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THE LEGAL EFFECT OF SUNDAY.

(*Concluded from April No., ante, p.* 215.)

II. *Contracts.*—The most cursory inspection of early statutes and authorities discloses the imperfect nature of the common-law restrictions upon this subject. Prior to the statute of Charles, it does not appear that any agreement was ever avoided by reason of being made on this day.[1] "*Prima facie* any act may be done on Sunday:" *Rawlings* v. *West Derby*, 2 Com. Bench 72, 80. Nisi Prius rulings to the contrary may, indeed, be found in *Morgan* v. *Richards*, 1 P. A. Browne (Pa.) 171, and *Smith* v. *Sparrow*, 2 C. & P. 547, in the latter of which, BEST, C. J., said, "I should consider that if two parties act so indecently as to carry on their business on Sunday, if there had been no statute upon the subject neither could recover," but these are devoid of authority, and the latter was abandoned on the hearing in banc, wherein it was said: "There is no doubt that, independently of the statute, an action would have lain:" 4 Bing. 84. So the oft-quoted passage of Coke, that "No merchandizing should be on the Lord's day," was evidently intended either as an historical account of the prior era then referred to, or as merely directory; and the same remark applies to the subsequent passage, "The ancient law of England extended not only to

[1] Save that the doctrine of market overt was somewhat qualified, for "sale on Sunday shall not be said sale in a market to alter the property of the goods:" Noy's Maxims 2.

legal proceedings but to contracts:" 2 Inst. 254. See *Comyns* v. *Boyer*, Cro. Eliz. 485; *Rex* v. *Brotherton*, 2 Strange 702; *Drury* v. *Defontaine*, 1 Taunt. 131; *Bloxsome* v. *Williams*, 1 C. & P. 294; 3 B. & C. 232; *Fennell* v. *Ridler*, 5 Id. 406; *Kepner* v. *Keefer*, 6 Watts 231; *Adams* v. *Gay*, 19 Vt. 358; *Bloom* v. *Richards*, 2 Ohio St. 389; *State* v. *Williams*, 4 Ired. 400.

In this country, the invalidity of such contracts wholly depends upon the various statutory provisions, and while it is well settled that no right of action can arise from an agreement to do that which is prohibited under a statutory penalty, yet owing to the anxiety of courts to prevent the religious nature of the day from being used as a means of injustice the distinctions become, at times, extremely refined. Few of these statutes totally avoid such contracts; the main line of demarcation being that while executory agreements will not be enforced, those fully executed will not be disturbed: *Scarfe* v. *Morgan*, 4 M. & W. 270; *Shuman* v. *Shuman*, 3 Casey 90; *Chesnut* v. *Harbaugh*, 28 P. F. Smith 473; *Greene* v. *Godfrey*, 44 Me. 25; *Moore* v. *Kendall*, 1 Chand. (Wis.) 33; *Ellis* v. *Hammond*, 57 Ga. 179; *Myers* v. *Meinrath*, 101 Mass. 366; *Horton* v. *Buffington*, 105 Id. 399. Hence a voluntary pledge upon Sunday cannot be redeemed without performance, and this although the demand secured was incapable of enforcement by action: *King* v. *Green*, 6 Allen 139. Nor can it be doubted that a delivery on Sunday passes the title as against creditors of the vendor: *Smith* v. *Bean*, 15 N. H. 577; *Banks* v. *Werts*, 13 Ind. 203; *Moore* v. *Kendall*, 1 Chand. (Wis.) 33; *Moore* v. *Murdoch*, 26 Cal. 514. So a grantee accepting a conveyance upon that day subject to a trust cannot hold the land discharged from the trust: *Faxon* v. *Folvey*, 110 Mass. 392; and equity has restrained the collection of a judgment procured in violation of such executed agreement: *Blakesley* v. *Johnson*, 13 Wis. 530.

In a case in Michigan it was, indeed, decided, that after the delivery of chattels upon Sunday, the vendor could tender the consideration at a subsequent day and recover possession by replevin: *Tucker* v. *Mowrey*, 12 Mich. 378; and in Vermont, a refusal to rescind on demand afterward made on a secular date, was treated as an express ratification, and the defendant thereupon held liable for a false representation at the time of the contract: *Adams* v. *Gay*, 19 Vt. 358, *infra*, p. 279; but these decisions are anomalous, it being generally held that in actions *ex contractu* a court will not

interfere either way. In other words, no *direct* liability is imposed by reason of acts done upon Sunday. Hence, there can be no recovery upon a promise (*Meader* v. *White*, 66 Me. 90), note (*Miller* v. *Lynch*, 38 Miss. 344; *Towle* v. *Larrabee*, 26 Me. 464; *Pope* v. *Linn*, 50 Id. 83; *Allen* v. *Deming*, 14 N. H. 133; *Smith* v. *Foster*, 41 Id. 215; *Keefer* v. *Kepner*, 6 Watts 231; *Foreman* v. *Ahl*, 5 P. F. Smith 326; *Bosley* v. *McAllister*, 13 Ind. 565; *Adams* v. *Hamell*, 2 Doug. (Mich.) 73; *Hussey* v. *Roquemore*, 27 Ala. 281; *Goss* v. *Whitney*, 27 Vt. 272; *Hill* v. *Wilker*, 41 Ga. 452),[1] bond (*Pattee* v. *Greeley*, 13 Metc. 284),[2] warranty (*Lyon* v. *Strong*, 6 Vt. 219; *Finley* v. *Quirk*, 9 Minn. 194; *Murphy* v. *Simpson*, 14 B. Mon. 419), guaranty (*Merriam* v. *Sterns*, 10 Cush. 257; *Moseley* v. *Hatch*, 108 Mass. 517), or other contract (*Heller* v. *Crawford*, 37 Ind. 279; *Berrill* v. *Smith*, 2 Miles 402; *Bustin* v. *Rogers*, 11 Cush. 346; *Slade* v. *Arnold*, 14 B. Mon. 287; *Sellers* v. *Dugan*, 18 Ohio 489), made upon that day; and in the absence of proof to the contrary, the *lex loci contractus* and the *lex fori* will be presumed to be the same: *Sayre* v. *Wheeler*, 31 Iowa 112; s. c. 32 Id. 559; *Hill* v. *Wilker*, 41 Ga. 452; *Shelton* v. *Merchants' Co.*, 59 N. Y. 258.[3] So no action lies for a deceit practised in an exchange of chattels upon Sunday: *Robeson* v. *French*, 12 Metc. 24.[4]

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[1] The decision in *Geer* v. *Putnam*, 10 Mass. 312, which is often supposed to assert a different rule (see *Allen* v. *Deming*, *Towle* v. *Larrabee*, *supra*), was based upon the insufficiency of a plea in not negativing the exceptions of a local statute; see *Robeson* v. *French*, 12 Metc. 24. An antecedent debt forming the consideration, was, in *Kaufman* v. *Hamm*, 30 Mo. 387, considered sufficient to support the note, but no authorities were cited, and this view does not seem to have occurred to the court in *Sanders* v. *Johnson*, 29 Ga. 526, where the facts were similar. An endorsement upon Sunday by the payee will clearly not discharge the liability of the maker: *Smith* v. *Foster*, 41 N. H. 215; although it may give no right of action to the endorsee: *Benson* v. *Drake*, 55 Me. 555.

[2] But as the illegality arises not by common law but from statutory enactments, this defence is, in Pennsylvania at least, inadmissible under the plea of *non est factum*: *Fox* v. *Mensch*, 3 W. & S. 444. See *Hulet* v. *Stratton*, 5 Cush. 539, for the practice in Massachusetts.

[3] In *O'Rourke* v. *O'Rourke*, 4 North Western Rep. N. S. 103 [March 6th 1880, Sup. Ct. Mich.], the contrary was held, upon the ground that the contract being valid at common law, it presumably so continued until evidence to the contrary was offered. But this hardly accords with the weight of authority: Whart. on Confl. of Laws, § 780.

[4] The case of *Adams* v. *Gay*, 19 Vt. 358, to the contrary, is noticed *supra*, p 274 and *infra* 279.

In Ohio a contrary doctrine prevails, it being there considered that under the statute prohibiting "common labor," only manual labor is forbidden, and, hence, specific performance has been enforced of executory articles dated and delivered on Sunday: *Bloom* v. *Richard*, 2 Ohio St. 388, overruling *Sellers* v. *Dugan*, 18 Ohio 489; and this decision has been approved elsewhere: *Johnson* v. *Brown*, 13 Kans. 529; *Horacek* v. *Keebler*, 3 Neb. 355; although in the latter cases the contracts had been executed upon subsequent dates.

So in New York it is held, following an argument formerly adopted, but subsequently repudiated, by the English cases, that the statute does not apply to private contracts, not notoriously violating public order: *Boynton* v. *Page*, 13 Wend. 425; *Greenbury* v. *Wilkins*, 9 Abb. Prac. 206 n.; *Miller* v. *Roessler*, 4 E. D. Smith 234; *Batsford* v. *Every*, 44 Barb. 618; *Merritt* v. *Earle*, 29 N. Y. 115; *Eberle* v. *Mehrbach*, 55 Id. 682; *People* v. *Young Men's Society*, 65 Barb. 357; *Sun Association* v. *Tribune Association*, 44 N. Y. Superior Ct. 141. In a somewhat recent case, however, it was decided that the sale of papers on Sunday was a breach of this public order, and, hence, that the price of an advertisement in such papers could not be recovered from the advertiser: *Smith* v. *Wilcox*, 19 Barb. 581; 25 Id. 341; 24 N. Y. 353. But in Missouri a directly opposite conclusion was reached by holding that the only contract between the advertiser and proprietor was for publication, and that sales were immaterial: *Sheffield* v. *Balmer*, 52 Mo. 474; see *Commonwealth* v. *Teaman*, 1 Phila. R. 460. It is conceived that the weight of authority, as well as obvious justice, accord with the latter view.

The effect of acts, admissions or part payment on Sunday, as a bar to the Statutes of Limitations, has caused some diversity of opinion. In Massachusetts, Georgia and Alabama such acts are not considered to waive those statutes (*Clapp* v. *Hale*, 112 Mass. 368; *Dennis* v. *Sharman*, 31 Ga. 607; *Bumgardner* v. *Taylor*, 28 Ala. 687), while in Maryland, Iowa and, perhaps, Pennsylvania, a contrary view prevails: *Thomas* v. *Hunter*, 29 Md. 406; *Ayres* v. *Bane*, 39 Iowa 518; *Lea* v. *Hopkins*, 7 Penn. St. 492.[1] These

[1] "A man may acknowledge the truth on Sunday, and, if he does, I do not know any rule that would prevent its being given in evidence against him. If a man writes a letter on Sunday and sends it to his creditor, who gets it on Monday, or even takes it from the office on Sunday, I presume it would be competent evidence

cases all admit that no direct liability can arise from any contractual relation created on that day, and the difference between them would seem to be, that the former class apply to the subsequent promise rules which would govern an action directly upon it, while the latter distinguish between actions on the promise and its admission as evidence of a previously existing claim, imposing no direct or additional obligation (see *Flinn* v. *St. John*, 51 Vt. 334). And, apart from this, it is usually considered that such acts or admissions may, with other circumstances, be evidence as part of the *res gestæ*, though in themselves creating no liability: *Rainey* v. *Capps*, 22 Ala. 288; *Riley* v. *Butler*, 36 Ind. 51; *McCalop* v. *Hereford*, 4 La. Ann. 185; *Beardsley* v. *Hall*, 36 Conn. 270; *Chestnut* v. *Harbaugh*, 78 Penn. St. 473. So performance on Sunday may extinguish an existing liability, though none can be created. Hence a previous obligation may be discharged by payment on that day (*Johnson* v. *Willis*, 7 Gray 164), but there can be no rescission or repudiation at that time without performance: *Benedict* v. *Bachelder*, 24 Mich. 425.[1]

Judicial notice will be taken of the almanac (*Knox* v. *Clifford*, 38 Wis. 651; *Finney* v. *Callendar*, 8 Minn. 41; *Clough* v. *Goggis*, 40 Iowa 325; *Christman* v. *Tuttle*, 59 Ind. 55), but the date appearing upon the face of an agreement is by no means conclusive; for a contract dated on Sunday may be proved to have been erroneously dated (*Drake* v. *Rogers*, 32 Me. 524; *Stacy* v. *Kemp*, 97 Mass. 166), and conversely, an instrument bearing a secular date may, as between the original parties or those with notice, be shown to have been dated and delivered on Sunday: *Pattee* v. *Greely*, 13 Metc. 284; *Kepner* v. *Keefer*, 6 Watts 231; *Bank* v. *Mayberry*, 48 Me. 198; *Reeves* v. *Butcher*, 2 Vroom 224; *Moseley* v. *Hatch*, 108 Mass. 517. The latter proof, however, is clearly inadmissible against a *bona fide* holder for value, without

against the debtor. As a bond or contract the suit is founded on it, and cannot be maintained, because it is against a public statute, but as an admission it is only evidence of a previous existing liability. The suit is founded on the previous liability. The admission is only evidence of the fact that the defendant acknowledged that liability. * * * We cannot carry the law so far as to say that the admission of a previously existing debt, made on the Sabbath, is not good:" *Lea* v. *Hopkins*, *supra*. In *Haydock* v. *Tracy*, 3 W. & S. 507, the action seems to have been brought on the subsequent promise (p. 509), and was so treated in the opinion in *Shuman* v. *Shuman*, 27 Penn. St. 90, 94.

[1] *Aliter*, under the Nevada Statutes: *Pence* v. *Langdon*, 9 Otto 580.

notice: *Knox* v. *Clifford, supra; Vinton* v. *Peck*, 14 Mich. 287, *Clinton Bank* v. *Graves*, 48 Iowa 228; *Cranson* v. *Goss*, 107 Mass. 439; *Love* v. *Wells*, 25 Ind. 503; *Saltmarsh* v. *Tuthill*, 13 Ala. 390; *Bank* v. *Thompson*, 42 N. H. 369; *Greathead* v. *Walton*, 40 Conn. 226; *Bank* v. *Mayberry, supra; Hall* v. *Parker*, 37 Mich. 590; *State* v. *Young*, 23 Minn. 521; *Begbie* v. *Levi*, 1 C. & J. 183. And in Pennsylvania, it has been said to be far from certain that the bond of a justice of the peace, signed and delivered on Sunday, would be invalid against those injured by his official misconduct. "Such a construction of the act would enable the obligors to take advantage of their own wrong, as against persons who cannot by any possibility protect themselves:" *Commonwealth* v. *Kendig*, 2 Penn. St. 448; *Hall* v. *Parker, supra; State* v. *Young, supra.* Nor will a judgment be arrested because entered upon a contract dated on Sunday when no proof to that effect was offered at the trial: *Hill* v. *Dunham*, 7 Gray 543; *Baker* v. *Lukens*, 35 Penn. St. 146.

So, the date is immaterial, where a contract does not take effect until delivery or final consummation: *Commonwealth* v. *Kendig, supra; Uhler* v. *Applegate*, 26 Penn. St. 140; *Beitenman's Appeal*, 55 Id. 183; *Hilton* v. *Houghton*, 35 Me. 143; *Harris* v. *Morse*, 49 Id. 432; *Clough* v. *Davis*, 9 N. H. 500; *Merrill* v. *Downs*, 41 Id. 72; *Prather* v. *Harlan*, 6 Bush 185; *Love* v. *Wells*, 25 Ind. 503; *Lovejoy* v. *Whipple*, 18 Vt. 379; *Goss* v. *Whitney*, 24 Id. 187; s. c. 27 Id. 272; *Butler* v. *Lee*, 11 Ala. 886; *Flanagan* v. *Meyer*, 41 Id. 132; *Peake* v. *Conlan*, 43 Iowa 297; *King* v. *Fleming*, 72 Ill. 21; *Bryant* v. *Booze*, 55 Ga. 438; *Bloxsome* v. *Williams*, 3 B. & C. 232. Hence, the liability of a defendant in possession for payment of the consideration, will depend upon the time when this possession was acquired.[1] If the contract was finally completed or delivery made upon a secular day, the price can be recovered in assumpsit upon a *quantum meruit*, but no warranty or terms agreed to upon Sunday will bind the parties; *Bradley* v. *Rea*, 14 Allen 20; s. c. 103 Mass. 188;[2] *Dickinson* v. *Richmond*, 97 Id. 45. See *Allen* v. *Deming*, 14 N. H. 141.

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[1] But possession acquired on Sunday, without the vendor's consent, is not proof of a contract upon that day: *Hadley* v. *Snevily*, 1 W. & S. 477.

[2] *Bradley* v. *Rea*, which may have operated with some harshness to the defendant, has been ably criticised in 6 Am. L. Rev. 350, but upon principle seems correct.

So, too, compensation for services rendered upon a secular date, in pursuance of a previous request on Sunday, can be recovered (*Tuckerman* v. *Hinkley*, 9 Allen 452; *Dickinson* v. *Richmond*, 97 Mass. 45; *Stackpole* v. *Symonds*, 3 Foster (N. H.) 229; *Meriwether* v. *Smith*, 44 Ga. 541; *Johnson* v. *Brown*, 13 Kans. 529), and a liability for use and occupation will arise from possession taken in pursuance of a previously invalid contract: *Stebbins* v. *Peck*, 8 Gray 553; *Day* v. *McAllister*, 15 Id. 433.

When, however, a contract is wholly made and delivered on Sunday, the price cannot be recovered at all (*Ladd* v. *Rogers*, 11 Allen 209; *Finn* v. *Donahue*, 35 Conn. 216; *Dodson* v *Harris*, 10 Ala. 566; *Meader* v. *White*, 66 Me. 90), as no promise to pay will be implied from the mere retention of possession: *Simpson* v. *Nichols*, 3 M. & W. 241; *Perkins* v. *Jones*, 26 Ind. 499; *Pike* v. *King*, 16 Iowa 49. Such possession, nevertheless, is a sufficient consideration to support an action upon an express promise subsequently made: *Williams* v. *Paul*, 6 Bing. 653; s. c. 4 M. & P. 532 (see *Simpson* v. *Nicholls*, *supra*); *Smith* v. *Case*, 2 Oregon 190; *Sumner* v. *Jones*, 24 Vt. 317; *Clough* v. *Davis*, 9 N. H. 500; *Sayles* v. *Wellman*, 10 R. I. 465; *Winchell* v. *Carey*, 115 Mass. 560; *Gwinn* v. *Simes*, 61 Mo. 335; *Melchoir* v. *McCarty*, 31 Wis. 252. The case of *Kountz* v. *Price*, 40 Miss. 341, which asserts the contrary, stands alone.

It is clear that the action may be brought on the subsequent promise if a sufficient consideration exists, and cognate to this, is the question whether subsequent ratification or adoption on a secular date will sustain an action on the original agreement. In Vermont and Kentucky such a result is allowed (*Adams* v. *Gay*, 19 Vt. 358; *Sargeant* v. *Butts*, 21 Id. 99; *Sumner* v. *Jones*, 24 Id. 317; *Flinn* v. *St. John*, 51 Id. 334; *Cambell* v. *Young*, 9 Bush 240),[1] but the opposite doctrine is maintained by most of the other

[1] In *Adams* v. *Gay* an exchange of horses, with warranty, was made on Sunday, and the animal delivered to the plaintiff being worthless, he afterward, upon another day, requested the defendant to rescind the contract, which the latter declined to do. The plaintiff thereupon brought an action of trover, and it was held that the retention of possession by the defendant, and his subsequent refusal to rescind, were equivalent to an express ratification of the original contract, and that he was liable for his misrepresentation or breach of warranty. But the principle of this decision is far more extensive than is recognised by the weight of authority, and, very recently, seems to have been so regarded by its author: 13 Am. Law Reg. (N. S.) 542, n. to *Frost* v. *Plumb*.

states, and neither part payment of interest nor express promises afterward made, will create any direct liability on the contract itself: *Shippey* v. *Eastwood*, 9 Ala. 198; *Pope* v. *Linn*, 50 Me. 83; *Day* v. *McAllister*, 15 Gray 435; *Reeves* v. *Butcher*, 2 Vroom 224; *Ryno* v. *Darby*, 5 C. E. Green 231; *Cattell* v. *The Trustees*, 62 Ind. 365; *Gwinn* v. *Simes*, 61 Mo. 335.[1]

Much of the confusion existing upon this branch of the subject seems to have resulted from the failure to discriminate correctly between those acts which are void, those which are voidable, and those prohibited by statute. Few acts are absolutely void, and agreements upon Sunday never are. No liability may arise from their breach, but when executed they are universally recognised as operative to transfer title or retain possession both as against third parties and the grantor himself. Hence they are not invalid to all intents, and cannot correctly be said to be void. The true distinction would appear to be that acts which will not be enforced at all in any shape, or which, under no circumstances, can confer a right of action, are absolutely void, while those which will not be enforced as against certain individuals are voidable, or, as is sometimes said, relatively void; and it has been well remarked that "a strong misleading element in decisions is an undue reliance on the broadest meaning of the ambiguous word *void*, which is so commonly found in laws, contracts, decisions and text-books. Deductions founded on the broadest meaning of the word would lead to greater errors than are found in the most erroneous cases, while those founded on its narrow and more usual meaning seldom err:" *Pearsoll* v. *Chapin*, 44 Penn. St. 9; *Negley* v. *Lindsay*, 67 Id. 217; *Allen* v. *Deming*, 14 N. H. 133; *Smith* v. *Bean*, 15 Id. 577.

But the invalidity of contracts in violation of the Sunday laws, depends upon entirely different and more flexible grounds—upon

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[1] *Dicta* favoring an opposite construction may be found in other cases, as in *Love* v. *Wells*, 25 Ind. 503, but in none was the question directly presented. Thus *Smith* v. *Bean*, 15 N. H. 577, and *Banks* v. *Werts*, 13 Ind. 203, were actions wherein creditors of the vendors attempted to set aside certain Sunday transactions upon the ground that no title passed, and these cases obviously fall within a different doctrine: *supra*, p. 274. In *Sayles* v. *Wellman*, 10 R. I. 465, and *Melchoir* v. *McCarty*, 31 Wis. 252, the action was not on the original contract, and in *Harrison* v. *Colton*, 31 Iowa 16, the agreement was not completed until a subsequent date. In the latter case the court cites Story on Contracts, § 619, as asserting that ratification revives the original contract, but in later editions of that text-book directly the contrary is stated: Story on Cont., § 756.

being opposed to motives of public policy as declared by statute; and, hence, there is every reason to hold that as between the parties themselves, or others with notice, no subsequent ratification can remove the original taint, while, on the other hand, an innocent purchaser will not be affected; and even as between the original parties, possession acquired under the agreement will support an action founded upon a new promise.

So although no action can be maintained on a promise of marriage made on Sunday, yet the marriage itself upon that day is always regarded as valid, whether upon motives of public policy or as being an executed contract: *Gangwere's Estate*, 14 Penn. St. 417; *George* v. *George*, 47 N. H. 36; *Bennett* v. *Brooks*, 9 Allen 118; *Weidman* v. *Marsh*, 4 Pa. Law Jour. R. 401.[1]

Where no recovery can be had on the agreement, the injustice of allowing a defendant *in pari delicto*, to retain both the property and the consideration, has induced some suggestions that possibly in the case of continued possession of the specific subject-matter, an action of trover might lie to recover the value of the property, and that the defendant could not, under such circumstances, justify his conversion by resort to the contract: *Ladd* v. *Rogers*, 11 Allen 209; *Myers* v. *Meinrath*, 101 Mass. 366;[2] see *Adams* v. *Gay*, 19 Vt. 358. The point, however, was not decided in these cases, and, upon principle, is open to grave objections, the general rule undoubtedly being that money paid, or goods delivered, in pursuance of an illegal contract cannot be recovered, and this without regard to the nature of the illegality; see *Collins* v. *Blantern*, 1 Smith's Lead. Cas. 703 (7th Am. ed.), "The doctrine of the courts in other cases is that what the parties have done shall stand, and

[1] In *Gangwere's Estate*, *supra*, the court, while upholding the marriage, were divided as to the validity of the settlement executed on that day.

[2] "It is a question to be determined by the court upon considerations of public policy. But those considerations must be general, and not such merely as arise out of the particular case. Where the payment or delivery is made for the furtherance of an immoral or illegal purpose, the court will not help the guilty party to revoke, although another equally guilty may thereby make an undeserved gain. But where the illegality consists in the time or mode in which the transaction takes place, and not in the character of the transaction itself, the court will undoubtedly regard the position of the parties in respect to the subject-matter. In case of a contract of sale not executed by payment of the consideration, where the contract remains executory on one side the law which declares the executory part of the contract void, might well regard the partial execution ineffectual. It is not necessary, however, to decide the point:" *Myers* v. *Meinrath*, *supra*.

that what they have not done shall be left unexecuted:" *Yates* v. *Foot*, 12 Johns. 1; see *Sykes* v. *Beadin*, Law Rep. 11 Ch. Div. 170.

But although the consideration cannot be recovered, the tendency of modern decisions is to hold the defendant liable for any damage to property in his possession for a particular purpose, although that possession may have been acquired by contract. Thus where the bailee, in an ordinary hiring for a specific purpose, transgresses the terms of the bailment, and, in so doing, injures the property intrusted to his care, an action for damages will lie, although both the bailment and the damage occurred on Sunday: *Morton* v. *Gloster*, 46 Me. 520; *Woodman* v. *Hubbard*, 5 Foster 67; *Harrison* v. *Marshall*, 4 E. D. Smith 271; *Nodine* v. *Doherty*, 46 Barb. 59; S. C. more fully reported, 5 Am. Law Reg. (N. S.) 346; *Frost* v. *Plumb*, 40 Conn. 111; *Hall* v. *Corcoran*, 107 Mass. 251, overruling *Gregg* v. *Wyman*, 4 Cush. 322. "There is nothing to support the position that the delivery of possession of a chattel on the Lord's day by way of bailment for a specific purpose in violation of the statute will prevent the general owner from maintaining an action against the bailee for using the chattel, not under the possession so acquired, but for an entirely different purpose not contemplated in the illegal contract, and, of itself, amounting to a conversion:" *Hall* v. *Corcoran*, *supra*.

In Rhode Island alone a different view prevails, originally based upon the doctrine of a case since overruled: *Whelden* v. *Chappel*, 8 R. I. 230; *Smith* v. *Rollins*, 11 Id. 464. But in both these decisions it will be observed that the plaintiff seems to have been unable to offer independent evidence of the defendant's negligence without resorting to the contract, and the court seem to have laid some stress upon this fact; see *Berrill* v. *Gibbs*, 2 Pa. Law Jour. Rep. 296.

Whether the bailor can recover for damages happening on Sunday *during the continuance of a bailment made on that day*, is somewhat unsettled. In Maine this has been denied upon the ground that the liability arises solely under an illegal contract which can confer no right of action, and that it is immaterial by whom the contract is proved (*Parker* v. *Latner*, 60 Me. 528),[1] and the law was held the same way in Massachusetts: *Way* v.

[1] And a note subsequently given in settlement of such damage was held to be without consideration: *Tillock* v. *Webb*, 56 Me. 100.

Foster, 1 Allen 408. But the latter case has been somewhat qualified (*Hall* v. *Corcoran*, 107 Mass. 251), and upon principle it is difficult to see why a liability should be imposed where the property is injured on Sunday after the termination of the bailment, and refused when the damage occurs during its continuance. In either case the original hiring does not necessarily form any part of the plaintiff's case. The tort, and not the contract, is the gist of the action; and the absence of remedy upon the contract, cannot, in principle, effect the right to indemnity for any collateral damage in which the nature of the possession is immaterial, for it is familiar that a plaintiff is always entitled to that remedy in which the proof necessary to sustain a recovery does not disclose an illegal transaction, or, as recently said, "If the plaintiff can show a complete cause of action without being obliged to prove his own illegal act, he may recover, although such illegal act may incidentally appear, and may be important even as explanatory of other facts in the case:" *Frost* v. *Plumb*, 40 Conn. 111; *Welch* v. *Wesson*, 6 Gray 505. Nor is it a correct reply that the plaintiff's participation in an illegal transaction removes the defendant's liability for all consequences which may occur from delivering possession in pursuance of the transaction. The logical results of such a doctrine would deprive the plaintiff of any remedy in case of refusal to surrender possession after the expiration of the bailment. It is, therefore, submitted that the better opinion will be found in the principle contained in the carefully considered views of a recent case in Connecticut, which have been previously endorsed in these pages by high authority: *Frost* v. *Plumb*, *supra;* 13 Am. Law Reg. (N. S.) 541.

"The plaintiff," said the court, "in making a contract prohibited by law, exposed himself to all its legitimate consequences. He is not only liable to the penalty, but the law will refuse to aid him in enforcing it, or in recovering compensation for breach of it; and will not allow him to recover in any action which essentially depends upon it. But it does not, in a case like this, deprive the owner of his general property in the horse, nor place him or his property outside of the protection of the law. Nor will it in any sense operate to justify or excuse the other party in the commission of any wrongful act not contemplated by the agreement. Now it must be conceded that an action of trover is not founded upon a contract. None is referred to in the declaration and none need be proved on