in the county of Limerick, but his real estates consisted of estates in the county of Clare, which was not mentioned in the will, and a small estate in the city of Limerick, inadequate to meet the charges in the will; it was held, that the devisee could not be allowed to show, by parol evidence, that the estates in the county of Clare were inserted in the devise to him in the first draft of the will, which was sent to a conveyancer, to make certain alterations not affecting those estates; that by mistake he erased the words "county of Clare;" and that the testator, after keeping the will by him for some time, executed it without adverting to the alteration as to that county.[1] And so, where land was described in a patent as lying in the county of M., and further described by reference

[1] Miller *v.* Travers, 8 Bing. 244; Doe *v.* Chichester, 4 Dow's P. C. 65; Doe *v.* Lyford, 4 M. & S. 550. The opinion of the Court in Miller *v.* Travers, by Tindal, C. J., contains so masterly a discussion of the doctrine in question, that no apology seems necessary for its insertion entire. After stating the case, with some preliminary remarks, the learned Chief Justice proceeded as follows: — "It may be admitted, that in all cases, in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity, which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence, upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim, 'Ambiguitas verborum latens, verificatione suppletur.' But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other, and to neither of which can the present case be referred. The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator, it is found that there are more than one estate or subject-matter of devise, or more than one person, whose description follows out and fills the words used in the will. As, where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale; or, where a man devises to his son John, and he has two sons of that name. In each of these cases respectively, parol evidence is admissible to show which manor was intended to pass, and which son was intended to take. (Bac. Max. 23; Hob. R. 32; Edward Altham's case, 8 Rep. 155.) The other class of cases is that, in which the description

to natural monuments; and it appeared, that the land described by the monuments was in the county of H., and

contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular. As, where an estate is devised called A., and is described as in the occupation of B., and it is found, that, though there is an estate called A., yet the whole is not in B.'s occupation; or, where an estate is devised to a person, whose surname or christian name is mistaken; or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence. But the case now before the Court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or, indeed, any description whatever of the estates in Clare. The present case is rather one, in which the plaintiff does not endeavor to apply the description contained in the will to the estates in Clare; but, in order to make out such intention, is compelled to introduce new words and a new description into the body of the will itself. The testator devises all his estates in the county of Limerick and the city of Limerick. There is nothing ambiguous in this devise on the face of the will. It is found upon inquiry, that he has property in the city of Limerick, which answers to the description in the will, but no property in the county. This extrinsic evidence produces no ambiguity, no difficulty in the application of the words of his will to the state of the property, as it really exists. The natural and necessary construction of the will is, that it passes the estate which he has in the city of Limerick, but passes no estate in the county of Limerick, where the testator had no estate to answer that description. The plaintiff, however, contends, that he has a right to prove that the testator intended to pass, not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare; and that the will is to be read and construed as if the word Clare stood in the place of, or in addition to, that of Limerick. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention, not apparent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject, on which it is altogether silent, and is the same in effect as the filling up a blank, which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted. Now, the first objection to the introduction of such evidence is, that it is inconsistent

not of M.; that part of the description which related to the county was rejected. The entire description in the

with the rule, which reason and sense lay down, and which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will, and that words which he has not used cannot be added. Denn *v.* Page, 3 T. R. 87. But it is an objection no less strong, that the only mode of proving the alleged intention of the testator is by setting up the draft of the will against the executed will itself. As, however, the copy of the will, which omitted the name of the county of Clare, was for some time in the custody of the testator, and therefore open for his inspection, which copy was afterwards executed by him, with all the formalities required by the statute of frauds, the presumption is, that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up, as of greater authority to evince the intention of the testator than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee, altogether omitted in the will? If it is admissible to introduce new matter of devise, or a new devisee, why not to strike out such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made in form by the testator in his lifetime, would really be made by the attorney after his death; that all the guards intended to be introduced by the statute of frauds would be entirely destroyed, and the statute itself virtually repealed. And upon examination of the decided cases, on which the plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for. On the contrary, they will all be found consistent with the distinction above adverted to, — that an uncertainty, which arises from applying the description contained in the will, either to the thing devised, or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself. Thus, in the case of Lowe *v.* Lord Huntingtower, 4 Russ. 581, n., in which it was held, that evidence of collateral circumstances was admissible, as, of the several ages of the devisees named in the will, of the fact of their being married or unmarried, and the like, for the purpose of ascertaining the true construction of the will; such evidence, it is to be observed, is not admitted to introduce new words into the will itself, but merely to give a construction to the words used in the will, consistent with the real state of his property and family; the evidence is produced to prove facts, which, according to the language of Lord Coke, in 8 Rep. 155, 'stand well with the words of the

patent, said the learned Judge, who delivered the opinion of the Court, must be taken, and the identity of the land

will.' The case of Standen *v.* Standen, 2 Ves. jun. 589, decides no more, than that a devise of all the residue of the testator's real estate, where he has no real estate at all, but has a power of appointment over real estate, shall pass such estate, over which he has the power, though the power is not referred to. But this proceeds upon the principle, that the will would be altogether inoperative, unless it is taken that, by the words used in the will, the testator meant to refer to the power of appointment. The case of Mosley *v.* Massey and others, 8 East, 149, does not appear to bear upon the question now under consideration. After the parol evidence had established, that the local description of the two estates mentioned in the will had been transposed by mistake, the county of Radnor having been applied to the estate in Monmouth, and vice versâ; the Court held, that it was sufficiently to be collected, from the words of the will itself, which estate the testator meant to give to the one devisee, and which to the other, independent of their local description; all, therefore, that was done, was to reject the local description, as unnecessary, and not to import any new description into the will. In the case of Selwood *v.* Mildway, 3 Ves. jun. 306, the testator devised to his wife part of his stock in the 4 per cent. annuities of the Bank of England; and it was shown by parol evidence, that at the time he made his will he had no stock in the 4 per cent. annuities, but that he had some which he had sold out, and had invested the produce in long annuities. And in this case it was held, that the bequest was in substance a bequest of stock, using the words as a denomination, not as the identical corpus of the stock; and as none could be found to answer the description but the long annuities, it was held, that such stock should pass, rather than the will be altogether inoperative. This case is certainly a very strong one; but the decision appears to us to range itself under the head, that 'falsa demonstratio non nocet,' where enough appears upon the will itself to show the intention, after the false description is rejected. The case of Goodtitle *v.* Southern, 1 M. & S. 299, falls more closely within the principle last referred to. A devise 'of all that my farm called Trogue's Farm, now in the occupation of A. C.' Upon looking out for the farm devised, it is found that part of the lands, which constituted Trogue's Farm, are in the occupation of another person. It was held, that the thing devised was sufficiently ascertained by the devise of 'Trogue's Farm,' and that the inaccurate part of the devise might be rejected as surplusage. The case of Day *v.* Trigg, 1 P. W. 286, ranges itself precisely in the same class. A devise of all 'the testator's freehold houses in Aldersgate-street,' when in fact he had no freehold, but had leasehold houses there. The devise was held in substance and effect to be a devise of his houses there; and that as there were no freehold houses there to satisfy the description, the word

ascertained, by a reasonable construction of the language used. If there be a repugnant call, which, by the other calls

'freehold' should rather be rejected, than the will be totally void. But neither of these cases affords any authority in favor of the plaintiff; they decide only that, where there is a sufficient description in the will to ascertain the thing devised, a part of the description, which is inaccurate, may be rejected, not that any thing may be added to the will; thus following the rule laid down by Anderson, C. J. in Godb. R. 131, — 'An averment to take away surplusage is good, but not to increase that which is defective in the will of the testator.' On the contrary, the cases against the plaintiff's construction appear to bear more closely on the point. In the first place, it is well established, that, where a complete blank is left for the name of the legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator. Hunt *v.* Hort, 3 Bro. C. C. 311, and in many other cases. Now the principle must be precisely the same, whether it is the person of the devisee, or the estate or thing devised, which is left altogether in blank. And it requires a very nice discrimination to distinguish between the case of a will, where the description of the estate is left altogether in blank, and the present case, where there is a total omission of the estates in Clare. In the case of Doe d. Oxenden *v.* Chichester, 4 Dow, P. C. 65, it was held by the House of Lords, in affirmance of the judgment below, that in the case of a devise of 'my estate of Ashton,' no parol evidence was admissible to show, that the testator intended to pass not only his lands in Ashton, but in the adjoining parishes, which he had been accustomed to call by the general name of his Ashton estate. The Chief Justice of the Common Pleas, in giving the judgment of all the Judges, says; 'If a testator should devise his lands of or in Devonshire or Somersetshire, it would be impossible to say, that you ought to receive evidence, that his intention was to devise lands out of those counties.' Lord Eldon, then Lord Chancellor, in page 90 of the Report, had stated in substance the same opinion. The case, so put by Lord Eldon and the Chief Justice, is the very case now under discussion. But the case of Newburgh *v.* Newburgh, decided in the House of Lords on the 16th of June, 1825, appears to be in point with the present. In that case the appellant contended, that the omission of the word 'Gloucester' in the will of the late Lord Newburgh proceeded upon a mere mistake, and was contrary to the intention of the testator, at the time of making his will, and insisted that she ought to be allowed to prove, as well from the context of the will itself, as from other extrinsic evidence, that the testator intended to devise to her an estate for life, as well in the estates in Gloucester, which was not inserted in the will, as in the county of Sussex, which was mentioned therein. The question, 'whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and

in the patent, clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described, as to render its identity wholly uncertain, it is admitted that the grant is void.[1] So, if lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the grantor owns lands answering to the one description, and not to the other, the description of the lands which he owned will be taken to be the true one, and the other rejected as *falsa demonstratio*.[2]

entitling the appellant to the Gloucester estate, as if the word "Gloucester" had been inserted in the will,' was submitted to the Judges, and Lord Chief Justice Abbott declared it to be the unanimous opinion of those who had heard the argument that it could not. As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to, as upon reason and principle, we think the evidence offered by the plaintiff would be inadmissible upon the trial of the issue."

[1] Boardman *v.* Reed and Ford's lessees, 6 Peters, 328, 345; per McLean, J.

[2] Loomis *v.* Jackson, 19 Johns. 449; Lush *v.* Druse, 4 Wend. 313; Jackson *v.* Marsh, 6 Cowen, 281; Worthington *v.* Hylyer, 4 Mass. 196; Blague *v.* Gold, Cro. Car. 447; Swyft *v.* Eyres, Ib. 548. So, where one devised "all that *freehold* farm called the Wick Farm, containing 200 acres or thereabouts, occupied by W. E. as tenant to me, with the appurtenances," to uses applicable to freehold property alone; and at the date of the will, and at the death of the testator, W. E. held, under a lease from him, 202 acres of land, which were described in the lease as the Wick Farm, but of which twelve acres were not freehold, but were leasehold only; it was held that these twelve acres did not pass by the lease. Hall *v.* Fisher, 1 Collyer, R. 47. The object in cases of this kind is, to interpret the instrument, that is, to ascertain the intent of the parties. The rule to find the intent is, to give most effect to those things, about which men are least liable to mistake. Davis *v.* Rainsford, 17 Mass. 210; McIver *v.* Walker, 9 Cranch, 178. On this principle, the things usually called for in a grant, that is, the things by which the land granted is described, have been thus marshalled. *First*. The highest regard is had to natural boundaries. *Secondly*. To lines actually run, and corners actually marked, at the time of the grant. *Thirdly*. If the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established, and no other departure from the deed is thereby required; marked lines prevailing over those which are not marked. *Fourthly*. To courses and distances; giving preference to the one

§ 302. Returning now to the consideration of the general rule, that extrinsic verbal evidence is not admissible to contradict or alter a written instrument, it is further to be observed, that this rule does not exclude such evidence, when it is adduced to prove that the written agreement is *totally discharged*. If the agreement be by deed, it cannot, in general, be dissolved by any executory agreement of an inferior nature; but any obligation by writing not under seal may be totally dissolved, before breach, by an oral agreement.[1] And

or the other, according to circumstances. See Cherry *v.* Slade, 3 Murphy, 82; Dogan *v.* Seekright, 4 Hen. & Munf. 125, 130; Preston *v.* Bowmar, 6 Wheat. 582; Loring *v.* Norton, 8 Greenl. 61; 2 Flintoff on Real Property, 537, 538; Nelson *v.* Hall, 1 McLean's R. 518; Wells *v.* Crompton, 3 Rob. Louis. R. 171. Monuments mentioned in the deed, and not then existing, but which are forthwith erected by the parties, in order to conform to the deed, will be regarded as the monuments referred to, and will control the distances given in the deed. Makepeace *v.* Bancroft, 12 Mass. 469; Davis *v.* Rainsford, 17 Mass. 207; Leonard *v.* Morrill, 2 N. Hamp. 197. And if no monuments are mentioned, evidence of long continued occupation, though beyond the given distances, is admissible. Owen *v.* Bartholomew, 9 Pick. 520. If the description is ambiguous or doubtful, parol evidence of the practical construction given by the parties, by acts of occupancy, recognition of monuments or boundaries, or otherwise, is admissible in aid of the interpretation. Stone *v.* Clark, 1 Metcalf, R. 378; Waterman *v.* Johnson, 13 Pick. 261; Frost *v.* Spaulding, 19 Pick. 445; Clark *v.* Munyan, 22 Pick. 410; Crafts *v.* Hibbard, 4 Metcalf, R. 438; Civil Code Louisiana, Art. 1951; Wells *v.* Compton, 3 Rob. Louis. R. 171. Words necessary to ascertain the premises must be retained; but words not necessary for that purpose may be rejected, if inconsistent with the others. Worthington *v.* Hylyer, 4 Mass. 205; Jackson *v.* Sprague, 1 Paine, 494; Vose *v.* Handy, 2 Greenl. 322. The expression of quantity is descriptive, and may well aid in finding the intent, where the boundaries are doubtful. Mann *v.* Pearson, 2 Johns. 37, 41; Perkins *v.* Webster, 2 N. H. 287; Thorndike *v.* Richards, 1 Shepl. 437; Allen *v.* Allen, 2 Shepl. 287; Woodman *v.* Lane, 7 N. H. 241; Pernam *v.* Weed, 6 Mass. 131; Riddick *v.* Leggatt, 3 Murphy, 539, 544. See also 1 Phil. Evid. by Cowen & Hill, p. 533, note 942; Ib. p. 538, note 948; Ante, § 290.

[1] Bull. N. P. 152; Milword *v.* Ingram, 1 Mod. 206; 2 Mod. 43, S. C.; Edwards *v.* Weeks, 1 Mod. 262; 2 Mod. 259, S. C.; 1 Freem. 230, S. C.; Lord Milton *v.* Edgworth, 5 Bro. P. C. 318; 4 Cruise's Dig. Tit. 32, ch. 3, § 51; Clement *v.* Durgin, 5 Greenl. 9; Ratcliff *v.* Pemberton, 1 Esp. 35;

there seems little room to doubt, that this rule will apply even to those cases where a writing is by the Statute of Frauds made necessary to the validity of the agreement.[1] But where there is an entire agreement in writing, consisting of divers particulars, partly requisite to be in writing by the Statute of Frauds, and partly not within the statute, it is not competent to prove an agreed variation of the latter part, by oral evidence, though that part might, of itself, have been good without writing.[2]

§ 303. Neither is the rule infringed by the admission of oral evidence to prove a *new and distinct agreement*, upon a *new consideration*, whether it be as a substitute for the old, or in addition to and beyond it. And if subsequent, and involving the same subject-matter, it is immaterial whether the new agreement be entirely oral, or whether it refers to, and partially or totally adopts the provisions of the former contract in writing, provided the old agreement be rescinded and abandoned.[3] Thus, where one by an instrument under seal agreed

Fleming *v.* Gilbert, 3 Johns. 531. But if the obligation be by deed, and there be a parol agreement in discharge of such obligation, if the parol agreement be executed, it is a good discharge. Dearborn *v.* Cross, 7 Cowen, 48. See also Littler *v.* Holland, 3 T. R. 390; Peytoe's case, 9 Co. 77; Kaye *v.* Waghorne, 1 Taunt. 428; Le Fevre *v.* Le Fevre, 4 S. & R. 241; Suydam *v.* Jones, 10 Wend. 180; Barnard *v.* Darling, 11 Wend. 27, 30. In equity, a parol recision of a written contract, after breach, may be set up in bar of a bill for specific performance. Walker *v.* Wheatley, 2 Humphreys, R. 119. By the law of Scotland, no written obligation whatever can be extinguished or announced, without either the creditor's oath, or a writing signed by him. Tait on Evid. p. 325.

[1] Phil. & Am. on Evid. 776; 2 Phil. Evid. 363; Goss *v.* Ld. Nugent, 5 B. & Ad. 58, 65, 66, per Ld. Denman, C. J.; Stowell *v.* Robinson, 3 Bing. N. C. 928; Cummings *v.* Arnold, 3 Metc. 486.

[2] Harvey *v.* Grabham, 5 Ad. & El. 61, 74; Marshall *v.* Lynn, 6 M. & W. 109.

[3] Burn *v.* Miller, 4 Taunt. 745; Foster *v.* Alanson, 2 T. R. 479; Shack *v.* Anthony, 1 M. & S 573, 575; Sturdy *v.* Arnaud, 3 T. R. 596; Brigham *v.* Rogers, 17 Mass. 573, per Putnam, J.; Heard *v.* Wadham, 1 East, 630, per Lawrence, J.; 1 Chitty on Pl. 93; Richardson *v.* Hooper, 13 Pick. 446;

to erect a building for a fixed price, which was not an adequate compensation, and having performed part of the work, refused to proceed, and the obligee thereupon promised, that if he would proceed he should be paid for his labor and materials, and should not suffer, and he did so; it was held that he might recover in assumpsit upon this verbal agreement.[1] So, where the abandonment of the old contract was expressly mutual.[2] So, where a ship was hired by a charter-party under seal, for eight months, commencing from the day of her sailing from Gravesend, and to be loaded at any British port in the English channel; and it was afterwards agreed by parol, that she should be laden in the Thames, and that the freight should commence from her entry outwards at the custom-house; it was held that an action would lie upon the latter agreement.[3]

§ 304. It is also well settled, that in a case of a simple contract in writing, oral evidence is admissible to show that by a subsequent agreement the *time of performance was enlarged*, or the *place* of performance changed, the contract having been performed according to the enlarged time, or at the substituted place, or the performance having been prevented by the act of the other party; or that the *damages* for non-performance were waived and remitted;[4] or that it was founded upon an insuffi-

Brewster *v.* Countryman, 12 Wend. 446; Delacroix *v.* Bulkley, 13 Wend. 71; Vicary *v.* Moore, 2 Watts, 456, 457, per Gibson, C. J.; Brock *v.* Sturdivant, 3 Fairf. 81; Marshall *v.* Baker, 1 Appleton, R. 402; Chitty on Contracts, p. 88.

[1] Munroe *v.* Perkins, 9 Pick. 298.

[2] Lattimore *v.* Harsen, 14 Johns. 330.

[3] White *v.* Parkin, 12 East, 578.

[4] Jones *v.* Barkley, 2 Doug. 684, 694; Hotham *v.* E. In. Co. 1 T. R. 638; Cummings *v.* Arnold, 3 Metc. 486; Clement *v.* Durgin, 5 Greenl. 9; Keating *v.* Price, 1 Johns. Cas. 22; Fleming *v.* Gilbert, 3 Johns. 530, 531, per Thompson, J.; Erwin *v.* Saunders, 1 Cowen, 249; Frost *v.* Everett, 5 Cowen, 497; Dearborn *v.* Cross, 7 Cowen, 50; Neil *v.* Cheves, 1 Bailey's R. 537, 538, note (a); Cuff *v.* Penn, 1 M. & S. 21; Robinson *v.* Bachelder, 4 New Hamp. 40; Medomak Bank *v.* Curtis, 11 Shepl. 36; 1 Phil. Evid.

cient or an unlawful *consideration*, or was without consideration;[1] or that the agreement itself was *waived* and abandoned.[2] So, it has been held competent to prove an additional and *suppletory agreement*, by parol; as, for example, where a contract for the hire of a horse was in writing, and it was further agreed by parol that accidents, occasioned by his *shying*, should be at a risk of the hirer.[3] A further consideration may also be proved by parol, if it is not of a different nature from that which is expressed in the deed.[4] And if the deed appears to be a voluntary conveyance, a valuable consideration may be proved by parol.[5]

§ 305. In regard to *receipts*, it is to be noted, that they may be either mere acknowledgments of payment or delivery, or

(by Cowen & Hill) p. 563, note 987; Blood *v.* Goodrich, 9 Wend. 68; Youqua *v.* Nixon, 1 Peters, C. C. R. 221. But see Marshall *v.* Lynn, 6 M. & W. 109.

[1] See Ante, § 26, cases in note (1); 1 Phil. Evid. (by Cowen & Hill) p. 108, note 194, and p. 555, note 976; Mills *v.* Wyman, 3 Pick. 207; Phil. & Am. on Evid. 757; 2 Phil. Evid. p. 367; Erwin *v.* Saunders, 1 Cowen, 249; Hill *v.* Buckminster, 5 Pick. 391; Rawson *v.* Walker, 1 Stark. R. 361; Foster *v.* Jolly, 1 C. M. &. R. 707, 708, per Parke, B.; Stackpole *v.* Arnold, 11 Mass. 27, 32; Folsom *v.* Mussey, 8 Greenl. 400.

[2] Ballard *v.* Walker, 3 Johns. Cas. 60; Poth. on Obl. Pt. 3, ch. 6, art. 2, No. 636; Marshall *v.* Baker, 1 Appleton, R. 402; Eden *v.* Blake, 13 M. & W. 614.

[3] Jeffrey *v.* Walton, 1 Stark. R. 267. In a suit for breach of a written agreement, to manufacture and deliver weekly to the plaintiff a certain quantity of cloth, at a certain price per yard, on eight months' credit, it was held, that the defendant might give in evidence, as a good defence, a subsequent parol agreement between him and the plaintiff, made on sufficient consideration, by which the mode of payment was varied, and that the plaintiff had refused to perform the parol agreement. Cummings *v.* Arnold, 3 Metc. 486. See further, Wright *v.* Crookes, 1 Scott, N. S. 685. Where the action is for work and labor extra and beyond a written contract, the plaintiff will be held to produce the written contract, for the purpose of showing what was included in it. Buxton *v.* Cornish, 12 M. & W. 426; Vincent *v.* Cole, 1 M. & Malk. 257.

[4] Clifford *v.* Turrill, 9 Jur. 633.

[5] Pott *v.* Todhunter, 2 Collyer, Ch. Cas. 76, 84.

they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it is merely *primâ facie* evidence of the fact, and not conclusive; and therefore the fact which it recites may be contradicted by oral testimony. But in so far as it is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol.[1] Thus, for example, a bill of lading, which partakes of both these characters, may be contradicted and explained in its recital, that the goods were in good order and well conditioned, by showing that their internal order and condition was bad; and, in like manner, in any other fact which it erroneously recites; but in other respects it is to be treated like other written contracts.[2]

We here conclude the Second Part of this Treatise.

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[1] Stratton *v.* Rastall, 2 T. R. 366; Alner *v.* George, 1 Campb. 392; Ante, § 26, note (1); 1 Phil. Evid. p. 368; Stackpole *v.* Arnold, 11 Mass. 27, 32; Tucker *v.* Maxwell, Ib. 143; Johnson *v.* Johnson, Ib. 359, 363, per Parker, C. J.; Wilkinson *v.* Scott, 17 Mass. 257; Rex *v.* Scammonden, 3 T. R. 474; 1 Phil. Evid. (by Cowen & Hill) p. 108, note 194, and p. 549, note 963; Rollins *v.* Dyer, 4 Shepl. 475; Brooks *v.* White, 2 Metc. 283. "The true view of the subject seems to be, that such circumstances, as would lead a Court of Equity to set aside a contract, such as fraud, mistake or surprise, may be shown at law, to destroy the effect of a receipt." Per Williams, J. in Fuller *v.* Crittenden, 9 Conn. 406; Ante, § 285.

[2] Barrett *v.* Rogers, 7 Mass. 297; Benjamin *v.* Sinclair, 1 Bailey, 174. In the latter case it was held, that the recital in the bill of lading, as to the good order and condition of the goods, was applicable only to their external and apparent order and condition; but that it did not extend to the quality of the material in which they were enveloped, nor to secret defects in the goods themselves; and that as to defects of the two latter descriptions, parol evidence was admissible. See also Smith *v.* Brown, 3 Hawks, 580; May *v.* Babcock, 4 Ohio R. 334, 346.

PART III.

OF THE

INSTRUMENTS OF EVIDENCE.