

Title:

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Ex antecedentibus et consequentibus fit optima interpretatio. (2 Inst. 173) - A passage is best interpreted by reference to what precedes and what follows it.

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Content:

A Selection of Legal Maxims

Chapter IV. - Rules of Logic

Allegans Contraria Non Est Audiendus (4 Inst. 279 ; Jenk. Cent. 16.) - He is not to be heard who alleges things contradictory to each other.

This elementary rule of logic, which is frequently applied in our Courts of justice, will receive occasional illustration in the course of this work. We may for the present observe that it expresses, in other language, the trite saying of Lord Kenyon, that a man shall not be permitted to "blow hot and cold" with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest^p.

In *Cave v. Mills*^q, the maxim under notice was applied. The plaintiff was surveyor to trustees of turnpike roads; as such surveyor it was his duty to make all contracts, and to pay the sums due for the repair of the roads, he being authorised to draw on the treasurer to a certain amount. His expenditure, however, was not strictly limited to that amount, and in the yearly accounts presented by him to the trustees a balance was generally claimed as due to him, and was carried to the next year's account. Accounts were thus rendered by him for three consecutive years showing certain balances due to himself. These accounts were allowed by the trustees at their annual meeting, and a statement based on them of the revenue and expenditure of the trust was published as required by the statute, 3. Geo. 4, c. 126, s. 78. The trustees, moreover, believing the accounts to be correct, paid off with monies in hand a portion of their mortgage debt. The plaintiff afterwards claimed a larger sum in respect of payments which had in fact been made by him, and which he ought to have brought into the accounts of the above years, but had knowingly omitted. It was held that he was estopped from recovering the sums thus omitted, for "a man shall not be allowed to blow hot

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and cold - to affirm at one time and deny at another - making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion. Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel', or by any other name, it is one which Courts of law have in modern times most usefully adopted."

[...]

Cases in which estoppel operates to preclude a person from contradicting that which has been accepted and acted upon as truth and fact by others, under circumstances constituting wilful and culpable deception are equally referable to the maxim *nullus commodum capere potest de injura sua propria*^t.

[...]

Chapter V. - Fundamental legal principles

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Actus Dei Nemini Injuriam. (2 Bla. Com. 122.) - The law holds no man responsible for the act of God.

Duties are either imposed by law or undertaken by contract, and the ordinary rule of law is that when the law creates duty, and the party is disabled from performing it without any default of his own by the act of God, the law excuses him^e, but when a

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party by his own contract imposes a duty upon himself he is bound to make it good, notwithstanding any accident by inevitable necessity^f.

The act of God which is the antithesis of the act of man, generally means an inevitable accident due directly and exclusively to natural causes without human intervention, and an accident so due is considered to be inevitable if it be such that it would be reasonable, under all the circumstances of the case, to expect a person to foresee and prevent it, or to resist or avert its consequences^g. The phrase often used of the distinctive forces of nature, such as storms and floods, and is applicable to these, though they be not unique, if they be extraordinary and such as could not reasonably be anticipated^h. It is also used of such an event as a person's death or his incapacity to act through illness.

Page: 181**Volenti Non Fit Injuria. (Wing. Max. 482.) - Damage suffered by consent is not a cause of action**

In actions founded on tort the leave and license of the plaintiff to do the act complained of usually constitutes a good defence by reason of the maxim *volenti non fit injuria*^p; and as a rule, a man must bear loss arising from acts to which he assented^q. Thus it was settled law that in an action of crim. Con. The husband's consent to the wife's adultery went in bar of the action, whereas his improper conduct, not amounting to consent, only went in reduction of damages on the ground of adultery went in bar of the action, whereas his improper conduct, not amounting to consent, only went in reduction of damages^r; and this doctrine now applies to the husband's claim, by petition in the Divorce Division (s), for damages on the ground of adultery with his wife^t. Upon the same principle a husband has no right to turn his wife away on account of her adultery at which he connived: he cannot complain of that to which he was a willing party^u. Nor is it contrary to this principle that an indictment lies for an illegal prize-fight notwithstanding the consent for the combatants; for the party complaining of the breach of the peace is the Crown^x. And on a criminal charge of assault consent affords no defence if the assault is likely or intended to do bodily harm^y. It has, indeed, been said that even in an action for an assault it is no defence to allege that the parties fought by consent, if the fight was unlawful^z; but it does not follow that either of the consent-

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ing parties to an unlawful fight can recover damages; for, even if their consent, being illegal, be a nullity, it may well be that the action would be dismissed by reason of the maxim *ex turpi causa non oritur actio*^a.

The maxim *volenti non fit injuria* has been often cited, and sometimes applied, in favour of defendants sued for damages for personal injuries; for instance it was so applied against a man who was hurt by a spring-gun while he trespassed in a wood after being warned by the owner that in it there were spring guns set^b in a manner which was not then illegal; and it seems that, as a rule, the application of the maxim is justifiable if the plaintiff received his injuries under circumstances leading necessarily to the interference that he encountered the risk of them freely and voluntarily and with full knowledge of the nature and extent of the risk: in other words, if the real cause of the plaintiff running the risk and receiving the injuries was his own rash act^c. Whether the maxim ought to be applied in a particular case is often a question rather of fact than law^{d>}.

Page: 191**Nullus commodum capere potest de injuria sua propria (Co. Litt. 148 b.) - No man can take advantage of his own wrong.**

It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong^e; and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest, we proceed at once to show its application by reference to decided cases; and, in the first place, we may observe that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law^d: *frustra legis auxilium quærit qui in legem comittit*^e; wherefore, A. shall not have an action of trespass against B., who lawfully enters to abate a nuisance caused by A.'s wrongful act^f; and an executor de son tort may not so readily obtain assistance from the law as a rightful executor^g. So if A. on whose goods a distress has been levied, by his own misconduct prevent the distress from being realised, A. cannot complain of a second distress as unlawful^h. So B., into whose field cattle have strayed through defect of fences which he was bound to repair, cannot distrain such cattle damage feasant in another field, into which they have got by breaking through a hedge which he had kept in good repair,

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because his own negligence was *causa sine qua non* of the mischiefⁱ. So if a man be bound to appear on a certain day, and before that day the obligee put him in prison, the bond is void^k. It is contrary to justice that a party should avoid his own contract by his own wrong. Accordingly, "in a long series of decisions the Courts have construed clauses of forfeiture in leases, declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessors. The same rule of construction has been applied to other contracts, where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract"; and it is applicable even where the legislature has imposed the

condition, unless the scope and purpose of the enactment be so opposed to the rule that it ought not to prevail^l.

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Res ipsa loquitur (the thing speaks for itself).

The onus of proving negligence lies upon the party who alleges it, for *ei qui affirmat, non ei qui negat, incumbit probatio*^l; and, to establish a case to be left to the jury, he must prove the negligence charged affirmatively, by adducing reasonable evidence of it^m. As a rule, the mere proof, that an accident has happened, the cause of which is unknown, is not evidence of negligenceⁿ.

In special circumstances, indeed, the mere fact that an accident has happened may be *prima facie* evidence of negligence, casting upon the party charged with it the onus of proving

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the contrary, for owing to the nature of the accident, *res ipsa loquitur*. Thus, where a ship in motion collides with a ship at anchor the collision is, generally, *prima facie* evidence of negligence in the management of the former^o, and where two trains of the same railway company collide, the burden of proving that the collision was not due to their servants' negligence falls upon the company^p. Similarly, it was held that a *prima facie* case of negligence was established by evidence that, while the plaintiff was lawfully passing under the doorway of the defendant's premises, a bag of sugar fell upon him from a crane fixed above the door^q, or that, while he was lawfully passing along the highway, he was struck by a brick falling from the defendant's railway bridge^r, or by a barrel tumbling out of an upper window of their shop^s. For where an accident happens from an inanimate object, which does not ordinarily happen if the persons who have the management of it use proper care, it may reasonably be inferred, in the absence of any explanation of them, that it happened through their want of care^t, and the defendants must "give a reasonable explanation which is equally consistent with the accident happening without their negligence as with their negligence"^u.

It is not settled whether the maxim is applicable to cases under the rule in *Donoghue v. Stevenson*^x, i. e., that "a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reason-

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able care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care^y."

The general rule, however, is that where the evidence adduced is equally consistent with the absence as with the existence of negligence in the defendant, the case ought not to be left to the jury^z; and the maxim, *res ipsa loquitur*, ought not to be applied unless the facts proved are more consistent with negligence in the defendant than with a mere accident^a. It is not enough, it has been said, for the plaintiff to show that he has sustained a jury under circumstances which may lead to a suspicion that there may have been negligence on the part of the defendant, but he must give evidence of some specific act of negligence^b.

Accordingly, where damage is done by a horse bolting in the street, the bolting is not in itself evidence of negligence; for it is indisputable that a horse sometimes becomes unmanageable from fright or other cause without want of care or skill in the person who has charge of it^c. Nor does proof that a motor vehicle skidded and ran into the plaintiff of itself shift the burden of proof^d, for a skid may result from many causes other than negligence of the driver. But if a person standing on the pavement is struck by a motor vehicle, the maxim applies unless and until the defendant shows that the occurrence was the result of a skid^e. In the same way the fact that a person on the pavement is injured by galloping horses shows a *prima facie* case unless the defendant is able to give some explanation, e. g., that they had bolted^f.

It has indeed been held that whenever a person walking along a road is run into and injured by a motor car a *prima facie* case is made out without further proof of negligence, for "the defen-

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dant is in the dilemma, either he was not keeping a sufficient look-out, or if he was keeping the best look-out possible

then he was going too fast for the best look-out that could be kept"^g. But the Court of Appeal have since refused to recognise this "dilemma principle" as a rule of law of general application ^h

Again, the maxim ought not to be applied to evidence of an unexplained accident, if the evidence is as consistent with the cause of the accident having been the victim's own negligence, as with its having been that of the defendant. For instance, if a railway company be sued by a widow under Lord Campbell's Act, evidence that her husband's dead body was found on the lines near a level crossing, having been apparently run over by a passing train, is insufficient; for it is not to be presumed persons are careful when crossing lines; nor is it sufficient to give evidence of acts of negligence, if it remains merely conjectural whether these acts were the cause of the accident ⁱ.

In deciding in any particular case whether the maxim, *res ipsa loquitur*, should be applied, the reported facts of other cases are of little value; each case must be decided upon its own facts. "It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt been properly applied in deciding other cases on other sets of facts"^k.

Chapter VI - Acquisition, enjoyment, and transfer of property

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Assignatus utitur jure auctoris. (Halk. Max., p, 14.) - An assignee is clothed with the right of his principal

[...]

In order to place in a clear light the general bearing of the maxim *assignatus utitur jure auctoris*, we will briefly notice, first, the quantity, and secondly, the quality or nature, of the interest in property which can be assigned by the owner to another party. And it is a well-known general rule, imported into our own from the civil law, that no man can transfer a greater right or interest than he himself possesses: *nemo plus juris ad alium transferre potest quam ipse habet*^p. The owner, for example, of a base of a determinable fee can, as a rule ^p, do no more than transfer to another his own estate, or some interest of inferior degree created out of it. In like manner, where the grantor originally possessed only a temporary or revocable right in the thing granted, and this right becomes extinguished by efflux of time or by revocation, the assignee's title ceases to be valid, according to the rule *resoluto jure concedentis resolvitur jus concessum*^q.

We find it laid down, however, that the maxim above mentioned, which is one of the leading rules as to titles, or the equivalent maxim, *non dat qui non habet*, did not, before the Real Property Act, 1845, apply to wrongful conveyances or tortious acts ^r. For instance, before that Act, if a tenant for years made a feoffment, this feoffment vested in the feoffee a defeasible estate

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of freehold; for according to the ancient doctrine, every person having possession of land, however slender or tortious his possession might be, was, nevertheless (unless, indeed, he were the mere bailiff of the party having title), considered to be in of the seisin in fee, so as to be able by livery to transfer it to another, and, consequently, if in the case above supposed, the feoffee had, after the conveyance, levied a fine, such fine would, at the end of five years from the expiration of the term, have barred the lessor ^s. But by s. 4 of the above Act it was provided that a feoffment "shall not have any tortious operation," and although this section has now been repealed ^t, there is no longer any need for it, as, since 1925, all lands lie in grant and are incapable of being conveyed by feoffment ^u.

Chapter VIII - The interpretation of statutes and written instruments

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Leges posteriores priores contrarias abrogant. (1 Rep. 25 b; 11 Rep. 62 b.) - Later laws repeal earlier laws inconsistent therewith.

The legislature, which possesses the supreme power in the State, possesses, as incidental thereto, the right to change, modify, and abrogate the existing laws. To assert that one Parliament can by its ordinances bind another would in fact be

to contradict this plain proposition; if, therefore, an Act of Parliament contain a clause "that it shall not be lawful for the King, by authority of Parliament during the space of seven years, to repeal this Act," such a clause, which is technically termed "*clausula derogatoria*," is void, and the Act may be repealed within seven years, for *non impedit clausula derogatoria quo minus ab eadem potestate res dissolvantur a quibus constituentur*^c; and *perpetua lex est nullam legem humanam ac positivam perpetuam esse, et clausula quoe abrogationem excludit ab initio non valet*^c. The principle thus set forth seems to be of universal application; and as regards our own Parliament, an

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Act may be altered, amended, or repealed in the same session in which it is passed ^d.

It is, then, an elementary rule that an earlier Act must give place to a later, if the two cannot be reconciled - *lex posterior derogat priori*^e - *non est novum ut priores leges ad posteriores trahantur*^f and one Act may repeal another by express words or by implication; for it is enough if there be words which by necessary implication repeal it^g. But a repeal by implication is never to be favoured, and must not be imputed to the legislature without necessity^h, or strong reasonⁱ, to be shown by the party imputing it^k. It is only effected where the provisions of the later enactment are so inconsistent with, or repugnant to, those of the earlier that the two cannot stand together; unless the two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time a repeal cannot implied; and special Acts are not repealed by general Acts unless there be some express reference to the previous legislation, or a necessary inconsistency in the two Acts standing together^l, which prevents the *maxim generalia specialibus non derogant* from being applied^m. For where there are general words in a later Act capable of reasonable application without being extended to subjects specially dealt with by earlier legislation, then, in absence of an indication of a particular intention to that effect,

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the presumption is that the general words were not intended to repeal the earlier and special legislationⁿ, or to take away a particular privilege of a particular class of persons^o. "The law will not allow the exposition to revoke or alter by construction of general words any particular statute, where the words may have their proper operation without it." ^p

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BenignÆ FaciendÆ sunt interpretationes propter simplicitatem laicorum ut res magis valeat quam pereat (Co. Litt. 36 a.); et verba intentioni, non e contra, debent inservire. (Fox's Case, 8 Rep. 93b, at 94a.) - A liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties.

The two rules of most general application in construing a written instrument are - 1st, that it shall, if possible, be so interpreted *ut res magis valeat quam pertat*, ^q, and 2ndly, that such a meaning shall be given to it as may carry out and effectuate to the fullest extent the intention of the parties. These maxims are, indeed, in some cases restricted by the operation of technical rules, which, for the sake of uniformity, ascribe definite meanings to particular expressions; and, in other cases, they receive, when applied to particular instruments, certain qualifications, which are imposed for wise and beneficial purposes; but, notwithstanding these restrictions and qualifications, the above maxims are undoubtedly the most important and comprehensive in determining the true construction of written instruments.

It is then laid down repeatedly by the old reporters and legal writers, that in construing a deed, every part of it must be made,

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if possible, to take effect, and every word must be made to operate in some shape or other^h. The construction, likewise, must be such as will preserve rather than destroyⁱ; it must be reasonable, and agreeable to common understanding^k; it must also be favourable, and as near the minds and apparent intents of the parties as the rules of law will admit^l, and, as observed by Lord Hale, the judges ought to be curious and subtle to invent reason and means to make acts effectual according to the just intent of the parties^m; they will not, therefore, cavil about the propriety of words when the intent of the parties appear, but will rather apply the words to fulfil the intent, than destroy the intent by reason of the insufficiency of the words.ⁿ It may, indeed, chance that, on executing an agreement under seal, the parties failed to contemplate the happening of some particular event or the existence of some particular state of facts at a future period^o; and all the Court can do in such a case is to ascertain the meaning of the words actually used; in construing the deed, they will adopt the

established rule of construction, "to read the words in their ordinary and grammatical sense, and to give them effect, unless such a construction would lead to some absurdity or inconvenience ^p, or would be plainly repugnant to the intention of the parties to be collected from other parts of the deed".^q And even recitals of intention in the deed itself cannot operate to control or vary unambiguous expressions in the operative part^r. For "the golden rule of construction,"; to which we shall presently revert, "is that words are to be construed according to their natural meaning, unless such a construction would either render them senseless or would be opposed to the general scope and intent of the instrument, or unless there be some very cogent reason of convenience in favour of a different interpretation"^s.

[...]

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Ex antecedentibus et consequentibus fit optima interpretatio. (2 Inst. 173) - A passage is best interpreted by reference to what precedes and what follows it.

It is an important rule of construction, that the meaning of the parties to any particular instrument should be collected *ex antecedentibus et consequentibus*; that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done ⁱ,

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in other words, the construction must be made upon the entire instrument, and not merely upon disjointed parts of it ^k; the whole context must be considered, in endeavouring to collect the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause^l. In short, the law will judge of a deed, or other instrument, consisting of divers parts or clauses, by looking at the whole; and will give to each part its proper office, so as to ascertain and carry out the intention of the parties^m.

Thus, in the case of a bond with a condition, the latter may be read and taken into consideration, in order to explain the obligatory part of the instrumentⁿ. So, in construing an agreement in the form of a bond in which a surety becomes liable for the fulfilment of an agent's duties therein particularly enumerated, a general clause in the obligatory part of the bond must be interpreted strictly, and controlled by reference to the prior clauses specifying the extent of the agency^o. On the same principle, the recital in a deed or agreement may be looked at in order to ascertain the meaning of the parties, and is often highly important for that purpose ^p: and the general words of a subsequent distinct clause or stipulation may oft be explained or qualified by the matter recited^q). Where, indeed, "the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed"^r. But where, on the other hand "those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words"^s. So, covenants are to be construed according to the obvious inten-

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tion of the parties, as collected from the whole context of the instrument containing them, and according to the reasonable sense of the words; and, in conformity with the rule above laid down, a covenant in large and general terms has frequently been narrowed and restrained ^t there has appeared something to connect it with a restrictive covenant, or where there have been words in the covenant itself amounting to a qualification ^u: and it has, indeed, been said, in accordance with the above rule, that, "however general the words of a covenant may be, if standing alone, yet, if from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the Court will limit the operation of the general words"^x.

It is, moreover, as a general proposition, immaterial in what part of a deed any particular covenant is inserted ^y; for the construction of a deed does not depend on the order of the covenants, or upon the precise terms of them; but regard must be had to the object, and the whole scope of the instrument^z. For instance, in the lease of a colliery, two lessees covenanted "jointly and severally in manner following"; and then followed various covenants as to working the colliery; after which was a covenant, that the moneys appearing to be due should be accounted for and paid by the lessees, not saying, "and each of them": it was held, that the general words at the beginning of the covenants by the lessees extended to all the subsequent covenants throughout the deed on the part of the lessees, there not being anything in the nature of the subject to restrain the operation of those words to the former part only of the lease^a.

Upon the same principle it is a sound rule of construction that where a word has a clear and definite meaning when used

in one part of a deed, will or other document, but has not when used in another, the presumption is that the word is intended to

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have the same meaning in the latter as in the former part^b. This rule is, however, only applicable to solve a difficulty or ambiguity, and the context may well show that the word has been used in different senses in different parts of the instrument^c.

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Verba chartarum fortius accipiuntur contra proferentem (Co. Litt. 36 a.) - The words of an instrument shall be taken most strongly against the party employing them.

This maxim ought to be applied only where other rules of construction failⁱ; and, indeed, in *Taylor v. St. Helen's Corporation*^k, Jessel, M.R., is reported to have said: "I do not see how, according to the now established rules of construction as settled by the House of Lords in the well-known case of *Grey v. Pearson*^l, followed by *Roddy v. Fitzgerald*^m and *Abbott v. Middleton*ⁿ, the maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favour of the grantor, for the grant is annulled." The maxim, however, has been judicially recognised^o since the above observations were made upon it; and perhaps it may be paraphrased thus that, as between the grantor and grantee, or between the maker of an instrument and the holder, if the words of the grant or instrument are of doubtful import, that construction shall be placed upon them which is most favourable to the grantee or holder.

The rule has been said to apply more strongly to a deed-poll than to an indenture, because in the former case the words are those of the grantor only^p. But though a deed-poll is to be construed against the grantor, the Court will not add words to it, nor give it a meaning contradictory to its language^q.

If, then, a tenant in fee simple grants to anyone an estate for life generally, this shall be construed to mean an estate for

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the life of the grantee, because an estate for a man's own life is higher than for the life of another^r. But, at common law, if a tenant for life leased land to another for life, without specifying for whose life, this was taken to be a lease for the lessor's own life; for this was the greatest estate which it was in his power to grant^s. And, as a general rule, it appears clear that, if a doubt arise as to the construction of a lease between the lessor and lessee, the lease must be construed most beneficially for the lessee^t.

In like manner, if two tenants in common grant a rent of 10s., this is several, and the grantee shall have 10s. from each; but if they make a lease, and reserve 10s., they shall have only 10s. between them^u. So it is a true canon of construction that, where there is any reasonable degree of doubt as to the meaning of an exception in a lease, the words of the exception, being the words of the lessor, are to be taken most favourably for the lessee, and against the lessor^x; and where a deed may enure to divers purposes, he to whom the deed is made shall have election which way to take it, and he shall take it in that way which shall be most to his advantage^y. But it seems that in such a case the instrument, if pleaded, should be stated according to its legal effect, in that way in which it is intended to have it operate^z. According to the principle above laid down, it was held that leasehold lands passed by the conveyance of the freehold, "and all lands or meadows to the said messuage or mill belonging, or used, occupied, and enjoyed, or deemed, taken, or accepted as part thereof." This, said Lord Loughborough, being a case arising on a deed, was to be distinguished from cases of a like nature arising on wills. In general, where there is a question on the construction of a will, neither party has done anything to preclude himself from the favour of the Court. But, in the

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present instance, the legal maxim applied, that a deed should be construed most strongly against the grantor^a.

"The rule that a man's own acts shall be taken most strongly against himself, obtains not only in grants, but extends in principle, to other engagements and undertakings"^b. Thus, the return of a writ of *fi. fa.* shall, if the meaning be doubtful,

be construed against the sheriff; and, if sued for a false return, he shall not be allowed to defend himself by putting a construction on his own return which would make it bad in law, when it admits of another construction which will make it good ^c.

In like manner, with respect to contracts not under seal the generally received doctrine of law undoubtedly is that the party who makes any instrument should take care so to express the amount of his own liability, as that he may not be bound further than it was his intention that he should be bound; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it, should rather have a construction put upon it in his favour, because the words of the instrument are not his, but those of the other party ^d. This principle applies to a condition in a policy of insurance which "being the language of the company must, if there be any ambiguity in it, be taken most strongly against them" ^e, and to an exception to the shipowner's liability in a bill of lading, which is the language of the shipowner ^f.

A remarkable illustration of the maxim is to be found in a case arising out of the failure of the Glasgow Bank. By the

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articles of that bank any person who became the holder of a share became subject to all the liabilities of an original partner. Certain shares were transferred into the names of persons who were entered in the stock ledger as "trustees." The bank failed, with large liabilities, and the trustees were placed on the list of contributories liable to calls in their own right. On a petition to rectify the list it was decided that they were personally liable as partners to the creditors of the bank, the House of Lords being of opinion that the expression, "as trustees," was ambiguous and must be construed *fortius contra proferentes*, so as to carry out the main object of the contract ^g.

If the party giving a guarantee leaves anything ambiguous in his expressions, it has been said that such ambiguity must be taken most strongly against him ^h; though it would rather seem that the document in question is to be construed according to the intention of the parties to it as expressed by the language which they have employed, understood fairly in the sense in which it is used, the intention being, if needful, ascertained by looking to the relative position of the parties at the time when the instrument was written ⁱ.

If a carrier give two different notices, limiting his responsibility in case of loss, he will be bound by that which is least beneficial to himself ^k. In like manner, where a party made a contract of sale as agent for A., and, on the face of such agreement, stated that he made the purchase, paid the deposit, and agreed to comply with the conditions of sale for A., and in the mere character of agent, it was held that this act of the contracting party must be taken *fortissime contra proferentem*; and that he could not, therefore, sue as principal on the agreement, without notice to the defendant before action brought, that he was the party really interested ^l. So if an instrument be couched in terms so ambiguous as to make it doubtful whether it be a bill of exchange or a promissory note, the holder may, as against the

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party who made the instrument, treat it as either ^m. If documents are drawn and accepted by the same parties (which in strictness would make them promissory notes and not bills of exchange), yet if the intention to give and receive such documents as bills of exchange be clear, both the parties to the documents and the holders could, even at common law, treat them as such ⁿ. And it is now provided that: "Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note" ^o.

In the Roman law, the rule under consideration for the construction of contracts may be said, in substance, to have existed, although its meaning differed considerably from that which attaches to it in our own: the rule there was, *ferè secundum promissorem interpretatur* ^p, where *promissor*, in fact, signified the person who contracted the obligation ^q, that is, who replied to the *stipulatio* proposed by the other contracting party. In case of doubt, then, the clause in the contract thus offered and accepted, was interpreted against the stipulator, and in favour of the *promissor*; *in stipulationibus cum quaeritur quid actum sit verba contra stipulatorem interpretanda sunt* ^r; and the reason given for this mode of construction is, *quia stipulatori liberum fuit verba late concipere* ^s: the person stipulating should take care fully to express that which he proposes shall be done for his own benefit.

When dealing with a *mercantile* instrument, "the Courts, are not restrained to such nicety of construction as is the case regard to conveyances, pleadings, and the like, "and in reference to a charterparty, it has been observed ^t that "generally speaking where there are several ways in which the contract; be performed, that mode is adopted which is the least profitable

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to the plaintiff and the least burthensome to the defendant." Further, in reference to the same instrument, it has been remarked that the merchant "is in most cases...the party best acquainted with the trade for which the ship is taken up, and with the difficulties which may impede the performance by him of his contract; words, therefore, in a charterparty, relaxing in his favour a clause by which an allowance to him of time for a specified object is in the interest of the ship precisely limited, must be read as inserted on his requirement, and construed at the least with this degree of strictness against him that they shall not have put upon them an addition to their obvious meaning"; though that meaning, where it is ambiguous, must be gathered from the surrounding circumstances to which the charterparty was intended to apply ^u. On the same principle, any limitation of a warranty of seaworthiness in a charterparty is inserted in the interest of the shipowner, and the warranty, whether express ^x or implied ^y, will only be cut down by clear, effective and precise words.

It must further be observed that the general rule in question, being one of some strictness and rigour, is the last to be resorted to, and is never to be relied upon but when all other rules of exposition fail ^z. In some cases, indeed, it is possible that any construction which the Court may adopt will be contrary to the real meaning of the parties; and, if parties make use of such uncertain terms in their contracts, the safest way is to go by the grammatical construction, and if the sense of the words be *in equilibrio*, then the rule of law will apply, *verba chartarum fortius accipiuntur contra proferentem* ^a.

Moreover, the principle under consideration does not seem to hold when a harsh construction would work a wrong to a third person, it being a maxim that *constructio legis non facit injuriam* ^b. Therefore at common law, if tenant in tail made a lease for life generally, he was taken to mean a lease for the life of the lessor ^c, for this was within the law; and not for the life

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of the lessee, which it was beyond the power of a tenant in tail to grant ^d.

[...]

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Falsa Demonstratio non nocet (Thomas d. Evans v. Thomas, 6 T. R. 671, at 676) cum de corpore constat (Ayray's Case, 11 Rep. 18 b, at 21 a). - Mere false description does not vitiate, if there be sufficient certainty as to the object.

Falsa demonstratio means an erroneous description of a person or a thing in a written instrument; and the above rule respecting it signifies that where the description is made up of more than one part, and one part is true, but the other false, there, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the

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devise ^o: the characteristic of cases within the rule being that the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only ^p. Thus, where a testator devised "his freehold farm situate at E. and now in the occupation of J. B., "it was held that the whole farm passed under the devise, although a part of it was copyhold ^q. In the latter case weight was given to the fact that there was no residuary devise, for a will should be read, if possible, so as to lead to a testacy, not an intestacy ^r; and the devise in question was construed according to the principle that "if the words of description when examined do not fit with accuracy, and if there must be some modification of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of description and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded" ^s.

The rule as to *falsa demonstratio* has sometimes been stated to be that "if there be an adequate and sufficient description, with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it" ^t: *quicquid demonstratæ rei additur satis demonstratæ frustra est* ^u. But in applying the doctrine of *falsa demonstratio* it is not material in what part of the description the *falsa demonstratio* is found: to limit the doctrine to cases in which the misdescription occurs at the end of the sentence would be to reduce a very useful rule, which is founded on good sense, to a mere technicality ^v. *Incivile est nisi tota sententia perspecta de aliqua parte judicare* ^w. The rule, however, is well

illustrated by the case of a gift of an entire thing which is sufficiently described, followed by an insufficient enumeration of the particulars of which that entirety consists: for the latter may be treated as a *falsa descriptio quæ non nocet*, unless, indeed, the context and surrounding circumstances show that what happens to be a blundering enumeration of particulars was

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a designed limitation of the gift itself ^x. "Where some subject-matter is devised as a whole under a denomination, which is applicable to the entire land, and then the words of description that include and denote the entire subject-matter are followed by words which are added on the principle of enumeration, but do not completely enumerate and exhaust all the particulars which are comprehended and included within the antecedent universal or generic denomination: then the ordinary principle and rule of law which is perfectly consistent with common sense and reason is this: that the entirety which has been expressly and definitely given, shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift" ^y.

The maxim is often cited without the addition of the words *cum de corpore constat* ^z, but these words seem to be of some importance; for it has been said that the maxim applies only - as expressed by Lord Kenyon in *Thomas v. Thomas* ^a - to cases "in which the false demonstration is superadded to that which was sufficiently certain before" ^b. The doctrine, *falsa demonstratio non nocet*, applies" only where the words of the devise, exclusive of the *falsa demonstratio*, are sufficient of themselves to describe the property intended to be devised, reference being had, if necessary, to the situation of the premises, to the names by which they have been known, or to other circumstances properly pointing to the meaning of the description" ^c.

[...]

Chapter IX. The law of contracts.

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Modus et convention vincunt legem

[...]

The rule under consideration, however, is subject to limitation, and does not apply where the express provisions of any law are violated by the contract, nor, in general, where the interests of the public, or of third parties, would be injuriously affected by its fulfilment. *Pacta, quæ contra leges constitutionesque vel contra bonos mores fiunt, nullam vim habere, indubitati juris est* (x C. 2, 3, 6.); and *privatorum conventio juri publico non derogat* ^y. "If the thing stipulated for is in itself contrary to law, the paction by which the execution of the illegal act is stipulated must be held as intrinsically null: *pactis privatorum juri publico non derogatur*" ^z. Accordingly illegality may be pleaded as a defence to an action on a deed. Thus, where the defendant and other obligors on a bond had agreed to execute the bond in

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favour of the plaintiff as security for money paid by him to another person as a bribe not to prosecute the other obligors for perjury, the defendant was permitted to set up the agreement and thereby avoid the payment of the bond on the ground of illegality ^a.

[...]

Ex dolo malo non oritur action (Per Lord Mansfield in *Holman v. Johnson*, Cowp. 341, at p. 343.) - A right of action cannot arise out of fraud.

It was thought convenient to place this maxim in immediate proximity to that which precedes it, because these two important rules of law are intimately related to each other, and the cases which have already been cited in illustration of the rule as to *par delictum* may be referred to generally as establishing the position, that an action cannot be maintained which is founded in fraud, or which springs *ex turpi causa*. The connection which exists between these maxims may, indeed, be satisfactorily shown by reference to a case already cited. In *Fivaz v. Nicholls* ^x, an action was brought to recover damages for an alleged conspiracy between B., the defendant, and a third party, C., to obtain payment of a bill of

exchange accepted by the plaintiff in consideration that B. would abstain from prosecuting C. for embezzlement; and it was held that the action would not lie, inasmuch as it sprang out of an illegal transaction, in which both plaintiff and defendant had been engaged, and of which proof was essential in order to establish the plaintiff's claim as stated upon the record. In this case, therefore, the maxim, *ex dolo malo non oritur actio*, was evidently applicable; and not less so, with regard both to the original corrupt agreement and to the subsequent alleged conspiracy, was the general principle of law, *in pari delicto potior est conditio defendentis*^y. Both maxims, again, seem equally applicable to the rule of the common law, now abolished by statute, that contribution could not be enforced amongst wrongdoers^z, and that a person, who knowingly committed an act declared by the law to be criminal, could recover compensation from others who participated with him in the commission of the crime^a. Bearing in mind, then, this connection between the

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two kindred maxims, we shall proceed to consider briefly the very comprehensive principle, *ex dolo malo*, or, more generally, *ex turpi causa, non oritur actio*.

In the first place, then, we may observe that the word *dolus*, when used in its more comprehensive sense, was understood by the Roman jurists to include "every intentional misrepresentation of the truth made to induce another to perform an act which he would not else have undertaken"^b, and a marked distinction accordingly existed in the civil law between *dolus bonus* and *dolus malus*: the former signifying that degree of artifice or dexterity which a person might lawfully employ to advance his own interest, in self-defence against an enemy or for some other justifiable purpose^c the latter including every kind of craft, guile, or machination, intentionally employed for the purpose of deception, cheating, or circumvention^d. As to the latter species of *dolus* (with which alone we are now concerned), it was a fundamental rule, to be observed by everyone in a judicial position, that *dolo malo pactum se non servaturum*^e; and, in our own law, it is a familiar principle that an action brought upon a supposed contract, which is shown to have arisen from fraud, may be successfully resisted^f.

It is, moreover, a general proposition that an agreement to do an unlawful act cannot be supported at law^g - that no right of action can spring out of an illegal contract^h; and this rule, which applies not only where the contract is especially illegal, but whenever it is opposed to public policy or founded on an immoral considerationⁱ, is expressed by the well-known maxim,

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ex turpi causa non oritur actio, and is in accordance with the doctrine of the civil law, *pacta quæ turpem causam continent non sunt observanda*^k, that is to say, wherever the consideration, which is the ground of the promise, or the promise which is the consequence or effect of the consideration, is unlawful, the whole contract is void. A Court of law will not, then, lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land; and this objection to the validity of a contract must, from authority and reason, be allowed in all cases to prevail. No legal distinction can be supported between the application of this objection to parol contracts and to contracts under seal; for "it would be inconsistent with reason and principle to hold, that, by the mere ceremony of putting a seal to an instrument, that is, by the voluntary act of the parties themselves, a contract, which was void in itself, on the ground of its being in violation of the law of the land, should be deemed valid, and an action maintainable thereon, in a Court of justice"^l.

Caveat emptor.

[...]

Although the buyer of goods bought from a seller who had no title to sell them may have remedies against the seller, yet, as a rule, the sale gives him no title to the goods as against the owner, and, as between the buyer and the owner, the maxim *caveat emptor* applies. For the general principle is that where goods are sold by a person who is not the owner, and who does not sell under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had^h: *nemo dat quod non habet*ⁱ: *nemo plus juris ad alium transferre potest quam ipse habet*^k. To this well-established principle, which applies to choses in action as well as to goods, there are, nevertheless, certain exceptions which, or some of which, will be briefly mentioned.

Page: 558**Qui per alium facit per seipsum facere videtur. (Co. Litt. 258 a.) - He who does an act through**

another is deemed in law to do it himself.

This maxim enunciates the general doctrine on which the law relative to the rights and liabilities of principal and agent depends.

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Where a contract is entered into with A. as agent for B., it is deemed, in contemplation of law, to be entered into with B., and the principal is, in most cases, the proper party to sue^g or be sued for a breach of such contract - the agent being viewed simply as the medium through which it was effected^h. *Qui facit per alium facit per se*.

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Omnis ratihabitio retrotrahitur et mandato priori æquiparatur (Co. Litt. 207 a.) - A subsequent ratification has a retrospective effect, and is equivalent to a prior command.

It is a rule of very wide application, and one repeatedly laid down in the Roman law, that *ratihabitio mandato*

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*comparatur*ⁿ, where *ratihabitio* means "the act of assenting to what has been done by another in my name"^o.

It is, then, true, as a general rule, that a subsequent ratification and adoption by a person of what has been already done in his name or as on his behalf, but without his authority, has a retrospective effect, and is equivalent to his previous command. For instance, if a stranger pays a debt without the debtor's authority, but acting as his agent and on his behalf, and the debtor subsequently ratifies the payment, it operates as a good payment made by the debtor on the date when it was actually made^p. And if an action is brought in a person's name and for his benefit, but without his knowledge, his subsequent ratification of the proceedings in the action renders them as much his own as if he had originally authorised them^q.

Without multiplying instances of the doctrine, it seems sufficient to state the general proposition, that the subsequent assent by the principal to his agent's conduct not only exonerates the agent from the consequences of a departure from his orders, but likewise renders the principal liable on a contract made in violation of such orders, or even where there has been no previous retainer or employment; and this assent may be inferred from the conduct of the principal^r. The subsequent sanction is considered the same thing, in effect, as assent at the time; the difference being, that, where the authority is given beforehand, the party giving it must trust to his agent; if it be given subsequently to the contract, the party knows that all has been done according to his wishes^s "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well-established rule of law. In that case, the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority"^t.

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An acceptance "subject to ratification" of an offer cannot be ratified. Until the so-called ratification there is no contractual relationship at all, and at any time before it takes place the offer can be withdrawn^u.

The principal limitation to the doctrine that a person can, by ratifying another's act, render that act his own in law, lies in the rule that a person cannot be said in law to ratify another's act, unless that other, in doing the act, purported, or assumed, or intended^x to do it as such person's agent; and this rule applies equally whether the doctrine of ratification is invoked to enable a person to take the benefit of an act, or to render him liable therefor as a principal, or to justify an act as done by lawful authority.

Thus, with regard to contracts, it is a well-established principle that "to entitle a person to sue upon a contract, it must be clearly shown that he himself made it or that it was made on his behalf by an agent authorised to act for him at the time, or whose act has been subsequently ratified and adopted by him"^y.

[...]

Chapter X. - The law of evidence

We have in a previous chapter investigated certain rules of the law of evidence which relate peculiarly to the interpretation of written instruments; it is proposed, in these concluding pages, briefly to state and illustrate some few additional rules of evidence. For detailed consideration of the cases reference should be made to treatises of acknowledged authority on the subject.

Optimus interpres rerum usus. (2 Inst. 282.) - Usage is the best interpreter of things.

Custom, *consuetudo*, is a law not written, established by long usage and the consent of our ancestors ^a; and hence it is said that usage, *usus*, is the legal evidence of custom ^b. Moreover, where a law is established by an implied consent, it is either common law or custom; if universal, it is *common law* ^c; if particular to this or that place, then it is *custom*. When any practice was, in its origin, found to be convenient and beneficial, it was naturally repeated, continued from age to age, and grew into a law, either local or general ^d. A custom, therefore, or customary law, may be defined to be a usage which has obtained the force of law, and is, in truth, the binding law, within a particular district, or at a particular place, of the persons and things which it concerns ^e; *consuetudo loci est observanda* ^f.

There are, however, several requisites to the validity of a custom, which can here be but briefly specified.

First, it must be certain, or capable of being reduced to a certainty ^g. Therefore, a custom that lands shall descend to the most worthy of the owner's blood was void; for how could this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, was certain, and therefore good. And a custom to pay a year's improved value for a fine on a copyhold estate was good; for, although the value was a thing uncertain, yet it could at any time be ascertained ^h.

Secondly, the custom must be reasonable in itself, or, rather, not unreasonable ⁱ. A custom is unreasonable and bad if it conflicts with the general principles of the common law, such as a custom which would compel persons to alienate property without an exercise of free will ^j. A custom, however, is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for *consuetudo ex certa causa rationabili usitata privat communem legem* ^k: custom, when grounded upon a certain and reasonable cause supersedes the common law ^l; in proof whereof may be instanced the customs of gavelkind and borough English ^m, which were directly contrary to the general law of descent; or the custom of Kent, which was opposed to the general law of escheat ⁿ. Referring to a peculiar custom respecting the descent of copyhold lands in a manor, Cockburn, J., observed that such "local customs are remnants of the older English tenures, which, though generally superseded by the

feudal tenures introduced after the dominion of the Normans had become firmly established, yet remained in many places, probably in manors which, instead of passing into the possession of Norman lords, remained in the hands of English proprietors. These customs, therefore, are not merely the result of accident or caprice, but were originally founded on some general principle or rule of descent" ^o.

In connection with these illustrations, it should be noted that gavelkind, borough English, and all other special customs of descent, have been abolished with regard to deaths occurring after 1925, as has also escheat ^p.

Further, a custom is not necessarily unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth; as the custom to turn the plough upon the headland of another, which is upheld in favour of husbandry, or the custom to dry nets on the land of another, which is likewise upheld in favour of fishing and for the benefit of navigation ^q. Similarly, the existence of a fair being treated as a matter of public convenience, a custom to erect stalls at a fair upon the highway may be reasonable, though the exercise of the custom causes a partial obstruction of the highway so long as the fair continues ^r and upon the ground that recreation is necessary ^s, it has been held to be a good custom for the inhabitants of a parish, at all seasonable times of the year, to enter upon a close within the parish, and there to erect a maypole and dance round it, and otherwise to enjoy upon the close any lawful and innocent recreation ^t. Again, in the interests of agriculture, it is a reasonable custom that a tenant shall have the way-going crop after the

expiration of his term ^u, and that a tenant, who is bound to use his farm in a good and tenantable manner and

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according to the rules of good husbandry, may, on quitting the farm, charge his landlord with part of the expense of draining land which needed drainage, though the drainage was done without the landlord's consent or knowledge ^v.

On the other hand, a custom, which is contrary to the public good, or prejudicial to the many and beneficial only to some particular person, is repugnant to the law of reason, for it could not have had a reasonable commencement. For example, a custom set up in a manor on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad, for it is injurious to the multitude and beneficial only to the lord ^x. So, a custom is bad, that the lord of the manor shall have £3 for every pound-breach of any stranger ^y, or that the lord of the manor may detain a distress taken upon his demesnes until fine be made for the damage at the lord's will ^z. In these and similar cases ^a, the customs themselves are void, on the ground of their having had no reasonable commencement - as being founded in wrong and usurpation, and not on the voluntary consent of the people to whom they relate ^b; for it is a true principle, that no custom can prevail against right, reason, or the law of nature. The will of the people is the foundation of that custom, which subsequently becomes binding on them; but, if it be grounded, not upon reason, but error, it is not the will of the people ^c, and to such a custom the established maxim of law applies, *malus usus est abolendus* ^d - an evil or invalid custom ought to be abolished.

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Thirdly, the custom must have existed from time immemorial ^e; it is no good custom if it originated within the time of legal memory ^f. But, in the absence of evidence to the contrary, the immemorial existence of a custom should be inferred, as a fact, from an uninterrupted modern usage to observe it ^g; and whenever it is found that a custom has existed immemorially, it is the duty of a Court of law to presume that it had a legal origin, if any legal origin is reasonably possible ^h; for "it is a maxim of the law of England to give effect to everything which appears to have been established for a considerable time and to presume that what has been done has been done of right and not of wrong"ⁱ; and "it is a most convenient thing that every supposition, not wholly irrational, should be made in favour of long-continued enjoyment"^j.

Fourthly, the custom must have continued without any interruption; for any interruption would cause a temporary cessation of the custom, and the revival would give it a new beginning, which must necessarily be within time of memory, and consequently the custom will be void. But this must be understood with regard to an interruption of the right: for an interruption of the possession only, for ten or twenty years, will not destroy the custom. As, if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed though they do not use it for

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ten years: it only becomes more difficult to prove; but, if the right be in any way discontinued for a single day, the custom is quite at an end ^k.

Fifthly, the custom must have been *peaceably enjoyed* and *acquiesced* in, not subject to contention and dispute. For, as customs owe their origin to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting ^l.

Sixthly, a custom, though established by consent, must, when established, be *compulsory*, and not left to the option of every man whether or not he will use it. A custom that all the inhabitants shall be rated towards the maintenance of a bridge will be good; but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all ^m.

Seventhly, customs existing in the same place "must be *consistent with each other*; one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd" ⁿ.

Eighthly, customs in derogation of the common law, or of the general rights of property, must be strictly construed ^o.

Ninthly, if it is sought to attach a custom or usage to a written contract it must not be inconsistent therewith; therefore where by the terms of a charterparty a ship was to proceed to a certain port, or so near thereto as she could get, and there discharge her cargo as customary, it was decided that a custom of the port by which the charterer was bound to

take delivery only at the port, and not at a place as near thereto as the vessel could safely get was excluded, as being inconsistent with the written contract ^P.

Where, then, continued custom has acquired the force of an express law ^Q, reference must of course be made to such custom

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in order to determine the rights and liabilities of parties, arising out of transactions which are affected by it; *optimus interpres rerum usus*. This maxim is, however, likewise applicable to many cases, and under many circumstances, which are quite independent of customary law in the sense in which that term has been here used, and which are regulated by mercantile usage and the peculiar rules recognised by merchants.

The law merchant, it has been observed, forms a branch of the law of England, and those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce; and, when so adopted, it is unnecessary to plead and prove them ^r.

[...]

Res inter alios acta alteri nocere non debet. (Wing. Max., p. 327.)- A transaction between two parties ought not to operate to the disadvantage of a third (b Res inter alios judicate neque emolumentum afferre his qui judico non interfuerunt neque solent irrogare; Cod. 7, 56, 2.).

Of maxims relating to the law of evidence, the above may be considered as one of the most important and most useful; its effect is to prevent a litigant party from being concluded or even

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affected, by the acts, conduct, or declarations of strangers ^c. On a principle of good faith and mutual convenience, a man's own acts are binding upon himself, and are, as well as his conduct and declarations, evidence against him; yet it would not only be highly inconvenient, but also manifestly unjust, that a man should be bound by the acts of mere unauthorised strangers; and if a party ought not to be bound by the acts of strangers, so neither ought their acts or conduct to be used as evidence against him ^d.

The above rule, then, operates to exclude all the acts, declarations, or conduct of others as evidence to bind a party, either directly or by inference; so that, in general, no declaration, written entry, or affidavit made by a stranger is evidence against a man; nor can a person be affected, still less concluded, by any evidence ^e, decree, or judgment to which he was not actually, or, in consideration of law, privy ^f.

[...]

^PSee Wood v. Dwarries, 11 Exch. 493; Andrews v. Elliott, 5 E. & B. 502; Tyerman v. Smith, 6 E. & B. 719; Morgan v. Couchman, 14 C. B. 100; Humblestone v. Welham, 5 C.B. 195; Williams v. Thomas, 4 Exch. 479; Taylor v. Best, 14 C. B. 487; R. v. Evans, 3 E. & B. 363; Williams v. Lewis, 7 E. & B. 929; Gen. Steam Nav. Co. v. Slipper, 11 C. B. N. S. 493; Elkin v. Baker, Id. 526, at p. 543; Green v. Sichel, 7 C. B. N. S. 747; Pearson v. Dawson, E. B. & E. 448; Haines v. East India Co., 11 Moo. P. C. 39; Smith v. Hodson, 4 T. R. 211, at p. 217; Brewer v. Sparrow, 7 B. & C. 310; Lythgoe v. Vernon, 5 H. & N. 180; see Rice v. Reed, [1900] 1 Q. B. 54; Re Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139; Re Suarez, [1917] 2 Ch. 131, [1918] 1 Ch. 176.

^Q7 H. & N. 913. See Van Hasselt v. Sack, 13 Moo. P.C. 185.

^rPost, pp. 191, 197.

^eIt has been contended that in the law of tort act of God is limited to negation of liability under the rule in Rylands v. Fletcher (post, p.243), and is not of general application (Winfield, Text-book of the Law of Tort, p.51). But this is not the generally accepted view (see, e.g., Holdsworth, History of English Law, iii., p.380, viii., p.455). And it is clear that events amounting to acts of God do constitute a defence in other cases, whether properly termed "act of God" or included in the wider term "inevitable accident" (which is no defence in Rylands v. Fletcher cases).

^fParadine v. Jane, Al. 26 (followed in Redmond v. Dainton, [1920] 2 K.B. 256) ; Nichols v. Marsland, 2 Ex. D. 1, at p. 4 ; see also Greenock Corp. v. Caledonian Ry., [1917] A.C. 556.

⁹Nugent v. Smith, 1 C. P. D. 423; Forward v. Pittard, 1 T. R. 27, at p. 33. See also 14 Q. B. D. 574.

^hNitro-phosp. Co. v. L. & St. Katharine Docks Co., 9 Ch. D. 503, at p. 516; see Brabant v. King, [1895] A.C. 632.

^pBullen & Leake, Prec., 3rd ed. 740.

^qGould v. Oliver, 4 Bing. N. C. 134, at p. 142.

^rDuberley v. Gunning, 4 T. R. 651, at p. 657; see the maxim cited in Forster v. Forster, 1 Hag. Cons. 144, at p. 146; in Rogers v. Rogers, 3 Hag. Ec. 57; in Anichini v. Anichini, 2 Curt. 211, at p. 213; and in Phillips v. Phillips, 1 Rob. Ec. 144, at p. 158.

^tBernstein v. Bernstein, [1893] P. 292, at p. 304; see also Keyse v. Keyse, 11 P. D. 100; Izard v. Izard, 14 P. D. 45.

^uWilson v. Glossop, 20 Q. B. D. 354, at p. 358.

^xR. v. Coney, 8 Q. B. D. 534, at p. 553.

^yR. v. Donovan, [1934] 2 K. B. 498.

^zBoulter v. Clarke, Bull. N. P. 16; see R. v. Coney, 8 Q. B. D. 534, at p. 538.

^aPost, Chap. IX.

^bIllott v. Wilkes, 3 B. & Ald. 304; see Bird v. Holbrook, 4 Bing. 628; Jordin v. Crump, 8 M. & W. 782; Barnes v. Ward, 9 C. B. 392; Wootten v. Dawkins, 2 C. B. N. S. 412; Harrold v. Watney, [1898] 2 Q. B. 320; Bromley v. Mercer, [1922] 2 K. B. 126.

^cSee Thomas v. Quatermaine, 18 Q. B. D. 685; Yarmouth v. France, 19 Q. B. D. 647; Smith v. Baker, [1891] A. C. 325; Abott v. Isham, 18 L. G. R. 719; Hall v. Brooklands Auto-Racing Club, [1933] 1 K. B. 205; Nabarro v. Cope & Co., (1938) 4 All E. R. 565.

^dPer Lindley, L.J., in Yarmouth v. France, 19 Q. B. D. 647, at p. 659.

^ePer LD. Abinger in Findon v. Parker, 11 M. & W. 675, at p. 680; Daly v. Thompson, 10 Id. 309; Malins v. Freeman, 4 Bing. N. C. 395, at p. 399; per Best, J., in Doe d. Bryan v. Bancks, 4 B. & Ald. 401, at p. 409; Co. Litt. 1, 48 b; Jenk. Cent. 209; 2 Inst. 713; D. 50, 17, 134, §1. It "is contrary to all legal principle" that "the plaintiff can take advantage of his own wrong" (per Willes, J., in Ames v. Waterlow, L. R. 5 C. P. 53, at p. 55). See also Dean of Christchurch v. Buckingham, 17 C. B. N. S. 391.

^{d1} Hale, P. C. 482

^{e2} Hale, P. C. 386.

^fDod. Eng. Lawy. pp. 220, 221. See Perry v. Fitzhowe, 8 Q. B. 757.

^gSee Carmichael v. Carmichael, 2 Phill. 101; Paull v. Simpson, 9 Q. B. 365.

^hLee v. Cooke, 3 H. & N. 203.

ⁱSingleton v. Williamson, 7 H. & N. 410.

^kNoy, Max., 9th ed., p.45; arg. Williams v. Gray, 9 C. B. 730, at p. 737.

^lDavenport v. R., 3 App. Cas. 115, at pp. 128, 129. See the authorities there cited; also Quesnel Forks Gold Mining Co. v. Ward, [1919] W. N. 286; R. v. Paulson, [1921] 1 A. C. 271, at p. 277.

^lPer Ld. Halsbury in Wakelin v. L. & S. W. Ry. Co., 12 App. Cas. 41, at p. 45; see McKenzie v. Chilliwack, [1912] A. C. 888.

^mPer Curiam in Scott v. Lond. & c., Dock Co., 3 H. & C. 596, at p. 601.

ⁿPer Bovill, C.J., in Simpson v. Lond. Gen. Omnibus Co., L. R. 8 C. P. 390, at p. 392.

^oThe Annot Lyle, 11 P. D. 114; The Indus, 12 P. D. 46. Cf. The Kite, [1933] P. 154 (dumb barge in tow of steam tug colliding with bridge); Fosbroke-Hobbes v. Airwork (1937), 53 T. L. R. 254 (aircraft).

^pCarpue v. L. B. & S. C. Ry. Co., 5 Q. B. 747; Skinner v. L. B. & S. C. Ry. Co., 5 Exch. 787.

^qScott v. Lond., & c., Dock Co., 3 H. & C. 596.

^rKearney v. L. B. & S. C. Ry. Co., L. R. 5 Q. B. 411; 6 Id. 759.

^sByrne v. Boadle, 2 H. & C. 722; see also Briggs & Oliver, 4 H & C. 403; Smith v. Baker, [1891] A. C. 325, at p. 335, per Ld. Halsbury; Langham v. Governors of Wellingborough School (1932), 101 L. J. K. B. 513 (golf ball).

^tScott v. Lond., & c., Dock Co., 3 H. & C. 596, at p. 601. The rule is not strictly limited to inanimate things. Where a dog was given into the sole custody of a person as bailee and the dog was lost whilst in his custody, the maxim applied to throw on him the burden of showing circumstances negating negligence (Phipps v. New Claridges Hotel, Ltd., 22 T. L. R. 49).

^uBallard v. North British Ry. (1923), S. C. (H. L.) 43, per Lord Dunedin; The Kite, [1933] P. 154, per Langton, J.

^x[1932] A. C. 562. See Grant v. Australian Knitting Mills, [1936] A. C. 85, and 55 L. Q. R., p. 6. Contra, see dicta by Lord Macmillan, [1932] A. C. at p. 622, and by Lewis, J., Daniels v. R. White & Sons, (1938) 4 All E. R. 258.

^y[1932] A. C., at p. 599. per Lord Atkin. See post, p. 253.

^zCotton v. Wood, 8 C. B. N. S. 568.

^aCrisp v. Thomas, 63 L. T. R. 756; see also Smith v. Midl. Ry. Co., 57 Id. 813.

^bPer Willes, J., in Lovegrove v. L. B. & S. C. Ry. Co., 16 C. B. N. S. 669, at p. 692. Cf. Mahon v. Osborne, [1939] 2 K. B. 14 (swab left in body after operation does not raise presumption of negligence by surgeon).

^cHammack v. White, 11 C. B. N. S. 588; Manzoni v. Douglas, 6 Q. B. D. 145; see also Holmes v. Mather, L. R. 10 Ex. 261.

^dWing v. London General Omnibus Co., [1909] 2 K. B. 652.

^eEllor v. Selfridge & Co. (1930), 46 T. L. R. 236. Cf. Martin v. Stanborough (1925), 41 T. L. R. 1; Parker v. Miller (1926), 42 T. L. R. 408; Halliwell v. Venables (1930), 99 L. J. K. B. 353.

^fGayler and Pope v. Davies & Sons, [1924] 2 K. B. 75, at p. 85, per McCardie, J.

^gPage v. Richards and Draper, unreported, cited at [1933] 2 K. B., p. 457, per Rowlatt, J.; Tart v. G. W. Chitty & Co., [1933] 2 K. B. 453; Baker v. E. Longhurst & Sons, [1933] 2 K. B. 461.

^hTidy v. Battman, [1934] 1 K. B. 319.

ⁱWakelin v. L. & S. W. Ry. Co., 12 App. Cas. 41; see Smith v. S. E. Ry. Co., [1896] 1 Q. B. 178; Youngman v. Pirelli, [1939] W. N. 197.

^kPer Slessor, L.J., [1934] 1 K. B., at p. 322.

^oD. 50, 17, 54; Wing. Max., p. 56.

^pFor the powers to enlarge a base fee into a fee simple absolute, see Fines and Recoveries Act, 1833, ss. 19, 35; Law of Property Act, 1925, s. 176. See also post, p. 304.

^qMackeld., Civ. Law, 179.

^r3 Prest., Abs. Tit. 25; Id. 244.

^sSee Mr. Butler's note (1), Co. Litt. 330 b; Machell v. Clarke, 2 Raym. Ld. 778; 1 Cruise, Dig., 4th ed. 80.

^tLaw of Property Act, 1925, s. 207 and 7th Sched.

^uId., s.51.

^vBac. Max., reg. 19. See, however, A.-G. for New South Wales v. Trethowan, [1932] A.C. 526.

^wBac. Max., reg. 19. See, however, A.-G. for New South Wales v. Trethowan, [1932] A.C. 526.

^xBac. Max., reg. 19. See, however, A.-G. for New South Wales v. Trethowan, [1932] A.C. 526.

^yBac. Max., reg. 19. See, however, A.-G. for New South Wales v. Trethowan, [1932] A.C. 526.

^dInterpretation Act, 1889, s. 10

^eSee Mackeld, Civ. L. 5.

^fD. 1, 3, 26. Constitutiones tempore posteriores potiores sunt his quæ ipsius proecesserant. D. 1, 4, 4.

^gPer Willes, J., in Great Central Gas Co. v. Clarke, 11 C.B.N.S. 814, at p. 835. In Birkenhead Docks Trustees v. Laird, 23 L.J. Ch. 457, Turner, L.J. is reported as saying that one private Act cannot repeal another except by express enactment, but this dictum is not to be found in the case as reported in 4 D.M. & G. 732, and was regarded by some other judges as slightly too wide, (See Green v. R. 1 App. Cas. 513; Altrineham Union v. Cheshire Lines 16 Q.B.D. 597). It was, however, accepted by Byles, J., in Purnell v. Wolverhampton Waterworks Co., 10 C.B.N.S. 591, but not by Erle, C.J., Williams, J. and Willes, J. (who also heard that case). Repeal by implication was clearly regarded as possible by the Court in Wyatt v. Gems, [1893] 2 Q.B. 225; and in Sheffield Corporation v. Sheffield Electric Light Co., [1898] 1 Ch. 203, such repeal was held to have taken place.

^hJudgm. in Dobbs v. Gr. Junction Waterworks Co., 9 Q.B.D 151, at p. 158.

ⁱPer Ld. Bramwell in G.W. Ry. Co. v. Swindon Ry. Co., 9 App. Cas. 787, at p. 809.

^kPer Chitty, J., in Lybbe v. Hart, 29 Ch. D. 8, at p. 15.

^lPer A. L. Smith, J., in Kutner v. Phillips, [1891] 2 Q. B. 267, at p. 272 (citing Gregory's Case, 6 Rep. 19b); Middleton v. Crofts, 2 Atk. 675; Thorpe v. Adams, L.R. 6 C.P. 125. See also Thames Conservators v. Hall, L.R. 3 C.P. 415 ; R. v. Champneys, 6 Id. 384.

^mSee per Willes, J., in Daw v. Metr. Bd. of W., 12 C.B.N.S. 161, at p. 178.

ⁿPer Ld. Selborne in Seward v. Vera Cruz, 10 App. Cas. 59, at p. 68 (citing Hawkins v. Gathercole, 6 D.M. & G. 1), See also Plymouth Corporation and Walter, In re, [1918] 2 Ch. 354, at 359 ; Brit. Columb Elect. Ry. Co. v. Gentile, [1914] W.N. 278; North Level Commissioners v. River Welland Catchment Board, [1938] Ch. 379

^oPer Ld. Blackburn in Garnett v. Bradley, 3 App. Cas. 944, at p. 969 ; see also Rockett v. Chippingdale, [1891] 2 Q.B. 293, at p. 299; Blackpool Corporation v. Starr Estate Co., [1922] 1 A.C. 27.

^pLyn v. Wyn, O. Bridg. 122, at p. 127 (cited in Thames Conservators v. Hall L.R. 3 C.P. 415, at p. 421; in Thorpe v. Adams, 6 Id. 125, at p. 135 ; and in Dodds v. Shepherd, 1 Ex. D. 75, at p. 78). See Re Smith's Estate, 35 Ch. D. 595.

^qSee per Erle, C.J., in Cheney v. Courtois, 13 C.B.N.S. 634, at p. 640; Broom v. Batchelor, 1 H. & N. 255 (cited in Hefffield v. Meadows, L.R. 4 C.P. 595, at p. 600); Steele v. Hoe, 14 Q.B. 431, at p. 445; Ford v. Beech, 11 Q.B. 852, at pp. 866, 868, 870; Oldershaw v. King, 2 H. & N. 517; Mare v. Charles, 5 E & B. 978 (approved in Penrose v. Martyr, E.B. & E. 499, at p. 503); Stacey v. Wallis, 28 T.L.R. 209; Glamorgan Coal Co. v. Glamorganshire J.S. Committee, [1915] 1 K.B. 471, at pp. 487, 488; Hillas & Co. v. Arcos (1932), 147 L. T. 503, at p. 514, per Lord Wright. "All contracts should, if possible, be construed ut res magis valeat quam pereat" (per Byles, J., in Shoreditch Vestry v. Hughes, 17 C.B.N.S. 137, at p. 162.) The maxim was applied in R. v. Broadhempston, 1 E. & E. 154, at p. 163, and in Pugh v. Stringfield, 4 C.B.N.S. 364, at p. 370. See Blackwell v. England, 8 E. & B. 541, at p. 549. "If a plea admits of two constructions, one of which gives a sensible effect to the whole, and the other makes a portion of its idle and insensible, the Court is bound to adopt the former construction" (per Williams, J., in Peter v. Daniel, 5 C.B. 568, at p. 579).

^hShep. Touch. 84; Plowd. 156.

ⁱPer Ld. Brougham in Langston v. Langston, 2 Cl. & F. 194, at p.243 (cited arg., Baker v. Tucker, 3 H.L. Cas. 106, at p.

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^kSee *Hewet v. Painter*, 1 Bulst. 174; *London v. Southwell College*, Hob. 303

^l*Windham v. Windham*, 1 Anders. 60; Jenk. Cent. 260.

^m*Crossing v. Scudamore*, 2 Lev. 9; per *Ld. Hobart*, Hob. 277 (cited in *Wilkinson v. Tranmarr*, Willes, 682, at p. 684); *Moseley v. Motteux*, 10 M. & W. 533

ⁿSee *Throgmorton v. Tracy*, Plowd. 145, at 159, 160, 162.

^oSee *judgm. in Lloyd v. Guibert*, L.R. 1 Q.B. 115, at p. 120.

^pThe element of inconvenience is not to be considered if the construction of the document is clear. *Bottomley's Case*, 16 Ch. D. 681, at p. 686.

^qPer *Parke, B.*, in *Bland v. Crowley*, 6 Exch. 522, at p. 529

^r*Re Sassoon* (1933), 49 T.L.R. 407

^sPer *Bramwell, B.*, in *Fowell v. Tranter*, 3 H. & C. 458, at p. 461.

^tPer *Ld. Ellenborough* in *Barton v. Fitzgerald*, 15 East, 530, at p. 541; *Shep. Touch.* 87; per *Hobart, C.J.*, in *Trenchard v. Hoskins*, Winch, 91, at p. 93. See *Micklethwait v. Micklethwait*, 4 C.B.N.S. 790, at p. 862.; or

^k*Judgm. in Doe d. Meyrick v. Meyrick*, 2 Cr. & J. 223, at p. 230; *Maitland v. Mackinnon*, 1 H. & C. 607.

^l*Coles v. Hulme*, 8 B. & C. 568; per *Ld. Hobart* in *Clanrickarde's Case*, Hob. 273, at p. 275 (cited in *Gale v. Reed*, 8 East, 80, at p. 89

^mSee *Hob. 275*; *Doe d. Bute v. Guest*, 15 M. & W. 160.

ⁿ*Coles v. Hulme*, 8 B. & C. 568, and cases there cited at p. 574, n. (a)

^o*Napier v. Bruce*, 8 Cl. & F. 470.

^p*Shep. Touch.* 75; *Cholmondeley v. Clinton*, 2 B. & Ald. 625, and 4 Bligh, 1.

^q*Payler v. Homersham*, 4 M. & S. 423 (cited in *Harrison v. Blackburn* 17 C.B.N.S. 678, at p. 691.; *Simons v. Johnson*, 3 B. & Ad. 175, at p. 180; *Boyes v. Bluck*, 13 C.B. 652; *Solly v. Forbes*, 2 B. & B. 38; *Charleton v. Spencer* 3 Q.B. 693; *Sampson v. Easterby*, 9 B. & C. 505 (affirmed in 1 Cr. & J 105); *Price v. Barker*, 4 E. & B. 760, at p. 777; *Henderson v. Stobart*, 5 Exch. 99.

^rSee *Page v. Midland Ry. Co.*, [1894] 1 Ch. 11; *Re Sassoon* (1933), 49 T.L.R. 407.

^s*Judgm. in Walsh v. Trevanion*, 15 Q.B. 733, at p. 751. See *Re Moon* 17 Q.B.D. 275, at p. 286.

^tPer *Ld. Ellenborough* in *Iggulden v. May*, 7 East, 237, at p. 241; *Case of Mines*, Plowd. 310, at 329; *Cage v. Paxlin*, 1 Leon. 116; *Broughton v. Conway*, Moo. (K.B.) 58; *Gale v. Reed*, 8 East, 80, at p. 89; *Sicklemore v. Thistleton*, 6 M. & S. 9 (cited *Jowett v. Spencer*, 15 M. & W. 662); *Hesse v. Stevenson*, 3 B & P 365, See *Doe d. Spencer v. Godwin*, 4 M. & S. 265.

^u*Judgm. in Smith v. Compton*, 3 B.& Ad. 189, at p. 200.

^x*Judgm. in Hesse v. Stevenson*. 3 B. & P. 365, at p. 574. See the maxim as to *verba generalia*, p. 438, post.

^yPer *Buller, J.*, in *Northumberland v. Errington*, 5 T.R. 522, at 526.

^zPer *Wilde, C.J.*, in *Richards v. Bluck*, 6 C.B. 437, at p. 441.

^a*Northumberland v. Errington*, 5 T.R. 522; *Copland v. Laport*, 3 A. & E.

^b*In re Birks*, [1900] 1 Ch. 417.

^c*Watson v. Haggitt*, [1928] A.C. 127.

ⁱ*Judgm. in Lindus v. Melrose*, 3 H. & N. 177, at p. 182.

^k6 Ch. D. 264, 280.

^l6 H. L. Cas. 61.

^m6 H. L. Cas. 823.

ⁿ7 H. L. Cas. 68.

^o*E.g.*, in *Burton v. English*, 12 Q.B.D. 218, at p. 220, per *Brett, M.R.*; *Birrell v. Dryer*, 9 App. Cas. 345, at p. 350; *Rowett, Leakey & Co. v. Scottish Provident Institution*, [1927] 1 Ch. 55, 69; *Royal London Society v. Barrett*, [1928] Ch. 411, 415; *Kaufman v. British Insurance Co.* (1929), 45 T.L.R. 399; *Hudson's Bay Co. v. Att. Gen. for Canada*, [1929] A.C. 285.

^p*Arg. Browning v. Beston*, Plowd. 131, at p. 134; *Shep. Touch.*, b; *Preston* 88, n. (81).

^qPer *Williams, J.*, in *Doe d. Myatt v. St. Helens Ry. Co.*, 2 Q.B. 365, at p. 373.

^r*Co. Litt.* 42 a; *Throgmorton v. Tracy*, Plowd. 145, at p. 156; *Shep. Touch.* 88.

^s*Finch, Law*, 55, 56. See also *Id.* 60. See now *Settled Land Act*, 1925, S. 41, as to a tenant for life's statutory, powers of leasing, and *Law of Property Act*, 1925, S. 149 (6), as to the effect of a lease for life made in consideration of a rent or fine.

^t*Dann v. Spurrier*, 3 B. & P. 399, at p. 403, where various authorities are cited. See also *Wolveridge v. Steward*, 1 Cr. & M. 644, at p. 657.

^u*Finch, Law*, 63; *Browning v. Beston*, Plowd. 131, at p. 140; *Co. Litt.* 197 a, 267 b.

^xPer *Bayley, J.*, in *Bullen v. Denning*, 5 B. & C. 842, at p. 847.

^y*Shep. Touch.* 83; cited in *Miller v. Green*, 8 Bing. 92, at p. 106.

^z2 *Smith, L.C.*, 13th ed., p. 499. But see now *Rules of the Supreme Court*, 9. XIX., r. 21.

^a*Doe d. Davies v. Williams*, 1 Black, H., 25, at p. 27.

^bPer Hotham, B., in *Gibson v. Minet*, 1 Black, H., 569, at p. 586. "A release in deed, which is the act of the party, shall be taken most strongly against himself" (Co. Litt. 264 b; cited in *Ford v. Beech*, 11 Q.B. 842, at p. 869). "Although the words of a covenant are to be construed according to the intent of the parties, yet they are to be taken most strongly against the party who stipulates" (per Holroyd, J., in *Webb v. Plummer*, 2 B. & Ald. 746, at p. 752). See *W. Lond. Ry. Co. v. L. & N. W. Ry. Co.*, 11 C. B. 254, at pp. 309, 339.

^cSee *Reynolds v. Barford*, 7 M. & Gr. 449, at p. 456; cf. ante, p. 195.

^dPer Alderson, B., in *Mayer v. Isaac*, 6 M. & W. 605, at p. 612, commenting on observations of Bayley, B., in *Nicholson v. Paget*, 1 Cr. & M. 48. See *Alder v. Boyle*, 4 C. B. 635.

^ePer Cockburn, C.J., in *Notman v. Anchor Ass. Co.*, 4 C.B.N.S. 476, at p. 481; *Fitton v. Accidental Death Ins. Co.*, 17 Id. 122, at pp. 134, 135; *Fowkes v. Manchester & L. Life Ass. Co.*, 3 B. & S. 917; per Ld. St. Leonards in *Anderson v. Fitzgerald*, 4 H.L. Cas. 484, at p. 507; per Blackburn, J., in *Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782, at p. 799; per Fletcher Moulton, L.J., in *Joel v. Law Un. & Crown Ins. Co.*, [1908] 2 K. B. 863, at p. 890; *Rowett, Leakey & Co. v. Scottish Provident Institution*, [1927] 1 Ch. 55, 69; *Royal London Society v. Barrett*, [1928] Ch. 411, 415; *Kaufman v. British Insurance Co.* (1929), 45 T. L. R. 399.

^fPer Ld. Loreburn in *Nelson Line v. Nelson*, [1908] A. C. 16, at p. 19.).

^g*Muir v. City of Glasgow Bank*, 4 App. Cas. 337.

^h*Hargreave v. Smee*, 6 Bing. 244, at p. 248; *Stephens v. Pell*, 2 Cr. & M.; See *Cumpston v. Haigh*, 2 Bing. N. C. 449, at p. 454.

ⁱPer Bovill, C.J., in *Coles v. Pack* L.R. 5 C.P. 65, at p. 70; *Wood v. Priestner*, L.R. 2 Ex. 66 and 282.

^k*Munn v. Baker*, 2 Stark. 255. See *Phillips v. Edwards*, 3 H. & N. 813, at p. 820.

^l*Bickerton v. Burrell*, 5 M. & S. 383, at p. 386, as to which case, see *Rayner v. Grote*. 15 M. & W. 359. See also, *Boulton v. Jones*, 2 H. & N. 564, and cases there cited: *Carr v. Jackson*, 7 Exch. 382; *Blythe & Co. v. Richards*, 85 L. J. K. B. 1425.

^m*Edis v. Bury*, 6 B. & C. 433; *Block v. Bell*, 1 M. & Rob. 149; *Lloyd v. Oliver*, 18 Q. B. 471; *Forbes v. Marshall*, 11 Exch. 166. In *M'Call v. Taylor*, 19 C. B. N. S. 301, the instrument in question was held to be neither a bill of exchange nor a promissory note.

ⁿ*Williams v. Ayers*, 3 App. Cas. 133.

^o*Bills of Exchange Act*, 1882, s. 5 (2); *Re British Trade Corporation* [1932] 2 Ch. 1. See also *Mason v. Lack* (1929), 45 T. L. R. 363; *Haseldine v. Winstanley*, [1936] 2 K. B.101.

^pD. 45, 1, 99, pr.

^q*Brisson. ad verb. "Promissor," "Stipulatio"; 1 Pothier, by Evans*, 58.

^rD.45, 1, 38, § 18.

^sD 45, 1, 19, pr.; D. 2, 14, 39.

^tPer Maule, J., in *Cockburn v. Alexander*, 6 C. B. 791, at p. 814; see also per Maule, J., in *Gether v. Capper*, 15 Id. 696, at p. 707.

^u*Hudson v. Ede*, L. R. 2 Q. B. 566, at p. 578.

^x*Petrofina S.A. of Brussels v. Compagnia Italiana Trasporto, &c.* (1937), 53 T. L. R. 650.

^y*Sleigh v. Tyser*, (1900) 2 Q. B. 333.

^z*Bac. Max.*, reg. 3; 1 *Duer. Insur.* 210.

^aPer Bayley, J., in *Love v. Pares*, 13 East, 80, at p. 86.

^bCo. Litt. 183 a; *Shep. Touch.* 88; *Rodger v. Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393, at p. 406.

^cPer Bayley, J., in *Smith v. Doe d. Jersey*, 2 B. & B. 551 ; see *Finch, Law*, 60.

^d2 Bl. Com. 380. A tenant in tail in possession has the statutory powers of leasing of a tenant for life: *Settled Land Act*, 1925, s. 20 (1) (i.). See ante, p. 403, note (s).

^ePer Lindley, M.R., in *Cowen v. Truefitt*, [1899] 2 Ch. 309, at p. 311 (citing *Jarman on Wills*, 5th ed. 742).

^f*Ibid.*; and per Alderson, B., in *Morrell v. Fisher*, 4 Exch. 591, at p. 604.

^g*Re Bright-Smith*, 31 Ch. D. 314.

^h*Re Harrison*, 30 Ch. D. 390, at p. 394, per Ld. Esher, M.R.; see *Re Battie-Wrightson*, [1920] 2 Ch. 330.

ⁱPer Ld. Selborne in *Hardwick v. Hardwick*, L. R. 16 Eq. 168, at p. 175.

^jPer Alderson, B., in *Morrell v. Fisher*, 4 Exch. 591, at p. 604; see also, per Parke, B., in *Llewellyn v. Jersey*, 11 M. & W. 183, at p. 189.

^kD. 33, 4, 1, § 8.

^lSee *Cowen v. Truefitt*, [1899] 2 Ch. 311.

^m*Hob.* 171.

ⁿ*Travers v. Blundell*, 6 Ch. D. 436, at p. 445. See *Harrison v. Hyde*, 4 H. & N. 805; *Josh v. Josh*, 5 C. B. N. S. 454; *Com. Dig.*, "Fait" (E.4); *Cambridge v. Rous*, 8 Ves. 12; *Enohin v. Wylie*, 10 H. L. Cas. 1.

^oPer Ld. Westbury, in *West v. Lawday*, 11 H. L. Cas. 375, at p. 384. See also per Lefroy, C.J., in *Roe v. Lidwell*, 11 Ir. C. L. R. 320, at p. 326 (cited arg. *Skull v. Glenister*, 16 C. B. N. S. 81, at p. 89); *In re Brockett*, [1908] 1 Ch. 185.

^pOr "cum de persona constat," see 6 T. R. 676. The maxim is cited in full in the judgment in *Travers v. Blundell*, 6 Ch. D.

436, at p. 444.

^a6 T. R. 671, at p. 676. See *Mosley v. Massey*, 8 East, 149; per Parke, J., in *Doe d. Smith v. Galloway*, 5 B. & Ad. 43, at p. 51; *Dyne v. Nutley*, 14 C. B. 122; per Littledale, J., in *Doe d. Ashforth v. Bower*, 3 B. & Ad. 453, at p. 459; *Gynes v. Kemsley*, 1 Freem. 293; *Counden v. Clarke*, Hob. 29, at p. 32; *Greene v. Armsteed*, Id. 65; *Stukeley v. Butler*, Id. 169, at p. 171; Vin. Abr., "Devise" (T.b.), pl. 4.

^bPer Wightman, J., in *Doe d. Hubbard v. Hubbard*, 15 Q. B. 227, at p. 240.

^cPer Patteson, J., at p. 241.

^dD. 50, 17, 45, § 1; D. 2, 14, 38; 9 Rep. 141.

^eArg., *Phillips v. Innes*, 4 Cl. & F. 234, at p. 241.

^f*Collins v. Blantern*, 2 Wils. K. B. See 1 Smith's L. C., 13th ed., p. 406, and authorities cited in the note thereto

^g2 C. B. 501, at pp. 512, 515. See ante, p. 491.

^hSee also *Stevens v. Gourley*, 7 C. B. N. S. 99, at p. 108.

ⁱSee ante, p. 495.

^jPer *Ld. Lyndhurst* in *Colburn v. Patmore*, 1 Cr. M. & R. 73, at p. 83; per *Maule, J.*, in *Fivaz v. Nicholls*, 2 C. B. 501, at p. 509

^k*Mackeld. Civ. Law*, 165.

^l*Mackeld. Civ. Law*, 165; Bell, Dict. and Dig. of Scots Law, 319; D. 4, 3, 3; *Brisson ad verb. "Dolus"*; *Tayl. Civ. Law*, 4th ed. 118.

^mD. 4, 3, 1, § 2; Id. 50, 17, 79; Id. 2, 14, 7, § 9.

ⁿD. 2, 14, 7, § 9.

^oPer *Patteson, J.*, in *Campbell v. Fleming*, 1 A. & E. 40, at p. 42; per *Holroyd, J.*, in *Batson v. Donovan*, 4 B. & Ald. 21, at p. 34; per *Ld. Mansfield* in *Gibbon v. Paynton*, 4 Burr. 2298, at p. 2300; *Evans v. Edmonds*, 13 C. B. 777; *Canham v. Barry*, 15 C. B. 597 (with which cf. *Feret v. Hill*, Id. 207); *Reynell v. Sprye*, 1 De G. M. & G. 660; *Curson v. Belworthy*, 3 H. L. C. 742. The effect of fraud upon a contract, and the right to rescind a contract on the ground of fraud, are discussed under the maxim, *caveat emptor, post*.

^pPer *Ld. Abinger* in *Lewis v. Davison*, 4 M. & W. 654, at p. 657.

^qPer *Ashhurst, J.*, in *Blachford v. Preston*, 8 T. R. 89, at 93. See *Jones v. Waite*, 5 Scott, N. R. 951, 5 Bing. N. C. 341, and 1 Id. 656; *Ritchie v. Smith*, 6 C. B. 462; *Cundell v. Dawson*, 4 Id. 376; *Sargent v. Wedlake*, 11 Id. 732.

^r*Allen v. Rescous*, 2 Lev. 174; *Walker v. Perkins*, 3 Burr. 1568; *Wetherall v. Jones*, 3 B. & Ad. 221, at pp. 225, 226; *Egerton v. Brownlow*, 4 H. L. Cas. 1 (distinguished in *Caithness v. Sinclair*, [1912] S. C. 79, and in *Re Wallace*, [1920] 2 Ch. 274).

^sD. 2, 14, 27, § 4; I. 3, 20, 24.

^tPer *Tindal, C.J.*, in *Gas Light Co. v. Turner*, 6 Bing. N. C. 666, at p. 675.

^u*Sale of Goods Act*, 1893, s. 21 (1).

^vPer *Littledale, J.*, in *Dixon v. Yates*, 5 B. & Ad. 313, at p. 339; per *Willes, J.*, in *Whistler v. Forster*, 14 C. B. N. S. 248, at p. 257.

^wD. 50, 17, 54; *Wing. Max.*, p. 56; 2 *Pothier, Oblig.* 263; see per *Parke, B.*, in *Awde v. Dixon*, 6 Exch. 869.)

^xTo entitle a person to sue upon a contract it must be shown that he himself made it, or that the contract was made on his behalf by an agent authorised to act for him at the time, or whose act has been subsequently ratified and adopted by him (*Watson v. Swann*, 11 C. B. N. S. 756).

^yThus, in *Depperman v. Hubbersty*, 17 Q. B. 766, *Coleridge, J.*, observed: "Here an avowed agent of a principal sues another avowed agent of the same principal; and the action must fail for want of privity of contract between the two parties to the suit." See *Lee v. Everest*, 2 H. & N. 285, at p. 291; *Coombs v. Brist. & Ex. Ry. Co.*, 3 H. & N. 1.

^zD. 46, 3, 12, § 4; D. 50, 17, 60; D. 3, 5, 6, §9; D. 43, 16, 1, § 14.

^{aa}*Brisson. ad verb. "Ratihabitio."* The operation of the maxim with reference to the law of principal and agent, is considered at length in *Story on Agency*.

^{ab}*Simpson v. Eggington*, 10 Exch. 845.

^{ac}*Ancona v. Marks*, 7 H. & N. 686.

^{ad}*Smith, Merc. Law*, 13th ed., p. 169, and cases there cited.

^{ae}Per *Best, C.J.*, in *Maclean v. Dunn*, 4 Bing. 722, at p. 727.

^{af}*Wilson v. Tummam*, 6 M. & Gr. 236, at p. 242; *Koenigsblatt v. Sweet*, [1923] 2 Ch. 314, at p. 325.

^{ag}*Watson v. Davies*, [1931] 1 Ch. 455.

^{ah}*Keighley v. Durant*, [1901] A. C. 240.

^{ai}*Watson v. Swann*, 11 C. B. N. S. 756, at p. 771.

^{aj}*Jacob, Law Dict.*, tit. "Custom."

^{ak}Per *Bayley, J.*, in *Read v. Rann*, 10 B. & C. 438.

^{al}"In point of fact, the common law of England, *lex non scripta*, is nothing but custom" (*Judgm. in Nunn v. Varty*, 3 Curt. 352, at p. 363). But the claim of any particular place to be exempt from the obligation imposed by the common law, may also be properly called a custom (Id.).

^d3 Salk. 112. Ex non scripto jus venit quod usus comprobavit; nam deturni mores consensu utentium comprobati legem imitantur; l. 1, 2, 9. Consuetudinis jus esse putatur id quod voluntate omnium sine lege vetustas comprobacit - Cic. de Invent. ii. 22.

^eTanistry Case, Dav. Ir. 29, at 31, 32 (cited in *Tyson v. Smith*, 9 A. & E. 406, at p. 421; and in *Rogers v. Brenton*, 10 Q. B. 26, at p. 63).

^fFinch's Case, 6 Rep. 63a, at 67a. See *Busher v. Thompson*, 4 C. B. 48.

^g*Bluett v. Tregonning*, 3 A. & E. 554, at p. 575 (where the custom alleged was designated by Williams, J., as "uncertain, indefinite, and absurd"); *Constable v. Nicholson*, 14 C. B. N. S. 230; *A.-G. v. Mathias*, 27 L. J. Ch. 761; *Padwick v. Knight*, 7 Exch. 854; *Wilson v. Willes*, 7 East, 121; *Broadbent v. Wilkes*, Willes, 360 and (in error), 1 Wils. 63 (which also shows that a custom must be reasonable; with this case cf. *Rogers v. Taylor*, 1 H. & N. 706); *Carlyon v. Lovering*, Id. 784.

^h1 Blac. Com. 78; 1 Roll. Abr. 565; Tanistry Case, Dav. Ir. 29, at 33. All copyhold land was enfranchised on the 1st January, 1926, and the liability to fines in respect of enfranchised land was extinguished, at latest, at the end of 1935: Law of Property Act, 1922, ss. 128, 138.

ⁱ1 Blac. Com. 77. See Allen, *Law in the Making*, 2nd ed., p. 97.

^j*Johnson v. Clark*, [1908] 1 Ch. 303.

^kCo. Litt. 113 a; *Tyson v. Smith*, 9 A. & E. 406, at p. 421.

^lLitt. s. 169: Co Litt. 33 b: *Falmouth v. George*, 5 Bing. 286, at p. 293. It is of the very essence of a custom that it should vary from the common law (per Ld. Kenyon in *Horton v. Beckman*, 6 T. R. 760, at p. 764).

^mSee *Muggleton v. Barnett*, 2 H. E. N. 653. The law took notice of the custom of borough English, and therefore, in pleading the custom, its nature did not have to be specially set forth (*Doe d. Hamilton v. Clift*, 12 A. & E. 566, at p. 579). The same remark applied to the custom of gavelkind (see Co. Litt. 175 b).

ⁿSee 2 Blac. Com. 84.

^o*Muggleton v. Barnett*, 2 H. & N. 653, at p. 681; cf. 1 Blac. Com. 74.

^pAdministration of Estates Act, 1925, s. 45.

^q*Mercer v. Denne*, [1905] 2 Ch. 538; see *Tyson v. Smith*, 9 A. & E. 406, at p. 421; Co. Litt. 33 b. See also *Falmouth v. George*, 5 Bing. 286, at p. 293. There cannot be a custom for the inhabitants of a parish to have, as such, a profit à prendre in alieno solo (*Gateward's Case*, 6 Rep. 59 b); see *Goodman v. Saltash*, 7 App. Cas. 633; *Neill v. Devonshire*, 8 Id. 135, at p. 154; *Fitzhardinge v. Purcell*, [1908] 2 Ch. 139.

^r*Elwood v. Bullock*, 6 Q. B. 383; see *Simpson v. Wells*, L. R. 7 Q. B. 214.

^sSee *Abbot v. Weekly*, 1 Lev. 176; *Fitch v. Rawling*, 2. Black. Hy., 393, at p. 398.

^t*Hall v. Nottingham*, 1 Ex. D. 1. A custom for the inhabitants of a parish to train horses at all seasonable times of the year in a place outside the parish is not good (*Sowerby v. Coleman*, L. R. 2 Ex. 96; cf. *Edwards v. Jenkins*, [1896] 1 Ch. 308).

^u*Wigglesworth v. Dallison*, Dougl. 201, and 1 Sm. L. C., 13th ed., p. 597.

^v*Mousley v. Ludlam*, 21 L. J. Q. B. 64; *Dalby v. Hirst*, 1 B. & B. 224; *Salisbury v. Gladstone*, 9 H. L. Cas. 692 (followed in *Blewett v. Jenkins*, 12 C. B. N. S. 16), is an important case with reference to the reasonableness of a custom. See also *Phillips v. Ball*, 6 C. B. N. S. 811. Compare Agricultural Holdings Act, 1923, s. 3, Sch. I., Pt. II. In most cases, customary rights of tenants are not affected by this Act: see ss. 1 (3), 54.

^xYear Bk., 2 H. 4, fol. 24 B. pl. 20: 1 Blac. Com. 77.

^ySee *Tyson v. Smith*, 9 A. & E. 406, at p. 422, n. (a).

^z*Ibid.*, p. 422.

^a*Douglas v. Dysart*, 10 C. B. N. S. 688. See *Phillips v. Ball*, 6 C. B. N. S. 811.

^b*Tyson v. Smith*, 9 A. & E. 406, at p. 422.

^cSee *Taylor*, Civ. Law, 3rd ed., 245, 246; *Noy, Max.*, 9th ed., p. 59, n. (a); Id. 60.

^dLitt. s. 212; 4 Inst. 274; *Hilton v. Granville*, 5 Q. B. 701 (as to which case see *Gill v. Dickinson*, 5 Q. B. D. 159; *Love v. Bell*, 10 Q. B. D. 547, at p. 561; *Buccleugh v. Wakefield*, L. R. 4 H. L. 377, at p. 399). See, also, *Rogers v. Taylor*, 1 H. & N. 706; *Clayton v. Corby*, 5 Q. B. 415 (where a prescriptive right to dig clay was held unreasonable - cited by Ld. Denman in *Wilkinson v. Haygarth*, 12 Q. B. 837, at p. 845); *Gibbs v. Flight*, 3 C. B. 581; *Bailey v. Stephens*, 12 C. B. N. S. 91; *Constable v. Nicholson*, 14 Id. 230, 241; *Newcastle-under-Lyme B.C. v. Wolstanton*, (1939) 3 All E. R. 597. In *Lewis v. Lane*, 2 My. & K. 449, a custom inconsistent with the doctrine of resulting trusts was held to be unreasonable. "The Superior Courts have at all times investigated the customs under which justice has been administered by local jurisdictions; and, unless they are found consonant to reason and in harmony with the principles of law, they have always been rejected as illegal" (*Judgm.*, *Cox v. Mayor of London*, 1 H. & C. 338, at p. 358).

^eLegal memory begins with the beginning of the reign of Richard I.; see Litt. s. 170.

^f1 Blac. Com. 76; *Simpson v. Wells*, L. R. 7 Q. B. 214. See also *Mounsey v. Ismay*, 3 H. & C. 486; and cf. *De la Warr v. Miles*, 17 Ch. D. 535. With regard, however, to usages of trade, "the custom may change, and a new custom may become notorious, so as to be incorporated into every contract, unless it be expressly excluded" (per *Channel, J.*, in *Moult v. Halliday*, [1898] 1 Q. B. 125, at p. 130).

^g*R. v. Jolliffe*, 2 B. & C. 54; *Jenkins v. Harvey*, 1 Cr. M. & R. 877, at p. 894, 2 Id. 393, at p. 407; see *Shephard v. Payne*, 16 C. B. N. S. 132; *Bryant v. Foot*, L. R. 3 Q. B. 497; *Lawrence v. Hitch*, Id. 521; *Holford v. George*, Id. 639; *Mercer v.*

Denne, [1904] 2 Ch. 534.)

^hGoodman v. Saltash, 7 App. Cas. 633; A. G. v. Wright, [1897] 2 Q. B. 318; see also Foreman v. Free Fishers of Whitstable, L. R. 4 H. L. 266, at p. 280.

ⁱPer Pollock, C.B., in Gibson v. Doeg, 2 H. & N. 615, at p. 623.

^jPer Bramwell, B., in Penryn v. Best, 3 Ex. D. 292, at p. 299; see Tilbury v. Silva, 45 Ch. D. 98.

^k1 Blac. Com. 77.

^lIbid.

^m1 Blac. Com. 78. This does not mean that a trade usage cannot be excluded by contract.

ⁿ1 Blac. Com. 78.

^oIbid.; Judgm. in Rogers v. Brenton, 10 Q. B. 26, at p. 57; per Bayley, J., in Richardson v. Walker, 2 B. & C. 827, at p. 839. See as to the above rule, per Cockburn, C.J., in Muggleton v. Barnett, 2 H. & N. 653, at pp. 680, 681.

^pHayton v. Irvin, 5 C. P. D. 130. See also The Alhambra, 6 P. D. 68; Reynolds v. Tomlinson, [1896] 1 Q. B. 586; Love v. Rowtor S.S. Co., [1916] 2 A. C. 527; Palgrave, Brown & Sons v. S.S. Turid, [1922] 1 A. C. 397.

^qSee Judgm. in Tyson v. Smith, 9 A. & E. 406, at pp. 425, 426.

^rJudgm. in Barnett v. Brandao, 7 Scott, N. R. 301, at p. 327, and in the same case (H.L.) 12 Cl. & F. 787, at pp. 805, 810; see also Bellamy v. Majoribanks, 7 Exch. 389; Jones v. Peppercome, 28 L. J. Ch. 158. As to the mode of providing mercantile usage, see Mackenzie v. Dunlop, 3 Macq. 22.

^sThe maxim was much considered in Meddowcroft v. Huguenin, 3 Curt. 403 (where the issue of a marriage, which had been pronounced void by the Consistorial Court, attempted unsuccessfully to impeach that sentence in the Prerogative Court). See R. v. Fontaine Moreau, 11 Q. B. 1028, and cases infra.

^d1 Stark. Evid., 3rd ed. 58, 59: see Best on Evidence, 12th ed., p. 430. See also Armstrong v. Normandy, 5 Exch. 409; R. v. Ambergate Ry. Co., 1 E. & B. 372, at p. 381; Salmon v. Webb, 3 H. L. Cas. 510.

^eSee Humphreys v. Pensam, 1 My. & Cr. 580.

^f"It cannot be doubted that a man's assertions or admissions, whether made in the course of a judicial proceeding or otherwise, and, in the former case, whether he was himself a party to such proceeding or not, may be given in evidence against him in any suit or action in which the fact so asserted or admitted becomes material to the issue to be determined. And in principle there can be no difference whether the assertion or admission be made by the party himself, who is and ought to be affected by it, or by some one employed, directed, or invited by him to make the particular statement on his behalf. In like manner a man who brings forward another for the purpose of asserting or proving some fact on his behalf, whether in a court of justice or elsewhere, must be taken himself to assert the fact which he thus seeks to establish " (per Cockburn, C. J., in Richards v. Morgan, 4 B. & S. 641, at p. 661).

Referring Principles:

I.2.2 - Trade usages

I.1.5 - No advantage in case of own unlawful acts

I.3.1 - Limitation of transfer of rights

I.1.2 - Prohibition of inconsistent behavior

I.1.6 - No damage claim in case of consent

II.1 - Prerequisites and effects of agency

II.3 - Agent acting without or outside his authority

IV.5.4 - Interpretation against the party that supplied the term

IV.5.2 - Context-oriented interpretation

IV.6.4 - No contract to detriment of third party

IV.7.1 - Invalidity of contract that violates good morals ("*boni mores*")

VI.3 - Force majeure

XII.1 - Distribution of burden of proof

XII.4 - Prima facie evidence