

and the analogies of the law of evidence indicate that, as a matter of procedure, such grantee should have the burden of proving that the presumption was justified by what was actually done by him in reliance on the promise of the grantor.

If due account had thus been taken of the normal acts and intentions of a person taking options, the resulting rule, while not trenching in any real sense upon the present doctrine of consideration, would have brought the common law into closer conformity with natural justice, and, if fenced about by the securities suggested, would have furnished an amply sufficient protection to the owner of the subject-matter of the offer. The rule now administered, ascribing, as it does, a controlling importance to the immediate transfer of a consideration often so small as to be quite nominal and merely formal, and wholly ignoring the course of action which is followed in a large majority of instances by grantees of options—at all events where the transaction is a part of a legitimate business transaction, and not purely speculative—deserves to be classed with that singular anomaly of the doctrine of accord and satisfaction which provoked the pungent remark of Sir George Jessel as to the extraordinary value which the common law attributes to a canary bird when it happens to be accepted in partial discharge of a debtor's liability.

5. Initial consideration not necessary, where subsequent acts are done in reliance upon the offer.—The hardships which the existing doctrine sometimes entails are to some extent mitigated by the operation of the doctrine that if the person to whom the promise is made should incur any loss, expense, or liability in consequence of the promise, and relying upon it, the promise thereupon becomes obligatory (1). An important limitation to this rule in the case of options upon land is that the party seeking to enforce the conveyance cannot receive any advantage from acts done on the land after the offer is made, unless they are such as are authorized by the offer (m). Nor can the rule be made to cover the acts of the party holding the option which are merely done for the purpose of ascertaining whether the property is worth acquiring (n).

(1) *Morse v. Bellows* (1835) 7 N.H. 549, 28 Am. Dec. 372; *Gordon v. Darnell* (1880) 5 Colo. 302 [entry followed by improvements]; *Perkins v. Hasdell* (1860) 50 Ill. 216 [taxes paid and improvements made]; *Wall v. Minneapolis & C. R. Co.* (1893) 86 Wis. 48 [entry within time limited, and improvements made]; *Byers v. Denver & C. R. Co.* (1889) 13 Colo. 552 [railway constructed].

(m) *Sutherland v. Parkins* (1874) 75 Ill. 338 [lessee in possession began to make fences].

(n) See *Peacock v. Dewesse* cited in note to sec. ante. For another exception to the rule, see *Bostwick v. Hess*, referred to in sec. 22 (b) post.