

YALE LAW JOURNAL

Published monthly during the Academic Year by the Yale Law Journal Co., Inc.
Edited by Students and members of the Faculty of the Yale Law School.

SUBSCRIPTION PRICE, \$4.50 A YEAR

SINGLE COPIES, 80 CENTS

Canadian subscription price is \$5.00 a year; foreign, \$5.25 a year.

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JOHN DEWEY has been professor of philosophy in the Universities of Michigan, Minnesota and Chicago and is at present professor of philosophy at Columbia University. Among his published works are *How to Think* (1909); *Democracy and Education* (1916); *Human Nature and Conduct* (1922).

WILLIAM H. COMLEY was graduated from the Yale Law School in 1899 and is a member of the Bridgeport Bar. He is at present State's Attorney for Fairfield County, Connecticut.

WALTER B. KENNEDY was formerly professor of law in the law school of the Catholic University of America and is at present professor of law at the Fordham University Law School.

PHILIP C. JESSUP, formerly assistant to the Solicitor of the State Department, is now lecturer in International Law at Columbia University. He is the author of *Outlines of the Law for Bar Examination and Law School Review* (1925).

A CUSTOMER'S RIGHTS AGAINST SECURITIES IN THE HANDS OF A BANKRUPT STOCKBROKER

If within four months of bankruptcy an insolvent debtor pays a debt for which there is a surety, and if the surety has knowl-

edge of the debtor's financial status and procures or knows of the payment¹, then the debtor's trustee in bankruptcy can recover the payment from the surety as a voidable preference.² Though seemingly undisputed, this result at first glance seems odd. It looks as if the surety, contrary to the terms of his undertaking, were being called upon to pay not his principal's debt to the secured creditor but that creditor's debt to the trustee (*i.e.*, to the other creditors) for surely the principal's debt has been paid and it is now the creditor who owes a debt—a debt to the trustee in the amount of the preference received. It has been pointed out, however, that under the words of the Bankruptcy Act the above result is inevitable.³ Under the act a creditor is anyone with a claim provable in bankruptcy.⁴ A surety has a claim, provable in the creditor's name if the debt is unpaid, and by subrogation *pro tanto* if he has paid the creditor in whole or in part.⁵ The surety is therefore a "creditor". A creditor may receive a

¹ In the words of the Bankruptcy Act of 1898, sec. 60b (U. S. Comp. Sts. 1916, sec. 9644) in order for a preference to be voidable it is necessary that "the person receiving it [the preference] or to be benefited thereby . . . shall . . . have reasonable cause to believe" that it was intended thereby to give a preference. (Italics ours.) In *Reber v. Shulman* (1910, C. C. A. 3d) 183 Fed. 564, where there was no evidence that the surety procured or knew of the payment, it was held that no voidable preference had been effected.

² *In re Sanderson* (1906, D. Vt.) 149 Fed. 273; *Goldman v. Cohen* (1919, C. C. A. 1st) 261 Fed. 672. Accordingly, when within four months of bankruptcy, a surety, knowing of his principal's financial state, induced the principal to sell him goods and use the price to pay the debt for which the surety was responsible, the trustee recovered the goods as a voidable preference. *Paper v. Stern* (1912, C. C. A. 8th) 198 Fed. 642.

³ A lengthy explanation of the reasons underlying the rule is found in *Swartz v. Siegel* (1902, C. C. A. 8th) 117 Fed. 13, 17; for a briefer one see *Smith v. Tostevin* (1917, C. C. A. 2d) 247 Fed. 102, 103.

⁴ Sec. 1 (9); U. S. Comp. Sts. 1916, sec. 9585.

⁵ Secs. 57i, 63a (4); U. S. Comp. Sts. 1916, secs. 9641, 9647. ". . . but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt." General Order, 21 (4). In other words, if the surety has paid the creditor less than the difference between the original debt and the dividend which the bankrupt estate can pay thereon, he will receive nothing by subrogation; if he has paid more than that difference he will receive the excess of his payment over that difference. In *Williams v. United States Fid. & Guar. Co.* (1915) 236 U. S. 549, 35 Sup. Ct. 289, the surety's duty to pay his principal's debt arose before the principal's bankruptcy, but the surety refused to pay until forced to do so at suit of the creditor after the bankruptcy. The surety then sued the discharged bankrupt for reimbursement by way of subrogation, urging that his claim, being contingent at the date of bankruptcy, was then unprovable. The court explained that the surety could have paid and proved his claim or could have required the assets of the bankrupt to be subjected to the payment of the debt to the principal creditor. It would seem, therefore, that a surety may become a "creditor" of the bankrupt estate before he has paid the principal creditor.

voidable preference not merely by a payment to him but by any payment by which he is "to be benefited".⁶ A surety receives a benefit by payment of his principal's debt, for but for that payment he would have to pay the debt and could recover only a smaller amount in the form of a dividend from the bankrupt's estate.⁷ Payment by the principal to the creditor, therefore, effects a voidable preference to the surety. The result is not harsh, for when the surety has received his dividend from the trustee he is in exactly the same position as if he had made up to the creditor the difference between the debt and the creditor's dividend or had himself paid the entire debt to the creditor and received by subrogation the creditor's dividend.

If a person instead of promising to pay the debt of another hands him notes or bonds and gives him permission to pledge them for the debt, the same purpose is served as in the usual suretyship relation. Accordingly the courts have attached to the situation the label of "real suretyship"⁸ and have accorded it many of the peculiar suretyship rules.⁹ Among these is the rule which we have been discussing. It has been held that when the debtor-pledgor, within four months of bankruptcy and with the real surety's knowledge of the necessary facts, redeems the pledged articles and returns them to the surety the latter receives a voidable preference.¹⁰

The typical contract between a stockholder and a margin customer seems to be essentially one of real suretyship. After the customer has paid the margin the broker under the common practice buys the stock and holds it, or other stock left for that purpose by the customer, as security under a contract, express or implied,¹¹ by which he may pledge it for his own debt in an amount not exceeding the customer's indebtedness to him, provided only he keeps on hand a sufficient amount of similar stock

⁶ Sec. 60 b; U. S. Comp. Sts. 1916, sec. 9644.

⁷ Sec. 65 a; U. S. Comp. Sts. 1916, sec. 9649.

⁸ Spencer, *Suretyship* (1913) secs. 1, 9, 10; see *St. Croix Timber Co. v. Joseph* (1910) 142 Wis. 55, 61, 124 N. W. 1049, 1052; cf. COMMENTS (1925) 35 YALE LAW JOURNAL, 92, 94.

⁹ *E.g.*, exoneration: *Robinson v. Gec* (1749, Ch.) 1 Ves. Sr. 251; discharge by extension of time of payment: *Bank of Albion v. Burns* (1871) 46 N. Y. 170; discharge by cancellation by will of principal debt: *Dibble v. Richardson* (1902) 171 N. Y. 131, 63 N. E. 829; discharge by alteration of principal contract: *Rowan v. Sharps' Rifle Mfg. Co.* (1865) 33 Conn. 1; discharge by illegality of principal contract: *Denison v. Gibson* (1872) 24 Mich. 187; equitable compulsion of set-off: *St. Croix Timber Co. v. Joseph*, *supra* note 8.

¹⁰ *Smith v. Tostevin*, *supra* note 3.

¹¹ The contract is usually express, being incorporated in the written order which the customer gives to the broker. But where not express the courts have not hesitated to imply the usual terms from custom. *In re Swift* (1900, D. Mass.) 105 Fed. 493; *Austin v. Hayden* (1912) 171 Mich. 38, 137 N. W. 317.

to satisfy the customer on his payment of the balance due.¹² The relation between customer and broker has been characterized by the courts as one of pledge,¹³ except in Massachusetts where, except when the security given is stock other than that being bought on margin,¹⁴ it is considered a mere debtor-creditor relation.¹⁵ But it is something more than the usual pledge, just as the more common form of real suretyship is something more than the usual bailment.¹⁶ All necessary elements of real suretyship seem to be present: possession by the broker of securities to which the customer has title (subject, it is true, to the broker's lien of pledge) and privilege in the broker to hypothecate for his own debt (for no greater amount, it is true, than his own lien). The real suretyship relation has been urged to the courts,¹⁷ and passages recognizing it are to be found in the cases.¹⁸ Nevertheless, in one of the very cases in which such a passage appears, it was decided that the return of the securities within four months of bankruptcy to the customer on his demand with knowledge of the broker's financial instability did not effect a voidable preference.¹⁹

¹² See Hagar, *The Bankruptcy Law as Applied to Stockbrokerage Transactions* (1921) 30 YALE LAW JOURNAL, 488; Oppenheimer, *Rights and Obligations of Customers in Stockbrokerage Bankruptcies* (1924) 37 HARV. L. REV. 860.

¹³ *Richardson v. Shaw* (1908) 209 U. S. 365, 28 Sup. Ct. 512; *Thomas v. Taggart* (1908) 209 U. S. 385, 28 Sup. Ct. 519; *Katz v. Nast* (1911, C. C. A. 7th) 187 Fed. 529; *In re Mercantile Trust Co.* (1913) 210 N. Y. 83, 103 N. E. 884; *Sproul v. Sloan* (1913) 241 Pa. 284, 88 Atl. 501.

¹⁴ *Hutchinson v. Le Roy* (1902, C. C. A. 1st) 113 Fed. 202; *Furber v. Dane* (1909) 203 Mass. 108, 89 N. E. 227.

¹⁵ *Wood v. Hayes* (1860) 81 Mass. 375; *Furber v. Dane* (1910) 204 Mass. 412, 90 N. E. 859. So also in the federal courts where the transaction occurred in Massachusetts. *In re Swift*, *supra* note 11.

¹⁶ Cf. Hand, D. J., in *Smith v. Tostevin*, *supra* note 3, at 104.

¹⁷ This was the basis of the petition for rehearing in *Robinson v. Roe* (1916, C. C. A. 2d) 233 Fed. 936, 940.

¹⁸ See *In re Toole* (1921, C. C. A. 2d) 274 Fed. 337, 344.

¹⁹ *Robinson v. Roe*, *supra* note 17. In this case the defendant left stock certificates with the brokers as collateral security for a marginal account, giving them authority to hypothecate them for their own debt. On learning of their financial instability the defendant within four months of their bankruptcy demanded the securities of the brokers and allowed them time in which to substitute others for them. The brokers did so and returned the securities to the defendant, from whom the brokers' trustee in bankruptcy now seeks to recover them as a voidable preference. Judgment was given for the defendant. In the opinion the court inadvertently said, at 939, ". . . all their loans . . . may be treated as one indebtedness, as to which the defendant was their surety to the banks." On rehearing it was explained, at 940, that it was intended to say, ". . . as to which the defendant's securities were their surety to the banks." It thus virtually admits the relation to be one of real suretyship, but refuses to apply on that account the rule that would have been applied in the case of ordinary, or personal, suretyship.

The decision was perhaps inevitable, since the rule of the case had already been laid down by the Supreme Court of the United States in *Richardson v. Shaw*,²⁰ which, indeed, was a stronger case, since the stock certificates returned to the customer were not the ones originally bought for him but others of the same variety. In this case the real suretyship relation was not mentioned. The opinion was concerned with pointing out that the relation between customer and broker could be considered as one of pledge and that stocks could be considered as fungibles.²¹ On this theory it was held that the customer merely got back what was his own and hence did not receive a voidable preference. Under like language the courts have handed down a more or less consistent set of decisions concerning pledges of customers' stock by bankrupt brokers. On payment of the sum, if any, due on the purchase price customers have been allowed to claim *in specie* stocks bought for them²² or others of similar character²³ found in the bankrupt's hands, dividing the latter *pro rata* if insufficient to satisfy them all.²⁴ The same rule has been applied where the bankrupt's repledge of stock was unauthorized and therefore wrongful.²⁵ Customers who did not authorize the repledge

²⁰ *Supra* note 13.

²¹ For an explanation of the fungible nature of stocks, see the articles cited in note 12, *supra*. Bonds likewise have been held fungible. *Duncan v. Johnston* (1925, C. C. A. 6th) 3 Fed. (2d) 422, discussed in (1925) 25 COL. L. REV. 832.

²² *In re Meadows* (1909, W. D. N. Y.) 173 Fed. 694, *aff'd* (1910, C. C. A. 2d) 177 Fed. 1004; *In re Mason* (1922, C. C. A. 9th) 282 Fed. 202.

²³ *In re Pierson* (1916, C. C. A. 2d) 233 Fed. 519.

²⁴ *In re J. F. Pierson, Jr., & Co.* (1915, S. D. N. Y.) 225 Fed. 889.

²⁵ *Gorman v. Littlefield* (1913) 229 U. S. 19, 33 Sup. Ct. 690; *Ducl v. Hollins* (1916) 241 U. S. 523, 36 Sup. Ct. 615. The cases go on the theory that it was the broker's privilege and duty to return to the customer the stock wrongfully taken and that it would be presumed that such was the intent with which the similar stock was bought. In the second case the presumption was contrary to fact, on which ground two justices dissented. The rule has been criticized as involving a presumption contrary to that of *Schwylar v. Littlefield* (1914) 232 U. S. 707, 34 Sup. Ct. 466, regarding trust funds wrongfully converted by a trustee to his own use. Oppenheimer, *op. cit. supra* note 12, at 867. It is interesting to compare two other decisions in related fields. In *National City Bank v. Hotchkiss* (1913) 231 U. S. 50, 34 Sup. Ct. 20, a bank lent money to a broker as a "clearance loan", *i.e.*, to enable him to take up the day's margin purchases. The loan was to be repaid before night; but in the meantime the broker became bankrupt as a result of a sharp drop in the market. After the insolvency and imminent bankruptcy of the broker was known he gave securities to the bank to cover the loan. These were held to effect a voidable preference. In *Sexton v. Kessler* (1912) 225 U. S. 90, 32 Sup. Ct. 657, an American firm, being indebted to an English firm, set aside for it in a safe deposit box certain securities, retaining over them full control, including power to make substitution. Within four months of its bankruptcy the American firm delivered the securities to the English firm. It was held that an "equitable lien" had been created prior to the four months

of their securities have been allowed priority over those who did where the amount of securities to be divided was insufficient for all.²⁶ Where the subpledgee, after liquidating the bankrupt's indebtedness to him,²⁷ has had left in his hands or has returned to the trustee a surplus in stock or cash, customers have been allowed to claim this *in specie*.²⁸ In this instance, although the certificates returned are identifiable as those bought for a particular customer, his claim to them has been held subject to contribution to his fellows, it being said that those customers who did not authorize the repledge would have priority.²⁹ The result in these last cases is not inconsistent with the real suretyship relation; for, since the surety has subjected his property to the payment, not of the general indebtedness of the bankrupt, but only of a particular debt, it is only fair that after that debt has been paid he should receive the surplus of his property *in specie*. Indeed, one court has given the suretyship relation as the ground for allowing contribution among the customers.³⁰

Seemingly out of harmony with the general pattern is the Massachusetts case of *Weston v. Jordan*.³¹ A voidable preference was held to be given a customer when his securities within four months of bankruptcy were returned to him by the broker. The avowed reason for the decision was an additional element not appearing in the usual case, the fact that the broker had at first refused compliance with the customer's demand for return of the securities. The demand and refusal, it was said, gave rise to a cause of action for conversion or breach of contract (it mattered not which)³² and thereby made of the customer a simple

period and that no voidable preference was affected. See COMMENTS (1925), 34 YALE LAW JOURNAL, 891, 895. It seems that in deciding what are voidable preferences the United States Supreme Court is willing to allow a debtor, later a bankrupt, much greater freedom in dealing with the stocks and bonds of his creditors than with their money.

²⁶ *In re Archer* (1923, D. Md.) 289 Fed. 267.

²⁷ The subpledgee gets the power and privilege to sell the customer's securities either through the authority of the broker to repledge, or in the absence thereof, as a bona fide purchaser.

²⁸ *Thomas v. Taggart*, *supra* note 13.

²⁹ *In re Toole*, *supra* note 18. The majority of the court held the pledge authorized; and hence the money surplus was divided *pro rata* among the creditors. By way of dictum it was indicated that the same rule would hold if all the pledges had been wrongful, and that the wronged creditors would have priority over the others if there were some of each. Contribution by wronged creditors is disapproved in (1922) 70 U. PA. L. REV. 124; cf. COMMENTS (1925) 35 YALE LAW JOURNAL, 92.

³⁰ *Supra* note 18.

³¹ (1897) 168 Mass. 401, 47 N. E. 133.

³² The court refused (*supra* note 31, at 404, 47 N. E. at 134) to reconsider the Massachusetts cases holding the relation of customer and broker to be one of debt rather than pledge, declaring that it would make no difference which rule was adopted in this instance. Under the debt theory the demand and refusal would effect a breach of contract; under the pledge theory a

creditor with a provable claim in bankruptcy, whatever he had been before. Since under the Massachusetts rule he had been but a simple creditor all the time, the element of demand and refusal did not change the result of the case. And although the avowed ground of the decision has been urged *arguendo* to the courts from time to time they, apparently, although doing lip-service to the rule laid down, have always been able to distinguish it.³³ But in the recent case of *In re Douglas, Petition of Bower* (1924, W.D.Pa.) 8 Fed. (2d) 111, that rule caused the court to reach a result directly opposite to that which it would have reached had the element of demand and refusal been absent. A customer's petition claiming a money surplus left in the hands of the sub-pledgee after liquidating the broker's indebtedness to him was dismissed because the broker had refused to comply with the customer's demand to return the stock.³⁴

The decision seems unsustainable. It has been pointed out that on the theory of real suretyship such a surplus as here existed is properly given to the customer, since he subjected his property only to the payment of a single debt now paid. Under the pledge theory, which, rather than the Massachusetts rule, is to be applied by a federal court in regard to a transaction occurring in Pennsylvania,³⁵ the customer would get the surplus as the proceeds of stock in which he had a property right. It is hard to see how demand and refusal could change this. Conversion has never been held to pass title except under the doctrine of accession.³⁶ On the contrary, it has been disputed whether judgment or

conversion. Either would give rise to a cause of action making the customer a mere creditor. In support of this view it mentioned that after the accrual of the cause of action the customer could refuse to accept the certificates subsequently tendered by the broker in case of their fall in price. But granted the existence of such a power, until its exercise, title would seem to remain in the customer.

³³ See *Richardson v. Shaw*, *supra* note 13, at 382, 383, 23 Sup. Ct. at 517, 518; *Robinson v. Roe*, *supra* note 17, at 939. In the latter case it was held that, since the customer gave the broker time to recover the securities and return them, the latter's inability immediately to comply with the demand could not be construed as a refusal. Disbelief is expressed that the customer would have become a mere creditor even if there had been demand and refusal. In *In re McIntyre* (1911, C. C. A. 2d) 189 Fed. 46, the petitioning creditor was allowed to reclaim his stock, although there had been a demand and refusal. There was no reference to the doctrine of *Weston v. Jordan*, *supra* note 31.

³⁴ The purchase was on margin, but before the demand the customer had paid in full. It does not appear that there was authority to repledge, but it is probable, from the nature of the transaction, that there was. See *supra* note 11.

³⁵ The federal courts apply the law of the state where the transaction occurred. See *supra* note 15.

³⁶ *E. g.*, where the value of the property has been greatly increased by the act of the converter. *Wetherbee v. Green* (1871) 22 Mich. 311 (timber, value \$25, to hoops, value \$700). Or there has been a "loss of identity"

satisfaction thereof has that effect in an action of trover,³⁷ and "title" has been thought necessary to maintain that action.³⁸ In the cases where the broker's act of pledging the customer's stock was a conversion, that did not operate to change the customer into a general creditor but rather gave him priority over those who had given the broker authority to pledge their stock.⁴⁰ The fact that the broker's refusal is regarded as a breach of contract should be ineffective to cut down the customer's rights in Massachusetts since there he had only the status of a general creditor to begin with. If, in any other jurisdiction, the customer should elect to waive the tort and sue in contract he would thereby exercise a power, given him by the broker's wrongful act, of vesting title in the broker and would be reduced to the status of general creditor; but such a foolish election was not made in the instant case, the attempt being on the contrary to claim the surplus of the proceeds of the stock *in specie*. Under the language of *Robinson v. Roe*⁴¹, if the customer, instead of demanding immediate delivery of the securities, had given the broker his leisure to get them for him, or if he had made no demand at all,⁴² then he would have been entitled to have his petition granted in the instant case. It seems strange indeed that his diligence should be prejudicial to him.

OPERATIVE WORDS OF CONVEYANCE

When written deeds first appeared, there was, for all but one form of conveyance,¹ no rigid requisite of a particular word or group of words to transfer freehold interests in land.² An intention to convey was said to be the operative fact, rather than the particular words used.³ There came to be attached to each

or "change of species". *Lampton's Ex'rs v. Preston's Ex'rs* (1829, Ky.) 1 J. J. Marsh. 454 (clay to brick). But even this has been held insufficient where the conversion was willful. *Silsbury v. McCoon* (1850) 3 N. Y. 379 (corn to whiskey).

³⁷ *Miller v. Hyde* (1894) 161 Mass. 472, 37 N. E. 760.

³⁸ See *Union Stock Yard Co. v. Mallory* (1895) 157 Ill. 554, 561, 41 N. E. 888, 890; but that a right of immediate possession is sufficient, see Chapin, *Torts* (1917) 381.

³⁹ *Gorman v. Littlefield*, *supra* note 25; *Duel v. Hollins*, *supra* note 25.

⁴⁰ *Supra* note 26.

⁴¹ *Supra* note 17, at 939.

⁴² As in *In re Toole*, *supra* note 18.

¹ "The word 'exchange' is essential to produce the effects of a *common law* exchange. . . . This word, and the word 'heirs', afford almost the only instances in which a rigid adherence to technical expressions is necessary even in deeds." 2 Hayes, *Introduction to Conveyancing* (5th ed. 1840) 11, note 17; 2 Blackstone, *Commentaries*, *323.

² 2 Blackstone, *op. cit. supra* note 1, at *297; 1 Wood, *Conveyancing* (1792) 320, 321.

³ *Shove v. Pinke* (1793, K. B.) 5 Term Rep. 124, in which Kenyon, L. J., stated, "It has never been held necessary that the word 'grant' should

form of conveyance, however, a word or group of words which more aptly than any others described the intention of the grantor, and were recognized without further question as operating to transfer the estate.⁴ Thus, in a feoffment the word "do" or "dedi" was "apt"; but the infeudation could also be accomplished by use of the word "grant" or "enfeoff". In a grant the apt words were "dedi et concessi"; in a release, "remise, release and forever quit-claim"; but their use was not imperative.⁵

The decadence of the feoffment with its symbolic livery of seisin (the deed, when used, being merely a sort of weak evidence) and the popularization of the written transfer followed the enactment of the Statute of Uses. The bargain and sale and the covenant to stand seized were really contracts, a transfer of the legal estate operating by force of the statute, and were, therefore, more easily susceptible of a liberal construction. No particular words were necessary to raise a use.⁶ A grant which created no estate, because of a failure to pay or express a consideration, was construed by reason of blood relationship, as a covenant to stand seized.⁷ Similarly, a deed of lease and release which could not operate because it attempted to create an estate *in futuro* was construed as a covenant to stand seized.⁸ But the converse was also true; and a deed which was ineffective to pass an estate by the Statute of Uses, might be effective at common law. An appointment to uses void at law would operate as a grant;⁹ and a deed in the form of bargain and sale, without a consideration paid or expressed, has been held a successful feoffment.¹⁰ The lease and release, however, popular because it evaded the Statute of Enrollments, became the prevalent mode of land transfer in England; and it was not until 1845 that a statute (8 & 9 Vict. c. 106, sec. 2) abolished the necessity for

be used in a grant, it being sufficient if the intention to grant be manifest by a deed." *Adams v. Steer* (1608, K. B.) Cro. Jac. 211. Of course, it was the expressed and not the subjective intent that was operative; but that expression was not required to have one particular form.

⁴ "In framing deeds, no legal necessity imposed the observance of those forms which practice (and practice alone) had established, for the technical symmetry of a deed might be varied or discarded at pleasure; but an adherence to forms, approved and understood, conduces to perspicuity and certainty, and strangely as this may sound, to brevity." 1 Hayes, *op. cit. supra* note 1, at 126.

⁵ See the "apt" words for each form of conveyance given in 2 Blackstone, *op. cit. supra* note 1, at *310-327.

⁶ 1 Hayes, *op. cit. supra* note 1, at 56; see *Jackson v. Root* (1820, N. Y.) 18 Johns. 60, 79.

⁷ *Crossing v. Scudamore* (1681, K. B.) 1 Ventris, 137, *aff'd* on appeal (1681, Exch.) 1 Mod. Rep. 175.

⁸ *Roe on the demise of Wilkinson v. Tranmer* (1757, C. B.) 2 Wils. 75.

⁹ *Shove v. Pinke*, *supra* note 3.

¹⁰ *Benicombe and Parker's Case* (1583, K. B.) 1 Leon. 25; *Perry v. Price* (1825) 1 Mo. 553.

using the clumsy lease and release by providing that henceforth "corporeal hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery."¹¹ But with this single form of conveyance were the "apt" words of the old forms of conveyance still recognized? And what words were "apt"? In his attempt to play safe, the nineteenth century conveyancer filled his instrument with a superabundance of redundancies. This over-caution was perhaps justified; it was not always expedient to rely upon the tendency of the courts to uphold a deed whenever possible. At this time it must be noted that the word "apt" had taken on a different and wider meaning. Instead of describing the word or words which were most commonly used to effectuate the grantor's intent, it referred to any language which was sufficient at law to indicate the grantor's intent to make a present conveyance. As a result of this historical development it was early the rule in this country that no particular word or words were necessary to pass an estate, but some language purporting to convey must be used; and it is only by such "apt" language that the grantor may transfer his estate.¹² As may reasonably be expected from a rule of such indefinite content there was a considerable difference of opinion as to what language sufficiently "purported" an intention to convey. Thus, such words as "I have this day sold to",¹³ "I warrant and defend",¹⁴ "I assign all my right and title in this deed",¹⁵ "I sign over all my right, title, claim, interest and demand of",¹⁶ "to revert to",¹⁷ have been held "inapt" to indicate the intent of the grantor. The difficulty of the courts has been, in large part, to gather from the language used an intent to convey as opposed to a mere intent to contract for a conveyance in the future,¹⁸ especially where the grantor's interest was inchoate or incomplete.¹⁹ In some cases the courts, unable to find a sufficient language of present conveyance at law, have held the

¹¹ See Bordwell, *The Repeal of the Statute of Uses* (1926) 39 HARV. L. REV. 466, 477.

¹² 2 Tiffany, *Real Property* (2d ed. 1920) sec. 435; 1 Devlin, *Deeds* (3d ed. 1911) secs. 211, 212. For a very complete list of cases, see 18 C. J. 178, 179.

¹³ *Johnson v. Bantock* (1865) 38 Ill. 111.

¹⁴ *Hummelman v. Mounts* (1882) 87 Ind. 178.

¹⁵ *Bentley's Heirs v. De Forest* (1826) 2 Ohio St. 221.

¹⁶ *McKinney v. Settles* (1862) 31 Mo. 541.

¹⁷ *Ryan v. Wilson* (1861) 9 Mich. 262.

¹⁸ *Brewton v. Watson* (1880) 67 Ala. 121; *Weinrich v. Wolf* (1884) 24 W. Va. 299; *Bell v. McDuffie* (1883) 71 Ga. 264; *Bentley's Heirs v. De Forest*, *supra* note 15; see *Hanks v. Folsom* (1883, Tenn.) 11 Lea, 555, 560; *Horton v. Murden* (1903) 117 Ga. 72, 43 S. E. 786 (construction of "turn over").

¹⁹ *McKinney v. Settles*, *supra* note 16.

conveyance valid in equity.²⁰ There does not seem to be any reason why a court of equity should be able to gather more intent from the same language than a court of law unless the deed were considered, at least, as a contract to convey, which equity acted upon by means of its power of specific performance. The tendency at law, however, has been in the direction of liberality in determining an intent presently to convey.²¹ Such phrases as "I am giving you that property, the house . . . shall belong to you",²² "shall go",²³ "to return to",²⁴ "we agree that lessee is to continue in said house without becoming a tenant",²⁵ "may be further entitled",²⁶ are examples of "apt" language.

No discussion of the formal requisites of a deed is complete without a consideration of present-day statutes with respect to the conveyance of interests in land. Some provide that any instrument in writing is effectual to transfer the legal title if such intention of the grantor can be collected from the entire instrument.²⁷ In others it is stated that "grants are to be interpreted in like manner with contracts in general."²⁸ These provisions seem to be a reflection of the same liberalizing tendency reached in other states by judicial decision. In almost all the statute books so-called "short form" deeds are given. These are usually of two kinds, the quit-claim and the grant, with or without warranty, and the operative words are normally "quit-claim" and "grant" or "convey".²⁹ But it is apparent, either in the

²⁰ *Cowdrey v. Cowdrey* (1906) 71 N. J. Eq. 353, 64 Atl. 93; *Barnes v. Banks* (1906) 223 Ill. 352, 79 N. E. 117 ("I present you with my house and lot"); see *Bentley's Heirs v. De Forest*, *supra* note 15.

²¹ In *East Jellico Coal Co. v. Jones* (1910) 141 Ky. 306, 132 S. W. 411, effect was given to a recital that the instrument was to correct a former deed, and conveyed land not there mentioned. In *Lorick & Lowrance v. McCreery* (1883) 20 S. C. 424, the following was operative to convey a good life estate: "For value received I hereby assign, set over and deliver to . . . all my right title and interest as legatee of the estate of . . ."

²² *Metzger v. Miller* (1923, D. C. Calif.) 291 Fed. 780 (construed from a series of letters under a California statute which interprets all deeds in the same manner as contracts); (1924) 22 MICH. L. REV. 373.

²³ *Folk v. Varn* (1857, S. C.) 9 Rich. Eq. 303 (deed of gift of chattels).

²⁴ *Ball v. Wallace* (1861) 32 Ga. 170. Compare *Ryan v. Wilson*, *supra* note 17.

²⁵ *Disley v. Disley* (1910) 30 R. I. 366, 75 Atl. 481.

²⁶ *Long Island R. R. v. Conklin* (1864) 29 N. Y. 572.

²⁷ Ala. Code, 1923, sec. 6339; Neb. Comp. Sts. 1922, sec. 5594.

²⁸ S. D. Rev. Code, 1919, sec. 530; Mont. Rev. Code, 1921, sec. 6349; N. D. Civil Code, 1913, sec. 5511; see *Evenson v. Webster* (1892) 3 S. D. 382, 53 N. W. 747.

²⁹ For examples see N. Y. Cons. Laws, 1923, ch. 51, sec. 258; Ariz. Rev. Sts. 1913, sec. 2065; Mass. Gen. Laws, 1921, ch. 183, sec. 12. See Rood, *Statutes of Uses and the Modern Deed* (1905) 4 MICH. L. REV. 109.

statute itself³⁰ or by judicial interpretation,³¹ that these forms are not exclusive of any other language which sufficiently indicates the intent to convey. It is interesting, however, to note a recrudescence of "apt" words in the old sense of the term, *i. e.*, a word commonly used and recognized without further question as expressing the requisite intent.

Apart from a few cases which seem to obscure a clear intent by a strained construction,³² the decisions are harmonious in attempting to gather an intent or "purport" to convey from the language used. More doubt arises where there has been an entire omission, either through ignorance or inadvertence, of granting words or language purporting to convey. As far as appears all but one case hold the omission fatal.³³ In *Bridge v. Wellington*³⁴ the court glossed over the difficulty by discovering an intent in the *habendum* and the covenants of warranty. But the general attitude is represented by the reporter's cryptic note: "*Quod voluit, non dixit.* The deed is clearly void." Some courts have attempted to mitigate the harshness of this requirement by means of an estoppel. Where the deed contains a covenant of warranty, the title is said to pass, as between the parties, by force of the covenant alone, and will be enforced in equity to prevent a circuitry of action.³⁵ A precedent at law may be found in the old English case of *Benicombe and Parker*,³⁶ where a defective bargain and sale was held to operate as a feoffment solely by reason of a letter of attorney to make livery of seisin, embodied in the deed.

This problem of discovering an intent where granting words were entirely omitted was presented in the recent case of *Legout v. Price* (1925, Ill.) 149 N. E. 427. The plaintiff's father, the owner in fee of the land in question, executed and delivered an instrument which purported to convey his land "to the heirs of Adolphus Legout", the plaintiff, but "provided always that Adolphus Legout may retain possession of, and have the use of the lands above conveyed during his lifetime." The plaintiff went into possession claiming a life estate. This suit was brought to set aside deeds to the defendant from the plaintiff and his children of an interest in the lands. The court held that a gift "to the heirs" of a living person was void for uncertainty. It was admitted that heirs of a living person might be construed as children in a remainder, but a particular estate on which to

³⁰ D. C. Code, 1924, sec. 503; N. D. Civil Code, 1913, sec. 5511; R. I. Gen. Laws, 1921, sec. 4285.

³¹ *Albert v. Holt* (1923) 137 Va. 5, 119 S. E. 120.

³² See *Dantzler v. Riley* (1918) 109 S. C. 44, 95 S. E. 132.

³³ *Davis v. Davis* (1873) 43 Ind. 561; *Webb v. Mullins* (1884) 78 Ala. 111. See *Brown v. Manter* (1850) 21 N. H. 528.

³⁴ (1804) 1 Mass. 219.

³⁵ *Brown v. Manter*, *supra* note 33.

³⁶ *Supra* note 10.

base the remainder is essential. The life estate to Adolphus Legout could not take effect because it was an attempted reservation to a stranger. It was impossible to construe the provision as the grant of a life estate, since there were no operative words of grant, and the words "retain and have the use of" do not purport to convey anything. The deed was, therefore, a nullity and gave no such title as would support a suit in equity. The draftsman of the deed had hedged himself in by an array of technical phrases, but the intent of the grantor is clear. He desired to create a life estate in his son and a remainder in his son's children.

The court might have attacked the technicalities. The basis for the rule that a grant "to the heirs" of a living person is void for uncertainty³⁷ lies imbedded in the mechanics of feudal conveyancing. It was essential that at every moment there be in existence a definitely ascertained person to whom livery of seisin could be made³⁸ and upon whom the over-lord could call for services whenever the occasion required. A man's heirs are not ascertainable until his death. But in the present day a grant *in futuro* is certainly effective as a springing use, and a grant to a class of persons would likewise be good if *in futuro*. Why not a grant to a class in the future to take effect at the death of A, whose death also determines the class?³⁹ Such a conclusion is said, however, to be dependent on some present particular estate.⁴⁰

³⁷ *Hall v. Leonard* (1822, Mass.) 1 Pick. 27; *Booker v. Tarwater* (1894) 138 Ind. 385, 37 N. E. 979; *Duffield v. Duffield* (1915) 268 Ill. 29, 108 N. E. 673. There is certainly no question of uncertainty if "heirs" is construed as the children now living of the person named. *Tinder v. Tinder* (1892) 131 Ind. 381, 30 N. E. 1077; *Seymour v. Bowles* (1898) 172 Ill. 521, 50 N. E. 122. In *Heath v. Hewitt* (1891) 127 N. Y. 166, 27 N. E. 959, A conveyed to the heirs of B reserving a life estate to himself, and after his death a life estate to W. Both A and W were dead. *Held*, that the heirs of B had good title to the land. In the instant case the facts were almost identical. After a grant "to the heirs of Adolphus Legout" reserving a life estate to Adolphus Legout, appears a clause: "It is also understood and agreed that the said Julian Legout do hereby reserve during his lifetime the rent off all the land herein conveyed that is now cleared and in cultivation except the sand hills." But a reservation of all the rent is equivalent to a life estate. *Powe v. Payne* (1922) 208 Ala. 527, 94 So. 537. Had the court decided in the instant case that the grantor retained a life estate *pro tanto*, there would have been no further question of reservation to a stranger. This clause was not discussed, and this comment assumes the facts as if it did not appear.

³⁸ Where registry stands in place of livery, the requisite of seisin may be satisfied. See *Huss v. Stephens* (1865) 51 Pa. 282. The extent to which a grant to vague and indefinite persons has been upheld is shown in *Futterer v. City of Sacramento* (1925, Calif.) 237 Pac. 48 ("to the present and future owners of town lots and town property in Sacramento City"); (1926) 14 CALIF. L. REV. 135.

³⁹ 2 Tiffany, *Real Property* (2d ed. 1920) 1596.

⁴⁰ *Aetna Life Ins. Co. v. Hoppin* (1911) 249 Ill. 406, 94 N. E. 669.

How such a condition can be deemed a necessity when estates can be created *in futuro* does not seem clear. But conceding the validity of this requirement, the court might have found a good life estate in Adolphus Legout. The prevalent doctrine that a reservation to a stranger is void⁴¹ is another relic of feudal days. At common law, a reservation was defined as a right created and taken back from what has been granted, as a rent charge or service, or the right to cut trees, which could only be rendered up to the grantor. An exception was merely an indication of non-grant of something *in esse* as a house, or part of the land.⁴² To-day both terms are used interchangeably, in an untechnical sense, to indicate the cutting off of a particular estate from an estate granted. The only obstacle which prevents the grantor from conveying to a stranger by way of reservation seems to be the necessity of words "purporting" to convey.⁴³ The courts treat the case as one of the entire omission of granting words, but that is not a necessary interpretation. By comparison with such operative words as "to return to"⁴⁴ and "shall go",⁴⁵ it does not seem too great a stretch of the imagination to construe the same intent from "reserving" and "retain and have the use of" in favor of a third person. Or, more soundly, the intent of the grantor may be disclosed by a construction of the deed as a whole and not a clause-by-clause interpretation. This was done in *Maynard v. Maynard* where the court, unwilling to leave the grantor's elderly daughters without support, gave effect by means of an estoppel to life estates created by way of reserva-

⁴¹ *Haverhill Savings Bank v. Griffin* (1903) 184 Mass. 419, 68 N. E. 839; *In re Dixon* (1911) 156 N. C. 26, 72 S. E. 71; *West Point Iron Co. v. Reymert* (1871) 45 N. Y. 703; *Martin v. Cook* (1894) 102 Mich. 267, 60 N. W. 679; *Stone v. Stone* (1909) 141 Iowa, 438, 119 N. W. 712. But a void reservation to a stranger may operate as a valid exception to the grantor. *Stone v. Stone*, *supra*; *Burchard v. Walther* (1899) 58 Neb. 539, 78 N. W. 1061. Or it may be sufficient, at least, to give notice to the grantee of existing rights of third persons. *Redding v. Voght* (1906) 140 N. C. 562, 53 S. E. 337; *West Point Iron Co. v. Reymert*, *supra*. In a few decisions the intent of the grantor prevails in spite of the fact that there is, in form, a reservation to a stranger. *Saulsberry v. Saulsberry* (1915) 162 Ky. 486, 172 S. W. 932; *Fryer v. Fryer* (1920) 204 Ala. 422, 85 So. 706. Also, an easement appurtenant may be created for the benefit of adjoining owners not parties to the deed. *Litchfield v. Boogher* (1911) 238 Mo. 472, 142 S. W. 302; *Gibbons v. Ebding* (1920) 70 Ohio St. 298, 71 N. E. 729. Or for the benefit of the public. See *Tiffany*, *op. cit. supra* note 39, sec. 436.

⁴² *Shepard, Touchstone*, 80; *Tiffany*, *loc. cit. supra* note 41; *Beardslee v. New Berlin L. & P. Co.* (1912) 207 N. Y. 34, 100 N. E. 434; see *Stone v. Stone*, *supra* note 41.

⁴³ *In re Dixon*, *supra* note 41; *Freudenberger Oil Co. v. Simmons* (1914) 75 W. Va. 337, 83 N. E. 995; *Littlefield v. Mott* (1883) 14 R. I. 288.

⁴⁴ *Supra* note 24.

⁴⁵ *Supra* note 23.

tion to them as strangers.⁴⁶ Of course, the conveyance of land should not be by guesswork; but obviously, the grantor did not mean his deed to be a nullity, and where the intention seems clear from the entire instrument, as in the instant case, the court should not hesitate, within reasonable limitations, to do for the parties what they inartistically tried to do for themselves.

THE PAROL EVIDENCE RULE AND THE STATUTE OF FRAUDS
IN RELATION TO THE LAW OF MISTAKE

The problem, whether parol evidence should be admitted to show mistake in a written instrument which purports to embody the terms of a contract, arises in suits over deeds,¹ contracts to sell,² credit transactions,³ and, indeed, written agreements generally.⁴ At the time when the question is raised the contract may be entirely executed,⁵ partially so,⁶ or entirely executory;⁷ and either party to the suit may have alleged the mistake. The plaintiff may allege mistake as the basis of a bill for reformation and specific performance, or for reformation and damages, or for re-

⁴⁶ (1858, N. Y.) 4 Edw. Ch. 711, in which Chancellor McCoun stated: "But, whatever it may be, the court is bound to give effect to the clause of the deed in which it is contained, and to award to them the benefit of it according to the clear intention of the whole instrument; for, although the clause is not good as a technical exception or reservation, yet it is good as indicating an intention which is not inconsistent with the rules of law."

¹ *Gillespie v. Moon* (1817, N. Y.) 2 Johns. Ch. 535; *Goode v. Rilcy* (1891) 153 Mass. 585, 28 N. E. 228; *Noel's Ex'r v. Gill* (1886) 84 Ky. 241, 1 S. W. 428; (1889) 5 L. R. A. 152, note.

² *Osborn v. Phelps* (1849) 19 Conn. 63; *Atwood v. Mikeska* (1911) 29 Okla. 69, 115 Pac. 1011.

³ *Bayes v. Blair* (1923) 199 Ky. 455, 251 S. W. 623 (suit on a note); *Smith v. Cram* (1924) 113 Or. 313, 230 Pac. 812 (foreclosure of mortgage).

⁴ *New York Life Ins. Co. v. Gilbert* (1923) 215 Mo. App. 201, 256 S. W. 148 (error in computing amount due on a policy); *New York Life Ins. Co. v. Kimball* (1919) 93 Vt. 147, 106 Atl. 676 (same); *Park Bros. v. Blodgett* (1894) 64 Conn. 28, 29 Atl. 133 (suit on a contract for sale of steel). Since testamentary dispositions are governed by a separate body of law, discussion of the effect of the parol evidence rule in that class of instruments has been intentionally omitted. For a typical example, see *Patch v. White* (1886) 117 U. S. 210, 6 Sup. Ct. 617; also (1910) 23 L. R. A. (N. S.) 370, note.

⁵ *Gillespie v. Moon*, *supra* note 1; *Goode v. Rilcy*, *supra* note 1; *McCabe v. O'Conner* (1920) 42 S. D. 506, 176 N. W. 43. Even if the transaction is entirely executed, if it can be shown that the party setting up mistake gave no consideration, equity will hesitate in granting reformation. See (1921) 30 YALE LAW JOURNAL, 418; Pound, *Consideration in Equity* (1918) 13 ILL. L. REV. 667, 676, 679.

⁶ *Park Bros. v. Blodgett*, *supra* note 4; *Ochco Realty Corp. v. Sec. Realty Corp.* (1923, 1st Dept.) 205 App. Div. 324, 199 N. Y. Supp. 466; *Libby, McNeil & Libby v. Bush Term. Bldg. Co.* (1923, Sup. Ct. Spec. T.) 121 Misc. 228, 201 N. Y. Supp. 149; (1924) 33 YALE LAW JOURNAL, 325.

⁷ *Atwood v. Mikeska*, *supra* note 2; *Osborn v. Phelps*, *supra* note 2.

scission; the defendant may make it the basis of a cross action by way of counterclaim, asking for reformation and specific performance, or for reformation and damages, or he may use it merely to support an equitable defense.

In the recent case of *Le Witt v. Park Ecclesiastical Society* (1925) 103 Conn. 285, 130 Atl. 387, the defendant apparently attempted to get evidence of mistake before the court as an equitable defense. The plaintiff had contracted in writing to buy the defendant's land "free from encumbrances" and paid down \$5,000 to be sacrificed as liquidated damages in case of a breach by him. The plaintiff refused the deed tendered by the defendant, because it showed a right of way, and sued to recover his payment. The defendant answered that the parties had been mistaken as to the legal effect of the word "encumbrance" and did not understand it to include a right of way. He asserted that by the true agreement the land was to be conveyed subject to the right of way, and claimed the \$5,000 as liquidated damages. The trial court gave judgment for the plaintiff, saying that the writing was unambiguous and the parol evidence rule prevented its reformation. The defendant appealed and the judgment was affirmed.

To prevent proof of these claims or defenses based on mistake it is customary to plead the parol evidence rule or the statute of frauds, or both. Indeed, in some cases the two are discussed in such a manner that it is practically impossible to determine on which ground the decision is placed.⁸ The parol evidence rule was devised by the courts of common law largely for the purpose of preventing erroneous decisions by the jury;⁹ but even there when the written words were ambiguous the courts were forced to let in extrinsic evidence for the purpose of explanation.¹⁰ The

⁸ *Elder v. Elder* (1833) 10 Me. 80; *Woolam v. Hearn* (1802, Ch.) 7 Ves. 211; Clark, *Principles of Equity* (1919) sec. 347; see *Macomber v. Pookham* (1889) 16 R. I. 485, 491, 17 Atl. 910, 912.

⁹ 5 Wigmore, *Evidence* (2d ed. 1923) sec. 2461; 2 Bacon's *Abridgment* (1793) 309: "A distinction has been taken between evidence that may be offered (1) to a jury and (2) to inform the conscience of the court [of equity], namely, that in the first case no such evidence should be admitted, because the jury might be inveigled thereby, but that in the second, it could do no hurt."

¹⁰ *Hamill v. Woods* (1895) 94 Iowa, 246, 62 N. W. 735 (in an action at law on a guaranty, parol evidence admitted for purpose of determining duration of the guaranty); *Louisville Ry. v. Reynolds* (1889) 118 Ind. 170, 20 N. E. 711 (parol evidence admissible because letter did not purport to contain the entire contract); *Kvamme v. Barthell* (1908) 144 Iowa, 418, 118 N. W. 766 (real estate broker allowed to show by parol for the sale of what lands he was to receive commission). See Holmes, *The Theory of Legal Interpretation* (1899) 12 HARV. L. REV. 417, 419: "Of course, the purpose of written instruments is to express some intention or state of mind of those who write them, and it is desirable to make that purpose effectual, so far as may be, if instruments are to be used. The question is how far the law ought to go in aid of writers."

chancellor, however, trained in weighing conflicting evidence, and having only occasionally to deal with the jury, and then merely as an advisory body, had less reason to adopt this rule than did the common-law courts; nevertheless, it has been applied in some equity cases.¹¹ However, once mistake is alleged, the rule should have no application in equity.¹² Whether or not such a rule is desirable in either equity or law has been questioned, and many courts now try to give effect to the agreement which the parties actually thought they expressed in the writing.¹³ Contrary to the holding in the instant case, the majority of American equity courts have not kept out evidence of mistake, once it is alleged, solely because of the parol evidence rule.¹⁴

Whether the statute of frauds prevents the introduction of parol evidence depends on the effect which the evidence, if proved, will have on the written instrument.¹⁵ Thus, in cases where it is

¹¹ *In re Kilvert's Trusts* (1871) 12 Eq. 183; *Attorney-General v. Shore* (1843, Ch.) 11 Sim. 592; *Vermont Marble Co. v. Eastman* (1917) 91 Vt. 425, 101 Atl. 151. These cases exclude evidence which would attempt to explain words which have a "plain meaning".

¹² 2 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) sec. 853; Clark, *op. cit. supra*, note 8, sec. 350; 2 Williston, *Contracts* (1920) sec. 631; and see cases *infra*, note 14.

¹³ 5 Wigmore, *loc. cit. supra*, note 9, sec. 2462: "There can be, in the nature of things, no absoluteness of standard in interpretation. . . . The ordinary standard, or 'plain meaning', is simply the meaning of the people who did not write the document." Thayer, *Preliminary Treatise on Evidence* (1898) 390; *Pitcairn v. Hess Co.* (1903, C. C. A. 3d) 125 Fed. 110, 113. "According to the modern and better view, the rule which prohibits the modification of a contract by parol is a rule, not of evidence, but of substantive law. . . . The writing is the contractual act, of which that which is extrinsic, whether resting in parol or other writings, forms no part." *Brown v. Byrne* (1854, Q. B.) 3 E. & B. 703, 714; *Myers v. Sarl* (1860, Q. B.) 3 E. & E. 306; *In re Jodrell* (1888) L. R. 44 Ch. D. 590, 609, 614.

¹⁴ *Keisselbrack v. Livingston* (1819, N. Y.) 4 Johns. Ch. 144; *Craig v. Kittredge* (1851) 23 N. H. 231; *Stedwell v. Anderson* (1851) 21 Conn. 139; *Walden v. Skinner* (1879) 101 U. S. 577; *Smith v. Butler* (1884) 11 Or. 46, 4 Pac. 517; *Citizens Nat. Bank of Attica v. Judy* (1896) 146 Ind. 322, 43 N. E. 259; *Bayes v. Blair*, *supra* note 3.

¹⁵ The language of some of the cases would seem to make this inquiry irrelevant. Thus in *Noel's Ex'r v. Gill* (1886) 84 Ky. 241, 249, 1 S. W. 428, 430, it was said: "Whether the parol evidence offered to correct the writing on account of fraud or mistake shows the verbal contract to be broader than the written instrument—covering more or different subject-matter, or enlarging the terms,—or is narrower than the written instrument, either in the terms or subject matter of the contract, courts of equity will grant relief by reforming the contract, so as to prevent fraud or mistake. The statute of frauds, in granting such relief, is not violated, but is uplifted, that it may not perpetrate the fraud that the Legislature designed it to prevent." But the decisions limit this language to executed contracts or to executory contracts where rescission only is sought; only one case has been found where the court reformed a wholly executory contract and then specifically enforced it. See *infra* note 24.

claimed that fraud was committed at the time the agreement was entered into, it is obvious that the claim, if proved, would not be barred by the statute of frauds, because the statute has no application to cases where trusts arise as a matter of law.¹⁶ Likewise, the statute is no bar when it can be shown that there has been sufficient "part performance" to take the place of the written memorandum required by the statute.¹⁷ In other words, in cases of fraud at the outset and "part performance" it is unnecessary to ask what effect the proof will have on the written agreement, for in such cases, no written agreement is necessary. In cases where mistake is alleged, however, this inquiry is of paramount importance.

There is one line of cases in which the evidence which shows that a mistake was made will also show the true agreement of the parties. A case of this type is where all the essential terms were contained in the written instrument but because of a "clerical error" the buyer was named as the seller. In this case the issue was really over the sufficiency of the memorandum; and once the evidence of how the mistake was made was shown, the true terms of the contract were also apparent and the relief asked was granted.¹⁸ This sort of mistake case should be clearly distinguished from the case where the evidence which is first offered shows only that a mistake has been made and requires additional evidence to show the true terms of the contract.¹⁹ In the instant case the first evidence offered would be for the purpose of proving that the parties were mistaken as to the legal effect of the word "encumbrance" and then additional evidence would have to be admitted to show that they intended the land to be conveyed subject to the right of way. It is the effect of this latter evidence on the written instrument which determines whether or not the statute of frauds is a bar to the claim.

There are several classes of cases illustrating this effect. Per-

¹⁶ (1676) 29 Car. II, c. 3, sec. 8. According to the English view the same result is reached although the fraud occurs subsequent to the agreement. *Davies v. Otty* (1865, Ch.) 35 Beav. 208. In the United States, however, it is generally held that the fraud must have occurred at the outset. *Titcomb v. Morrill* (1865, Mass.) 10 Allen, 15. See also (1906) 6 GOL. L. REV. 326; (1907) 20 HARV. L. REV. 549; (1914) 12 MICH. L. REV. 27, 515; (1912) 39 L. R. A. (N. S.) 906, note.

¹⁷ *Eaton v. Whitaker* (1846) 18 Conn. 222; *Bradley v. Loveday* (1922) 98 Conn. 315, 119 Atl. 147; (1923) 32 YALE LAW JOURNAL, 846.

¹⁸ *Bryant Electric Co. v. Stein* (1920) 95 Conn. 211, 111 Atl. 204. Where, however, the promises were on two separate papers and A signed B's and B signed A's, it was held that the writing was insufficient. *Osborn v. Phelps* (1848) 19 Conn. 63.

¹⁹ *Stedwell v. Anderson* (1851) 21 Conn. 139; *Park Bros. v. Blodgett* (1894) 64 Conn. 28, 29 Atl. 133 (mistakes of law, relief granted); *contra: Fowler v. Black* (1891) 136 Ill. 363, 26 N. E. 596; *Holbrook v. Tomlinson* (1922) 304 Ill. 579, 136 N. E. 745; (1923) 32 YALE LAW JOURNAL, 502.

haps the most common is that where the grantor conveyed more land than the bargain called for and sues the grantee for a reconveyance of the surplus.²⁰ As between the parties,²¹ the grantor's claim is allowed and the result described by calling the grantee a "constructive trustee". The reverse of the previous case is where the party bringing the suit is attempting to show that by mistake there was omitted from the written agreement terms, which, had they been inserted, would entitle the plaintiff to a greater interest than the written agreement gives him. The minority view denies relief, saying that to grant it would be to enforce a contract which was never in writing.²² The majority view, allowing recovery, furnishes sufficient protection against trumped-up suits which the statute of frauds sought to prevent, since the proof of mistake by parol evidence must be by more than a "mere preponderance".²³ In another situation, where the contract is wholly executory and the suit is brought for reformation and specific performance, a claim being made for more than the written bargain calls for, most courts have denied specific performance; but the mistake may be shown for purposes of rescission.²⁴ The statute of frauds is no bar in the rescission cases, for the effect of the action is merely to restore the *status quo* and thus destroy any new legal relations that have arisen out of the imperfect transaction.²⁵ Finally, where the defendant sets up mistake merely as an equitable defense to the plaintiff's claim, the early English cases said no contract was being enforced and allowed the

²⁰ *Gillespie v. Moon*, *supra* note 1; *Goode v. Riley*, *supra* note 1; *Green v. Johnson* (1922) 153 Ga. 738, 113 S. E. 402.

²¹ If the *res* has been sold by the grantee to an innocent purchaser for value, the grantor cannot recover it. *Cross v. Bean* (1889) 81 Me. 525.

²² *Elder v. Elder*, *supra* note 8: "It is one thing to limit the effect of an instrument and another to extend it beyond what its terms import. . . . A deed conveys one farm, when it may be proved by parol that it should have conveyed two. Here equity cannot relieve without violating the statute." *Glass v. Hulbert* (1869) 102 Mass. 24; *contra*: *Noel's Ex'r v. Gill*, *supra* note 15; *Keisselbrack v. Livingston*, *supra* note 14; *McCabe v. O'Conner*, *supra* note 5; *Central Granaries Co. v. Nebraska Lumbermen's Assoc.* (1921) 106 Neb. 80, 182 N. W. 582.

²³ *Clark*, *loc. cit.*, *supra* note 8; *Leslie v. O'Neil* (1913) 108 Ark. 697, 156 S. W. 1017.

²⁴ *Davis v. Ely* (1889) 104 N. C. 16, 10 S. E. 138: "The plaintiff may enforce the contract in its present form, or he may rescind it, and ask for an adjustment of any equities which may have grown out of the transaction." In *Atwood v. Mikeska*, *supra* note 2, however, the court reformed and specifically enforced a wholly executory contract. See 3 Williston, *op. cit.*, *supra* note 12, sec. 1555, approving the view allowing only rescission.

²⁵ The cases where mistake is made use of for the purpose of undoing what legal relations have already come into existence should be distinguished from those in which mistake prevents the creation of legal relations. See *Raffles v. Wichelhaus* (1864, Exch.) 2 Hurl. & C. 906; *Corbin, Cases on Contracts* (1921) 114, note 70.

defense.²⁶ This seems to be a reasonable view and is law to-day.²⁷ The great difficulty, however, is in determining what is an equitable defense.

The instant case suggests a new type, for obviously it cannot be brought within any of the first three classes, and it differs from the last, in that if it is allowed, the defendant will have established his ownership in the \$5,000 payment. In such a case, where the defendant sets up mistake for the purpose of showing that he was entitled to keep the \$5,000 as liquidated damages, if his defense is sustained, would not the defendant be "maintaining an action" on an unwritten contract for the transfer of an interest in land? It is obvious that the defendant did not come into court first; yet to allow him to win would be to reach the same result as if he had maintained a successful action for reformation and damages because of non-performance by the buyer. It is pointed out above that in wholly executory contracts, the majority view is that mistake can be shown for obtaining rescission only. But the statute of frauds merely provides that "no action shall be maintained"; it does not prohibit the voluntary performance of an oral contract, and it does not invalidate such a contract in so far as it has been executed. In the instant case the defendant has possession of the money, and even though he would have failed if he had been obliged to sue to obtain this money, the evidence as to mistake offered by him for the purpose of preventing the other party from recovering it back should not be excluded merely because he could not have established a right to the money, had he started a suit.²⁸ It is interesting to note that previous to the present action the defendant had introduced a bill for reformation and specific performance, but withdrew it because he thought the statute of frauds would prevent the relief.

THE NECESSITY OF INDORSEMENT FOR AFTER ACQUIRED INSURANCE

Where an insurance agent has failed to comply with his promise to an assured to attach, in accordance with express provisions in the policy, a written indorsement of the additional insurance taken out by the assured, the problem is raised whether or not recovery should be permitted in a suit upon the policy.

²⁶ *Marquis Townshend v. Stangroom* (1801, Ch.) 6 Ves. 328; *Woolam v. Hearn*, *supra* note 8.

²⁷ *Markley v. Lockwood* (1920) 188 Iowa, 357, 176 N. W. 294.

²⁸ The cases where the courts have reformed and enforced wholly executory contracts within the statute of frauds have been cases where the mistakes were of fact. Would these jurisdictions also give the same relief where the mistake is one of law?

The question was decided in the negative in the recent case of *Fire Association of Philadelphia v. Nime* (1925, C. C. A. 5th) 9 Fed. (2d) 28. The assured procured \$35,000 additional insurance. He handed his prior \$5,000 policy to the agent of the plaintiff company saying: "Make total concurrent on stock \$40,000 on that policy." The agent assented, but neglected to make the proper indorsement. The property burned several months later. Suit was brought on the policy, which contained the usual provision that no "agent . . . shall have the power to waive any provision or condition of this policy . . . unless such waiver, if any, shall be written upon or attached thereto." The court gave judgment for the defendant on the ground that no oral agreement "was effective to change the policy or condition thereof."

Standard fire insurance policies provide that the entire policy shall be void if the assured "now has, or shall hereafter make or procure any other contract of insurance." This provision makes the duty of the insurer conditional upon there being no additional insurance without its consent. Procuring such insurance, however, does not render the policy wholly "void",¹ even though that word is used in the provision. Just as in the case of infancy contracts and those induced by fraud, there remains in the insurer a power of "validation".² By an expression of consent, the insurer can renew his contractual duty to pay in spite of the non-fulfilment of the condition precedent. He is generally said to "waive" the condition. This result, as in the case of other conditions the fulfilment of which is not the substantial equivalent for which a promise is given, can be produced by a mere expression of assent without any new consideration; and it can be produced by an agent authorized to make contracts of insurance, if done according to the waiver provisions in the policy.³ But where there has been an attempted waiver other than in the manner provided, the question of the authority of the agent to waive has troubled the courts. In some states courts have avoided the problem by the simple technique of holding that this provision shall be considered waived unless the company affirmatively exercises its power to avoid the policy within a reasonable time after notice of the additional insurance.⁴ For this purpose notice to the agent has been held to be notice to

¹ Vance, *Waiver and Estoppel in Insurance Law* (1925) 34 YALE LAW JOURNAL, 834, 852; *Tillis v. Liverpool L. & G. Ins. Co.* (1903) 46 Fla. 26S, 35 So. 171.

² 2 Williston, *Contracts* (1920) sec. 746, and cases cited.

³ Mechem, *Agency* (2d ed. 1914) sec. 1064, and cases cited.

⁴ Vance, *op. cit. supra* note 1, at 852, and cases cited.

the company.⁵ It is impossible to believe that such decisions are detrimental to the company. The obvious purpose of the provision is to safeguard the company from fraudulent over-insurance. If the assured fails to disclose the facts, he is penalized by forfeiture at the election of the company; if he gives notice of other insurance, the company may cancel the policy, generally upon five days' notice. The subsequent attachment of the indorsement seems to be merely a matter of form, in that it can confer no added benefit upon the insurer after notice of other insurance has been given to the company. -

Other state courts have adopted the theory that the agent has the power to make an oral waiver even though expressly prohibited by the terms of the policy.⁶ This result is based upon the proposition that parties cannot by mutual agreement limit their own powers to contract with each other.⁷ Thus a mutual written agreement to contract only in writing cannot prevent the parties thereto from making valid subsequent oral agreements changing any or all of the terms of their former written contract.⁸ A rule that a person cannot by contract deprive *himself* of power to make an inconsistent contract is not a good reason for holding that an *agent* cannot be given power to make a written contract without also giving him power to alter it by parol. In spite of this, however, many state courts have held that an agent, having issued a policy contract providing that no change shall be made except in writing, can subsequently make an oral agreement waiving a provision requiring a written indorsement.⁹ And

⁵ 1 Mechem, *op. cit. supra* note 3, sec. 1070, and cases cited; *Thompson v. Traders' Ins. Co.* (1902) 169 Mo. 12, 68 S. W. 889; *Queen Ins. Co. of Am. v. Straughan* (1904) 70 Kan. 186, 78 Pac. 447; *Eagle Fire Ins. Co. v. Lewallen* (1909) 56 Fla. 246, 47 So. 947; *Neimeyer v. Claiborne* (1908) 87 Ark. 72, 112 S. W. 387; NOTES (1926) 26 COL. L. REV. 203.

⁶ *Illinois Live Stock Ins. Co. v. Koehler* (1895) 58 Ill. App. 557; *German-American Ins. Co. v. Sanders* (1897) 17 Ind. App. 134, 46 N. E. 535; *Bank of Anderson v. Home Ins. Co.* (1910) 14 Calif. App. 208, 111 Pac. 507; *People's Nat. Fire Ins. Co. v. Jackson* (1913) 155 Ky. 150, 159 S. W. 688; *Delaware Ins. Co. v. Wallace* (1913, Tex. Civ. App.) 160 S. W. 1130; *Continental Ins. Co. v. Bair* (1917) 65 Ind. App. 502, 114 N. E. 763; *First Nat. Bank v. Home Ins. Co.* (1922) 274 Pa. 129, 118 Atl. 17; *contra: Sparks v. National Union Fire Ins. Co.* (1918) 23 Ga. App. 38, 97 S. E. 462 (statute required insurance contracts to be in writing).

⁷ *Morrison v. Insurance Co.* (1887) 69 Tex. 353, 6 S. W. 605; *West v. Insurance Co.* (1894) 10 Utah, 442, 37 Pac. 685; *Maryland Gas Co. v. McTyler* (1924) 150 Tenn. 691, 266 S. W. 767; 2 Williston, *op. cit. supra* note 2, sec. 759.

⁸ Anson, *Contracts* (Corbin, 4th Am. Ed. 1924) secs. 412, 415-417; *Westchester Fire Ins. Co. v. Earle* (1876) 33 Mich. 143; *Liverpool L. & G. Ins. Co. v. Sheffy* (1894) 71 Miss. 919, 16 So. 307; *Hanover Fire Ins. Co. v. Dole* (1898) 20 Ind. App. 333, 50 N. E. 772; *Northwestern Nat. Ins. Co. v. Avant* (1909) 132 Ky. 106, 116 S. W. 274.

⁹ *Phenix Ins. Co. v. Grove* (1905) 215 Ill. 299, 74 N. E. 141; *Mattocks v.*

where the agent, as in the instant case, has agreed to attach an indorsement according to the terms of the policy, an agreement seems to be implied that the condition shall be waived until the indorsement is attached.¹⁰

Under either of these views the plaintiff in the instant case might have recovered. But in the federal courts there appears to be no recognition of the "notice" doctrine; nor that the condition can be waived except by a written indorsement attached to the policy.¹¹ This attitude should not, however, prevent a recovery in the instant case. The court has apparently overlooked the fact that the non-fulfillment of the condition was caused by the agent's failure to make the indorsement in accordance with his promise. This promise was not expressly prohibited by the provision limiting the agent's authority, for the promise did not purport to change or waive any condition of the policy. On the contrary the agent agreed to comply with its express terms. When the agent has undertaken to make an indorsement, at what instant during the process of "making" should the company become bound? Upon the promise to make it? Upon the selection of the printed indorsement? When the agent signs it? When he enters it upon the books? When it is attached to the policy? Or when the policy is re-delivered to the assured with the indorsement attached? The promise is really but the first step in the "making"; manifestly no indorsement would be made in the absence of an agreement to make it.¹² An authorization by the company to make indorsements should imply an authorization to do all the acts necessary to the "making"—including the formation of the preliminary agreement to make the indorsement. An authorization to issue policies carries with it such an implication, for if the agent in the instant case had promised to issue a new

Des Moines Ins. Co. (1888) 74 Iowa, 233, 37 N. W. 174; *Grubbs v. Insurance Co.* (1891) 108 N. C. 472, 13 S. E. 236; *German-American Ins. Co. v. Humphrey* (1896) 62 Ark. 348, 35 S. W. 428; *Tillis v. Liverpool L. & G. Ins. Co.* *supra* note 1; *People's Nat. Fire Ins. Co. v. Jackson* *supra*, note 6; *contra: Beasley v. Phoenix Ins. Co.* (1913) 140 Ga. 126, 78 S. E. 722.

¹⁰ See cases cited *supra* note 6.

¹¹ *Meigs v. London Assur. Co.* (1904, C. C. E. D. Pa.) 126 Fed. 781; *Atlas Red. Co. v. New Zealand Ins. Co.* (1905, C. C. A. 8th) 138 Fed. 497. The instant case relied principally on the cases of *Northern Assurance Co. v. Grand View Bldg. Assoc.* (1902) 183 U. S. 308, 22 Sup. Ct. 133, and *Lumber Underwriters v. Rife* (1915) 237 U. S. 605, 35 Sup. Ct. 717. For a comprehensive discussion of these cases see Vance, *op. cit. supra* note 1. Federal courts are not bound by the decisions of the state courts on insurance law, it being a part of the commercial law. 2 Foster, *Federal Practice* (5th ed. 1913) sec. 477; *Meigs v. London Assur. Co.*, *supra*.

¹² See *Ellis v. Albany City Fire Ins. Co.* (1872) 50 N. Y. 402, where it was argued that no policy could be issued without a preliminary agreement to issue it, and that the preliminary agreement was binding upon the company.

policy with an indorsement attached (permitting additional insurance) the company would have been bound upon the making of the promise.¹³ Yet his authority to make an indorsement is apparently the same as his authority to issue a policy. It should, therefore, follow that if the agent can bind the company by an oral agreement to issue a policy,¹⁴ he can bind the company by an agreement to attach an indorsement.¹⁵ The assured does not know the difference between a request for an indorsement and a request for a new policy. To him they both mean: "I now have other insurance; if I am not *now* covered by your policy, give me \$5,000 protection at once." And he would have used those words if the agent had not just told him about the "indorsement". One promise should be as binding as the other.

There is no lack of consideration for the agent's promise to make the indorsement.¹⁶ In the typical case, the assured, after giving notice of the additional insurance, asks the agent if the policy is still good, and impliedly (if not expressly) adds that if

¹³ *Relief Fire Ins. Co. v. Shaw* (1876) 94 U. S. 574; *Insurance Co. v. Thornton* (1901) 130 Ala. 222, 30 So. 614; *Hicks v. British Amer. Ins. Co.* (1900) 162 N. Y. 284, 56 N. E. 743. In *Newark Mach. Co. v. Kenton Ins. Co.* (1893) 50 Ohio, 549, 35 N. E. 1060, it was said that the company becomes bound by the oral agreement of insurance, and that the policy is only evidence of such agreement.

¹⁴ Authority to issue a policy gives the agent power to bind the company by an oral agreement to issue a policy. *Ellis v. Albany City Fire Ins. Co.* *supra* note 12; *Sanborn v. Fireman's Ins. Co.* (1860, Mass.) 16 Gray, 448; *McCabe v. Aetna Ins. Co.* (1899) 9 N. D. 19, 81 N. W. 426; *Pelican Assur. Co. v. Schildknecht* (1908) 128 Ky. 351, 108 S. W. 312; *Brown v. Home Ins. Co.* (1910) 82 Kan. 442, 108 Pac. 824; *contra: Benner v. Fire Assoc. of Philadelphia* (1910) 229 Pa. 75, 78 Atl. 44 (prohibited by statute under which company was incorporated).

¹⁵ See cases cited *supra* note 6; *Dupuy v. Delaware Ins. Co.* (1894, C. C. W. D. Va.) 63 Fed. 680; *Rathbone v. City Fire Ins. Co.* (1862) 31 Conn. 193; *Maryland Fire Ins. Co. v. Gusdorf* (1875) 43 Md. 506; *Morrison v. Insurance Co.* (1887) 69 Tex. 353, 6 S. W. 605; *West v. Insurance Society* (1894) 10 Utah, 442, 37 Pac. 685; *Henschel v. Oregon Fire Ins. Co.* (1892) 4 Wash. 476, 30 Pac. 735; *Manchester v. Guardian Assur. Co.* (1896) 151 N. Y. 88, 45 N. E. 381; *Eagle Fire Ins. Co. v. Lewallen*, *supra* note 5; *Sutherland v. Federal Ins. Co.* (1910) 97 Miss. 345, 52 So. 689; *Cosmopolitan Fire Ins. Co. v. Gingold* (1911) 3 Ala. App. 537, 57 So. 266; *Royal Ins. Co. v. Morgan* (1916) 122 Ark. 243, 183 S. W. 198; *Hartford Ins. Co. v. Lumber Co.* (1918) 116 Miss. 822, 77 So. 798; *Continental Ins. Co. v. Bair*, *supra* note 6; *McGinnes v. Caledonian Ins. Co.* (1922) 78 Pa. Super. Ct. 376; *Royal Exch. Assur. v. Franklin* (1924) 158 Ga. 644, 124 S. E. 172; *contra: Greentaner v. Connecticut Fire Ins. Co.* (1920) 228 N. Y. 338, 127 N. E. 249 (agency contract terminated before promise made); *Pringle v. Spring G. Ins. Co.* (1910) 205 Mass. 88, 91 N. E. 209 (where agent did not have authority to make indorsements or issue policy).

¹⁶ *Equitable Ins. Co. v. Cooper* (1871) 60 Ill. 509. In *Hartford Fire Ins. Co. v. Lumber Co.*, *supra* note 15, the premium was held to be a continuing consideration until the expiration of the policy and sufficient to support a promise to make indorsement.

it is not, he will cancel that policy at once. The agent replies that an indorsement must be made in order to keep the policy in force. The assured requests the indorsement. It so happens that it is not convenient to make the indorsement then and there. To prevent cancellation, the agent promises to make the indorsement, and gives assurance that the policy will be all right. Relying on the promise,¹⁷ the assured forbears¹⁸ to exercise his privilege and power to cancel and delivers the policy to the agent for indorsement.¹⁹ Factually this forbearance is beneficial to the insurer-promisor, and detrimental to the assured-promisee. While the insurer is under no legal duty to pay under the policy (prior to the indorsement) the policy is not wholly void, for there yet remains in the insurer a privilege and power to validate the policy by waiver of the condition relating to additional insurance. Upon being satisfied that there has been no fraud involved in the taking of the additional insurance, the insurer is just as anxious to reinstate the policy as it would have been to keep the policy on its books had there been no additional insurance. This is evidenced by the fact that the insurer makes no charge for the indorsement, but on the contrary supplies its agent with printed indorsements together with instructions to give prompt service to policy holders in the making of indorsements. Furthermore, experience shows that the average policy once on the books is very likely to be renewed again and again. Actually the renewals constitute a large portion of the gross premium receipts of the insurer. Forbearance to cancel the policy is therefore beneficial to the insurer. It is at the same time detrimental to the assured in that by cancellation he would receive a refund of a portion of the unearned premium at short rate. Legally the assured, having broken a condition of the policy, cannot sue the insurer for the unearned premium.²⁰ But in practice, in the absence of fraud, the agent is ready to

¹⁷ *Manchester v. Guardian Ins. Co.*, *supra* note 15 (called reliance on the promise); *cf.* 1 Williston, *op. cit. supra* note 2, secs. 135, 139 (termed "promissory" estoppel).

¹⁸ 1 Williston, *op. cit. supra* note 2, sec. 135.

¹⁹ *Haigh v. Brooks* (1839, Q. B.) 10 Adol. & El. 309 (surrender of paper held consideration for a promise without reference to content of paper). But it should not be necessary that the policy be delivered to the agent. *Manchester v. Guardian Ins. Co.*, *supra* note 15; *Delaware Ins. Co. v. Wallace*, *supra* note 6; *Maryland Fire Ins. Co. v. Gusdorf*, *supra* note 15; *Bennett v. Western Und. Assoc.* (1902) 130 Mich. 216, 89 N. W. 702. The agent may promise to call for the policy. *Manchester v. Guardian Ins. Co.*, *supra* note 15. Some courts, however, have construed the promise as being conditional upon the delivery of the policy to the agent. *Supple v. Iowa State Ins. Co.* (1882) 53 Iowa, 29, 11 N. W. 716; *Connecticut Ins. Co. v. Smith* (1897) 10 Colo. App. 121, 51 Pac. 170; *Baumgartel v. Providence Washington Ins. Co.* (1893) 136 N. Y. 547, 32 N. E. 990; *Perry v. Calcedonian Ins. Co.* (1905, 3d Dept.) 103 App. Div. 113, 93 N. Y. Supp. 50.

make the refund at any time upon surrender of the policy for cancellation by the assured. Nothing is said about the effect of the additional insurance. Such practice is necessary to enable the agent to keep the confidence of his policy holders in competition with other agents. An insurer slow in returning premiums is very likely to lose the agent's business.

The assured should, therefore, be able to sue on the promise.²¹ The damages recoverable²² should be equal to the amount of the policy, the loss occasioned by the breach of the agent's promise.²³ Conceivably the assured might sue in equity for specific performance of the agreement.²⁴ Recovery should likewise be allowed where the suit is brought on the policy, as in the instant case. The company set up in its answer that no indorsement has been made on the policy. If the indorsement had been issued, clearly the company's defense would fail. If the assured should set forth the promise in his reply²⁵ as an equitable defense or counterclaim for specific performance,²⁶ affirmative relief might be given under the federal equitable defense statute.²⁷ For all practical purposes the suit should then proceed as though the indorsement had been made before suit. Equitable relief, however, should not be necessary. The promise itself ought to be a sufficient reply to the company's defense that the indorsement was not made. It is well recognized that one party to a contract cannot sue for the non-performance of an act which he has prevented; nor can he refuse performance of his duty because of the non-fulfillment of a formal condition precedent when he himself has caused such non-fulfillment. By analogy it should follow that

²⁰ *Farmer's Mut. Ins. Co. v. Phenix Ins. Co.* (1902) 65 Neb. 14, 90 N. W. 1000; Vance, *Insurance* (1904) sec. 85.

²¹ *Manchester v. Guardian Assur. Co.*, *supra* note 15; *Hartford Ins. Co. v. Lumber Co.*, *supra* note 15; see also other cases cited *supra* note 15, where insurer was held bound by the promise of the agent to make the indorsement.

²² The decision in the instant case should not be res judicata as regards a subsequent action on the promise, for technically, the promise might be considered as a separate cause of action. Cf. *Connecticut Fire Ins. Co. v. Judge Monroe Circuit Court* (1889) 77 Mich. 231, 43 N. W. 871 (declaration on policy not amendable so as to state new "cause of action" on promise to issue policy).

²³ *Manchester v. Guardian Ins. Co.*, *supra* note 15.

²⁴ Cf. *Taylor v. Merchants' Fire Ins. Co. of Baltimore* (1850, U. S.) 9 How. 390 (specific performance of agreement to issue policy).

²⁵ Matters of waiver or estoppel need not be alleged in the declaration. *Arnold v. American Ins. Co.* (1906) 148 Calif. 660, 84 Pac. 182.

²⁶ In *Bank of Anderson v. Home Ins. Co.*, *supra* note 6, the court considered "done what ought to be done", without a formal counterclaim for specific performance of promise to attach indorsement.

²⁷ *Liberty Oil Co. v. Condon Nat. Bank* (1922) 260 U. S. 235, 43 Sup. Ct. 118.

the company cannot avoid the policy because of the non-attachment of an indorsement which the company is under a duty to attach²⁸ to a policy in the possession of its agent.²⁹

²⁸ *Cosmopolitan Fire Ins. Co. v. Gingold*, *supra* note 15; *Hartford Ins. Co. v. Lumber Co.*, *supra* note 15; *German-American Ins. Co., v. Lee* (1915) 51 Okla. 28, 151 Pac. 642 (cannot avoid policy because of breach of duty of agent to make indorsement); *Continental Ins. Co. v. Bair*, *supra* note 6; *McGinnes v. Caledonian Ins. Co.*, *supra* note 15; *cf.* 1 Williston, *op. cit. supra* note 2, sec. 595.

²⁹ Assuming the indorsement factually necessary, there is some authority holding that the company might be suable in tort for negligence of the agent in failing to make the indorsement within a reasonable time. The undertaking by the company through its agent to make the indorsement, and the accepting of the policy for that purpose, imposed a common law duty upon the company to do all that the average prudent man would have done under the circumstances. *Coggs v. Bernard* (1703, C. P.) 2 Ld. Raym. 909 (gratuitous bailment consideration for promise). And "it is no answer to an action to recover damages caused by its failure to perform that duty to show that it was not paid for what it undertook to do." See *Carr v. Maine Cent. Ry.* (1917) 78 N. H. 502, 504, 102 Atl. 532, 533 (failure to execute claim papers delivered to company). Likewise, where the suit is brought on the policy, a reply that the indorsement was not made because of the negligence of the agent should be sufficient answer to the company's defense that the indorsement was not attached to the policy. *Cf. German-American Ins. Co. v. Lee*, *supra* note 28; *Delaware Ins. Co. v. Wallace*, *supra* note 6; *McGinnes v. Caledonian Ins. Co.*, *supra* note 15.