detriment theory.

It is not intended here to attack the result arrived at; but the foregoing theory that the promisor is allowed by the law the option between doing as he promised and paying damages for not so doing is both immoral and incorrect. One who contracts is bound to perform, not merely to pay damages for non-performance. As the court here admits, certain promises will be enforced specifically. A good example is the case of an option to buy, where one contracts for a consideration or under seal to hold an offer open for a specified time. This offer cannot be withdrawn, and does not even lapse with the death of the offeror. *Townley v. Bedwell*, 14, Vesey, 591; *Adams v. Peabody Coal Co.*, 230 Ill. 469. The offer, even after death or an attempted revocation, can be accepted, and specific performance can be obtained, or damages for a breach. The action is based upon the contract of sale, and not upon the promise to hold the offer open. That promise was binding, and had to be performed. The promisor was bound to do more than to pay damages and costs. He was bound to hold his offer open, and it remained open.

If a contractor is bound to perform in case of any class of contracts, then he is bound to perform as to all classes. No difference is discoverable in the nature of the promises or in the character of the legal bond attaching to them. An obligation attaches to all or to none. If equity will not specifically enforce a promise to pay money, it is not because equity does not recognize any obligation resting on the promisor to perform specifically, but because the remedy at law in damages is regarded as so nearly equal to specific performance that there is no need to exercise the extraordinary jurisdiction of equity. Even if a debtor cannot be compelled to perform his promise, an inadequacy of legal remedy is not the same thing as an absence of legal obligation. To this the case of an oral promise within the statute of frauds bears witness.

If it is correct to say that a promisor is bound to do only that which the law will attempt to compel him to do, is it not equally logical to say that a promisor is bound to do only that which the law *can* compel him to do? If so, then he may be bound to do nothing at all, for if he has no property, or if he can successfully conceal the fact that he has property, he cannot even be compelled to pay damages and costs. Many a judgment creditor knows this to his sorrow.

Therefore it appears that in making part payment, a debtor is doing only that which the law and his contract have already bound him to do. A further question remains: Is such a part payment a detriment to the debtor (promisee) so as to enable him to maintain assumpsit, with its contractual form but tort parentage? There is an aspect in which it may be so regarded, even without adopting the theory of Professor Ames that any act not illegal is a sufficient consideration. With the New Hampshire court, we must admit that payment as per contract cannot be compelled. Hence, in paying part, the debtor gives up money which he might otherwise keep in his pocket. This is *in fact* a financial detriment, a damage sufficient *in fact* as a basis for the action of assumpsit. Is there any estoppel to make use of it as such? Is it so immoral for the debtor to say that his doing that which the law and his contract already bound him to do is a detriment, because the law unfortunately affords no adequate remedy for enforcing the obligation, that a court of law should refuse to listen to him? It appears not. It is not immoral in this case, because here the creditor has certainly excused the debtor from his obligation to pay the remainder of the debt, in morals at least. The creditor is *morally* bound by his promise to give up the remainder of the debt. Hence, it does not lie in his mouth to say that the debtor is immoral in refusing to pay more, or in alleging the above mentioned detriment *in fact* as a consideration for the creditor's promise. We can thus arrive at the same result as did the New Hampshire court without adopting any immoral general theory that contracts are not binding.

In this reasoning there lies also a rule for deciding such cases as *Scotson v. Pegg*, 6 H. & N. 295; and *Abbott v. Doane*, 163 Mass. 433. The doing of that which one is already bound by contract with a third person to do would under this rule always be a sufficient consideration for a promise of a new party. He does what he was bound to do, but what he could not have been compelled to do, an actual detriment; and as between him and the new promisor there is absolutely nothing immoral or unfair in allowing him to set it up as a basis for an assumpsit. The weight of authority contra is based upon an incorrect assumption of fact either as to the damage to the promisee or as to morality.

In cases like *Munroe v. Perkins*, 9 Pick. 298, where, in return for a new promise, the promisee does that which he was already bound by a former contract with the promisor to do, there is the same actual detriment *in fact*, but it is harder to determine as to the estoppel on moral grounds. Often there should be such an

estoppel, as in *Lingenfelder v. Brewing Co.*, 103 Mo. 578. But if morally there is no estoppel, the consideration should certainly be held sufficient. The question is purely one of morality in the individual case. See *King v. Railway Co.*, 61 Minn. 482. If a court of law refuses to consider a question of mere morality, then all such contracts are enforcible. *A. L. C.*