INDEBITATUS ASSUMPSIT AND THE STATUTE OF FRAUDS

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FOR ALMOST three centuries courts in common law jurisdictions have been engaged in charting the area of operation of the Statute of Frauds and the task is not yet complete. One of the regions in which no clear directions have been provided is that in which the facts would, apart from the Statute of Frauds, give rise to an action in *indebitatus assumpsit.*

Suppose that by an oral agreement A contracts to sell an interest in land to B for £2,000 and A fully performs the contract but B does not pay the purchase money. Can A recover the purchase money at law in an action of *indebitatus assumpsit* or will the Statute of Frauds be a defence to that action?

In the United States of America the view favoured is that the vendor of land can sue for the price when the land has been transferred even though the original promise to pay the price was unenforceable because of the Statute of Frauds.[1]

The High Court of Australia has recently given an indication of its view on the problem in *Turner v. Bladin.*[2] Dicta contained in the written joint judgment of the Court consisting of Williams, Fullagar, and Kitto, JJ., show a preference for the view that the Statute of Frauds is no defence in these circumstances.

It was not necessary for the decision of the issues in *Turner v. Bladin* for the High Court to consider this problem and its statement on it is not formally authoritative.

The facts as found by the trial judge, Herring C.J., of the Supreme Court of Victoria, were that by an oral agreement the respondent plaintiffs had agreed to sell to the appellant defendant their interest in a quarrying business for £7,500. The defendant had been let into possession and enjoyment of the business, but up to the time of the action he had paid only £2,100. The plaintiffs had sued for the balance, £5,400, and interest thereon.

The defendant by his defence claimed that the agreement was one not to be performed within the space of one year from the

[1]A discussion of the earlier American authorities is contained in *Hodges v. Green* (1856) 28 Vermont Reports 358, reprinted in Chafee and Simpson, *Cases in Equity* (1934) Vol. II, 1116. The American Restatement of the Law of Contracts, s. 193 (3), embodies this view.

[2](1951) 82 C.L.R. 463.

making thereof. In answer to this, the plaintiffs' reply alleged that the agreement had been wholly or partly performed by the plaintiffs.

At the trial each party's pleadings were amended, the plaintiffs adding a claim for specific performance and the defendant adding to his defence an additional allegation that the agreement was one for the sale of an interest in land.

Herring C.J. apparently found that it was a contract for the sale of an interest in land, but because there was part performance by the plaintiffs, specific performance could be decreed.

In the High Court the appellant defendant conceded that in view of the plaintiffs' performance of the agreement, the Statute of Frauds[3] would not be a bar in equity if the agreement was such that specific performance could properly be decreed. The argument for the appellant sought to establish that for reasons not relevant here, the agreement was such that specific performance could not properly be decreed. The High Court rejected the appellant's contention. The agreement was held to be such that specific performance could be decreed, and the Court approved the giving of that remedy in this case.

The ratio of *Turner v. Bladin* is thus confined to the position of the parties in equity, but the Court pointed to the existence of a legal remedy available to the plaintiffs.

> "We consider that we should add that, though the agreement sued on was found to be an agreement for the sale of an interest in land, we do not think that s. 128 of the Instruments Act was any defence to the plaintiff recovering at law in an action of *indebitatus assumpsit* the amount of the instalments which had become payable at the date of the writ and overdue interest to the date of judgment in the action. The consideration moving from the plaintiffs to the defendant was fully executed with the result that the defendant became indebted to the plaintiffs for the balance of purchase money and interest. An action to recover these sums would not be an action of *indebitatus assumpsit*."[4]

Following this dictum were comments on articles in the *Law Quarterly Review* by A. T. Denning (now Denning L.J.),[5] and on various cases.

The plaintiffs in *Turner v. Bladin* did not need to rely on an action of *indebitatus assumpsit* because they could obtain by means of the equitable decree for specific performance substantially the same results as would apparently have flowed from an action of

[3] S. 4 of the Statute of Frauds is re-enacted with some modification in the Instruments Act 1928–1936 (No. 3706–No. 4370) (Victoria) s. 128.

[4] (1951) 82 C.L.R. 463, 474. [5] (1925) 41 L.Q.R. 79. (1939) 55 L.Q.R. 63.

indebitatus assumpsit. However, there may be cases similar in other respects to *Turner v. Bladin* where a decree for specific performance is not available, as for instance, if the party seeking this equitable remedy has unclean hands or has not shown the degree of promptness which a Court of Equity expects of suitors seeking a decree for specific performance. In these circumstances the party who is debarred by the Statute of Frauds from enforcing the agreement at law may still have a remedy in the form of *indebitatus assumpsit.*

The justification relied upon in earlier cases and apparently recognized by the High Court for allowing this remedy at law rests on a distinction between suing on an agreement and suing on a debt. If the plaintiff seeks to sue on the agreement, the Statute of Frauds is said to be a bar. But if he sues on the debt, the Statute of Frauds is not applicable because it is aimed only at actions upon agreements.

This distinction between an action on the debt and an action on the agreement is derived from the latter part of the sixteenth century. Whether or not the distinction holds good today, it was valid then.

To understand its emergence it is necessary to look back to the period when many of the claims for which the Writ of Debt had been the appropriate remedy were brought within the scope of that variety of the Action on the Case which became known as *Assumpsit.*

Apart from the cases in which the Writ of Debt was brought on a sealed writing or to recover penalties, it had a "real" nature in the sense that the plaintiff sued for a liquidated sum which the defendant was under duty to pay because he had received a benefit. Mutual promises or agreement did not suffice to impose that duty. The duty to pay arose only after the plaintiff had provided some material benefit, the *quid pro quo.* The original bargain between the parties did not itself give rise to liability, but when the *quid pro quo* had passed it was necessary to refer to that bargain to fix the liquidated sum due.[6]

According to orthodox views of the theory behind this use of the Writ of Debt, liability was based not on agreement but on a duty to pay arising from the receipt of a benefit. From this view of the Writ of Debt the notion of suing on a debt stems.

The Writ of Debt was an imperfect remedy. The plaintiff who could not produce a sealed writing was likely to be met by the defendant's assertion of his right to wage his law.

[6]There was one exception, namely, sale of specific chattels, which from the middle of the fifteenth century assumed a consensual character inasmuch as the writ of Debt could be used whilst the bargain was still executory on both sides. See Fifoot, *History and Sources of the Common Law (Tort and Contract)*, pp. 226–229.

The creditor who did not have a sealed writing and who wished to sue his deceased debtor's representatives could not use the Writ of Debt, because only the debtor could wage his law, and as there had been no opportunity for him to claim that mode of proof, no action of Debt could be maintained against his representatives.

In the sixteenth century creditors turned to another remedy, the newer action of *Assumpsit*. By 1506 it had been established that *Assumpsit* would lie to recover damages for failure to implement an undertaking as well as being available where performance of an undertaking had been embarked upon, but in an imperfect manner. This extension of *Assumpsit* to cases of non-feasance, the fruit of an analogy with the action of Deceit, introduced a theory of contract in which attention was focused on the undertaking or promise. The acceptance shortly afterwards of the theory of actionability of mutual promises meant that a person might be under a duty to do something or in default pay damages because he had promised. The notion of suing at law on an agreement is derived from *Assumpsit*.

It was a natural development for legal advisers seeking a more effective remedy than the Writ of Debt as a means whereby a creditor could recover a fixed sum due under an informal bargain, to explore the possibilities of *Assumpsit* and so avoid the archaic technicalities of wager of law. The different approaches of the Court of Common Pleas and the Court of Queen's Bench are well known. Common Pleas, with a desire to preserve the value of its monopoly over actions of Debt, would allow the creditor to sue in *Assumpsit* in lieu of Debt only when the creditor could prove an express undertaking by the debtor, made subsequently to the original bargain, to pay the debt. Queen's Bench, with scant regard for the older Court's concern regarding Debt, did not require any subsequent express undertaking and was prepared to imply an undertaking from the mere existence of the debt.

Despite repeated reversals in appeals to the Court of Exchequer Chamber,[7] Queen's Bench continued to allow *Assumpsit* to be used to recover fixed sums due under informal bargains where Debt would have been an appropriate remedy. In this way the notion of suing on an agreement was interwoven with the notion of suing on a debt.

This disparity in doctrine administered by the two courts continued until "for the honour of the Law and for the quiet of the subject in the appeasing of such diversity of opinions",[8] *Slade's* case[9]

[7]This was the new court consisting of the judges of Common Pleas and the Barons of the Exchequer established by 27 Eliz. c.8 (1585) (amended in 1589 by 31 Eliz. c. 1) to hear errors from the Queen's Bench.

[8]4 Coke Rep. 93.a. [9]*ibid.*, 91a, 92b.

had been argued twice in the older Court of Exchequer Chamber.[10] The Court of Exchequer Chamber accepted the approach of Queen's Bench as being correct.

It was resolved:

> "That every contract executory imports in itself an *Assumpsit*, for when one agrees to pay money or to deliver anything, thereby he assumes or promises to pay or deliver it; and therefore, when one sells any goods to another and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day, in that case both parties may have an action of Debt or an Action on the Case or *Assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal Actions on the Case as well as Actions of Debt."[11]

It has been stated earlier that the view that the Statute of Frauds does not prevent an action at law in *indebitatus assumpsit* for the purchase money due under a contract for the sale of an interest in land when the consideration is executed rests on a distinction between suing on the agreement and suing on the debt. It might be supposed that as the decision in *Slade's* case was the result of the Court high-lighting the promise of the debtor implicit in the original bargain, a defendant's liability in *indebitatus assumpsit* was founded on promise or agreement rather than the passing of some *quid pro quo*. The notion of debt would seem to have been eclipsed by the notion of agreement.

The extension of *Assumpsit* confirmed by that decision could be justified only by emphasizing the promise aspect. A. T. Denning (now Denning L.J.), has argued that even after *Slade's* case, *indebitatus assumpsit* retained an affinity with the old action of Debt, so that at the time of the passing of the Statute of Frauds contemporary lawyers were alive to a distinction between suing on an agreement and suing on a debt, and regarded an action of *indebitatus assumpsit* as essentially an action on a debt. He put the matter this way:

> "No doubt in analysing the nature apart from the form of an action in *indebitatus assumpsit* for a liquidated sum it could be said that it was an action on the contract, inasmuch as you had to resort to the executory agreement to make out your claim. It was indeed in its nature an action on an executed contract, but that would not be the way in which it would be considered in the seventeenth century. At that day the form of the action was the

[10]This was the older informally established Court of Exchequer Chamber for debate consisting of all the judges and the Barons of the Exchequer.

[11]4 Coke Rep. 94a–94b.

test, and in the form it was not an action on the agreement but an action on the debt. When, therefore, in 1677 the Statute of Frauds said 'No action shall be brought upon any agreement, etc.', the answer was quite clear: 'This is not an action upon an agreement, it is an action upon a debt'."[12]

The issue then is as to the form of an action in *indebitatus assumpsit.*

An example of the form of a claim in *indebitatus assumpsit* is provided in *Tomkins v. Roberts* (1701):

"*Martin Tomkins* complains of *Thomas Roberts* in the custody of the marshal, etc., for that to wit, whereas the said *Thomas,* the 30th day of September in the 12th year of the reign of the Lord William the third now King of England, etc., at Westminster in the county aforesaid, was indebted to the said *Martin* in 50 pounds of the lawful money of England for wines by him the said *Martin* to the same *Thomas,* and at his special instance and request, before sold and delivered; and the said *Thomas* so therein being indebted, he the same *Thomas* in consideration thereof afterwards, to wit, the day, year and place aforesaid, assumed upon himself and to the same *Martin* then and there faithfully promised that he the same *Thomas* the said 50 pounds with interest to the same *Martin,* when thereunto afterwards he should be requested, would well and faithfully pay and content. Nevertheless, the said *Thomas,* his promise and assumption in form aforesaid made not regarding, but contriving and fraudulently intending him the said *Martin* of the said fifty pounds with the interest thereof in this behalf craftily and subtilly to deceive and defraud, the said fifty pounds with the interest thereof to the same *Martin* hath not yet paid nor him for the same hitherto in any wise contented, altho' the same *Thomas* afterwards, to wit, the 1st day of May in the 13th year of the reign of the said now Lord the King, and often after at Westminster aforesaid in the county aforesaid, by the same *Martin* to do it was requested, but the same to him hitherto to pay, or otherwise in any wise to content, hath altogether refused and yet doth refuse."[13]

It is true that there is an allegation of debt but there is also an allegation of a promise. As between Debt and *Assumpsit,* the form of the claim is equivocal. But in the light of *Slade's* case and the antecedent line of development, there is nothing in this form to suggest

[12](1925) 41 L.Q.R. 79, 83.

[13] Reprinted in Fifoot, *History and Sources of the Common Law* (*Tort and Contract*) pp. 378–379.

that contemporary lawyers would not regard the promise as the predominant element.

Evidence that the seventeenth-century lawyer thought of *indebitatus assumpsit* in terms of agreement is provided by the early cases in which the new remedy was extended to cover further ground formerly occupied by Debt. Where statutory penalties or customary dues were claimed, Debt had been the appropriate form of action. This type of liability did not arise from agreement; there was a duty to pay imposed by statute or custom. Thus in *City of London v. Goree*[14] in 1677 the plaintiff recovered the amount of dues levied by custom upon foreign goods exposed for sale within the city boundaries by means of *indebitatus assumpsit.* There was no actual promise and the defendant's liability could not be founded on contract, but the Court described the duty to pay as arising *ex quasi contractu,* It is not unreasonable to suppose that if the contemporary view of *indebitatus assumpsit* was that it was as much an action on a debt as the old writ of Debt, all the discussion regarding absence of a promise would have been unnecessary.

Further evidence of the nature of *indebitatus assumpsit* is provided by the draft of the Statute of Frauds itself, which was read a first time in the House of Lords in February 1673.[15] After a provision that, in actions upon the Case, actions of Debt, and other personal actions on parol contracts, of which no memorandum in writing was taken by the direction of the parties, no more than a fixed amount of damages was to be recovered, there was a proviso:

> "Provided that this Act shall not extend to such actions or suits which shall or may be grounded upon contracts or agreements for wares sold, or money lent, or upon any *quantum meruit,* or any other *assumpsit* or promises which are created by the construction or operation of law; but that all and every such action shall and may be sued and prosecuted in such manner as the same might have been before the making of this Act, anything hereinbefore to the contrary notwithstanding."

The wording used to describe the actions excluded from the Act calls to mind the Common or *Indebitatus* counts which were developed from the end of the seventeenth century as simple forms of declaration for the more common claims brought in *indebitatus assumpsit.*

The wording of this proviso suggests that the draftsman identified

[14](1677) 2 Levinz 174; 3 Keble 677; 1 Ventris 298.

[15]The original drafts of the Statute of Frauds are reprinted in Holdsworth, *A History of English Law,* Vol. VI, Appendix I, pp. 673–675.

these incipent common counts at least so far as goods sold and delivered and money lent were concerned, with agreements and promises and as they were merely forms of *indebitatus assumpsit*, it is implicit that that action was likewise identified with agreements and promises.

While it is true that the drafts of a Statute cannot be referred to to assist its construction, in an historical investigation of the contemporary views regarding a particular legal remedy, such material may be valuable.

That Blackstone regarded *indebitatus assumpsit* as being essentially an action on agreement and having more affinity with the action of *Assumpsit* than the action of Debt is shown by his discussion of the advantages attaching to *indebitatus assumpsit*:

> "If therefore I bring an action of debt for £30, I am not at liberty to prove a debt of £20 and recover a verdict thereon; any more than, if I bring an action of *detinue* for a horse, I can thereby recover an ox. For I fail in the proof of that contract which my action or complaint has alleged to be specific, express or determinate. But in an action on the case on what is called an *indebitatus assumpsit*, which is not brought to compel a specific performance of the contract but to recover damages for its non-performance, the implied *assumpsit*, and consequently the damages for the breach of it, are in their nature indeterminate; and will therefore adapt and proportion themselves to the truth of the case which shall be proved without being confined to the precise demand stated in the declaration."[16]

It may still be arguable in view of this evidence that the lawyers of the seventeenth and eighteenth centuries, taking their cue from *Slade's* case, duly recognized the consensual character of the remedy in *indebitatus assumpsit*, and did not look on it as an action on a debt as was the old Writ of Debt. Sir William Holdsworth has explained that the enactment of the Statute of Frauds was made necessary by the defects in the system of trial by jury and in the law of evidence.[17] *Bushell's* case[18] had disallowed control of juries by fine or imprisonment whilst the motion for new trial because the verdict was manifestly against the weight of evidence was not as yet a fully recognized appeal technique in civil cases.

To provide that a particular kind of evidence of certain transactions was required before action could be brought was one means of limiting the almost uncontrolled discretion of the jury.

The persons who were most likely to know the facts were not competent witnesses. The parties, their husbands and wives, and all

[16] *Commentaries*, Book III: Ch. 9. 155.
[17] H.E.L. Vol. VI, pp. 388–389. [18] (1670) Vaughan's Rep. 435.

other persons who had an interest in the result of the action were precluded from giving information to the Court. In this state of affairs, the Statute must have done much to reduce the number of fraudulent claims.

It seems reasonably clear that the mischief at which section 4 of the Statute of Frauds was aimed was the prevention of fraudulent assertions that a promise had been given. It would not seem to matter whether the consideration was executed. The plaintiff who had supplied some *quid pro quo* and who sued in *indebitatus assumpsit* would still in many cases have to prove the antecedent express agreement for a definite payment. This involved proving a promise in much the same way as the plaintiff suing in Special *Assumpsit* on an agreement which was still executory, had to prove an express promise. The mischief was the same in each kind of claim.

This discussion would be completely academic if there existed a considerable body of authority for the proposition embodied in the High Court's dictum.

But in view of the conflicting comments contained in the English cases and the fact that the High Court's statement is *obiter dicta*, the question of the right of a plaintiff to sue in *indebitatus assumpsit* when he has supplied the consideration under a contract made unenforceable by the Statute must still be regarded as being unsettled.

In *Simon v. Metivier*,[19] which was concerned with section 17 of the Statute of Frauds, Lord Mansfield showed his predilection for equitable principles when he said:

> "The key to the construction of the Act is the intent of the Legislature; and therefore many cases, though seemingly within the letter, have been let out of it; more instances have indeed occurred in courts of Equity than of Law; but the rule is in both the same. For instance, when a man admits the contract to have been made, it is out of the statute, for here there can be no perjury. Again, no advantage shall be taken of this Statute to protect the fraud of another. Therefore if the contract is executed, it is never set aside. And there are many other general rules by way of exception to the Statute."[20]

Forty years later, Lord Ellenborough in *Hinde v. Whitehouse*[21] thought that Lord Mansfield's views would lead to "indefiniteness of construction". However, in 1815, in *Inman v. Stamp*,[22] where the action was one of *assumpsit* by a landlord on an agreement to

[19] (1766) 1 W. Bl. 599. [20] *ibid.*, 600. [21] (1807) 7 East. 558. [22] (1815) 1 Stark. 12.

provide lodgings for the defendant, the defendant having renounced before the date for taking possession, Lord Ellenborough, after holding that this was contract for an interest in land within the Statute and was "void", said the position "would have been otherwise, if the defendant had entered upon the premises, since that would have been a part-execution of the contract". He refers to no authority for this proposition. It may be that the doctrine under discussion was derived not so much from the distinction of suing on the debt instead of the agreement, but from lingering traces of equitable principles imported into the Common Law by Lord Mansfield.

In *Price v. Leyburn*[23] (1819) Dallas C.J., after deciding that the contract sued upon was not related to an interest in land, added *obiter*:

> "Besides the contract is executed; and therefore I think that the objection (i.e. that the action was barred by the Statute of Frauds) is not well founded."[24]

Cocking v. Ward[25] (which came before the Court of Common Pleas in 1845) is the first authority in which this question of the effect of the consideration being executed is discussed at any length. The plaintiff was the tenant of a farm which the defendant desired to take over. The defendant requested the plaintiff to surrender possession to the landlord and to endeavour to prevail upon the landlord to accept the surrender and to accept the defendant as his new tenant. An agreement was reached whereby the defendant was to pay the plaintiff £100 when he became the tenant.

The plaintiff carried out his part of the agreement and the defendant duly became the tenant, but the defendant failed to pay the £100. The plaintiff sued in *Assumpsit*, the first count of the declaration being in the form of a Special *Assumpsit* as on an express agreement and the second count being upon an account stated. The defendant relied on the Statute of Frauds, there being no sufficient writing. The plaintiff's counsel put the claim under the first count upon the proposition that where the consideration is executed the Statute of Frauds is not a defence. He relied on *Price v. Leyburn.*

Tindal C.J. delivered the Court's judgment denying recovery on the first count in these words:

> "But, as the special count in this action is framed upon the very contract itself, to enforce the payment by the defendant of the

[23](1815) Gow's N.P.C. 109. [24]*ibid.*, 112 [25](1845) 1 C.B. 858.

sum stipulated to be paid as the price of the interest in the land which the plaintiff gave up, and to which the defendant succeeded, we think the contract itself cannot be considered as altogether executed so long as the defendant's part still remains to be performed."[26]

The plaintiff, however, recovered on the account stated, there being clear evidence that the defendant after he became tenant admitted the debt.

This decision was given at a time when complexities in civil procedure abounded as the result of the Hilary Rules encouraging the growth of distinctions by which remedies could be classified. The words used by Tindal C.J. suggest that it was the mode in which the plaintiff's first count was framed which prevented recovery, and it is probable that the distinction between suing on a debt and suing on an agreement derives from this dictum.

The alternative to framing an action on the contract itself is taken to be the framing of it on a debt, and if *indebitatus assumpsit* can be regarded as primarily an action on a debt rather than on an agreement, then recovery may be possible. All that *Cocking v. Ward* decides is that in a claim formulated in Special *Assumpsit*, the plaintiff cannot get around the Statute of Frauds by saying that the consideration is executed. The case does not decide whether he could recover in *indebitatus assumpsit.*

In the next case, *Souch v. Strawbridge*[27] (1846), there was an agreement whereby the defendant left a child under the care of the plaintiff for so long as the defendant should think proper and the plaintiff was to receive 5s. per week.

The plaintiff brought *assumpsit* to recover the total of the overdue payments and the defendant relied on the Statute of Frauds on the basis that the agreement was one not to be performed within the space of one year from making thereof and there was no sufficient writing.

The Court of Common Pleas held that the agreement was a contract upon a contingency the performance of which was not necessarily to take place beyond the space of a year and therefore was not within the Statute.

Tindal C.J., however, in *obiter dicta* proceeded to discuss the result of the consideration being executed:

"In the first place, it appears to me that this is not an action which is within the prohibition of the statute. It is brought for a by-gone or executed consideration, viz, the support and

[26] *ibid*, 868. [27] (1846) 2 C.B. 808.

maintenance of a child at the request of the defendant. There was evidence enough to show that the child was placed under the care of the plaintiff at the charge of the defendant, with his assent, and that he made payments on account of its maintenance. That is equivalent to the proof that is ordinarily given in an action for goods sold and delivered, whence the law implies a promise on the defendant's part to pay for them. . . . The meaning of that (i.e. section 4 of the Statute so far as it deals with agreements not to be performed within the space of one year) is, that no action shall be brought to recover damages in respect as the non-performance of such contracts as are therein referred to. The statute was directed to a totally different object than the prevention of an action like the present: its design was to prevent the setting up, by means of fraud and perjury, of contracts or promises by parol, upon which parties might otherwise have been charged for their whole lives; and for that purpose it requires that certain contracts shall be evidenced only by the solemnity of writing. It has no application to an action in the present form, founded upon an executed consideration."[28]

Coltman J., however, entertained doubts on this question:

"If it had been necessary to decide this case upon the other point, I should have wished to consider it; because I feel some difficulty in saying that the plaintiff may rely on an executed consideration, where he is obliged to resort to the executory contract in order to make out his case."[29]

The remaining members of the Court, Cresswell and Erle JJ. did not advert to the question in their judgments.

An arrangement very similar to that in *Cocking v. Ward* gave rise to *Kelly v. Webster*[30] (1852), in the Court of Common Pleas.

In this case the plaintiff sued for the balance of the amount payable by the defendant under their verbal agreement. The defendant relied on the Statute of Frauds, inasmuch as the agreement related to an interest in land, and called in aid *Cocking v. Ward*. The plaintiff argued that the Statute did not apply to executed contracts and based this proposition on *Inman v. Stamp* and *Souch v. Strawbridge*.

The only judgment reported is that of Maule J. He was content to regard this case as being covered by *Cocking v. Ward* and the short judgment adds little to the body of judicial comment.

In *Smart v. Harding*[31] (1855) the plaintiff had agreed to sell his

[28] *ibid.*, 813–814. [29] *ibid.*, 816. [30] (1852) 12 C.B. 283. [31] (1855) 15 C.B. 652.

dairy to the defendant and to yield up to him possession of the premises of the business which he occupied as tenant from year to year in return for a money payment. The plaintiff gave up possession to the defendant, but the latter refused to pay the balance of the purchase money. There was no written evidence of the agreement sufficient to satisfy the Statute. The defendant pleaded the Statute of Frauds and the argument in the Court of Common Pleas was directed to the issue whether or not the agreement was related to an interest in land and it was in reference to that issue that *Cocking v. Ward* was referred to by Jervis C.J. and Maule J. There was no discussion in this case of the effect of the consideration being executed.

Hodgson v. Johnson[32] (1858), although contributing little, is worthy of mention. When counsel for the plaintiff, who was attempting to establish that the agreement sued upon was not one for the sale of an interest in lands, referred to the views of Dallas C.J. in *Price v. Leyburn,* referred to above, he was met by the comment from Crompton J. that "*Kelly v. Webster* is a strong authority against you".

Knowlman v. Bluett,[33] a decision of the Court of Exchequer Chamber in 1874, has been treated in New South Wales as an authority for the proposition "that where the contract, although not in writing, has been so far executed that nothing remains to be done but payment of the money, which may be recovered in an action under the common count, the Statute of Frauds is no answer to such action".[34]

The plaintiff and the defendant had made a verbal agreement whereby the defendant was to pay to the plaintiff £300 per annum for so long as the plaintiff should maintain and educate the defendant's children. The plaintiff maintained and educated the children for several years and the defendant paid the agreed sums. The defendant then discontinued his payments, but the plaintiff contined to maintain and educate the children and brought an action for two and a half years' arrears.

The defendant argued that the contract was one not to be performed within a year and as there was no note or memorandum in writing of it, the Statute of Frauds prevented the plaintiff's action. The court below, the Court of Exchequer, had held that the contract was not within the Statute of Frauds because it was not one "not to be performed within a year from the making thereof". But on the defendant's appeal to the Court of Exchequer

[32](1858) El. Bl. & El. 685. [33](1874) L.R. 9 Ex. 307.
[34]*Koellner v. Breese* (1909) 9 S.R. (N.S.W.) 457, 459.

Chamber that court did not determine the question whether the contract was within the Statute of Frauds. It decided that the plaintiff could recover even assuming that the contract was one not to be performed within a year.

Blackburn J., with whose judgment the other five members of the Court concurred, put the reasons thus:

> "It is said that the action is not maintainable because there is no memorandum in writing of the bargain. But the plaintiff has performed her part of it, and it would be unjust if she could not obtain repayment of the sums she has expended. She could have maintained an action for 'money paid at the defendant's request', and it would have been no answer to have said that the term in respect of which she was suing was longer than a year, and that the agreement which fixed the rate of remuneration was one not to be performed within a year. We think that in substance her present claim is for money paid, although the declaration is in form upon a special contract."[35]

In the course of the argument, Blackburn J. had referred to Tindal C.J.'s dictum in *Souch v. Strawbridge* that the Statute does not apply where the consideration is executed, but Blackburn J's judgment does not rest on this principle.

It is based upon the view that the plaintiff's claim was in substance a claim for money paid. Money paid is an action on an implied contract which does in fact exist and it is not a quasi-contractual remedy. But for the purpose of ascertaining the scope of the Statute of Frauds money paid is more akin to an action in quasi-contract than, say, an action for the price of land sold and conveyed where some predetermined price is being sued for by the vendor. In money paid the plaintiff does not have to prove the original agreement to fix the amount he seeks to recover as does the vendor claiming the agreed price in the action for land sold and conveyed. There was then in *Knowlman v. Bluett* some justification for saying that the Statute of Frauds did not bar recovery by the plaintiff.

It may be that *Knowlman v. Bluett* is authority only for the proposition that the Statute of Frauds is no obstacle where the substance of the action is a claim for money paid and that it is not authority for the wider proposition that where money is due under an agreement otherwise unenforceable under the Statute of Frauds, it can be recovered in *indebitatus assumpsit* when the consideration is executed.

[35](1874) L.R. 9 Ex. 307, 308.

If *Knowlman v. Bluett* is authority for that wider proposition, counsel for the plaintiffs in *Sanderson v. Graves,*[36] which came before the Court of Exchequer in 1875, were remiss in not citing it. The plaintiffs made a written agreement with the defendant to let him a public house as tenant from year to year, giving him an option to call for a lease for twenty-eight years upon terms, *inter alia,* that if he sold that lease for more than £1,200, he should give the plaintiffs half the difference. A lease was granted, and the defendant sold for £2,500. The plaintiffs sued for half of the profit of £1,300. The defendant claimed that the lease given to him was given under a substituted agreement which did not conform to the Statute of Frauds. The Court, consisting of Bramwell, Pigott, and Amphlett, B.B., held that the agreement under which the lease was given was a new agreement going beyond mere substituted performance of the old agreement, and as the new agreement did not comply with the Statute of Frauds, the action was not maintainable.

The plaintiff's counsel relied on the doctrine that the Statute of Frauds did not prevent action being brought where the consideration was executed, but Bramwell B. disposed of that argument as follows:

> "It was contended for the plaintiffs, on the authority of a dictum of Tindal C.J., in *Souch v. Strawbridge,* that the Statute does not apply to executed contracts. But, with all respect, that cannot be true of all cases within s. 4. For, as to some of them, the question cannot arise till the contract is executed, e.g., cases of guarantee, cases in consideration of marriage. There are cases where, when the thing is executed, a defendant might be liable, e.g., on a contract to paint and deliver a picture on and not before a day distant more than a year. If at the time appointed, the person ordering the picture took it, he would be held to have renewed his promise at the moment. So of any other case where the law would imply a promise on the doing of anything by the promisor. But the law implies no such promise as that relied on here on the granting of a lease."[37]

Amphlett B. also referred to the argument:

> "The plaintiff (sic) also contended that the Statute of Frauds did not apply to executed contracts, although executed on one side only, and there are some old dicta, and even decisions, that appear to bear out that view, and had it been sustained, courts of law would have certainly made a long stride towards the

[36](1875) L.R. 10 Ex. 234. [37]*ibid.,* 238.

adoption of the equitable doctrine of part performance. I think, however, that in the face of more modern decisions, such as *Cocking v. Ward,* and others, the older authorities on this point must be considered overruled."[38]

Support for the doctrine that the Statute of Frauds is no bar to an action in *indebitatus assumpsit* where the consideration is executed is at first sight provided by *Pulbrook v. Lawes.*[39] The plaintiff proposed by letter to take a lease of defendant's house if the defendant would carry out certain alterations. After further discussion, it was agreed that the alterations should be made and the plaintiff should pay £75 towards them. The plaintiff also wished to have certain other work done, and it was agreed that he should send in his own workmen to do it. The plaintiff's workmen did this additional work but owing to the default of the defendant in carrying out the alterations to be made by him, the plaintiff was prevented from taking possession of the house.

The plaintiff sued in the first place for breach of the agreement and added common counts for work done and materials provided, for money paid and money due upon accounts stated.

The action for breach of the agreement failed because the letters did not constitute a sufficient memorandum in writing to satisfy the Statute of Frauds, but the plaintiff was held entitled to recover on a *quantum meruit* for the value of the improvements made by him to the defendant's house. Blackburn J. referred to *Cocking v. Ward,* but in his view it did not prevent recovery because:

"That case was decided before the Common Law Procedure Acts came into operation, and when there was not the same power of amending the special count as there is now."[40]

The basis of the reasoning allowing the plaintiff to recover was that the claim was very similar to a claim for money the consideration for which had totally failed. The case is thus one in which the plaintiff's recovery was based on conceptions of quasi-contract and standing by itself it affords no authority for the recovery by a vendor of purchase money by *indebitatus assumpsit* on facts similar to those in *Turner v. Bladin* which did not raise any claim in quasi-contract.

Turning to the Australian decisions, the question under discussion arose in *Bagnell v. White*[41] but the High Court did not determine it because it thought that the amount involved in the case was so small that it was not proper for the High Court to decide

[38] *ibid.*, 241–242.
[39] (1876) 1 Q.B.D. 284.
[40] *ibid.*, 289.
[41] (1906) 4 C.L.R. 89.

"such a difficult matter", and accordingly the special leave to appeal from the decision of the Supreme Court was rescinded.

Direct authority for the view that a vendor who has sold and conveyed land can sue for the purchase money in *indebitatus assumpsit* though there is no sufficient writing, is provided by *Koellner v. Breese*,[42] a decision of the Supreme Court of New South Wales. By an agreement treated as not being evidenced as required by the Statute of Frauds, the plaintiff and the defendant agreed that the plaintiff should sell certain land to the defendant for £200. The land was transferred but the defendant failed to pay the whole of the purchase price and the plaintiff sued for the balance owing. The declaration contained common counts for land sold and transferred and for money due on accounts stated and also a special count upon the agreement.

The defendant's pleas to all counts were based on the Statute of Frauds. On the plaintiff demurring, the Court, consisting of Simpson A.C.J., Cohen and Pring JJ., gave judgment for the plaintiff. Simpson A.C.J., in whose judgment the other two members of the Court concurred, said there could be no question that the defendant's plea was bad, as to the action on the common counts. The plea regarding the special count upon the agreement raised more difficulty. The plaintiff had argued that the special count on the agreement was in reality merely a count in debt upon an executed contract, with a prefatory averment showing how the debt arose. The defendant contended that in order to prove the debt, the plaintiff had to prove the sale of the land, which he could not do—unless there was a contract in writing and he relied on *Sanderson v. Graves* and *Hodgson v. Johnson*. In Simpson A.C.J.'s opinion, these authorities were decisions of courts of co-ordinate jurisdiction with the Supreme Court of New South Wales and were not binding. However, *Knowlman v. Bluett*, a decision of the Court of Exchequer Chamber, which should be followed, was distinct authority in favour of the plaintiff.

Just as in *Knowlman v. Bluett*, the plaintiff's declaration, although in form upon a special contract, was in substance a claim for money paid, so in the case before the Court the second count, although in form a special count, upon the agreement for the sale of land was in substance a common count for the price of land sold and conveyed.

No other authorities were relied upon in the judgment.

If as has been stated above, *Knowlman v. Bluett* is limited to

[42](1909) 9 S.R. (N.S.W.) 457.

cases where the plaintiff could have claimed for money paid, it could not have been used as authority favouring the plaintiff in *Koellner v. Breese.* Furthermore, Simpson A.C.J.'s judgment proceeds on the assumption that it is well-settled that claims in the form of common counts, by-pass the Statute of Frauds completely.

The foregoing survey of the English authorities shows that this proposition was not well established unless *Knowlman v. Bluett* could be treated as an authority covering all claims for which common counts were available regardless of whether they were claims in quasi-contract or other claims covered by *indebitatus assumpsit.*

According to Jordan C.J., in a later case before the Supreme Court of New South Wales, *Horton v. Jones,*[43] which favours recovery in *indebitatus assumpsit* despite the Statute of Frauds, "It would seem that the mere fact that the consideration is executed is not sufficient to found an action [i.e. in *indebitatus assumpsit*]: unless the circumstances are such as to make it possible to maintain an action on the common money counts: *Cocking v Ward*; *Pulbrook v. Lawes*; cf. *Bagnall v. White*; and contrasting *Koellner v. Breese.*"

This appears to elevate, at this late stage, the common counts from mere forms to substantive conditions of liability and in view of the High Court's statement of opinion in *Turner v. Bladin*[44] that *Koellner v. Breese,* a case where the plaintiff's claim could not have been fitted into the mould of a common count, was rightly decided, Jordan C.J.'s limitation is now of doubtful validity.

Conclusions

Where A has contracted with B to sell land to B by a contract which is unenforceable because of the Statute of Frauds and A has conveyed the land, there is tentative authority for the view that he can, in a claim in *indebitatus assumpsit,* recover the purchase price despite the Statute of Frauds.

The antecedents of this doctrine are by no means clear. It appears to owe something to late eighteenth-century common law flirtation with the equitable doctrine of part-performance. Insofar as it now rests on a distinction between suing on an agreement and suing on a debt, it has received some assistance from the period of strict pleading. If it is true that lawyers of the seventeenth and eighteenth centuries looked on *indebitatus assumpsit* as an action for a debt rather than to enforce promises, they must

[43](1934) 34 S.R. (N.S.W.) 359, 367. [44](1951) 82 C.L.R. 463, 474.

be regarded as having wanted the best of both worlds in approbating the notion of agreement in *Slade's* case and reprobating it after that case when considering the impact of the Statute of Frauds.

Even if the distinction did not exist in the seventeenth and eighteenth centuries, its existence today may serve a useful purpose as a means of obviating the undoubted injustice which would otherwise flow from the application of the Statute of Frauds to the type of case under discussion in today's altered conditions.